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No.: **ICC-01/04-01/07**

Date: **15 March 2011**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public document

**Order determining the mode and order of examination for the
witnesses called by the Defence teams
(regulations 43 and 54 of the Regulations of the Court)**

Order to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Mr Jean-Louis Gilissen
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applications for
Participation/Reparations**

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TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to articles 64 and 67 of the Rome Statute (“the Statute”) and regulations 43 and 54 of the Regulations of the Court, orders as follows.

1. By decision of 14 September 2010 (“the Decision of 14 September 2010”)¹ in order to ensure the efficiency and expeditiousness of the trial, the Chamber ordered the Defence teams *inter alia* to disclose to the parties and participants, not less than two weeks prior to the commencement of the Defence case:
 - a. a document outlining the legal and factual issues that it intends to raise during its defence case as well as the defences, if any, to be advanced by the accused;
 - b. the names, pseudonyms or other aliases, addresses where possible, and dates of birth of all witnesses whom it intends to call to testify at trial, in their anticipated order of testimony;
 - c. the statements of the witnesses whom it intends to call to testify, or a summary of the key elements that each witness will address during his or her testimony; and
 - d. the length of the examination of each witness.

2. Both Defence teams made the relevant disclosures in filings on 4 and 7 March 2011, that is, within the time limit set by the Chamber. They chose to file summaries, thereby satisfying their disclosure obligation. One team filed a list of 23 witnesses with an anticipated examination-in-chief of 122 hours,² and the other submitted a list of 18 witnesses, including the accused Mathieu Ngudjolo, with an

¹ *Decision on the “Prosecution’s Application Concerning Disclosure Pursuant to Rules 78 and 79(4)”*, 14 September 2010, ICC-01/04-01/07-2388.

² Defence for Germain Katanga, “Disclosure of the List of Defence Witnesses and of the Legal and Factual Issues that It Intends to Raise during its Defence Case”, 4 March 2011, ICC-01/04-01/07-2759-Conf; “Disclosure of the Summaries of the testimony of the Defence Witnesses and of the List of Documents that the Defence Intends to Use during its Case”, 7 March 2011, ICC-01/04-01/07-2760-Conf.

anticipated duration of 200 hours,³ with the further information that three of those witnesses are common to both Defence teams.

3. On 8 March 2011, the Prosecutor brought before the Chamber an application stating that:

(a) in his view, the “summaries” transmitted by both Defence teams did not satisfy the exhaustiveness requirement laid down by the Chamber in its Decision of 14 September 2010; and

(b) the “summaries” mentioned “themes” or “subjects” but did not contain a “description of the facts”, which meant that he could not meaningfully prepare his cross-examinations.

Accordingly, the Prosecutor requested that disclosure be more comprehensive and that the examination of the first witness begin no later than two weeks after such new disclosure.⁴

4. At a status conference on 9 March 2011 focusing on the preparation of the Defence case (“First Status Conference”),⁵ the Prosecutor maintained his position, and the Legal Representatives of the Victims essentially indicated that some of the disclosed summaries appeared insufficiently comprehensive, that it would be helpful to be provided with additional information, *inter alia*, on the occupation or ethnic origin of the witnesses, and that certain summaries appeared to them to be redundant.

³ Defence for Mathieu Ngudjolo, “*Exécution par la Défense de Mathieu Ngudjolo de la « Décision relative à la requête de l’Accusation concernant la communication d’éléments par la Défense en application des règles 78 et 79-4 »*” (ICC-01/04-01/07-2388), 4 March 2011, ICC-01/04-01/07-2756.

⁴ Office of the Prosecutor, “*Requête urgente de l’Accusation aux fins d’obtention d’une Ordonnance enjoignant à la Défense de se conformer à la Décision relative à la requête de l’Accusation concernant la communication d’éléments par la Défense en application des règles 78 et 79-4 (ICC-01/04-01/07-2388-tFRA, 28 septembre 2010)*”, 8 March 2011, ICC-01/04-01/07-2763-Conf.

⁵ ICC-01/04-01/07-T-236-FRA ET WT 09-03-2011.

5. The Chamber responded to the Prosecutor's application by an oral decision rendered at a second status conference, held on 10 March 2011 ("Second Status Conference").⁶
6. During the First Status Conference, the Chamber started by noting the efforts of both Defence teams to make a rigorous selection of their witnesses, as they themselves highlighted during the status conference.
7. After considering the time allocated by each of the Defence teams to their witnesses, and after noting significant differences in the anticipated duration of the examination of common witnesses and highlighting risks of repetition,⁷ the Chamber first invited the two teams to propose a reduction in the number of hours allocated to each witness and to consider removing witnesses whose presence did not, on the face of it, appear to be indispensable.
8. The Chamber then invited the two Defence teams to present their views on its other suggestions to vary the order in which Defence witnesses would be called.⁸ At this status conference, the Chamber caused a proposed order of appearance of the witnesses ("the Chamber's Proposal") to be distributed to the parties and participants,⁹ suggesting that the testimonies be grouped according to subject matter (challenges to the credibility of Prosecution witnesses, responsibility of the Accused, etc.) and that, when dealing with these subjects, the Defence for Mathieu Ngudjolo should conduct its examination immediately after the Defence for Germain Katanga in order to make the best use of the time and to ensure that the hearings are as coherent and therefore as comprehensible as possible.
9. The Chamber also emphasised that these were only proposals for discussion, or for consultation between the teams, and that it would hear their submissions at

⁶ ICC-01/04-01/07-T-237-FRA ET WT 10-03-2011, p. 1, line 16 to p. 4, line 19.

⁷ ICC-01/04-01/07-T-236-FRA ET WT 09-03-2011, p. 19, line 16 to p. 21, line 20.

⁸ ICC-01/04-01/07-T-236-FRA ET WT 09-03-2011, p. 22, line 3 to p. 26, line 7.

⁹ ICC-01/04-01/07-HNE-51. See Registry, "*Enregistrement au dossier d'une pièce présentée lors de l'audience du 9 mars 2011*", 11 March 2011, ICC-01/04-01/07-2768 and ICC-01/04-01/07-2768-Anx.

the Second Status Conference scheduled for the following day.¹⁰ Furthermore, it stressed that it was “[TRANSLATION] fully aware that some of these witnesses can actually feature in several of the categories”¹¹ it had defined, focusing on what appeared on a first reading of the summaries to be the “[TRANSLATION] core”¹² of their testimony.

10. On 14 March 2011, the Defence for Germain Katanga indicated that it wished to remove Witness DRC-D02-P-0214 from its list,¹³ meaning that it would now be calling a total of 22 witnesses.

Time allocated to the Defence teams for their respective cases

11. From the First Status Conference, the Defence team for Mathieu Ngudjolo indicated that it thought it could “reasonably” halve the anticipated duration of its examination-in-chief of its witnesses from 200 hours to 100.¹⁴ It emphasised that it remained open to any observations from the Chamber.¹⁵

12. It also signified that it believed it could adopt the Chamber’s proposal not to call Witness D03-P-0110.¹⁶

13. For its part, the Defence for Germain Katanga announced firstly that it thought it could reduce the 122 hours it had initially proposed¹⁷ and, subject to being allowed time for reflection, the number of its witnesses.¹⁸ At the Second Status Conference, the Defence team indicated that, upon reconsideration, it deemed

¹⁰ ICC-01/04-01/07-T-236-FRA ET WT 09-03-2011, p. 21, lines 15 to 24.

¹¹ *Ibid.*, p. 22, lines 15 and 16.

¹² *Ibid.*, p. 22, lines 16 and 18.

¹³ Defence for Germain Katanga, “Disclosure of Additional Information on the Defence Witnesses”, 14 March 2011, ICC-01/04-01/07-2770-Conf.

¹⁴ ICC-01/04-01/07-T-236-FRA ET WT 09-03-2011, p. 41, lines 18 to 22.

¹⁵ *Idem.*

¹⁶ *Ibid.*, p. 41, lines 3 to 6.

¹⁷ *Ibid.*, p. 28, lines 14 to 16.

¹⁸ *Ibid.*, p. 29, lines 1 to 3.

that a total of 90 hours would be “reasonable”.¹⁹ Furthermore, it informed the Chamber of its intention to travel in the near future to the Democratic Republic of the Congo in order, *inter alia*, to ascertain whether, as the Chamber noted, it was indispensable to call Witnesses D02-P-0155, D02-P-0192 and D02-P-0196 and to determine whether there is really a “difference”²⁰ between these witnesses.

14. In light of the information currently at its disposal, the Chamber considers that 150 hours should be allocated to the two Defence teams to present their case, as follows: 85 hours for the Defence team for Germain Katanga and 65 hours for the Defence team for Mathieu Ngudjolo, since the two teams will not be calling the same number of witnesses. The time allocated for the examination of Mathieu Ngudjolo and – should he testify – of Germain Katanga is not included in the 150 hours and will be determined subsequently. If both Accused testify, they will in any event only do so at the end of the presentation of their cases. Hence, the decision on the number of hours allocated to them can be deferred.

15. Whilst remaining aware that each defence case is unique, the Chamber further notes that, in the case of three common witnesses, the Defence team for Mathieu Ngudjolo should, to a certain extent, benefit from the examination-in-chief of Germain Katanga’s Defence team.

16. The Chamber emphasises that the number of hours allocated to the two Defence teams represents an average of approximately four hours for each examination-in-chief per witness and per team, while the Prosecutor was allocated an average of four and a half hours for each witness.²¹ The Chamber considers that this difference is warranted, since the Prosecutor must prove his case beyond reasonable doubt.

¹⁹ ICC-01/04-01/07-T-237-FRA ET WT 10-03-2011, p. 6, lines 8 to 10.

²⁰ *Ibid.*, p. 23, lines 1 to 3.

²¹ *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, 1 December 2009, ICC-01/04-01/07-1665-Corr, para. 8.

17. The Chamber considers that it is fair to allocate the Defence team taking the floor second 20% of the time allocated to the Defence team conducting the examination-in-chief of a witness. However, it does not rule out the option of granting additional time, upon an oral or written application explaining why such additional time is required for a particular witness.
18. In respect of the time allocated to the Prosecutor for cross-examination, after the discussions which took place at the two status conferences, the Chamber considers that a total duration of 120 hours is fair and will enable the Office of the Prosecutor to carry out its mandate effectively. This quota does not include the time for cross-examining the Accused.
19. As for the Legal Representatives of the Victims, the Chamber recalls that they may put questions with the Chamber's leave. In this respect, it refers to the *Directions for the conduct of the proceedings and testimony in accordance with rule 140 of 1 December 2009*.²²

Order of appearance of Defence witnesses

20. Each of the Defence teams has emphasised throughout the hearings that it was indispensable for them to be able to conduct their own defence separately, which to their mind made the Chamber's proposal of interspersing witnesses called by the Defence for Mathieu Ngudjolo in the case for Germain Katanga difficult to achieve. The Chamber can only note this position, which has been emphatically reiterated.
21. However, the Defence for Mathieu Ngudjolo has signified that it is willing to adopt the Chamber's proposal inviting it to examine the three common witnesses

²² *Ibid.*, paras. 82 *et seq.*

immediately after the examination by the Defence for Germain Katanga.²³ This will therefore apply to Witnesses D03-P-0011, D03-P-0236 and D03-P-0340.

22. The Chamber has noted some differences between the Defence teams in respect of grouping testimonies by subject area when they call their witnesses. Mathieu Ngudjolo's Defence has emphasised on several occasions that the Chamber's proposal could be detrimental to the proving of its case²⁴ and that one witness may speak to several different issues.²⁵

23. The Defence for Germain Katanga, whilst also arguing that some witnesses could not be considered likely to discuss only one subject²⁶ and that its preference would be for the Chamber to allow it to decide itself on the exact sequence in which it will call its witnesses,²⁷ noted that the Chamber's proposal appeared "workable".²⁸ It further suggested some "[TRANSLATION] adjustments"²⁹ to the order initially proposed by the Chamber. These modifications involve postponing the three witnesses called to challenge the credibility of Witness 267 (D02-P-0155, D02-P-0192 and D02-P-0196), to arrange for Witnesses D02-P-0134 and D02-P-0136 to testify as early as possible given their work situation, and to leave the testimony of the Defence team's resource person for last, since he is currently contributing decisively to the completion of the investigations.

24. The Chamber notes the position adopted by both Defence teams. It considers that, in this case, there is reason to adopt a successive presentation of the two defence cases, save for the aforementioned common witnesses. In light of the practical considerations advanced by the Defence for Germain Katanga and of the need for

²³ *Ibid.*, para. 65.

²⁴ ICC-01/04-01/07-T-237-FRA ET WT 10-03-2011, p. 11, lines 27 and 28.

²⁵ *Ibid.*, p. 12, lines 1 to 4.

²⁶ *Ibid.*, p. 18, line 23 to p. 19, line 2.

²⁷ *Ibid.*, p. 23, lines 21 to 22.

²⁸ ICC-01/04-01/07-T-237-ENG ET WT 10-03-2011, p. 7, line 13.

²⁹ *Ibid.*, p. 7, line 20.

the three detained witnesses to testify at short notice, from 23 March 2011 onwards, the first five witnesses to be called will be:

D02-P-0134;
 D02-P-0136;
 D02-P-0236/D03-P-0011;
 D02-P-0228; and
 D02-P-0350.

25. As for the other witnesses called to testify, the Chamber urges both Defence teams to propose a new order for their own witnesses which, to the extent possible, takes into account the Chamber's concern to maintain coherence and comprehensibility which it expressed during the status conferences. In this respect, the Chamber would welcome efforts to group the testimonies in accordance with criteria for challenging the credibility of witnesses and the responsibility of the two Accused. It expects to receive the two new lists by 10 a.m. on 21 March 2011.

Application of the Office of the Prosecutor

26. Finally, at the First Status Conference, the Prosecutor applied to the Chamber for a one-week extension of time prior to the commencement of the case for the Defence in order to complete his own preparation and fulfil his disclosure obligations ("the Prosecutor's Oral Application").³⁰

27. Noting that the hearings will not in fact recommence until 23 March 2011, instead of 21 March, and recalling once more that the Prosecutor has known the names of the three detained witnesses since 24 February 2011, the Chamber considers that there is no justification for a further postponement of the commencement of the case for the defence.

³⁰ ICC-01/04-01/07-T-236-FRA ET WT 09-03-2011, p. 45, line 27 to p. 49, line 19.

FOR THESE REASONS, the Chamber

ALLOCATES to the parties and participants the number of hours set forth in paragraphs 14 to 18 of this Order;

DECIDES that the first five witnesses to be examined from 23 March 2011 will be Witnesses D02-P-0134, D02-P-0136, D02-P-0236/D03-P-0011, D02-P-0228 and D02-P-0350;

ORDERS the two Defence teams to file the final order in which they will call their own witnesses by 10 a.m. on 21 March 2011; and

DISMISSES the Prosecutor's Oral Application.

Done in both English and French, the French version being authoritative.

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 15 March 2011,
At The Hague, The Netherlands