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Date: 9 February 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

Public

**Prosecution's Submissions on the Modalities of Disclosure Required for the
Protection of Incriminating Witnesses**

Source: Office of the Prosecutor

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

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Background

1. At the Status Conference held on 3 February 2009, Trial Chamber II (“the Chamber”) ordered the Prosecution to submit a report setting out its suggested modalities for the protection of witnesses of whom statements and interview transcripts will be disclosed to the Defence as incriminating evidence for use at trial.¹
2. The Prosecution sets out its submissions below.

Submission

3. The Prosecution is aware of the Defence’s right to know the identity of incriminating witnesses and, accordingly, wishes to ensure that, prior to disclosure, protective measures are instituted in an expeditious manner.
4. Where a witness is subsequently a candidate for admission to the ICC witness protection programme (“ICCPP”) or other non judicial protective measures and meaningful disclosure of the transcripts of his evidence, on account of their inherent precision, will lead to his immediate identification by the Accused, the Prosecution proposes the imposition of additional protective measures. Such measures would be instituted until resolution of the witness’ candidacy for the ICCPP or other non-judicial protective measures and may comprise the provision of summaries or verbatim extracts of the interview. The Prosecution would ensure that such summaries and verbatim extracts be subject to the review of the Chamber and retain, where circumstances permit,² the incriminating content of the witness’ evidence thus enabling the Defence to continue the preparation of

¹ ICC-01/04-01/07-T-56-ENG ET, pp. 40-41, 3 February 2009.

² Without leading to the identification of the witness.

its case. Upon implementation of sufficient protective measures, there would be no further obstacle to complete and immediate disclosure of the identity of the witness and the statement or interview transcripts.³

5. In case the OTP and the VWU do not agree on the appropriate non-judicial protective measures or on the inclusion into the ICCPP, the matter will be submitted to the chambers.
6. For those witnesses who may not be minded to seek or receive the security afforded by the ICC Protection Programme or other forms of non judicial protection, the Prosecution proposes such protective measures as may be required to strike a balance between the Defence's ability to research the provider of incriminating evidence on the one hand and the witness' security on the other hand. Retention of the identity of a witness⁴ until an agreed time-period prior to testimony (otherwise known as "rolling disclosure") meets such an equitable standard and has been considered an acceptable means of disclosure in the procedural context of the *ad hoc* international criminal tribunals.
7. At the Status Conference held on 3 February 2009, the Prosecution suggested that disclosure of the identity of witnesses such as described in paragraph 6 above be withheld until 30 days prior to testimony. It should be stressed that this period is suggested in light of the facts - the security situation in Ituri - and the law, including the jurisprudence of the *ad hoc* international criminal tribunals.⁵

³ Excluding any redactions required pursuant to Rule 81.

⁴ But the Prosecution nevertheless would provide an approved summarised or a redacted version of the statement of the witness.

⁵ Cf. *Prosecutor v. Augustine Gbao*, "Decision on Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 10 October 2003, SCSL-2003-09-PT, where a period of 42 days prior to testimony was approved for the purposes of rolling disclosure; and, by contrast, *Prosecutor v. Tharcisse Renzaho*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to the Crimes Alleged in the Indictment", 17 August 2005, ICTR-97-31-I, where a period of 21 days prior to testimony was similarly approved.

8. Accordingly, the Prosecution respectfully submits that the retention of a witness' identity until 30 days prior to testimony, or until entry of a witness into the pre-trial "familiarisation" process in The Hague, will give the Defence maximum flexibility in the preparation of its case.
9. Where circumstances merit such, the Prosecution will, in addition, seek to persuade the Chamber that protective measures such as envisaged in Rule 87(3)(b) of the Rules of Procedure and Evidence ought to be imposed from the moment of disclosure as an extra guarantee for the security of a witness. Such an additional measure would entail disclosure of the witness' identity to Defence counsel with the latter undertaking not to reveal such to any other third party thereby minimising any potential threat emanating from those sympathetic to both Accused.

Conclusion

10. The Prosecution respectfully presents the submissions stated above as the suggested modalities for the disclosure of incriminating evidence provided by witnesses requiring protective measures.



Luis Moreno-Ocampo, Prosecutor

Dated this 9th day of February 2009

At The Hague, The Netherlands