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No.: **ICC-01/04-01/07**
Date: **21 January 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 Redacted Version

**Order Instructing the Prosecutor to Provide Additional Details about Certain
Disclosure Notes, Inspection Reports and the Report Dated 5 January 2009
(Regulation 28 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

Mr Luis Moreno-Ocampo

Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper

Ms Caroline Buisman

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kagengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Legal Representatives of the Applicants

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pursuant to articles 54, 64, 67 and 68 of the *Rome Statute* (“the Statute”), rules 77 and 81 of the *Rules of Procedure and Evidence* (“the Rules”) and regulation 28 of the *Regulations of the Court*, Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively) orders:

1. At the status conference of 27 and 28 November 2008, the Chamber stressed that the redaction of material or information is the exception.¹ It recalled that its intervention is essential to fully perform the judicial scrutiny under rule 81 of the Rules, as interpreted by the Appeals Chamber in its decisions.² The need for this scrutiny was reiterated in its orders of 18³ and 19⁴ December 2008 as well as in its decision of 12 January 2009.⁵

2. Scrutiny by the Chamber must take place before the documents which may be redacted are disclosed to the Defence: in such an event, the judges alone are authorized to determine whether the planned redactions may prejudice the rights of the accused. This scrutiny process mostly concerns redactions in which the Prosecutor takes the initiative to protect the interests referred to in rules 81(2) and (4) of the Rules. It also relates to those redactions which are required of him by the provider of the documents and information obtained under article 54(3)(e) of the Statute. In the latter case, it is indeed appropriate to have recourse to the following procedure:

where [...] the material [...] was obtained on the condition of confidentiality, the Trial Chamber (as well as any other Chamber of this Court, including this Appeals

¹ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 55, lines 6 to 8; ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 80, lines 23 and 24.

² ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 53, lines 5 to 8 and p. 55, lines 6 and 7; ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 86, lines 14 to 18.

³ *Order Instructing the Registry to File Documents on the Influence that the Accused may have Retained in the DRC and on the Pressure that they Might Currently Exert on Victims and Witnesses*, 18 December 2008, ICC-01/04-01/07-800-Conf-tENG, para. 9.

⁴ “*Ordonnance enjoignant au Procureur de fournir des détails supplémentaires concernant sa requête aux fins d’expurger la seconde déclaration du témoin 280 (norme 28 du Règlement de la Cour)*”, 19 December 2008, ICC-01/04-01/07-804, para. 6.

⁵ *Decision on the Redaction Process*, 12 January 2009, ICC-01/04-01/07-819-tENG, para. 7.

Chamber) will have to respect the confidentiality agreement concluded by the Prosecutor under article 54(3)(e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider (see article 64(6)(c) of the Statute and rule 81(3), first sentence, of the *Rules of Procedure and Evidence*). Instead, the Chamber will have to determine, in *ex parte* proceedings open only to the Prosecutor, whether the material would have had to be disclosed to the defence, had it not been obtained under article 54(3)(e) of the Statute. If the Chamber concludes that this is the case, the Prosecutor should seek the consent of the information provider, advising the provider of the ruling of the Chamber. If the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information.⁶

This procedure was, moreover, recently referred to by the Prosecutor himself in a report filed on 5 January 2009 (“the Report of 5 January 2009”)⁷ in response to a request for information from the Chamber about the documents which he had obtained in the instant case under article 54(3)(e) of the Statute.

3. From the disclosure notes which it received between the date on which the confirmation hearing ended, 16 July 2008, and the date of this order, the Chamber notes that the Prosecutor disclosed to the Defence, in redacted form without first bringing the matter before the Chamber, at least 16 pieces of incriminating evidence which, unless the Chamber is mistaken, all appear to have been obtained under article 54(3)(e) of the Statute.⁸ It noted that this was also the case for at least 16 pieces

⁶ Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”*, 21 October 2008, ICC-01/04-01/06-1486, para. 48 (“the Judgment of 21 October 2008”).

⁷ “Rapport de l’Accusation sur les documents ou renseignements obtenus en vertu d’accords de confidentialité conclus sur la base de l’article 54(3)(e) suite à ‘l’Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires’”, 5 January 2009, ICC-01/04-01/07-811, para. 3.

⁸ Office of the Prosecutor, “Prosecution’s Communication of Incriminatory Evidence Disclosed to the Defence on 19 December 2008”, 25 August 2008, ICC-01/04-01/07-703, p. 3; Office of the Prosecutor, “Prosecution’s Communication of Incriminatory Evidence Disclosed to the Defence on 19 December 2008”, 19 December 2008, ICC-01/04-01/07-805, p. 3; “Prosecution’s Communication of Incriminatory Evidence Disclosed to the Defence on 9 January 2009”, 12 January 2009, ICC-01/04-01/07-815, p. 3.

of evidence under article 67(2) of the Statute and 32 falling under rule 77 of the Rules,⁹ all seemingly obtained under article 54(3)(e) of the Statute too.

4. Furthermore, in the Report of 5 January 2009, the Prosecutor provided an update on the disclosure of potentially exonerating evidence or evidence under rule 77 of the Rules, without, however, referring to incriminating evidence, despite the fact that the Chamber requested a “comprehensive report”.¹⁰ He states that he obtained the lifting of the confidentiality restrictions for 118 documents under article 67(2) of the Statute and for 84 documents under rule 77 of the Rules. However, the Chamber noted that, out of the first 118 documents,¹¹ 32 have been or will be¹² disclosed to the Defence with the redactions requested by the provider and two will be disclosed in summary form.¹³ As for the 84 other documents,¹⁴ 31 were disclosed

⁹ Office of the Prosecutor, “Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 25 August 2008”, 25 August 2008, ICC-01/04-01/07-704, p. 3; Office of the Prosecutor, “Prosecution’s Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 25 August 2008”, 25 August 2008, ICC-01/04-01/07-705, p. 3; Office of the Prosecutor, “Prosecution’s Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 18 September 2008”, 19 September 2008, ICC-01/04-01/07-713, p. 3; Office of the Prosecutor, “Prosecution’s Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 24 October 2008”, 3 November 2008, ICC-01/04-01/07-735, p. 3; “Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 19 November 2008”, 21 November 2008, ICC-01/04-01/07-755, p. 3; Office of the Prosecutor, “Prosecution’s Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 19 November 2008”, 21 November 2008, ICC-01/04-01/07-756, p. 3; Office of the Prosecutor, “Prosecution’s Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 24 November 2008”, 25 November 2008, ICC-01/04-01/07-772, p. 3; Office of the Prosecutor, “Prosecution’s Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 4 December 2008”, 5 December 2008, ICC-01/04-01/07-787, p. 3; Office of the Prosecutor, “Prosecution’s Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 19 December 2008”, 19 December 2008, ICC-01/04-01/07-807, p. 3; “Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 9 January 2009”, 12 January 2009, ICC-01/04-01/07-816, p. 3; “Prosecution’s Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 9 January 2009”, 12 January 2009, ICC-01/04-01/07-817, p. 3.

¹⁰ *Order Instructing the Participants and the Registry to File Supplementary Documents*, 10 December 2008, ICC-01/04-01/07-788-tENG, para. 9.

¹¹ ICC-01/04-01/07-811-Conf-Exp-Anx1A.

¹² The documents mentioned in annex 1A which the Prosecutor intends to disclose in redacted form are, unless the Chamber is mistaken, as follows: [REDACTED].

¹³ Unless the Chamber is mistaken, the documents mentioned in annex 1A are as follows: [REDACTED].

¹⁴ ICC-01/04-01/07-811-Conf-Exp-Anx1B.

to the Defence in redacted form and a further one should be disclosed under the same conditions.¹⁵ Furthermore, the Prosecutor plans to disclose one document in summary form.¹⁶

5. Accordingly, the Chamber orders the Prosecutor to promptly explain to the Chamber why the redactions of the incriminating evidence and the exonerating evidence or rule 77 evidence, as mentioned in the notes, were carried out without first bringing the matter before the Chamber and in disregard for the procedure set down by the Appeals Chamber, as reiterated in paragraph 2 above, with respect to exonerating evidence. Such an explanation must also be provided for all of the redactions in documents which were already disclosed to the Defence and which are mentioned in annexes 1A and 1B to the Report of 5 January 2009.

6. To this end, the Chamber requests that the Prosecutor refer first to the following disclosure notes: [REDACTED]. The incriminating evidence which the Chamber was able to identify¹⁷ bears the following registration numbers: [REDACTED]. The article 67(2) exonerating evidence, which the Chamber was able to identify¹⁸ is, absent error, as follows: [REDACTED]. The rule 77 evidence, which the Chamber was able to identify,¹⁹ bears the following registration numbers: [REDACTED].²⁰

¹⁵ This document is mentioned in annex 1B under registration number [REDACTED].

¹⁶ This document is mentioned in annex 1B under registration number [REDACTED].

¹⁷ Disclosure note ICC-01/04-01/07-703 mentions 12 documents which the Chamber was unable to identify.

¹⁸ Disclosure note ICC-01/04-01/07-704 mentions a document which the Chamber was unable to identify.

¹⁹ Disclosure notes ICC-01/04-01/07-705 and ICC-01/04-01/07-713 mention nine (seven + two) documents which the Chamber was unable to identify. Moreover, the Chamber is querying the status of the four documents mentioned in note ICC-01/04-01/07-787 (see paragraph 15 of this order).

²⁰ The Chamber understands that this document, mentioned in the annex to note ICC-01/04-01/07-817, was disclosed to the Defence in redacted form.

7. The Prosecutor shall then refer to the documents disclosed to the Defence in redacted form and mentioned in annex 1A to the Report of 5 January 2009, which, absent error, are as follows: [REDACTED].

8. The documents mentioned in annex 1B to the Report of 5 January 2009 are, absent error, as follows: [REDACTED].

9. The Chamber notes that, in the end, since the Judgment of 21 October 2008,²¹ the Prosecutor appears to have disclosed at least 76 incriminating and exonerating documents in redacted form to the Defence, without first bringing the matter before the Chamber.²² Furthermore, the Chamber observes that only four documents²³ mentioned in the disclosure notes pertaining to the rule 77 evidence are listed in the Report of 5 January 2009. Accordingly, the Chamber wishes to obtain clarification about the apparent lack of consistency between the disclosure notes and the above-mentioned Report.

10. Moreover, the Chamber also wishes to obtain additional information about the following disclosure notes.

11. With respect to note ICC-01/04-01/07-703 addressed to the Single Judge, the Chamber observes that out of the 16 incriminating documents disclosed to the Defence, 12 were redacted by the provider. The annex listing these documents does not specify those which were redacted. The Chamber would like to obtain further clarification on this point.

12. With respect to note ICC-01/04-01/07-704 addressed to the Single Judge, the Chamber observes that three documents were disclosed to the Defence, one of which

²¹ See footnote 6 above.

²² This total comprises the four documents referred to in this paragraph and includes the four documents mentioned in note ICC-01/04-01/07-787 referred to at paragraph 15 of this order and the two documents mentioned in note ICC-01/04-01/07-713 referred to at paragraph 14 of this same order.

²³ Unless the Chamber is mistaken, they include the following documents: [REDACTED].

was redacted by the provider. The annex listing these documents does not specify which of the three was redacted. The Chamber would like to obtain further clarification on this point.

13. With respect to note ICC-01/04-01/07-705 addressed to the Single Judge, the Chamber notes that, out of 24 documents, seven were disclosed to the Defence after being redacted by the provider. The annex listing these documents does not specify those which were redacted. The Chamber would like to obtain further clarification on this point.

14. With respect to note ICC-01/04-01/07-713 addressed to the Single Judge, the Chamber notes that out of 14 documents obtained under 54(3)(e) of the Statute, 12 were disclosed to the Defence unredacted. The Chamber would like to know the exact status of the two remaining documents.

15. With respect to note ICC-01/04-01/07-787, the Chamber notes that, out of the 24 documents mentioned as having been disclosed to the Defence, it is stated that 20 have been disclosed unredacted. Accordingly, the Chamber directs the Prosecutor to specify whether the four remaining documents were obtained under article 54(3)(e) of the Statute and whether they were disclosed to the Defence in redacted form.

16. With respect to note ICC-01/04-01/07-806, the Chamber requests the Prosecutor to specify whether document DRC-OTP-0159-0354 was disclosed to the Defence in redacted form and to confirm that document [REDACTED] was obtained under article 54(3)(e) of the Statute.

17. In the annex to document ICC-01/04-01/07-807, the Prosecutor does not state clearly whether the piece of evidence [REDACTED] was disclosed to the Defence in redacted form or not. Accordingly, the Chamber directs the Prosecutor to provide it with any necessary information on this point.

18. Lastly, with respect to note ICC-01/04-01/07-817, the Prosecutor refers to a summary of a piece of evidence [REDACTED] disclosed to the Defence on 9 January 2009. Germain Katanga's Defence objected to the use of such a procedure²⁴ which it considers contrary to the one set down by the Appeals Chamber.²⁵ Accordingly, the Chamber orders the Prosecutor to justify why he disclosed such a summary without first bringing the matter before the Chamber.

FOR THESE REASONS, THE CHAMBER

ORDERS the Prosecutor to file, by no later than 4 p.m. on 26 January 2009, a report:

- 1) stating, for each of the documents mentioned in paragraphs 6 to 8 above, why the procedure set down by the Appeals Chamber in the Judgment of 21 October 2008 was not followed, in particular, why it did not implement an *ex parte* procedure prior to the disclosure of materials to the Defence in order to ascertain whether these materials should have been disclosed or not in the event that they were not obtained under article 54(3)(e) of the Statute;
- 2) providing all necessary clarification about the documents mentioned at paragraphs 11 to 17 inclusive of this Order;
- 3) justifying the disclosure of the summary mentioned at paragraph 18 above without having first brought the matter before the Chamber; and
- 4) supplementing the Report of 5 January 2009:

²⁴ Germain Katanga's Defence, "Defence Observations on the *Rapport de l'Accusation sur les documents ou renseignements obtenus en vertu d'accords de confidentialité conclus sur la base de l'article 54(3)(e) suite à « l'Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires »*", 19 January 2009, ICC-01/04-01/07-835, para. 4.

²⁵ See paragraph 2 of this order.

- by providing all of the information about the incriminating documents or information obtained under confidentiality agreements entered into under article 54(3)(e) of the Statute;
- by explaining the lack of consistency raised at paragraph 9 above; and
- by explaining the exact circumstances surrounding the disclosure of documents [REDACTED] contained in annex 1B to the Report.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 21 January 2009

At The Hague, The Netherlands