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No.: **ICC-01/04-01/07**
Date: **10 December 2008**

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 Document

Order Instructing the Participants and the Registry to File Additional Documents

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the*

Court to:

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
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

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
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Legal Representatives of the Applicants

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Mr Simo Vaatainen

Detention Section

Victims Participation and Reparations Section

Ms Fiona McKay

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to article 64(3)(a) of the Rome Statute (“the Statute”), rules 132 and 134 of the *Rules of Procedure and Evidence* (“the Rules”), and regulations 24, 28(1), 28(2), 34 and 54 of the *Regulations of the Court*, issues the following Order.

I. Preliminary remarks

1. By an Order of 6 November 2008,¹ the Chamber convened a status conference to set the date of the trial pursuant to rule 132(1) of the Rules. To this end, the Chamber deemed that it was appropriate to obtain information from the participants in the proceedings as well as from the Registry which might assist it in conducting this first status conference effectively. On 13 November 2008, it addressed an order to them, instructing them to respond to a number of issues in writing and to make such observations as they considered relevant, on which they would like the Chamber to rule.² At the hearing of 27 and 28 November 2008, these responses and observations were further developed and, at the Chamber’s request, further details were provided and written submissions were called for. The main purpose of the present Order is to remind the participants and the Registry of the nature of the written submissions requested and to set time limits for their filing.³

2. As stated upon completion of the discussions,⁴ the Chamber considers it necessary to obtain information to supplement the oral submissions. This Order also gives particulars of the supplementary information requested.

3. As far as the date of the trial is concerned, the Chamber, whilst taking into account the date of 8 June 2009 put forward by the parties,⁵ reserves the right to set it

¹ *Ordonnance fixant la date d’une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 6 November 2008, ICC-01/04-01/07-739.

² *Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute)*, ICC-01/04-01/07-747-tENG.

³ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 98, lines 13-18.

⁴ *Ibid.*

in light of the information that it is to receive. Further possible status conferences may be organized for this purpose. In this respect, the Chamber recalls that Counsel for the Defence are under an obligation to provide representation to the accused persons at all hearings, even if team members are unavailable. The Chamber notes with satisfaction the oral undertakings made to this effect by Counsel.⁶

4. As regards a possible visit by the Chamber to the site of the events, it is appropriate to note the agreement in principle of all parties, subject, however, to Defence Counsel's condition that they also be present at the site. This issue will be dealt with at a subsequent stage of the proceedings.

5. Subject to specific requests, the additional documents called for shall meet the requirements of the *Regulations of the Court*.⁷ Each time a decision is cited therein, its registration number, date and the relevant paragraph shall be specified. The participants and the Registry shall also comply with the provisions of regulation 23bis of the *Regulations of the Court*, whereby documents shall state the factual and legal basis for the chosen classification. The Chamber notes, moreover, that the Prosecutor will endeavour to provide the Chamber and all Parties with official French-language versions of all documents and with working copies in the other language.⁸ It further notes that the "more technical" documents, such as reports on the disclosure and transfer of material, may be provided in English only.⁹

⁵ Mathieu Ngudjolo's Defence Team, "*Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance II en vue de la conférence de mise en état du 27 Novembre 2008 (article 64-3-a du Statut)*", 24 November 2008, ICC-01/04-01/07-758, para. 12, Germain Katanga's Defence Team, "Defence Response to the Order dated 23 November 2008", 24 November 2008, ICC-01/04-01/07-763, p. 5; Office of the Prosecutor, "*Réponse de l'Accusation à l'Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut)*" du 13 novembre 2008", 24 November 2008, ICC-01/04-01/07-764, p. 13; ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 54, lines 5 to 8 and p. 73, lines 23 to 24.

⁶ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 80, lines 2 to 18; ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 61, lines 12 to 25; p. 62, lines 1 to 2; p. 63, lines 20 to 25; p. 64, lines 1 to 9.

⁷ Regulations 36, 37 and 39(1) of the *Regulations of the Court*.

⁸ ICC-01/04-01/07-T-52-ENG, p. 37, lines 23 to 25; p. 38, lines 1 to 2.

⁹ ICC-01/04-01/07-T-52-ENG, p. 38, lines 23 to 25.

6. Lastly, the Chamber observes that Germain Katanga's Counsel has expressed his intention to raise before the end of the year, on the basis of article 17 of the Statute, an issue relating to admissibility.¹⁰ The Chamber recalls that, if Counsel intends to proceed in this manner, the interests of the proper administration of justice dictate that issues of this nature be addressed as soon as possible.¹¹

II. Documents requested of the Prosecutor

7. In his written response of 24 November 2008, the Prosecutor stated that his "[TRANSLATION] objective was to present all his incriminating evidence between now and the end of January 2009",¹² a date which he confirmed during the proceedings.¹³ The Chamber takes note of this. In its Order of 13 November 2008, the Chamber asked to which charge and to which mode of responsibility the incriminating evidence still to be disclosed to the Defence for the purpose of the trial was specifically directed.¹⁴ In response to the question put to him again on this point at the hearing,¹⁵ the Prosecutor stated that he had no objection to disclosing such matters.¹⁶ The Chamber therefore requests that he submit to it his proposals for a model table linking the charges confirmed by Pre-Trial Chamber I and the modes of responsibility with the alleged acts, as well as with the evidence on which he intends to rely at trial.

8. In the Order issued by it on 13 November 2008, the Chamber asked to which charge and/or to which mode of responsibility the exonerating pieces of evidence covered by article 67(2) of the Statute or rule 77 of the Rules and disclosed following the *Decision on the confirmation of charges* were directed.¹⁷ The Prosecutor replied that such an analysis "[TRANSLATION] does not constitute an obligation under the e-court

¹⁰ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 49, lines 19 to 25; p. 50, lines 1 to 2.

¹¹ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 52, lines 11-13.

¹² ICC-01/04-01/07-764, p. 3.

¹³ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 46, lines 20-25.

¹⁴ ICC-01/04-01/07-747-tENG, p. 5.

¹⁵ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 45, lines 11 to 16.

¹⁶ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 56, lines 15 to 24, and p. 75, lines 24 to 25.

¹⁷ ICC-01/04-01/07-747-tENG, p. 5 and 6.

protocol adopted by Pre-Trial Chamber I".¹⁸ At the hearing, he reaffirmed this position, adding *inter alia* that it is incumbent on the Defence, and not the Prosecutor, to perform this analysis.¹⁹ He further asserted that "[TRANSLATION] the Chamber must avoid having [...] purportedly exculpatory documents",²⁰ and asked the Chamber for further guidance on the matter. However, before providing him with such guidance, the Chamber asked the Prosecutor to present reasoned submissions setting out all of the arguments which, in his view, preclude the disclosure of such a table to the Chamber and the Defence. In this document, the Prosecutor must explain how he understands his obligation under article 54(1)(a) of the Statute, pursuant to which "in order to establish the truth, [the Prosecutor shall] extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under th[e] Statute, and, in doing so, investigate incriminating and exonerating circumstances equally", and state which investigation methods he favours to this end. In his written response, Mathieu Ngudjolo's Counsel raised the issue of "[TRANSLATION] the implementation of the duty to investigate exonerating circumstances, for which the Prosecutor is responsible"²¹ under the Statute. He reiterated the content of his submissions orally.²² The Chamber will therefore obtain observations from all of the participants on this point and will subsequently determine whether or not it is appropriate to order the Prosecutor to analyse, if need be in the form of a table, the exonerating evidence disclosed to the Defence.

9. The Chamber requests the Prosecutor to submit a comprehensive report on the documents or information which he has obtained under confidentiality agreements concluded pursuant to article 54(3)(e) of the Statute. It seeks the following information: 1) a complete list of material for which the information providers have agreed to the lifting of confidentiality restrictions, together with

¹⁸ ICC-01/04-01/07-764, p.7.

¹⁹ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 57 lines 16 to 22.

²⁰ ICC-01/04-01/07-T-52-FRA ET WT 27-11-2008 p. 59 lines 2 to 6.

²¹ ICC-01/04-01/07-758, paras. 29 to 31.

²² ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008 p. 68 lines 13 to 25, p. 69 lines 1 to 7 and p. 70 lines 18 to 25 and p. 71 lines 1 to 3.

particulars of the manner in which this material has been disclosed to the Defence (full disclosure, redacted form, summaries or similar form,²³ or admission of fact); 2) a list of material for which negotiations are still ongoing, together with the schedule for these; 3) a list of material for which the lifting of confidentiality has been refused, together with the Prosecutor's proposals on the disclosure of this material.

III. Documents requested of Counsel for the Defence

10. The Chamber notes that, in its written response dated 24 November 2008, Mathieu Ngudjolo's Defence drew the Chamber's attention to the issue of victim participation. It raised this issue again at the hearing, asking the Chamber to review²⁴ the position adopted by the Appeals Chamber in its Judgment of 11 July 2008.²⁵ It submitted that this issue cannot be considered to be settled at this stage in the proceedings in the instant proceedings,²⁶ and emphasised the particular circumstances of Mr Mathieu Ngudjolo's case,²⁷ in which the number of confirmed charges and victims who have already been granted leave to participate is higher. The Defence twice stated its intention to submit written applications to the Chamber. The Chamber takes note of this, whilst specifically drawing the attention of the Defence to the need to set out all of the arguments in favour of a review of the issue.

IV. Documents requested of the Legal Representatives of the Victims

11. In its written response of 24 November 2008, the Registry raised on its own initiative the issue of the organisation of common legal representation,²⁸ indicating that the teams of victims' legal representatives have already reached agreement on this matter. At the hearing, the Registry raised this issue again, suggesting that the

²³ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 63, lines 10 to 23.

²⁴ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 66, lines 5-6.

²⁵ Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, 11 July 2008, ICC-01/04-01/06-1432.

²⁶ ICC-01/04-01/07-758, para. 22.

²⁷ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 65, lines 19 to 20.

²⁸ The Registry, "Response to the questions raised by Trial Chamber II on 13 November 2008 and additional observations", 24 November 2008, ICC-01/04-01/07-765, pp. 10 to 12.

Chamber provide directions without delay²⁹ in view of rule 90 of the Rules. Although to date the number of legal representatives has not been fully determined, due to pending applications for participation, the Registry stated that, at this stage in the proceedings, it might be helpful to instruct it to assist the victims in organizing their common legal representation.³⁰ In the course of the hearings, the four legal representatives responded to these observations,³¹ pointing out that in-depth discussions would be necessary so as to define in a clear and objective manner a grouping procedure which was in the victims' interest.³² In order to ensure the efficiency of the proceedings, the Chamber strongly encourages the legal representatives to involve the Registry in their consultations and invites both parties to submit practical proposals to it as soon as possible.

V. Documents requested of representatives of the Registry

12. In its written response dated 24 November 2008, the Victims Participation and Reparations Section raised five questions in relation to which it seeks directions from the Chamber and which the Registry designated under the following headings: 1) format of reports filed under regulation 86(5) of the *Regulations of the Court*; 2) specific questions relating to the processing of applications to participate in the proceedings; 3) legal representation; 4) protection measures and 5) reparation.³³ These questions were developed orally.³⁴ The Registry reported conflicting jurisprudence and practice³⁵ among the Court's chambers and stated that some issues had not been settled. Accordingly, the Chamber directs the Registry to provide to it, in the form of written submissions, on the one hand the list of requested directions and a detailed list of those points of conflict noted by it, and on

²⁹ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 40, lines 21 to 25; p. 41, lines 1 to 4.

³⁰ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 41, lines 10-11.

³¹ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 88, lines 22 to 25; p. 89, lines 1 to 21; p. 93, lines to 3 and 4; *ibid.*, lines 16 to 25 and pp. 94 lines 1 to 8; *ibid.*, lines 12 to 25 and p. 95 lines 1 to 8; *ibid.*, line 20 and p. 96, lines 24 to 25.

³² ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 94, lines 5 to 8.

³³ ICC-01/04-01/07-765, pp. 9 to 14.

³⁴ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 38 to 43.

³⁵ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 38, lines 20 to 25, p. 39 lines 1-6.

the other, in so far as they are necessary for the proper discharge of its functions,³⁶ practical proposals for the improvement of current practices, explaining how the latter should be modified.

13. As regards the new applications for participation from victims in the instant case, the Victims Participation and Reparations Section has proposed to file a report as provided for by regulation 86(5) of the *Regulations of the Court*. Inasmuch as the Chamber has not yet issued any new directions, this report should comply with those practices applied to date.

14. In its written response of 24 November 2008, the Division of Court Services raised nine issues in relation to which it intends to seek directions from the Chamber and which the Registry has designated under the following headings: 1) witness familiarization; 2) in-court assistance; 3) contacting witnesses called by the other participants; 4) dual status of victims and witnesses; 5) witness testimony; 6) live broadcast of audio visual recordings; 7) use of visual aids; 8) Lingala interpretation and 9) hearing schedule.³⁷ These issues were raised orally.³⁸ The Registry submitted that existing jurisprudence could not be considered as being completely settled and that it seemed desirable to it to allow any new participants to “[TRANSLATION] express themselves” on these matters.³⁹ Accordingly, the Chamber directs the Registry to provide it with written submissions on the list of requested directions, to the exclusion of the above-mentioned point 8), and, to the extent that they are necessary for the proper discharge of its functions,⁴⁰ with practical proposals for the improvement of current practices, explaining how the latter should be modified.

15. In its written response of 24 November 2008, the Registry asked the Chamber whether it should continue to provide interpretation in Lingala to the accused

³⁶ Regulation 24 *bis*, paragraph 1 of the *Regulations of the Court*.

³⁷ ICC-01/04-01/07-765, pp. 6 to 8.

³⁸ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 29, line 18, to p. 39, line 15.

³⁹ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 33, line 19.

⁴⁰ Regulation 24 *bis*, paragraph 1 of the *Regulations of the Court*.

persons at trial. When specifically questioned on this point at the hearing, it stated that the decision issued by Judge Steiner on 2 June 2008,⁴¹ implementing the Appeals Chamber judgment of 27 May 2008⁴² and authorizing interpretation in Lingala at the confirmation hearing, covers the specific stage of the confirmation hearing⁴³ and does not apply to the trial phase. Accordingly, the Registry considered it “indispensable”⁴⁴ for the Chamber to review this decision. As requested by it at the hearing, the Chamber directs the Registry to provide it with written submissions in support of a review of Judge Steiner’s above-mentioned decision, supporting them with any relevant document.

16. In response to the written⁴⁵ and oral⁴⁶ submissions from the Legal Representatives of the Victims setting out the pressure and threats to which they have been subjected, the Registry has proposed continuing the discussions already initiated on this issue and organizing a working meeting with the Legal Representatives of the Victims in an attempt to define the best possible level of protection.⁴⁷ The Chamber would like this proposal to be implemented as quickly as possible. It asks the Registry provide it, as soon as it is in a position to do so, with a report marked “Confidential – *Ex Parte* – Victims’ Representatives only”, stating the participants’ respective positions at this meeting as well as the outcome of these consultations. The Chamber retains the option of convening an *ex parte* hearing on this issue.

⁴¹ Pre-Trial Chamber I, *Decision Implementing the Appeals Chamber Judgement concerning Languages*, 2 June 2008, ICC-01/04-01/07-539.

⁴² Appeals Chamber, *Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘Decision on the Defence Request Concerning Languages’*, 27 May 2008, ICC-01/04-01/07-522.

⁴³ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 37, lines 14 to 16.

⁴⁴ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 37, line 23.

⁴⁵ Legal Representatives of Victims a/0333/07 and a/0110/08, “*Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a) du Statut*”, 24 November 2008, ICC-01/04-01/07-761, pp. 5 to 7.

⁴⁶ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 86 to 89; ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, pp. 3 to 11.

⁴⁷ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 16, lines 17 to 22.

VI. Hearings

17. In the course of the discussions, the Prosecutor proposed raising the issue of the protection of three prosecution witnesses⁴⁸ at a closed session, as well as the disclosure modalities for any exonerating material contained in the statements of witnesses whom he does not intend to call as prosecution witnesses.⁴⁹ The Chamber considers it necessary to hold an *ex parte* hearing with the Prosecutor and the Registry to address these two issues.

FOR THESE REASONS

The Chamber directs the participants and the Registry to file additional documents as follows:

- 1) the document referred to in paragraph 7 of this Order shall be filed by not later than 4.00 p.m. on 9 January 2009, and Counsel for the Defence and the Legal Representatives of the Victims shall have until 4.00 p.m. on 23 January 2009 to file their response;
- 2) the document referred to in paragraph 8 shall be filed by not later than 4.00 p.m. on 19 January 2009, and Counsel for the Defence and the Legal Representatives of the Victims shall have until 4.00 p.m. on 2 February 2009 at the latest to file their response. Pursuant to regulation 24 of the *Regulations of the Court*, the Chamber authorizes the Prosecutor to file a reply by not later than 4.00 p.m. on 9 February 2009;
- 3) the document referred to in paragraph 9 shall be filed by not later than 4.00 p.m. on 5 January 2009, and Counsel for the Defence and the Legal Representatives of the Victims shall have until 4.00 p.m. on 19 January 2009 at the latest to file their response;

⁴⁸ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 70, line 20.

⁴⁹ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 73, line 10, to p. 74, line 24.

- 4) the document referred to in paragraph 10, if any, shall be filed by not later than 15 January 2009. Germain Katanga's Defence may file its own observations by not later than 4.00 p.m. on 29 January 2009. The Prosecutor and the Legal Representatives of the Victims shall file their response by not later than 4.00 p.m. on 5 February 2009;
- 5) the document referred to in paragraph 12 shall be filed by not later than 4.00 p.m. on 16 December 2008. The Prosecutor, Counsel for the Defence and the Legal Representatives of the Victims shall have until 4.00 p.m. on 12 January 2009 at the latest to file their response;
- 6) the document referred to in paragraph 13 shall be filed by not later than 4.00 p.m. on 19 December 2008;
- 7) the document referred to in paragraph 14 shall be filed by not later than 4.00 p.m. on 12 January 2009. The Prosecutor, Counsel for the Defence and the Legal Representatives of the Victims shall have until 4.00 p.m. on 26 January 2009 at the latest to file their response;
- 8) the document referred to in paragraph 15 shall be filed by not later than 4.00 p.m. on 21 January 2009. The Prosecutor, Counsel for the Defence and the Legal Representatives of the Victims shall respond by not later than 4 February 2009. Pursuant to regulation 24 of the *Regulations of the Court*, the Chamber authorizes the Registry to file a reply by not later than 4.00 p.m. on 11 February 2009.

The Chamber hereby convenes an *ex parte* hearing, to be attended by the Prosecutor and the Registry only, for 28 January 2009 at 10:00 a.m.

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 10 December 2008

At The Hague, The Netherlands