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

Date: **14 July 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

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

PUBLIC

Defence Response to Prosecution's Public « *Mémoire de l'Accusation, en application de l'Ordonnance du 26 juin 2009, aux fins de dépôt de propositions d'expurgations (Témoins P-23, P-33, P-37, P-44, P-47, P-52, P-68, P-101 et P-113)* »

Source: Defence for Mr Germain Katanga

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

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. This is the Defence's Response to the Prosecution's « *Mémoire de l'Accusation, en application de l'Ordonnance du 26 juin 2009, aux fins de dépôt de propositions d'expurgations (Témoins P-23, P-33, P-37, P-44, P-47, P-52, P-68, P-101 et P-113)* », filed on 6 July 2009.¹
2. The Defence has already stated its objections against the proposed admission of facts instead of disclosure of the statements of these nine persons whose evidence falls within the scope of Rule 77.² The Defence reiterates those objections and highlights the exceptional nature of protective measures, in particular the non-disclosure of the statements and identities of persons whose evidence must be disclosed under Rule 77.³
3. The Defence submits that the proposition of the Prosecution to withhold statements in their entirety from the Defence and to disclose a list of facts asserted therein is excessive. As was held by the Appeals Chamber and previously cited by the Defence: "The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule."⁴ This general rule can be limited only on an exceptional basis⁵ and "as an absolute last resort".⁶
4. The fact that the persons in question do not exclusively produce exonerating evidence but also incriminating evidence makes the disclosure of their statements even more essential because the Defence may need such evidence in the cross-examination of the witnesses the Prosecution intends to call.

¹ ICC-01/04-01/07-1269, Version publique expurgée Avec 10 Annexes confidentielles, ex parte, réservées à l'Accusation.

² ICC-01/04601/07-1028, Defence Response to the Prosecution's *Requête aux fins d'admission de faits et de non communication de l'identité de neuf témoins (W-023, W-033, W-037, W-044, W-047, W-052, W-068, W-101, W-113) ayant fourni des éléments de preuve relevant de la Règle 77*, 6 April 2009.

³ *Ibid*, inter alia, paras 2, 14.

⁴ *Ibid*, para. 14; reference to: Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-475, 13 May 2008, para. 70.

⁵ ICC-01/04-01/07-819-tENG, (TCII) Décision relative à la procédure d'expurgation, 12 January 2009, paras. 1 & 12 ; ICC-01/04-01/07-946, (TCII) Décision sur la requête du Procureur aux fins d'autorisation d'interjeter appel de la décision relative aux expurgations rendue le 10 février 2009, 6 March 2009, para. 13; Status Conference held by Trial Chamber II, T-27.11.2008, p. 55 lines 4-10 & p. 60 line 4.

⁶ Status Conference held by Trial Chamber II, T-27.11.2008, p. 60 line 6 & p. 80 lines 22-25.

5. In conclusion, the admission of facts by the Prosecution is not helpful to the Defence in the manner proposed. The Defence objects to it, and requests that the Chamber order the Prosecution to disclose the statements instead.

Respectfully submitted,



David HOOPER

Dated this 14th July 2009
At The Hague, Netherlands