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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

**with Annexes A, C and D - Confidential, *ex parte*, only available to the Office of
the Prosecutor
and Annex B, only available to the Office of the Prosecutor and the Defence**

**Prosecution's Application to Be Permitted to Add the Statement of Witness 317 to
its List of Evidence and to Add Witness 317 to its List of Witnesses pursuant to
Regulation 35**

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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Other

Pursuant to Regulation 35(2) of the Regulations of the Court, the Prosecution respectfully requests leave to add to its List of Incriminating Evidence the statement of a newly available witness, Witness 317, and to include this witness on its List of Witnesses at trial.¹ The evidence will clarify and provide context for evidence that is currently on the Prosecution's List of Evidence and is critically significant to the determination of the truth.

As set out below, despite its repeated efforts and for reasons entirely outside its control, the Prosecution was unable to secure that it would successfully obtain leave to call the witness or proffer her statement before the lapse of the time limit. Because of the existence of good cause to have missed the deadline and the substantial importance of the information, the Prosecution submits that the evidence should be allowed notwithstanding the delay.

The Prosecution also assures the Chamber that it will not seek to add any additional witnesses to its List of Witnesses.

Confidentiality

The Prosecution requests that Annexes A, C and D to this filing be received by the Chamber as confidential, *ex parte*, only available to the Office of the Prosecutor as they contain the unredacted statement of Witness 317, the redacted statement and underlying reasons for the redactions to the statement. The Prosecution submits Annex B as Confidential, only available to the Office of the Prosecutor and the Defence as it relates to the correspondence between the United Nations and the Office of the Prosecutor. The Prosecution submits that such classifications are

¹ Witness 317 is an employee of the United Nations ("UN"), which requires that certain specified protective measures be provided before the statement can be disclosed and the witness authorized to testify at trial. The Prosecution accordingly also requests that, if the application is granted, the Chamber also order the specified measures. See *infra*, paras 38 to 42.

necessary since the UN is requesting protective measures to the statement of Witness 317 before it can be disclosed to the Defence and since the UN is also seeking protective measures in relation to the public.

Background

1. On 24 February 2003, Witness 317 was a Human Rights Officer working for the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC"). In that capacity, she led an investigative team that looked into, among other things, the incident at Bogoro of 24 February 2003.
2. On 6 December 2007, following a UN response to the Prosecution's request for the interview of Witness 317, the Prosecution accepted the conditions set forth by the United Nations Department of Peacekeeping Operations ("DPKO") for the interview with Witness 317 to take place.
3. On 16 January 2008, the Prosecution forwarded a request to be permitted to interview Witness 317 to the United Nations Office of the High Commissioner for Human Rights ("OHCHR") as Witness 317 was then based in Geneva and working for the OHCHR.
4. After Pre-Trial Chamber I issued its Confirmation Decision, the Prosecution reiterated to the OHCHR, on 3 November 2008, its request to be permitted to interview Witness 317.
5. Thereafter, the Prosecution followed up repeatedly with the UN regarding the status of execution of its request, indicating and reiterating the importance and urgency of a response. It raised the matter orally in routine and regular telephone contacts with the UN's Office of Legal Affairs ("OLA"), which in

turn continued to pursue the matter with relevant Departments and Offices within the UN System. It also submitted written reminders on 17 February, 10 March and 5 May 2009.

6. On 23 January 2009, the Prosecution was ordered to disclose all incriminating evidence to the Defence by 30 January 2009 and all material relevant pursuant to Rule 77 before 27 February 2009 (“Order”).² On 13 March 2009, the Chamber ordered the Prosecution to submit a Table of Incriminating Evidence, its List of Incriminating Evidence and List of Witnesses.³ The deadline was subsequently extended to 27 May 2009.⁴ The Prosecution submitted a Table of Incriminating Evidence, its List of Incriminating Evidence and List of Witnesses on 27 May 2009.
7. On 2 June 2009, the Prosecution received affirmative response from the DPKO for the conduct of the interview subject to the conditions set out in its letter. On 5 June 2009, the Prosecution agreed to the conditions for the interview of Witness 317.
8. On 10 July 2009, the DPKO told the Prosecution that Witness 317 had been informed of the UN’s consent and that the Prosecution could now proceed to contact her to make the necessary arrangement for the interview. Immediately the Prosecution contacted Witness 317 in Haïti where she is currently a Senior Human Rights Officer working for the United Nations Stabilization Mission in Haiti (“MINUSTAH”) to make arrangements for an interview. The witness was not available for the interview until 7 August.

² Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d’une conférence de mise en état, ICC-01/04-01/07-846.

³ ICC-01/04-01/07-956, pp. 18-19.

⁴ ICC-01/04-01/07-1156-Conf-Exp.

9. On 7, 8 and 9 August 2009, the Prosecution interviewed Witness 317.
10. On 13 August 2009, the Prosecution requested the lifting of the applicable disclosure restrictions and on 25 August 2009, transmitted the record of the interview of Witness 317 to the DPKO. Concurrently, on 13 August 2009, the Prosecution also requested permission from the OLA to add Witness 317 to its List of Witnesses to be called to testify. This could only be done after the assessment of the statement which was signed on 9 August 2009.
11. On 14 August 2009 and at a status conference on 1 October 2009, the Prosecution informed the Chamber that it would seek permission to add a new witness to its List of Witnesses.⁵
12. On 5 October 2009, the Prosecution received confirmation in writing that the UN agreed to the lifting of the applicable disclosure restrictions on the statement of Witness 317, subject to the retention of certain redactions and to the addition of Witness 317 to its List of Witnesses to be called to testify.
13. On 7 October, the Prosecution received the statement of Witness 317 with the redactions retained by the UN pursuant to Article 18(3) of the Relationship Agreement between the United Nations and the International Criminal Court ("Relationship Agreement"), which mirrors Article 54(3)(e) of the Rome Statute.
14. On 10 October, further to its request, the Prosecution received from the UN the underlying explanations for the continued need to maintain redactions in order to permit the disclosure of the statement to both Accused.

⁵ See ICC-01/04-01/07-1378-Conf-Exp-AnxB and ICC-01/04-01/07-T-71-CONF-ENG, p. 70 *in fine* and p. 71.

Request Pursuant to Regulation 35(2)

The circumstances establishing that the delay was outside the control of the Prosecution

15. According to Regulation 35(2), after the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

16. As the prior recitation demonstrates, the Prosecution sought over several months to obtain consent to interview the witness. The Prosecution acted quickly after this consent was provided by making arrangements to interview her. A few days after the interview was completed, on 13 August the Prosecution – having determined that the potential testimony was sufficiently important – requested the UN to permit her to testify.

17. According to the information obtained during the contacts and discussions with the UN to follow up on the original 2007 request, the Prosecution understands that the time taken for the processing of this request was attributable to the consultation process required within the UN and between the UN Secretariat (Office of Legal Affairs), the OHCHR, and the Peacekeeping missions on the ground.

18. A request from the Office of the Prosecutor for the interview of a former MONUC staff member goes first to the DPKO, which consults with both the OLA and the relevant Peacekeeping missions in the field. In the present case, the OLA also had to consult with the OHCHR since Witness 317 is a Human Rights Officer.

19. During the pendency of this request, the UN adjusted the rules relating to the human rights components of Peacekeeping missions (known as Integrated Human Rights Offices), which instituted reporting lines to both the DPKO and the OHCHR. This adjustment added to the consultations needed and the procedures for seeking consent.
20. Additionally, the fact that during the consultation process, staff members of the respective UN offices and agencies changed positions (including the High Commissioner for Human Rights herself) appears to have also affected the speed of the response.
21. Finally, the UN conditioned its agreement to the interview of Witness 317 on the application of Article 18(3) of the Relationship Agreement.⁶ Article 18(3) states: “The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations”. As such, pursuant to the conditions set out by the UN for the interview to take place, both the content of the interview and the fact that the interview had taken place remained confidential.⁷

⁶ <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Negotiated+Relationship+Agreement+between+the+International+Criminal+Court+and+the+United+Nations.htm>.

⁷ In contrast to the situation which arose in the case of the *Prosecutor v. Lubanga*, the Prosecution did not face the conflict between obligations, on the one hand to the UN under the Agreement to protect confidentiality (in that case under Article 54(3)(e)) and at the same time to the Accused under Article 67(2) or Rule 77 to disclose exculpatory or other relevant evidence. The confidentiality obligation instead only limited the Prosecution’s ability to use (and, only in anticipation of use, to disclose) incriminating evidence. Thus, the directive of the Appeals Chamber, that “the use of article 54(3)(e) of the Statute must not lead to breaches of the obligations of the Prosecutor vis-à-vis the suspect or accused”, (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 42) is inapplicable here.

22. Accordingly, until the UN provided consent on 5 October, the Prosecution could not seek to include Witness 317 on its List of Witnesses or request that her statement be disclosed and added to its List of Evidence.

23. On 7 October – the same day that the Prosecution received from the UN the redacted copy of the statement of Witness 317 for disclosure – the Chamber issued its decision interpreting Regulation 35 to require that the Prosecution inform the Chamber before the expiration of deadlines that it would continue its investigation and might seek leave to vary the time limit.⁸ The Prosecution accordingly had now to consider that Decision and its effect on the proffer of the newly obtained incriminating evidence.

The failure of the Prosecution to seek an extension of time before the interview was conducted

24. Prior to the 7 October Decision, the Prosecution had not interpreted – and did not anticipate that the Chamber would interpret – Regulation 35 as requiring that it seek an extension of time if it intended to conduct any investigation past 30 January 2009, the date on which it was required to submit its incriminating evidence. As set out in the Application for Leave to Appeal, the Prosecution had instead relied on prior decisions confirming that it had both the authority and the responsibility to continue its investigations.

25. The Prosecution recognizes that that Decision bears on the instant request to add the evidence and witness. However, the present case is different than the circumstances that triggered the recent decision involving the forensic mission to examine the *Institut de Bogoro*. A concrete mission regarding the *Institut de*

⁸ See ICC-01/04-01/07-1515 and ICC-01/04-01/07-1515-Corr, of 9 October 2009. On 13 October 2009, the Prosecution filed an application for leave to appeal that decision, see ICC-01/04-01/07-1527.

Bogoro had been planned prior to the expiration of the deadline and although it had been delayed, it was expected that this known and identifiable mission would go ahead. In contrast, in the present case the Prosecution had been attempting to interview Witness 317 for almost two years with limited progress. This was not a mere question of timing or delays - prior to the expiration of the deadline, the Prosecution was not aware whether it would be able to ultimately conduct this interview. In contradistinction with the situation underlying the forensic mission in the *Institut de Bogoro*, the Prosecution had no control over the process, but depended on the willingness of the information provider to agree to the interview of the witness.

26. As the Chamber noted in its recent decision, if the Prosecutor anticipates that it may come forward after the deadline with information it must make a motion to extend the deadline and “propose a reasonable new date”.⁹ In these circumstances, it was impossible for the Prosecution to propose, in good faith, any meaningful date or even a range of dates.

27. In the present situation, even had the Prosecution sought an extension of time pursuant to Regulation 35 to take further investigative steps, it could not have done so based on the hypothetical availability of a person to testify at trial. Specifically, the Prosecution (a) had no guarantee that the witness would be available to provide a statement; (b) was unaware that the witness’s evidence would be relevant to the case; and (c) had no guarantee that even if the witness was interviewed and provided relevant information, the witness would thereafter be willing to testify.

28. As a result, the Prosecution respectfully submits that it is in the same position as described by the Chamber in its decision on the disclosure of Witness 373’s

⁹ ICC-01/04-01/07-1515-Corr, para. 31.

statement and to the witness's testimony at trial. The Prosecution may have known the existence of the witness before the expiration of the 30 January 2009 deadline, but the Chamber recognised the difficulties the Prosecution encountered to contact the witness and to satisfy the deadline.¹⁰ These circumstances previously led the Chamber to conclude that the Prosecution could rightly invoke Regulation 35(2).¹¹

29. Other factors identified by the Chamber in that decision also counsel in favor of allowing this evidence. The "volume and complexity" of the new evidence is not overwhelming.¹² The statement is 15 pages long, and it refers to documents that have been in the possession of the Accused for over 18 months. Thus, the new evidence does not present an overwhelming or complex matter against which the Accused will be required, at a late date, to prepare. The Prosecution will also schedule Witness 317 as its last witness in order to minimize even further the possible detrimental impact of the late disclosure on the Defence.

30. As set out below, moreover, the relevance and probative value of the evidence is substantial. As the Court explained, "[i]n the case of newly discovered incriminating evidence, the Prosecution must show that the new evidence is either more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case".¹³ Its importance is measured by the effect that the evidence will have on the establishment of the truth.¹⁴ That factor similarly supports a decision to allow its inclusion in the list of evidence and the inclusion of the witness as a trial witness.

¹⁰ ICC-01/04-01/07-1135, para. 15.

¹¹ *Ibid.*, para. 16.

¹² ICC-01/04-01/07-1515-Corr, para. 33.

¹³ *Ibid.*, para. 37.

¹⁴ *Ibid.*

Nature and relevance of the statement and testimony of Witness 317

31. In March 2003, a MONUC Special Investigation Team investigated several human rights abuses committed in Ituri since January 2003, including the attack on Bogoro of 24 February 2003. The Special Investigation Team submitted its final report on 20 June 2003.¹⁵ This report was first disclosed to Germain Katanga on 21 January 2008¹⁶ and to Mathieu Ngudjolo Chui on 19 March 2008.¹⁷

32. Witness 317 was the Team Leader of the Special Investigation Team and, as she confirmed during her interview, she personally wrote the report.

33. During her interview, Witness 317 was asked to comment on that Report and on the UN's *Special report on the events in Ituri, January 2002 – December 2003*.¹⁸ This report was first disclosed to Germain Katanga on 17 December 2007 and to Mathieu Ngudjolo Chui on 19 March 2008.¹⁹ In her statement, Witness 317 also confirms that she wrote this report with other colleagues.

34. The two reports are on the Prosecution's List of Incriminating Evidence.²⁰ These reports were previously admitted as evidence during the confirmation hearing and were relied upon by Pre-Trial Chamber I in its Decision on the confirmation of charges.²¹

¹⁵ ERN : DRC-OTP-0152-0286.

¹⁶ See disclosure report ICC-01/04-01/07-157.

¹⁷ See disclosure report ICC-01/04-01/07-337 and ICC-01/04-01/07-337-Conf-AnxD.

¹⁸ ERN : DRC-OTP-0129-0267.

¹⁹ See disclosure reports ICC-01/04-01/07-114 and ICC-01/04-01/07-337 and ICC-01/04-01/07-337-Conf-AnxB.

²⁰ See ICC-01/04-01/07-1174-Conf-Exp-AnxP, filed on 27 May 2009.

²¹ ICC-01/04-01/07-717. The admissibility of the two reports is currently being challenged by the Defence team of Mathieu Ngudjolo, see ICC-01/04-01/07-1522. The Prosecution is currently drafting its response to this Application of the Defence.

35. The Prosecution respectfully submits that the statement of Witness 317, which confirms and explains the two reports previously disclosed to the Defence, is essential to establish the truth and to counter the anticipated claim by the Defence that the reports are unreliable. The statement of Witness 317 provides the methodology used to collect the information, which sources were interviewed (including a large number of victims) and the consultation process that led to the submission of the reports. The statement also provides additional and valuable information on the Special Investigations Team's visit to Bogoro on 26 March 2003. Finally the report describes the circumstances and context of the admissions of Mathieu Ngudjolo and the follow-up question of Witness 317 that led Mathieu Ngudjolo to provide additional details which provide an essential insight into the Accused's knowledge and intent.

36. During the Confirmation Hearing, the Defence for Mathieu Ngudjolo's challenged the probative value of UN reports, alleging that they were based mainly on hearsay and that the Prosecution had not explained the methodology employed by the UN to draft its reports.²² The Defence for Mathieu Ngudjolo went further in relation to the admissions of their client as related in the two reports: *"l'Accusation, dans la présentation de son dossier, est revenue sur ces prétendus aveux. La Défense relève à nouveau qu'il s'agit de pur ouï-dire dont les sources ne sont nullement identifiées"*.²³

37. The Prosecution submits that the source of the information relating to the Accused's admissions and of the two reports is Witness 317. Witness 317 is now identified and available to testify. If the Chamber permits the Prosecution to add Witness 317 to its List of Witnesses, the Defence of Mathieu Ngudjolo

²² ICC-01/04-01/07-699, para. 28.

²³ ICC-01/04-01/07-699, para. 29 *in fine*.

and Germain Katanga will have the opportunity, in cross-examination, to test the credibility and reliability of the two reports and Witness 317.

38. Additionally, the Prosecution submits that the Defence will not suffer undue prejudice by the late disclosure, as the statement of Witness 317 is 15 pages and refers to two reports, the content of which is known to the Defence since at least 19 March 2008. Moreover, to minimize even further the potential prejudice to the Defence, the Prosecution will call Witness 317 as its last witness.

Protective measures

39. In Annex A, which is Confidential, *ex parte*, only available to the Office of the Prosecutor, the Prosecution submits the unredacted statement of Witness 317. In Confidential Annex B, the Prosecution submits the letters received on 5 October from the Office of Legal Affairs authorizing the disclosure of the Statement of Witness 317 and consenting that the witness be called to testify.

40. In these letters, the OLA also requests the implementation of protective measures in relation to the testimony of Witness 317, as a condition for permitting the testimony: namely that during the examination and re-examination of Witness 317 no questions be asked that would require the witness to disclose --

- In open session, information the public disclosure of which would endanger the safety or security either of current or former United Nations personnel or of other persons;
- In open session or closed session, information the disclosure of which to any person, in particular the accused, would endanger the

safety or security either of current or former United Nations personnel or of other persons;

- In open session or closed session, the identity of persons, groups or organizations that provided information either to Witness 317 in her capacity as member of MONUC's Human Rights Division or the United Nations more generally on condition that their identities remain confidential and not be disclosed;
- In open session, information that was provided to Witness 317 or to the United Nations on the understanding that it should remain confidential and not be disclosed.

41. The OLA also requests that a representative of the Secretary-General be permitted to attend the hearings at which Witness 317 will be providing oral testimony. The OLA further requests that this representative, with the consent of Trial Chamber II, be permitted to consult with or be consulted by Witness 317, and to make submissions to Trial Chamber II that Witness 317 not be required to answer a question or to supply certain information since to do so (i) would endanger the safety or security either of current or former United Nations personnel or of other persons, or (ii) would prejudice the security or proper conduct of any current or future operation or activity of the United Nations or (iii) would breach an obligation of confidentiality which it is incumbent upon the United Nations, and upon Witness 317 as one of its officials, to respect.

42. The OLA also agrees to the lifting of the applicable disclosure restrictions on the statement of Witness 317, subject to the retention of certain redactions. The redacted version of the statement is submitted in Annex C, which is Confidential, *ex parte*, only available to the Office of the Prosecutor. The

Prosecution has no objection for the Defence to immediately have access to Annex C if the Trial Chamber II so approves.

43. In Annex D, which is Confidential, *ex parte*, only available to the Office of the Prosecutor, the Prosecution submits the underlying reasons of the United Nations for each redaction, which are limited to the names of individuals and organisations.

Conclusion

44. The Prosecution submits that the conditions pursuant to Regulation 35(2) are met. Alternatively, the Prosecution has shown “that the new evidence is either more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case”.²⁴ For these reasons, the Prosecution seeks the permission to add the statement of Witness 317 to its List of Incriminating Evidence and to add Witness 317 to its List of Witnesses.



Luis Moreno-Ocampo, Prosecutor

Dated this 16th day of October 2009

At The Hague, The Netherlands

²⁴ ICC-01/04-01/07-1515-Corr, para. 37.