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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 Redacted Version

**Observations regarding the disclosure of the identity of Prosecution witnesses to
third parties**

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. On 28 August 2009, the Prosecution filed a motion requesting that Trial Chamber II (“the Chamber”) order certain protective measures in regards to the witnesses it intends to present in its case.¹
2. On 16 September 2009, the Defence for Mathieu Ngudjolo filed its observations on the matter.²
3. On 22 September 2009, the Defence for Germain Katanga filed its observations.³
4. On 23 November 2009, the Chamber rendered its decision in which it prohibits the Defence from disclosing the identity of twenty-two (22) witnesses to third parties (“the Decision”).⁴
5. On 8 December 2009, the Defence for Mathieu Ngudjolo filed a motion requesting guidance from the Chamber regarding the disclosure of witnesses’ identity to third parties.⁵

Observations

6. The Prosecution submits that the welfare and security of its witnesses is dependent upon the rigorous adherence to the protective measures ordered by the Chamber. Among those measures, the Defence teams are not permitted to disclose the identity of the witnesses to third parties, since this could necessarily compromise their safety as well as the safety of their family members.

¹ ICC-01/04-01/07-1440.

² ICC-01/04-01/07-1475.

³ ICC-01/04-01/07-1486.

⁴ ICC-01/04-01/07-1667-Conf.

⁵ ICC-01/04-01/07-1702-Red.

7. While in certain circumstances, the Defence may need to disclose a witness's identity in order to pursue specific lines of investigation, the Defence should at all times abide by the need to ensure that the witness's safety is not unduly compromised. In essence, such disclosure must be directly and specifically necessary for the preparation and the presentation of the Defence's case.⁶

The security of the witnesses

8. Pursuant to Article 68(1) of the Statute, the Chamber has an obligation to take appropriate measures to protect, *inter alia*, the safety of victims and witnesses. The protection of the identity of witnesses is essential to ensure that their safety is not compromised and also in order to guarantee their continued cooperation with the Court. Consequently, the Prosecution submits that any decision on this matter should strive to ensure that witnesses' identities are protected and are not unnecessarily or negligently disclosed.
9. [REDACTED].⁷ The Prosecution emphasises that the mere fact of indicating the possible association of witnesses with the Court or Prosecution can therefore be prejudicial to their safety. Actions taken by third parties can have a serious impact on the witness being contacted and his or her willingness to continue to cooperate with the Court. Consequently, the Defence should only disclose the identity of witnesses for legitimate investigative purposes, and it should carefully limit disclosures to the smallest possible number of third parties.
10. This is equally important with respect to witnesses who are in the Court's Protection Program ("ICCPP") [REDACTED] and for witnesses who are not in the ICCPP. If the identity of protected witnesses is disclosed to third parties,

⁶ See Trial Chamber I's decision regarding disclosure of non-public information to members of the public, ICC-01/04-01/06-1372, paras 8 and 9.

⁷ [REDACTED].

there is an equally elevated risk that activities will take place to locate these witnesses and to compromise their safety and to discourage them from continuing to cooperate with the Court.

11. The Prosecution submits that the current insecurity in the Democratic Republic of the Congo ("DRC") also militates against the disclosure of witnesses' identification to third parties.⁸

Possible guidelines for the disclosure of witnesses' identity when specifically necessary for the preparation of the Defence's case

12. The Prosecution is mindful of the fact that in certain cases the Defence may need to disclose a witness's identity in order to pursue specific lines of investigation. However, in light of the security concerns that have been addressed above, the Prosecution suggests the following non-exhaustive guidelines. New information or changed circumstances may justify the imposition of additional measures.
13. First, disclosure of the witness's identity to a third party must be directly and specifically necessary for the preparation and the presentation of the Defence's case.⁹
14. Second, because of the ever-present risk of compromising the witness's safety, the Defence must obtain, in advance of disclosing confidential information to third parties, the advice from the Victims and Witnesses Unit ("VWU") on whether it is safe to do so and the manner in which this must be done. For these purposes, the VWU should obtain all relevant information from the

⁸ The issue of insecurity in the DRC was recognised by the Chamber in the decision ICC-01/04-01/07-1265-Conf-Exp, par. 19. See also ICC-01/04-01/07-T-65-ENG ET WT, p. 79, 1 June 2009.

⁹ See *supra* footnote 6. Also, the third party should be met at a discrete location where confidentiality can be ensured.

Defence, including the identity of the third parties, in order to update its risk assessment of Prosecution witnesses. The VWU should be directed to give its advice on the basis of a Court-wide agreed standard for witness protection.¹⁰ If the VWU does not advise the requested disclosure, the Defence may make an application to the Chamber, *ex parte*, but may not disclose the witness's identity unless the Chamber expressly approves the request.

15. Third, the Prosecution requests a standing order from the Chamber directing the Defence to not reveal to third parties that the person about whom they are seeking information is a witness for the Prosecution or is involved in any way in a case before the ICC. The Defence should also be instructed to avoid any mention of the fact that the information is being solicited for a matter pertaining to the ICC.
16. Fourth, the Defence should be directed to inform the Prosecution of the fact that they have disclosed a Prosecution witness's identity to third parties. This is to enable the Prosecution to update its own risk assessment of Prosecution witnesses and to comply with its statutory duty to protect witnesses by taking extra measures to monitor the security of the witness involved.
17. Fifth, the Defence should maintain a logbook in which is recorded each instance in which a witness's identity has been disclosed. This logbook should also contain the name and the particulars of the person to whom it was disclosed, as well as the date on which this occurred. All other relevant information should also be included. The purpose of this logbook would be two-fold: (1) In case the security of a witness would be compromised, the Chamber could have access to relevant information regarding the persons to

¹⁰ The Strategic Plan of the International Criminal Court sets as a priority objective of the Court to "(p)ut in place a system to address all security risks, striving for maximum security of all participants consistent with the Rome Statute". See ICC-ASP/5/6, 4 August 2006, para. 31 and Annex, page 14. See also Revised strategic goals and objectives of the International Criminal Court 2009-2012 in the Report on the activities of the Court, ICC-ASP/7/25, Annex, 29 October 2008, p. 18.

whom the witness's identity was disclosed and (2) the Chamber would be able to identify the instances in which the witness's identity has been disclosed. This log should be available to the Chamber, upon request, on a confidential *ex parte* basis.

18. Sixth, the Defence should generally be directed to provide the Chamber, the Prosecution and the VWU with any information in its possession that is relevant to the assessment of a risk to victims and witnesses. The information provided to the Prosecution may in this case be limited to Prosecution witnesses of whom they have disclosed the identity to a third party. This is to enable all organs of the Court to comply with their respective duties to protect victims and witnesses.

Conclusion

The Prosecution submits that a strict adherence to these non-exhaustive guidelines is essential to minimise the risk to the safety, security and well being of the witnesses.



Luis Moreno-Ocampo, Prosecutor

Dated this 11th day of December 2009

At The Hague, The Netherlands