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

Date: **14 May 2009**

TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

***THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI***

Public Document

Decision on Witnesses 002, 030, 323 and 373

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

The Office of the Prosecutor

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Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II of the International Criminal Court (“the Chamber”), acting pursuant to articles 64(2), 64(3)(c) and 69(3) of the Statute, rule 76 of the Rules of Procedure and Evidence (“the Rules”), and regulations 35(2) and 54 of the Regulations of the Court, orders the following.

1. By an application filed on 27 April 2009, the Prosecutor requests the Chamber’s permission to disclose to the Defence a number of pieces of incriminating evidence, or material coming under rule 77 of the Rules, concerning Witnesses 002, 030, 323 and 373 (“the Application”).¹ This Application is submitted under regulation 35 of the Regulations of the Court, since, subject to pending protective measures, incriminating evidence should have been disclosed by 30 January 2009, and in the case of rule 77 material, by 27 February 2009. The Chamber considered that it required additional information from the Prosecutor, which was provided by an exchange of e-mails on 12 and 13 May 2009. These e-mails were disclosed to both teams for the Defence.

2. The Chamber will respond to the Application by analysing the situation of each witness or document of which disclosure is requested. For each piece of evidence it will examine whether the criterion of regulation 35(2) of the Regulations of the Court has been met. And in any event, in light of its obligations under articles 64(2) and 64(3)(c) of the Statute and its powers under regulation 54 of the Regulations of the Court, it must consider whether it is appropriate to grant the Application by satisfying itself, in the case of each piece of evidence, that the Defence does not suffer any prejudice thereby. Thus the Chamber will respond to this issue by considering *inter alia* the volume of the evidence, whether it raises a new issue and whether the Defence is in a position to familiarise itself with this material and to use it sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

¹ Office of the Prosecutor, “*Requête en application de la norme 35 du Règlement de la Cour, aux fins de communication d’éléments de preuve à charge ou relevant de la règle 77*”, 27 April 2009, ICC-01/04-01/07-1077.

Lastly, the Chamber points out that neither Defence team has wished to submit observations on this Application.

Witness 002 and associated documents

3. The Prosecutor wishes to disclose in evidence two interviews with this witness, together with 10 annexes,² all of which relates to videos filmed in Ituri. He maintains that the final decision to have this witness give evidence for the prosecution could only be taken after speaking to the witness on 4 March 2009,³ and after hearing the witness give evidence in the *Lubanga* case between 1 and 3 April 2009. Witness 002 agrees to give evidence in the present case and is already included in the Court's Protection Programme.

4. The Chamber notes that the Prosecutor was in possession of the two interviews and the 10 annexes before the deadline for the disclosure of incriminating evidence, namely 30 January 2009. It is not fully convinced of the Prosecutor's inability to submit his application for disclosure within the time limit "for reasons outside his control". Rather it considers that his decision to use this witness was dictated by considerations of a strategic nature, which do not fall directly within the scope of the aforementioned regulation 35. Thus the Prosecutor justifies his Application in the following terms:

[TRANSLATION] More precisely, the decision to have Witness W-002 give evidence as a prosecution witness was made after January 2009. As at 30 January 2009, the Prosecution had planned for other witnesses to comment on the videos in question. Therefore, the disclosure of incriminating interviews and their annexes prepared by Witness W-002 was not in issue at that time; thus, the Prosecution had no reason before 30 January 2009 to request an extension of the time limit for disclosing this material. The decision to use W-002 as a witness was only made subsequently, *inter alia* in light of the witness' testimony in the *Lubanga* case.⁴

² ICC-01/04-01/07-1077, paras. 13 to 15.

³ E-mail exchange between the Prosecutor and the Legal Adviser to the Trial Division, 12 and 13 May 2009.

⁴ ICC-01/04-01/07-1077, para. 17.

5. Nevertheless, the Chamber considers this witness' statement to be relevant and likely to offer a better understanding of the issues in the case and help to determine the truth. The Prosecutor has indeed pointed out that the interviews and the 10 annexes would provide the Court with more accurate commentaries on each of the videos already produced.

6. The Prosecutor has explained that the two interviews with Witness 002 are 9 and 19 pages long respectively, and that none of the annexes exceeds three pages, the total number of pages being around 42. He recalls that the Defence already has the videos concerned, so that these are not new issues for them.

7. The Chamber takes note of these explanations. It considers that the disclosure of this new evidence can only facilitate the analysis of the videos already in the Defence's possession. In addition, it observes that the Defence will benefit from a systematic presentation of this material as part of the table of incriminating evidence, which the Prosecutor is due to place on file on 20 May 2009. It considers that the Defence will thus have better material for analysis, as well as sufficient time properly to prepare itself before the starting date of the trial, scheduled for the end of September 2009.

8. The Prosecutor seeks further to disclose, under rule 77 of the Rules, 10 documents associated with this witness. These documents are different video commentaries from those just discussed. The videos have already been disclosed to the Defence, and the 10 documents containing commentaries thereon were apparently not disclosed at the same time as the videos as a result of an oversight.⁵ Lastly, the Prosecutor explains that he does not intend to use these incriminating documents during the trial, but that they seem to him to be "[TRANSLATION] probably useful to the Defence".⁶

⁵ Ibid., para. 27.

⁶ Ibid., para. 28.

9. The time limit for disclosure set for 27 February 2009 has certainly passed and, here again, the conditions for applying regulation 35 of the Regulations of the Court are not fully satisfied. The Chamber considers, however, for the reasons set out above, that these documents merit disclosure, as the Defence will not suffer any prejudice thereby.

Witness 030 and associated documents

10. The Prosecutor wishes to disclose two annexes (Annexes III and IV) to the interview with Witness 030 already disclosed to the Defence on 29 January 2009.⁷ Annex III includes commentaries by this witness on two videos already disclosed to the Defence.⁸ Annex IV is directly linked to Annex III.⁹ These two annexes are commented upon in the body of the interview with Witness 30 and they number 13 pages in total.¹⁰

11. The Prosecutor explains that he was in possession of both these annexes before 30 January 2009 and that the annexes were not disclosed on 29 January 2009 at the same time as the interview with Witness 30 due to a simple oversight.¹¹

12. Here again, the Prosecutor's alleged inability cannot, in the opinion of the Chamber, fall within the scope of regulation 35(2) of the Regulations of the Court. Nevertheless, these documents are relevant to the Defence insofar as they relate to documents which it already possesses and which will be relied on at trial as incriminating evidence. They are not lengthy documents, which cannot be regarded

⁷ Ibid., paras. 20 and 21.

⁸ Rule 77 video DRC-OTP-0151-0663: Rule 77 package 9, 4 April 2008; INCRIM video DRC-OTP-0151-0665: INCRIM package 24, 23 January 2009. See e-mail exchange between the Prosecutor and the Legal Adviser to the Trial Division, 12 and 13 May 2009.

⁹ See e-mail exchange between the Prosecutor and the Legal Adviser to the Trial Division, 12 and 13 May 2009.

¹⁰ ICC-01/04-01/07-1077, para. 24.

¹¹ Ibid., para. 23.

as totally new to the Defence, and the Defence will have time fully to familiarise itself with them before the start of the trial.

Witness 323 and associated documents

13. The Prosecutor wishes to disclose a drawing and an annotated map relating to the statement by Witness 323 which has already been disclosed to the Defence.¹² The Prosecutor explains that he was in possession of both these documents before 30 January 2009 and that it was due to a simple oversight that the documents were not disclosed.¹³ For the reasons set out above in paragraph 12, the Chamber considers that it can agree to the requested disclosure.

Witness 373 and associated documents

14. The Prosecutor further seeks to disclose in evidence an interview with this witness, together with 45 photographs taken during visits to Zombe in July and August 2003 that include pictures of child soldiers. He explains that Witness 373, who is a journalist, was identified on 21 January 2009, that the witness was contacted on 22 January, then on 9 February and also on 11 and 17 March 2009, but, because of the witness' professional obligations, it was only possible to meet and interview the witness on 30 March 2009. The Prosecutor states that the witness agrees to give evidence and that no protective measure is necessary in regard to this witness.

15. The Chamber notes that the Prosecutor knew of the existence of the witness before the time limit for disclosure of incriminating evidence, namely 30 January 2009. However, it takes note of the difficulties he has had in contacting this witness and in meeting the deadline. The Prosecutor expresses himself in the following terms:

¹² Ibid., paras. 20 and 22.

¹³ Ibid., para. 23.

[TRANSLATION] [...] the Office of the Prosecutor was not in possession of the material in question at the deadline of 30 January 2009; he was not certain that he could actually take evidence from this witness; nor did he know on this date the exact nature and scope of this evidence (it became apparent that another journalist, interviewed after 30 January 2009, had evidence which, on examination, did not relate to Zumbe, so disclosure of this evidence as incriminating evidence proved to be pointless); lastly, he had no guarantee either that W-373 would agree to give evidence as a prosecution witness, which is a *sine qua non* for presenting said material at trial.¹⁴

16. The Chamber considers that the situation in which the Prosecutor found himself as described above gives him legitimate grounds for invoking regulation 35(2) of the Regulations of the Court. Furthermore, it notes that the interview in question does not exceed 21 pages and that, despite the fact that the testimony is new, the subject of child soldiers is not new to the Defence, which has already carried out investigations in that regard. Lastly, the Chamber notes that, as no protective measure is envisaged, the documents can be disclosed to the Defence quickly, and moreover, together with the aforementioned table of incriminating evidence,¹⁵ which will give the Defence sufficient time to prepare before the commencement of the trial.

17. Lastly, the Prosecutor wishes to disclose, under rule 77 of the Rules, a one-page investigator's note concerning Witness 373, together with data (size and dimensions of images) relating to the registration of the aforementioned 45 photographs.¹⁶ He explains that this note was prepared after the witness' interview, i.e. at the end of March 2009, and that he did not have any data relating to the 45 photographs before meeting the witness on 30 March 2009. For the reasons set out in the previous paragraph, the Chamber considers that regulation 35(2) of the Regulations of the Court may be invoked in this case and that it was indeed for reasons outside his control that the Prosecutor was not able to disclose these documents in time. It notes that the Prosecutor stresses that he does not intend to rely on these documents at trial, but that they "will probably be useful to the

¹⁴ Ibid., para. 10, including the footnote on page 7.

¹⁵ See paragraph 7 of the present Decision.

¹⁶ ICC-01/04-01/07-1077, paras. 25 and 26.

Defence".¹⁷ It considers, therefore, that the documents merit disclosure, as the Defence will not suffer any prejudice thereby.

Additional Comments

18. In the light of all of the foregoing, the Chamber accordingly considers that it is able to grant all the disclosure requests made by the Prosecutor. It nonetheless wishes to recall that, when an obligatory deadline is set, in this case 30 January and 27 February 2009, the participants must, as far as possible, keep the Chamber informed of discussions held or contacts made before expiry of the deadline, in the event that it might be thought, with a sufficient degree of certainty, that they could lead to the submission of an application for extension under regulation 35 of the Regulations of the Court. This information should include a minimum of specific detail and not be confined to statements of a general nature. For example, in particular at the trial stage, the Office of the Prosecutor should not merely hint during hearings that, under its ongoing investigations, it may interview new witnesses or gather new evidence, without informing the Chamber, whenever it is in a position to do so, of any intention it may have of presenting an application for extension.

19. The Chamber would further recall that regulation 35(2) of the Regulations of the Court draws a clear distinction between an application for extension made before the lapse of a time limit, which presupposes that there is good cause, and one that is made once the time limit has lapsed, which presupposes that the applicant was unable to file the application within the time limit for reasons outside his or her control. In the interests of the proper administration of justice, the Chamber strongly recommends therefore that participants make their application for extension before the lapse of the relevant time limit, in particular when this involves, as in the instant case, the disclosure of evidence due to be used at trial.

¹⁷ Ibid., para. 28.

FOR THESE REASONS, the Chamber

GRANTS the Application;

INSTRUCTS the Prosecutor to disclose the material as soon as possible;

ORDERS the Prosecutor to incorporate the information relating to Witnesses 002, 030, 323 and 373 into the table of incriminating evidence due to be filed by 4 p.m. on 20 May 2009.

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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Hans-Peter Kaul

Dated this 14 May 2009

At The Hague, The Netherlands