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

Date: **26 June 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

**Order Convening an *Ex Parte* Hearing on the Protection of Exculpatory Witnesses
90, 169, 175, 178 (alias 253), 179, 243, 270, 271, 282, 288, 292, 337, and of Exculpatory
Witnesses 23, 33, 37, 44, 47, 52, 68, 101, 113**

Order 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

Defence Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Defence Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi 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
Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Mbuyu Anjelani

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 Väättäinen

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber II of the International Criminal Court (“the Chamber”), acting pursuant to regulation 30 of the Regulations of the Court, orders as follows:

1. On 11 February 2009, the Prosecutor submitted a report to the Chamber explaining the conditions under which he envisages disclosing the statements of exculpatory witnesses who, in his view, require special protective measures.¹ These witnesses have in fact indicated that they do not intend to consent to the disclosure of their identities.

2. After being invited by an Order of 12 February 2009² to submit their observations, the two Defence teams³ and the Legal Representatives of the Victims⁴ filed their submissions on 23 February 2009. The Chamber reviewed the situation of certain of the victims concerned at two *ex parte* hearings held on 25 February⁵ and 16 March 2009.⁶

¹ Office of the Prosecutor, “Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Witnesses Providing Exculpatory Evidence or Evidence of a Nature Material to the Preparation of the Defence”, 11 February 2009, ICC-01/04-01/07-893.

² *Order fixing a Time Limit for Responses by the Participants in the Proceedings (regulation 34 of the Regulations of the Court)*, 12 February 2009, ICC-01/04-01/07-895.

³ Defence for Mathieu Ngudjolo, “Réponse unique de la Défense aux soumissions numéros 893 et 902 de l’Accusation”, 23 February 2009, ICC-01/04-01/07-911; Defence for Germain Katanga, “Defence Response to the Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Witnesses Providing Exculpatory Evidence or Evidence of a Nature Material to the Preparation of the Defence”, 23 February 2009, ICC-01/04-01/07-918.

⁴ 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 ‘Prosecution’s Submissions on the Modalities of Disclosure Required for the Protection of Witnesses Providing Exculpatory Evidence or Evidence of a Nature Material to the Preparation of the Defence’”, 23 February 2009, ICC-01/04-01/07-913; Legal Representatives of Victims, “Observations des représentants légaux de victimes sur les mesures de protection liées à la communication par le Procureur, à la Défense, de pièces de témoins à décharge”, 23 February 2009, ICC-01/04-01/07-919.

⁵ ICC-01/04-01/07-T-60-CONF-EXP-ENG ET 25-02-2009, pp. 4 to 14.

⁶ ICC-01/04-01/07-T-62-CONF-EXP-ENG ET 16-03-2009, pp. 1 to 23.

3. The Prosecutor submitted two further reports to the Chamber dated 16 and 23 March 2009 respectively, updating the Chamber on the disclosure to the Defence of witness statements falling under article 67(2) of the Statute or under rule 77 of the Rules of Procedure and Evidence (“the Rules”).⁷

4. Finally, on 23 March 2009, the Prosecutor submitted two specific applications to the Chamber. The first concerns 12 witnesses and requests protective measures consisting of the permanent redaction of their identities or the disclosure of summaries of their statements to the Defence.⁸ The second proposes a procedure for the admission of facts and the non-disclosure of the identities of nine witnesses.⁹

5. On 1 April 2009, the Defence teams submitted their observations on these two applications.¹⁰

⁷ Office of the Prosecutor, “*Information de la Chambre - en vue de l’audience ex parte du 16 mars 2009 - sur l’état d’avancement de la communication à la Défense des déclarations de témoins relevant de l’Article 67-2 ou de la Règle 77 justifiant de potentielles expurgations*”, 16 March 2009, ICC-01/04-01/07-960-Conf-Exp; Office of the Prosecutor, “*Notice d’information de la Chambre sur la situation des différents témoins relevant de l’Article 67-2 ou de la Règle 77 et objets de requêtes en date des 20 et 23 mars 2009 aux fins notamment d’expurgations*”, 23 March 2009, ICC-01/04-01/07-983-Conf-Exp.

⁸ Office of the Prosecutor, “*Prosecution’s Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 - also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 280 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules*”, 23 March 2009, ICC-01/04-01/07-985. See also Office of the Prosecutor, “*Corrigendum to Prosecution’s Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 - also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 280 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules*”, 25 March 2009, ICC-01/04-01/07-985-corr.

⁹ Office of the Prosecutor, “*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*”, 23 March 2009, ICC-01/04-01/07-986-Conf-Exp. See also Office of the Prosecutor, “*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*”, 26 March 2009, ICC-01/04-01/07-991 (public redacted version).

¹⁰ Defence for Mathieu Ngudjolo, “*Observations consolidées de la Défense de Mathieu Ngudjolo relatives aux demandes d’expurgations et autres sollicitées par le Procureur dans ses soumissions référencées sous ICC-01/04-01/07-985 et ICC-01/04-01/07-991*”, 1 April 2009, ICC-01/04-01/07-1014; Defence for Germain Katanga, “*Defence Response to Prosecution’s Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 – also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 280 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and*

6. Before issuing a decision on the applications, the Chamber considers it necessary to obtain additional information from the Office of the Prosecutor and the Victims and Witnesses Unit (“the VWU”), both on the security situation of the witnesses concerned and on the modalities of disclosure proposed.

7. On this latter point, the Chamber notes that the Prosecutor maintains that the redaction process is not “[TRANSLATION] the best suited” to the statements given by the nine witnesses, for whom he proposes the admission of facts procedure. The Chamber now invites the Prosecutor to explain his reasons for not having recourse in the first instance to the redaction process in relation to these nine witnesses. In any event, the Chamber wishes proposals for the redactions of their statements, transcripts or investigators’ notes to be submitted to it before the hearing in order that it may determine the most appropriate protective measures. The Chamber also invites the Prosecutor to consider the possibility of combining, in the same document, redactions and admissions of facts, in order to comply fully with his disclosure obligation pursuant to rule 77 of the Rules.

FOR THESE REASONS, the Chamber

CONVENES an *ex parte* hearing, confined to the Office of the Prosecutor and the VWU, to be held at 9.30 a.m. on 8 July 2009, resuming if necessary at 2.30 p.m. on the same day; and

DIRECTS the Prosecutor to submit to the Chamber, in writing, all of the information and proposals mentioned in paragraph 7 of this Order by 10.00 a.m. on 6 July 2009.

64(6)(e), and Article 68(1) of the Statute and Rules 81(4) of the Rules”, 1 April 2009 ICC-01/04-01/07-1016; Defence for Germain Katanga, “Defence Response to 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’”, 3 April 2009, ICC-01/04-01/07-1028.

Done in 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 26 June 2009,

At The Hague, The Netherlands