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No.: ICC-01/04-01/07
Date: 25 February 2011

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

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

Public

Redacted Defence Disclosure of the Names of Four Defence Witnesses

Source: Defence for Mr Germain Katanga

Document 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
Mr Eric Macdonald, Senior Trial Lawyer

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper Q.C.
Mr Andreas O'Shea

1. The Defence hereby informs the Prosecution of the names of four of its Defence witnesses that it intends to call:
 - DRC-D02-P-0236, [REDACTED]
 - DRC-D02-P-0228, [REDACTED]
 - DRC-D02-P-0350, [REDACTED]
 - DRC-D02-P-0214, [REDACTED]
2. The names of further Defence witnesses will be provided prior to the 7 March 2011, 9am, pursuant to the Court order.
3. The Defence requests an assurance of non-prosecution by the Court “in respect of any act or omission that preceded the departure of that person from the requested State” pursuant to Rule 74 (4) and Rule 191 of the Rules, and Article 93-2 of the Statute, given that their testimony before the ICC may contain self-incriminating information.
4. Such undertaking was given by the Prosecution to all its incriminating witnesses in our case, in the *Position de l'Accusation sur la mise en œuvre de la règle 74*:¹
 3. Conformément à l'article 26 du Statut, le Bureau du Procureur ne peut pas engager de poursuites contre les témoins qui pourraient s'auto-incriminer mais étaient âgés de moins de 18 ans au moment de la commission des faits. C'est le cas des témoins P-28, P-157, P-250, P-279 et P-280.
 4. Pour les autres témoins à charge, âgés de plus de 18 ans au moment des faits, l'Accusation n'a pas l'intention de les poursuivre pour les faits qu'ils ont révélés ou révéleraient à l'audience et qui pourraient les incriminer.
5. The Prosecutor even indicated in Court that such guarantee was reserved for all witnesses who are to come before the court, all witnesses who co-operate with the court.² It is in the interests of fairness and equality of arms that the same attitude be taken towards Defence witnesses.
6. The Defence also takes this opportunity to remind the Prosecution of its disclosure obligations. More precisely, the Defence requests the Prosecution to disclose, as soon

¹ ICC-01/04-01/07-1614-Conf.

² See ICC-01/04-01/07-T-216-Red-ENG WT 15-11-2010, p. 31, l. 18-25, relative to P-28 :

“I think you should remind the witness that if he tells the truth, he will not be accused of anything at all. In accordance with Statute, if the witness speaks the truth, he will not be prosecuted for any crimes that he might have committed within the framework of the conflict that he's going to give testimony on. That is a guarantee which is reserved for all witnesses who is come before the court and not only Witness 0028, all witnesses co-operate with the court.”

See also ICC-01/04-01/07-T-91-Red-ENG WT 27-01-2010, pp 17-18, relative to P-250, and in particular p. 18, l. 9-13:

“MR. MACDONALD: (Interpretation) Mr. President, my answer is as follows: The witness should not have any fear of any possible prosecution before this court or before any national jurisdiction, so it is not necessary for Rule 74 to be applicable. The witness may say anything that he knows without any fear at all.”

as possible, any information in his possession concerning the Defence witnesses, pursuant to Rule 77, and in light of Trial Chamber I's Decision on the Scope of the Prosecution's Disclosure Obligations as Regards Defence Witnesses, dated 12 November 2010,³ according to which:

16. It follows from this Decision of the Appeals Chamber that the prosecution's disclosure obligations under Rule 77 of the Rules are wide, and they encompass, inter alia, any item that is relevant to the preparation of the defence, and including not only material that may undermine the prosecution case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation. This means that the prosecution is to communicate to the defence any material in its possession that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case.

17. This obligation has been further explored in jurisprudence from the ICTY, which, as referred to above, was cited favourably by the ICC's Appeals Chamber. The ICTY indicated that information is material to the preparation of the defence if there "is a strong indication that... it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'"^{^^}

18. In all the circumstances, the information, in the sense described above, that is relevant and concerns defence witnesses who are to be called, is to be disclosed to the defence for preparation, not least because it will enable the accused to decide whether or not to call them. Therefore, information that undermines or supports the evidence, or the credibility, of proposed defence witnesses falls within the scope of Rule 77 of the Rules. This is likely to assist trial efficiency, because it will increase the likelihood that only those witnesses are called who are, on an examination of all the relevant material, credible and reliable. The prosecution is not obliged to disclose its theories or its tactics, but instead it must provide all relevant information and material as regards the defence witnesses. (...)

20. Although appropriate summaries have been provided, questioning, as the Chamber has previously underlined, may to some extent be reactionary,^{^^} and the answers from witnesses may reveal additional material that is relevant and disclosable. The prosecution's disclosure obligations continue throughout the trial, and once fresh items are identified that should be provided to the defence, this is to be effected expeditiously.

Respectfully submitted,



David HOOPER Q.C.

Dated this 25 February 2011

At The Hague

³ ICC-01/04-01/06-2624.