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

Date: 19 April 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

Defence Response to the
Requête conjointe visant la communication d'un rapport relatif au témoin DRC-D02-P-0176 et visant les modalités de communication aux représentants légaux des documents transmis entre les parties sous couvert de la Règle 77 du Règlement de procédure et de preuve

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

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Introduction

1. By its motion filed on Friday 15th April 2011, the victims have, through both legal representatives, requested the disclosure of Rule 77 material previously disclosed to the Defence by the Prosecution.¹ This material consists of a report relating to witness 176, who is due to testify after the judicial recess of 25-29 April 2011.
2. The legal representatives argue that this material should be disclosed to them on the basis that it affects their interests. It is suggested that their interests are affected because the witness in question will testify in a manner which contradicts the evidence given by prosecution and victim witnesses.
3. It should be noted that Rule 77 of the Rules of Procedure and Evidence provides for disclosure between the parties.² Furthermore, in the same manner that it has been held that the victims have no duty of disclosure of exculpatory evidence on the victims,³ neither do the Defence nor the Prosecution have any general duty of disclosure of evidence on the victims.

B. Interest is not in itself an adequate basis for disclosure

4. It is submitted that the justification given in relation to this material is inadequate to merit an order for disclosure of this particular material to the victims.
5. It is not in every case, where the interests of victims are affected by material, that its disclosure to them should be ordered. It should be noted that the Appeals Chamber has held that there is no duty for the victim's representatives to disclose exculpatory material on the accused.⁴ This type of material clearly affects the interests of the

¹ ICC-01/04-01/07-2837.

² Rule 77, Inspection of material in possession or control of the Prosecutor:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

³ ICC-01/04-01/07-2288, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, para. 2.

⁴ ICC-01/04-01/07-2288, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, para. 2.

accused. It would accordingly not be right to assert that just because material falls within the interests of the victims that it should be disclosed to them.

C. Absence of a genuine and particular interest in this instance

6. Further, it has not been adequately demonstrated that the material in question particularly affects the interests of the victims. The fact that it relates to witness 176 does not in itself determine this issue. It is not anything relating to witness 176 which can be deemed to be particularly in the interests of the victims merely by virtue of that fact.
7. It is the function of the Defence witnesses to undermine incriminating evidence against the accused. All parties and participants have a degree of interest in the question of the incrimination of the accused. That is evident from the fact that this is a criminal trial. The interests of the victims in this are therefore no greater than that of the parties. In fact, the interest of victims must lie less in the incrimination of the accused as in the general plight of the victims who have suffered harm. The motion does not demonstrate how such interests are particularly affected in this case as to justify an order for disclosure not expressly provided for in the rules.

D. Prosecutor's willingness to disclose

8. The willingness of the Prosecutor to disclose the material to the victims should not affect the question. Otherwise, the Prosecutor could disclose all material of an incriminating nature to the victims whether or not it is being used in the trial. This assumes that the legal representatives will investigate this material for possible use in the trial. Such turn participant to party and observer to prosecutor. It has been consistently held by this Chamber that under no circumstances should the legal representatives take on the role of prosecutor.⁵
9. In the case of this material it is not as yet clear if it will be used during the trial by one of the parties. As and when notification is given, the victims may have a greater claim

⁵ See, e.g., ICC-01/04-01/07-1665 (20/11/09), para. 83 ("The victims are not parties to the trial and certainly have no role to support the case of the Prosecution"); ICC-01/04-01/07-T-188-CONF-ENG-CT (15/10/10), p. 18 (Legal Representative (Victims) permitted on a case by case basis, to call evidence, but is not to act in this regard, as a Prosecutor *bis*).

to access such material. Such notification must be given at least three days before the appearance of the witness, pursuant to this Chamber's Directions for the Conduct of the Proceedings.⁶ This is a principle which has not been the subject of any appeal from the victims.

ACCORDINGLY,

The Defence objects to the disclosure of the said material to the victims through their legal representatives.

Respectfully submitted,



David HOOPER Q.C.

Dated this 19 April 2011

At The Hague

⁶ ICC-01/04-01/07-1665, *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, dated 20 November 2009, paras 103, 108.