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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR**

v. Germain KATANGA and Mathieu NGUDJOLO CHUI

Public Document

**Prosecution's Response to Paragraph 8 of the
*"Ordonnance enjoignant aux participants et au Greffe de déposer des documents
complémentaires"* of 10 December 2008**

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. In its “*Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires*” of 10 December 2008,¹ Trial Chamber II (“the Chamber”), invited submissions on whether the Office of the Prosecutor (the “Prosecution”) should prepare a table documenting evidence disclosed to the Defence pursuant to Article 67(2) of the Rome Statute (the “Statute”) and Rule 77 of the Rules of Procedure and Evidence (the “Rules”) since the confirmation proceedings.

Submission

2. To accommodate the Chamber and facilitate its assessment of the extent to which Article 67(2) and Rule 77 evidence has been preserved in the course of its investigation, the Prosecution submits a draft table² which incorporates the category-based criteria used to determine whether material within its control and possession falls under Article 67(2) or Rule 77.
3. The Prosecution submits this draft table while reiterating³ that neither the Statute nor the Rules oblige the Prosecution to supply the Chamber with a tabulated analysis of the exculpatory evidence that it collects or of evidence which may be material to the preparation of the defence.
4. In particular, the wording of Article 67(2) indicates that disclosure of exculpatory material is to be effected *inter partes* and not to the Court.⁴

¹ ICC-01/04-01/07-788.

² A draft version of this table is attached to this filing as Annex I.

³ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008 at p. 56.

⁴ ICC-01/04-01/06-102 at p. 5; ICC-01/05-01/08-55 at para. 42 and ICC-01/05-01/08-75 at para. 31.

5. The Chamber's order emphasised that the Prosecution shall indicate how it understands its corresponding duty under Article 54(1)(a) of the Statute to investigate exonerating circumstances. The Prosecution also notes that the Chamber's request to tabulate potentially exculpatory evidence is confined to such material that has been disclosed to the Defence since the Confirmation Hearing.⁵
6. As mentioned during the Status Conference held on 28 November 2008, the Prosecution abides by its duty under Article 54(1)(a) to investigate incriminating and exonerating circumstances equally.⁶ The Prosecution pursues its duty to follow up and investigate exonerating circumstances when such have the potential to elucidate "*whether there is criminal responsibility*"⁷ under the Statute.
7. The Office of the Prosecutor adopts the same investigative methods and approach as applied for the investigation of incriminating circumstances. The Prosecution analyses, collects, assesses and discloses exonerating evidence that impacts on such "criminal responsibility" of the accused. The Prosecution follows any exonerating leads that surface in the course of the investigation. In doing so, the Prosecution collects all forms of exonerating items (*i.e.* statements, documents, videos, etc.).
8. Additionally, to ensure the respect of its duties pursuant to Article 54(1)(a), the Prosecution adopted guidelines for the identification and disclosure of documents falling under the category of Article 67(2) and/or Rule 77. The Prosecution disclosed these guidelines⁸ and also invited both Defence teams "to communicate their input to better define and refine these criteria or

⁵ ICC-01/04-01/07-788 at para. 8 and see also: ICC-01/04-01/07-747; Question 5 addressed to the Prosecution at the foot of p. 5.

⁶ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008 at p. 76.

⁷ The language of Article 54(1)(a) of the Statute.

⁸ "Prosecution's Report regarding Review Criteria and Lifting Procedures for Information under Article 54(3)(e)", ICC-01/04-01/07-458, 29 April 2008.

categories for review of material for disclosure/inspection under Article 67(2) and Rule 77".⁹

9. The Prosecution emphasises that it adopts a flexible and liberal approach in such matters entertaining, in the interests of justice, discrete and specific requests to disclose evidence requested by the Defence which do not necessarily impact directly on the criminal responsibility of the Accused.¹⁰
10. That said, the Prosecution understands Article 54(1)(a) as imposing on the Office of the Prosecutor a duty to initiate a prosecution after equal consideration of the incriminating and potentially exonerating evidence collected. Consequently, in the procedure of the International Criminal Court, while Article 54(1)(a) can be seen as requiring the Prosecution to perform an internal analysis of the totality of its evidence prior to exercising its discretion to prosecute, the language of Article 67(2) requires the Prosecution to supply the Defence with the potentially exonerating items. The Prosecution submits that it falls to the Defence to analyse the exculpatory material during the presentation of its case to the Chamber.

Draft Table

11. The Prosecution proposes that the table referred to in paragraph 2 above include the following fields for each item disclosed.¹¹

- the ERN number of the item;
- the nature of the item (whether a document, statement or otherwise);
- the title of the item;

⁹ *Ibid.* at para. 2. See also ICC-01/04-01/07-T-26-ENG ET 22-04-2008, p. 28, lines 12-24.

¹⁰ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008 at p. 51 where the Prosecution informed the Chamber that it had received and was complying with a Defence request to supply all information it may have on the record concerning legal proceedings initiated against Mathieu Ngudjolo Chui in the Democratic Republic of the Congo.

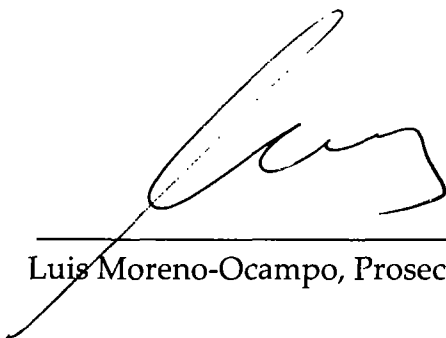
¹¹ The Prosecution adopts a format similar to that adopted for the communication of incriminating evidence to the Chamber: "Proposition de tableau type pour la présentation des éléments de preuve sur lesquels l'Accusation entend se fonder au procès", ICC-01/04-01/07-813, 9 January 2009.

- the date of the item;
- the language of the item;
- the charges to which the item relates;
- the element of the alleged crime to which the item relates;
- the alleged mode of participation to which the item relates;
- the date of disclosure of the item to the Defence;
- the criterion which defines the item as either exculpatory or material to the Defence;¹²

12. The Prosecution respectfully submits that providing analytical information beyond that envisaged in the draft table might be of prejudicial effect because it could predispose the Chamber as to the way the Defence ought to present its case.

Conclusion

13. The Prosecution submits in Annex I its proposed table to be applied to items disclosed since the Confirmation Hearing which may be exculpatory or material to the preparation of the defence, while maintaining its principled objection to communicating an analysis of exculpatory evidence to the Chamber.



Luis Moreno-Ocampo, Prosecutor

Dated this 19th day of January 2009

At The Hague, The Netherlands

¹² See *supra* note 8.