



Original: **English**

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

Date: **23 January 2009**

TRIAL CHAMBER II

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

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

Public Document

**DEFENCE OBSERVATIONS CONCERNING PROSECUTION TABLE OF
DISCLOSURE**

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
Ms Caroline Buisman

Counsel for the Defence for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Jean-Christostome Mulamba
Nsokoloni
Mr Joseph Keta
Mr J.L. Gilissen

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

Procedural background

1. On 10 December 2008, the Chamber issued its “Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires”¹ whereby it ordered the Prosecutor, *inter alia*, to submit, no later than 9 January 2009, a document described at paragraph 7 of the same Order.
2. In its Order of 10 December, the Chamber also requested the Defence to submit its Response to the Prosecution submissions no later than 23 January.

Defence response

3. In paragraph 7 of its Order, the Chamber ordered that the Prosecution should submit a proposal, in the form of a table, outlining in summary fashion the alleged evidential relevance of the proposed exhibits in relation to each aspects of the Prosecution case.
4. The purpose and function of such a document has been clearly outlined in the *Bemba* proceedings.² It is intended to protect and guarantee the fundamental rights of the accused to detailed and timely notice of the charges and to guarantee his right to adequate time and facilities to prepare for trial.³ In addition, such a document should ensure the streamlining of disclosure and allow the Chamber to exercise its functions.⁴
5. The *Bemba* Chamber made it clear that what was required of the Prosecution, in light of its obligations pursuant to Articles 61(5) and 67(1)(a)-(b) was for the Prosecution to provide, through such table, an “in-depth” evidential analysis of its case as will be presented to the Chamber.⁵ In particular, the Prosecution in that case was ordered to provide information pertaining to the relationship between the proposed evidence and the constituent elements of both the crimes charged and the modes of liability.⁶
6. The Defence submits that, in addition to the above mentioned goals and purposes served by such a document, the following are relevant:
 - (i) *Notice of the Prosecution case:* At this stage, the Defence of Mr Katanga has only the most general understanding of the nature of the charges against the defendant. Insofar as the defendant is entitled, not just to receive a general

¹ ICC-01/04-01/07-788.

² See *Prosecutor v Bemba*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008.

³ *Ibid*, paras 64-70.

⁴ *Ibid*, para. 67.

⁵ *Ibid*, paras 68-69.

⁶ *Ibid*, para. 69.

description of the case, but a detailed explanation thereof, this table must contribute to that goal and to protecting the fundamental rights that attach to it.

- (ii) *Ability to prepare:* A detailed table would also assist the Defence in carrying out preparation for trial, including by allowing it to conduct targeted investigations and to make precise requests for relevant documentation. Unless the table is sufficiently clear and precise, the table would serve no good investigative function for the Defence.
- (iii) *Length of the Prosecution case:* One of the reasons for the length of contemporary war crimes trials is, the Defence submits, the lack of clarity that often accompanies the prosecution of such cases in particular as regard the manner in which allegations are intended to be proved by prosecuting authorities. In other words, the strategy often appears to be: 'produce as much documents as possible and figure out later what good purpose they could serve'. This methodology is not, the Defence submits, acceptable or fair. The Prosecution must be required to give sufficient notice, prior to trial, not only of the detailed nature of its case but of the evidential path that he proposes to follow to prove it. Without such requirement, the present trial could last several years.
- (iv) *Changing nature of the Prosecution case:* Another common feature of contemporary war crimes trials is the ever-changing nature of the Prosecution case all through the proceedings (and appeal), generally as a result of a failure on the part of the Prosecution to establish particular elements of its case. Such a course, if permitted to occur, creates great unfairness for the defendant as it denies him the ability to prepare and effectively to confront that new case. It is therefore essential that, but for exceptional circumstances, the Prosecution be made to stick to its case, as pleaded, and to the evidential strategy that must be outlined in the table that has been requested of the Prosecution.
- (v) *Admission/exclusion of proposed exhibits:* The greater the precision of the table, the easier it will be for the parties to litigate any issue that pertains to the admissibility of any of the proposed exhibits. It will also facilitate the work of the Chamber in making its rulings about such matters as they arise in the course of the trial.

7. Having reviewed the proposed Prosecution table,⁷ the Defence has the following submissions to make. First, the Prosecution should be requested to provide a detailed *chain of custody* in relation to each and every proposed exhibits. Such practice (which has been followed in a number of cases before the United Nations *ad hoc* Tribunals) will allow the Defence, where necessary, to (i) to conduct any investigation pertaining to this document, (ii) to establish whether to challenge the admission of this document (in particular, if it raises issues pertaining to its authenticity).
8. Secondly, the amount of information contained in the draft table submitted by the Prosecution is, at least in two respects, insufficient and must be completed. In *Bemba*, the Chamber made it clear that the Prosecution should provide information pertaining to the “elements of” the crimes and forms of liability relevant to the charges.⁸ In the present case, the Prosecution seeks to limit the information to the forms of liability generally, rather than to its individual elements. The distinction is of fundamental importance. If, for instance, it is the Prosecution position that a particular document is relevant to establishing that the accused gave material support to the perpetrator, it would not be enough to refer to that document as relevant to charges that he aided and abetted the crimes. Likewise, it should be specified, for instance, if and whether the document in question pertains to the *mens rea* or *actus reus* of the alleged crime or what aspect of the relevant form of liability it relates to. To be of assistance to the Defence, and to serve the goals listed above, the table must identify “the elements” (of both the crimes and modes of liability) in relation to which it is said to be relevant. To that extent, the table proposed by the Prosecution is inadequate and should be amended to clearly reflect the nature of the Prosecution case as regard each of the elements (of both alleged crimes and forms of liability) relevant to its case.
9. Thirdly, to be of any assistance to the Defence (and, we submit, to the Chamber), such table must demonstrate a genuine effort on the part of the Prosecution to link the proposed exhibits to the issues in the case. It is of no assistance to provide a table, such as the draft attached to the Prosecution filing of 9 January, that lists more than half a dozen grounds or issues without any apparent efforts to discriminate between the matters that are genuinely related to the exhibits and those that are not. If the Prosecution is permitted to give only such broad and general description, the table will serve no good purpose and the entire exercise will prove useless. Accordingly, the

⁷ ICC-01/04-01/07-813, *Proposition de tableau type pour la présentation des éléments de preuve sur lesquels l'Accusation entend se fonder au procès*, 9 January 2009.

⁸ *Prosecutor v Bemba*, ICC-01/05-01/08-55, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, para. 69.

Defence submits that the Prosecution should be directed to give much greater precision and clarity to the relationship which he says exist between each of the proposed exhibits and the elements of the crimes and forms of liability relevant to this case.

Respectfully submitted,



David HOOPER

Dated this 23 January 2009

At Kinshasa