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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 CONGO
IN THE CASE OF
THE PROSECUTOR
v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public Document

Defence Response to the Prosecution' Submissions regarding paragraph 8 of the Order of 10 December 2008

Source: **Defence for Mr Germain Katanga**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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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 Prosecution, *inter alia*, to submit, no later than 19 January 2009, a document described at paragraph 8 of the same Order. The Chamber also requested the Defence for Mr Katanga ("Defence") to submit its Response to the Prosecution submissions no later than 2 February.

2. On 19 January 2009, the Prosecution filed the Prosecution's Response to Paragraph 8 of the "*Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires*" of 10 December 2008 ("Prosecution's Response").[2]

Defence response

3. The interpretation given by the Prosecution of its statutory obligations has no support in the Statute. In fact, it is directly contradicted by the letter and the spirit of that document.

4. Article 54(1) makes it clear that:

> "The Prosecutor shall:
>
> (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
>
> (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
>
> (c) Fully respect the rights of persons arising under this Statute."

[1] ICC-01/04-01/07-788.
[2] ICC-01/04-01/07-834.

5. The apparent suggestion of the Prosecutor that Article 67(2) and Rule 77 merely provide for an obligation to "preserve" evidence is wrong and without merit. Article 67(2) makes it clear that it deals with a duty ("shall") and that the duty is born by the Prosecutor ("he or she"), not the Defence as the Prosecution sought to allege during the hearing of 27 November 2008.[3] The same language may be observed in Article 54.

6. Under the Statute, the role of the Prosecutor of the International Criminal Court ("ICC") has been – intentionally – tailored very differently from the role given to, for example, the Prosecutors of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR"). Before these jurisdictions, the Prosecutor sole obligation is to disclose exculpatory material that is in its possession. It is one of the lessons of these Tribunals that such an obligation is not sufficient to ensure the fairness of the proceedings and the necessary equality of arms and that such a system open to serious abuses if interpreted narrowly. Dozens of findings have been made by the *ad hoc* Tribunals to the effect that the Prosecutor had failed to comply with its disclosure obligations (including as regard exculpatory material).

7. As a result in part of that experience, and with a view to address these shortcomings, the drafters of the Statute have given the Prosecutor of the ICC duties that fall much closer from those that would be expected of a *juge d'instruction* in a civil law jurisdiction. These statutory obligations are outlined, *inter alia*, in Article 54(1) and 67(2) of the Statute. They are and must be read, and interpreted, in light of the fundamental rights which the Statute – and customary international law – guaranteed to the defendant. Particularly relevant in that regard is the right of the defendant to equality of arms, his right to adequate time and resources and his right to a fair trial.[4] It is no coincidence that the issue of supplementary disclosure (Article 67(2) Statute) is dealt with in an Article devoted to "Rights of the Accused".

8. That fact is relevant for another reason: rights protected by the Statute are to be guaranteed by the Court itself as the guardian of the fairness of these proceedings. Therefore, the suggestion that issues of disclosure of material (exculpatory or otherwise) is an *inter partes* matter is not quiet correct:[5] as ultimate guardian of the defendant's rights, it is the Chamber's responsibility and, in fact, duty, to ensure that those rights are respected and protected. In that sense, its involvement in the issue of

[3] ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, pages 56-58.
[4] See Article 67(1) of the Statute.
[5] Prosecution's Response, para. 4.

disclosure is both welcome and, in light of the approach of the Prosecution in this matter, necessary.

9. Beside the issue of the interpretation of the Statute in regard to this matter, there are practical reasons which militate in favour of a reading of the Prosecution obligations which places a genuine obligation upon the Prosecution to carry out its disclosure obligation with the greatest of diligence and caution:

(i) *Imbalance of resources*: the Office of the Prosecutor has much greater resources than the Defence, in particular investigative resources. Unless a fair, and proportionate, amount of those resources was used to conduct the "exculpatory" part of the investigation, no fair trial could be guaranteed in these proceedings. Nor could a fair trial occur unless the Prosecution adopts an honest and fair reading of its disclosure obligations.

(ii) *Ability to get access to material*: in general, the Prosecution will have greater, or easier, access to certain categories of material (in particular, as regard material originating from victims or states/international organisations). It is counsel's experience that states and international organisations will generally be much readier to assist the Prosecution than the Defence. In those circumstances, it is again essential that the Prosecution should take all necessary measures to obtain exculpatory material from these providers and should disclose it with the greatest of diligence.

(iii) *Ability of the Defence to prepare and conduct investigation*: the ability of the Defence to conduct a targeted investigation (which its limited resources require) depend a great deal on the material that it has already received from the Prosecution and which might allow it to focus its limited resources on these leads.

10. The Prosecutor has sought to interpret its obligations very narrowly suggesting, *inter alia*, that its obligations in that regard were limited to (i) following an investigative lead if one appears, and (ii) to perform an "internal analysis" of the material it has collected at the end of its investigation. This falls far short of the responsibility which the Statute places upon the Prosecutor.

11. Disclosure obligations are just the tip of a process:

(i) *Identification of categories of potential exculpatory material*: nowhere is the Statute suggesting, as the Prosecutor would have it, that its investigative duty under Article 54(1) is limited to a duty to "follow up".[6] This is in fact conceded, albeit perhaps unwittingly, in paragraph 7 of its Response where the Prosecution says that the same method of investigation should apply – and must apply – in relation to the investigation of incriminating and exonerating evidence. In any case, and furthermore, Article 54(1)(a) draws no distinction between the Prosecution's conduct of his investigation as regard incriminating and exculpatory so that the distinction sought to be drawn by the Prosecutor has no support in the Statute and is in fact contradicted by it. Article 54(1)(b) and (c) also requires that the Prosecution should conduct an "effective" investigation and one that is consistent with the fundamental rights of the accused. This requires that the Prosecution should actively look for pre-determined category of material which, if they exist, would be exculpatory. This will include, *inter alia*, asking questions to witnesses in relation to matters and issues which would be exculpatory and record their answers diligently and fully where such information is provided. How otherwise could it fulfill its obligation under Article 54(1) if, instead of actively looking for exculpatory evidence, it has limited its search incriminating material and that no exculpatory evidence has *popped up* in that context? The discovery of critical information would then depend on the hazards of a one-side investigation and the identification of exculpatory material would be no more than the accidental consequence of an investigation conducted exclusively *à charge*. That is not the way in which the Statute has framed the obligations of the Prosecutor.

(ii) *Investigative efforts carried out regarding exculpatory matters*: Contrary to the Prosecution's suggestion that its duties are only to "follow a lead" if one appears,[7] the Chamber has underlined this aspect in its Order of 10 December 2008 where it referred to the "*méthodes d'enquête*" favoured by the Prosecutor to fulfill its obligations.[8] For the reasons outlined above, the duties and responsibilities of the Prosecution are much more onerous than what transpires from its submissions. The fact that Prosecution has conducted the investigation of this case on the basis of <u>that</u> understanding of its obligations is gravely alarming. The Defence submits that the Chamber should invite or order the Prosecution to provide a full and complete explanation and description of the nature and scope of the "exculpatory" part of its investigation.

[6] Prosecution's Response, paras 6 and 7.
[7] See, in particular, Prosecution's Response, paras 6 and 7.
[8] ICC-01/04-01/07-788, para 8.

(iii) *Review of the material*: The Defence does not wish to comment upon the criteria used by the Prosecution to identify exculpatory or potentially exculpatory material.[9] That responsibility is solely that of the Prosecution. It will only note the following: first, the criteria used by the Prosecution should cover each and every fact pleaded in the indictment and said to be relevant to establishing the responsibility of Mr Katanga. In that sense, the criteria outlined in the Prosecution's Report of 29 April 2008[10] are clearly inadequate and insufficient. Secondly, it is of critical importance that the material be reviewed by officers of the Prosecutor. Keyword search or the use of "guidelines"[11] are unlikely and are in fact incapable of generating and identifying the relevant material. In that sense, the Prosecution should include in its table or otherwise the actual procedure used to generate and identify the relevant material, i.e., how its statutory obligations in this matter are being implemented.

(iv) *Organisation of the material*: Unless the material is properly organized and referenced, it is of no or very limited assistance to the Defence. The disclosure practice of the Prosecution of the ICTY suggests that the Defence would have to spend an inordinate amount of time reviewing thousands of pages of irrelevant material. Particularly important in that regard is that the organizing of the material should allow the Defence to immediately identify any new disclosure so as to prevent double- or triple- review of the same material. In case, certain material is being re-disclosed, the Prosecution should make this clear. Also essential for large documents (such as records or laws) is for the Prosecution to identify the part or parts that are exculpatory. It is not uncommon for the Defence in such a case to have to review (and charge for the review of) dozens or hundreds of pages to locate the one relevant page or sentence in a document. The cost and time involved in such process could be cut by the Prosecution being asked to identify the specific parts relevant to its disclosure obligations.

(v) *Disclosure of the material*: Such disclosure must be timely and must clearly identify the material or part of the material that is said to be exculpatory or potentially exculpatory. There are two disclosure approaches that are

[9] ICC-01/04-01/07-458, Prosecution's Report regarding Review Criteria and Lifting Procedures for Information under Article 54(3)(e), 29 April 2008.
[10] *Ibid*.
[11] Prosecution's Response, para. 8.

particularly un-helpful and which, if adopted in this jurisdiction, would fall short of (i) the statutory obligations of the Prosecutor and (ii) the fundamental rights of the accused (in particular, his right to equality of arms, adequate time/resources to prepare for trial and guarantee of a fair trial):

- *Minimalist approach*: This consists in the narrowest possible interpretation of the disclosure obligation, a course apparently now favoured by the Prosecution. It consists in effectively giving a limited amount of material to the Defence based on a narrow reading of prosecutorial investigative obligations. As a result of such an approach, the Defence is denied material that is critical to its case. To take only two examples: (i) Does the Prosecution investigate the credibility/reliability of its witnesses and, if so, what steps are taken? If it interprets its investigative obligations as arising only when something "comes up", it might mean and, often, will mean, that an unreliable witness will be permitted to testify without his or her story having been verified. (ii) Does the Prosecution query with its witnesses the basis of their belief pertaining to facts that are incriminating? If, for instance, a particular witness expresses a belief that an accused person was in charge of a particular group, will the investigator ask follow up questions to establish the basis of the belief and the reliability of it? Unless the Prosecution actively pursues and seeks exculpatory evidence, it is more likely than not that no such evidence will come to light.

- *Maximalist or "dump-it-all" approach*: Having been found in non-compliance of its disclosure obligations on many occasions, the Prosecutor of the ICTY has taken to effectively disclose thousands of documents (numbering millions of pages) onto the Defence, regardless of its relevance or irrelevance, and accompanying that "disclosure" with a suggestion that such material might contain exculpatory evidence. Such practice is unacceptable as it shows the onus and responsibility for disclosure and puts onto the Defence a burden that it cannot meet with its limited resources.

12. It is, therefore, critically important for the fairness, expeditiousness and smooth advancement of this process that the Chamber should outline clearly what the duties and obligations of the Prosecutor are in this matter. Transparency and prosecutorial diligence are critical in this matter.

13. In that sense, the proposed table attached to the Prosecution's Response is grossly inadequate. In addition to the information which the Prosecution proposes to include in the table, the following should be part of that document:

(i) *Process of identification in particular criteria used*: The Prosecution should be ordered to provide a full and complete explanation and description of the nature and scope of the "exculpatory" part of its investigation.

(ii) *Analysis of the material*: The Prosecution should be ordered to provide a full and detailed description of the process of review of the material collected as part of its investigation with a view to identify potentially exculpatory material.

(iii) *Organisation of the material and proper recording thereof*: For the reasons outlined above, the Prosecution must be required to organise the material in such a way and to identify the relevant parts of that material in such manner as to enable the Defence to use its resources efficiently and to solely focus on what is relevant to this case. In particular, where large documents are involved, the Prosecution should be expected to identify the particular passage of the document that is potentially exculpatory. New disclosure must be identified as such.

(iv) *Description of relevance of disclosure*: The Prosecution should identify, clearly, what aspect of its case the material in question is potentially relevant to. A general reference to a paragraph of the indictment or to a broad allegation is insufficient and, in fact, of no assistance to the Defence. The Prosecution should be required to provide a clear and detailed description of the fact – whether an element of a crime charged, an element of a form of liability or another fact pleaded in the indictment – to which the document relates.

14. It is equally important to the fairness of these proceedings, the Defence submits, that the Chamber should leave no doubt that it is willing to sanction any violation of the Prosecutor's investigative and disclosure obligations.

15. The Defence notes in that regard that, despite dozens of disclosure violations at the ICTY, with sometimes grave consequences, difficulties and embarrassment for the Defence, the judges of the ICTY have never been willing to impose sanctions pursuant to Rule 68*bis* of the Rules. Unless the disclosure regime is accompanied by the real

possibility of sanctions, it is unlikely, the Defence submits, to be properly implemented. This, in turn, is likely to prejudice the fairness of the trial.

Conclusions

16. In view of the above, and for the reasons given, the Prosecution should be ordered:

(i) to provide a full and complete explanation and description of the nature and scope of the "exculpatory" part of its investigation.

(ii) to provide a full and detailed description of the process of review of the material collected as part of its investigation with a view to identify potentially exculpatory material.

(iii) to organise the material in such a way and to identify the relevant parts of that material in such manner as to enable the Defence to use its resources efficiently and to solely focus on what is relevant to this case. In particular, where large documents are involved, the Prosecution should be expected to identify the particular passage of the document that is potentially exculpatory. New disclosure must be identified as such.

(iv) to disclose potentially exculpatory material in timely fashion. The Prosecution should disclose such material as soon as it has been identified and reviewed. It should not wait any longer. This is necessary for the Defence to be able to investigate further and to have adequate time to prepare where necessary.

(v) to identify, clearly, what aspect of its case the disclosed material is potentially relevant to. A general reference to a paragraph of the indictment or to a broad allegation is insufficient and, in fact, of no assistance to the Defence. The Prosecution should be required to provide a clear and detailed description of the fact – whether an element of a crime charged, an element of a form of liability or another fact pleaded in the indictment – to which the document relates.

Respectfully submitted,

David HOOPER

Dated this 2 February 2009

At Kinshasa