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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

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

Public Document

**Defence Objections to the Prosecution's Urgent Application to Be Permitted to
Present as Incriminating Evidence Transcripts and Translations of Videos and
Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions
(ICC-01/04-01/07-1260)**

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
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

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Mbuyu Anjelani

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

Introduction

1. The Defence for Mr Katanga (“Defence”) hereby objects to the ‘Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions’, notified on 2 July 2009,¹ completed by an Addendum on 8 July 2009.²
2. The Prosecution seeks permission to add to its List of Incriminating Evidence (“List”) the transcripts of 25 videos which are already included in this List³ and 14 translations of these transcripts.
3. The Defence notes with concern that one of these 25 videos, the video DRC-OTP-1018-0145, taken in Bogoro in 2007 by the Prosecution,⁴ remains undisclosed, though included in the List filed on 27 May 2009.⁵
4. The 24 other videos were disclosed to the Defence between 21 April 2008 and 29 January 2009.
5. The Prosecution also requests the addition of a ‘newly received’ video, DRC-OTP-1042-0006, to the List and the redactions to one of the transcripts and its corresponding translation.

Defence Submissions

6. Regulation 35 (2) of the Regulations of the Courts states that “[t]he Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension

¹ ICC-01/04-01/07-1260.

² ICC-01/04-01/07-1278, Addendum to Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions.

³ Videos DRC-OTP-0083-0002, DRC-OTP-1017-1482, DRC-OTP-0080-0011, DRC-OTP-0113-0218, DRC-OTP-0087-0014, DRC-OTP-0080-0010, DRC-OTP-0081-0004, DRC-OTP-0116-0002, DRC-OTP-0127-0061, DRC-OTP-0081-0007, DRC-OTP-1018-0145, DRC-OTP-0035-076, DRC-OTP-0080-0006, DRC-OTP-0124-0008, DRC-OTP-0120-0294, DRC-OTP-0081-0009, DRC-OTP-0036-0194, DRC-OTP-0151-0665, DRC-OTP-0124-0014, DRC-OTP-0127-0065, DRC-OTP-0081-0012, DRC-OTP-0082-0004, DRC-OTP-0081-0011, and DRC-OTP-0081-0006, DRC-OTP-0155-0004.

⁴ Cf. ICC-01/04-01/07-1052, Mémoire de l'Accusation, en vertu de la norme 35, en modification de la Requête de l'Accusation [ICC-01/04-01/07-912] aux fins d'expurgations d'informations dans une bande vidéo relevant de la Règle 77 en « Requête de l'Accusation aux fins d'expurgations d'informations dans une bande vidéo à charge », 9 April 2009.

⁵ Cf. ICC-01/04-01/07-1174-Conf-Exp-AnxP, Detailed list of incriminating evidence, document n°346.

can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”

7. The Defence recalls that the Pre-Trial Chamber issued a warrant of arrest against Germain Katanga on 2 July 2007.⁶ On 18 October 2007, Germain Katanga was transferred to The Hague. The confirmation hearing for Mr. Katanga’s case was scheduled for 28 February 2008,⁷ but, following the joinder of his case with that of Mr. Ngudjolo’s, the confirmation was postponed until 27 June 2008.⁸ The Decision on the confirmation of charges was issued on 26 September 2008.⁹
8. On 23 January 2009, the Trial Chamber issued the *Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d'une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)* by which it ordered the Prosecution to disclose all incriminating evidence before 30th of January 2009 or to file by this date any request of redactions of incriminating evidence (« Chamber’s Order of 23 January 2009 »).¹⁰
9. On 13 March 2009, the Trial Chamber ordered the Prosecution to submit a Table of Incriminating Evidence and to file all the items of evidence listed in the Table with the Registry no later 3 April 2009, and decided that, after filing the Table of Incriminating Evidence, the Prosecution will have to seek leave of the Chamber before adding any new item of evidence, providing reasons why the item is being submitted at that stage, why it could not have been submitted earlier and how it intends to use it at trial.¹¹ The Prosecution was granted several extensions of time to submit the Table of Incriminating Evidence, until 4 May 2009,¹² 20 May 2009¹³ and finally 27 May 2009.¹⁴ On 27 March 2009, the Trial Chamber set a date for the start of the trial, the 24th September 2009.¹⁵

⁶ ICC-01/04-041/07-1-tENG, Warrant of arrest for Germain Katanga.

⁷ ICC-01/04-01/07-T-5-ENG, 22 October 2007, page 29.

⁸ ICC-01/04-01/07-T-38-ENG CT2 WT 27-06-2008.

⁹ ICC-01/04-01/07-716-Conf.

¹⁰ ICC-01/04-01/07-846.

¹¹ ICC-01/04-01/07-956, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol.

¹² ICC-01/04-01/07-1017, Decision on the Prosecution's Application for Extension of Time Limit to Submit a Table of Incriminating Evidence and Related Material, 2 April 2009

¹³ ICC-01/04-01/07-1095, Decision on the "Prosecution's Motion to File Partial Table of Incriminating Evidence and Related Material, Confidential - Ex Parte, available to the Prosecution Only, on 4 May 2009 - Regulation 35" (n°1090)", 4 May 2009.

¹⁴ ICC-01/04-01/07-1178-Conf-Exp, *Version confidentielle expurgée de la « Décision relative à la protection des témoins à charge 267 et 353 » du 20 mai 2009 (ICC-01/04-01/07-1156-Conf-Exp)*, 29 May 2009.

¹⁵ ICC-01/04-01/07-999, *Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve)*.

10. In light of this procedural history, the Defence submits that the Prosecution has had ample time since the start of the case against Mr Katanga, 20 months ago, to disclose all its incriminating videos and their corresponding transcripts and translations.
11. The Prosecution has not indicated in its filings when it started the transcription and translation of the videos. The Defence, which has had some experience translating documents (there is no general translation facility provided to the Defence) is sceptical of footnote 10, according to which “the average time necessary to transcribe one hour of video is approximately 5.8 days (for English and French language footage) and 6.1 days (Swahili and Lingala footage). The time necessary to translate one hour of video fluctuates significantly according to scenes and language, but on average amounts to 10 days.” Even if these times are accurate the Prosecution must have been aware of the facilities available to it after so many years. The Defence notes with concern that the Prosecution indicates that it is still awaiting the translations of six transcripts, expected to be completed by 21 August 2009,¹⁶ one month before the start of the trial.
12. The Trial Chamber recognised that it has a duty to ensure that the Defence has sufficient time to prepare itself for the trial and that when it considers a request of disclosure based upon Regulation 35 of the Regulations of the Court, it should assess the volume of the material whose disclosure is requested:
- “La Chambre, comme le prévoit l'article 64-3-c du Statut, a l'obligation d'assurer la divulgation des documents ou des renseignements suffisamment tôt avant l'ouverture du procès pour permettre une préparation suffisante de celui-ci. L'article 67-1-b, en ce qui le concerne, consacre le droit de l'accusé à disposer du temps nécessaire à la préparation de sa défense, droit dont la Chambre assure le respect en vertu de l'article 64-2 du Statut. Il lui appartient donc de veiller à ce que la Défense ne subisse en l'espèce aucun préjudice, ce qui la conduit à examiner le volume de l'élément de preuve en cause et à apprécier s'il soulève une question nouvelle et si la Défense dispose du temps suffisant pour l'exploiter et se préparer au procès ».¹⁷
13. Given the limits placed upon the Prosecution’s disclosure of incriminating material by the Chamber’s Order of 23 January 2009, and by the following decisions setting a deadline for the disclosure of the Table of Incriminating Evidence, the Defence

¹⁶ ICC-01/04-01/07-1260, para. 5.

¹⁷ ICC-01/04601/07-1280-Conf-Exp, Version confidentielle expurgée de la « Décision relative à la requête du Procureur aux fins de mesures de protection et d'expurgation d'informations dans des éléments de preuve relevant de la règle 77 (témoins 132, 249 et 287) (ICC-01/04-01/07-1194) " du 2 juillet 2009 (ICC-01/04-01/07-1265-Conf-Exp), 8 July 2009; a public redacted version was filed the same day, ICC-01/04-01/07-1281.

submits that the current Prosecution's request concerns too many documents and is too late.

14. The Defence submits that the Prosecution should have anticipated the amount of work required by the transcripts and translations of videos and organised its resources in consequence in order to respect the imperative deadlines set in the Chamber's Order of 23 January 2009 - a deadline based upon the stated objective of the Prosecution itself to submit all its incriminating evidence before the end of January 2009-¹⁸ and in the Decisions on the disclosure of the Table of Incriminating Evidence.
15. The Prosecution's Application does not demonstrate good cause but, instead, reveals that the Prosecution has not displayed enough diligence. It should have been prepared to disclose the transcripts and translations of the videos by the time it was required to file its List of Incriminating Evidence, 27 May 2009 – in this regards the following extract of the Decision on the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages" issued by the Single Judge in the *Lubanga* case is relevant:

CONSIDERING further that, in principle, in order for the Court to conduct its business effectively, the Prosecution must be prepared to provide the evidence on which it intends to rely at the confirmation hearing in one of the working languages of the Court by the time it is required to file the Prosecution List of Evidence and the Prosecution Amended List of Evidence in accordance with rule 121 (3), (4) and (5) of the Rules,¹⁹

16. The Defence also objects to the inclusion in the List of Incriminating Evidence of the 'newly received' video DRC-OTP-1042-0006 because it is proposed to submit it after the initial deadline for the disclosure of incriminating material and because of its limited relevance. As underlined by the Prosecution, it has already disclosed a video, DRC-OTP-0155-0004, which includes most parts of this new video DRC-OTP-1042-0006. Besides, the Prosecution would like to interview the witness, W-444, who has provided it with the new video, to authenticate it and obtain certain clarification regarding its contents, which would lead to the disclosure of further material (transcript and eventual translation of this interview) to the Defence. Therefore, in light of the near date of the trial, the limited relevance of the video, and of the further disclosure that it would imply, the Defence submits that the Chamber should deny the

¹⁸ See ICC-01/04-01/07-764, '*Réponse de l'Accusation à l'« Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de a conférence de mise en état (article 64-3-a du Statut) » du 13 novembre 2008*', 24 November 2008, p. 3, quoted in the Chamber's Order of 23 January 2009, ICC-01/04-01/07-846, para. 2.

¹⁹ ICC-01/04-01/06-676, 7 November 2006, pp. 3-4.

Prosecution's request to admit in the List of Incriminating Evidence the video DRC-OTP-1042-0006.

17. For the forgoing reasons, the Defence respectfully requests the Chamber to deny the 'Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions'.

Respectfully submitted,



David HOOPER

Dated this 9 July 2009

At The Hague