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

Date: 5 August 2009

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 Response to the Prosecution Requests to add new evidence to the List of
Incriminating Evidence (ICC-01/04-01/07-1305 and 1345)**

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

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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

1. On 15 July 2009 and 30 July 2009, the Prosecution filed the '*Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge*'¹ (« First Motion ») and the '*Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge et de modification de la liste des éléments à charge*'² (« Second Motion »)
2. The Prosecution requests leave to add to the List of Incriminating Evidence certain evidence resulting from investigations led in March 2009 in Bogoro and its surroundings.
3. The Defence notes the late character of the mission and that it could have taken place earlier, in particular to ensure the integrity of the evidence and to enable the Defence sufficient time to investigate the matter.
4. As noted by the Trial Chamber,

28. Accordingly, although the Prosecution is allowed to continue its investigation after the confirmation of charges, there is no unlimited right to submit newly discovered material. The submission of the fruits of ongoing investigations is equally subject to the time limits imposed by the Chamber, particularly in light of the phase of the trial proceedings and the remaining time available to the Defence for the preparation of the trial. In other words, the Prosecution cannot rely on its right to continue investigating in order to justify late submission of newly discovered material. The fate of such new material must be determined by the Chamber on a case by case basis, and will depend to a large extent on whether the new material contains primarily incriminating or potentially exculpatory information. [...]

30. If the Prosecution seeks to disclose newly discovered incriminating evidence after the applicable time limit, it must convince the Chamber of the significance and relevance of the newly discovered evidence and the need for the Chamber to consider it in the interest of having a better understanding of the case and the establishment of the truth. It does not suffice, in this regard, for the Prosecution simply to argue that the evidence is new. Instead, the Prosecution must either show that the new evidence is more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case. If the Chamber finds that this is the case, it may allow the Prosecution to submit such newly discovered incriminating evidence after the time limit has lapsed, bearing in mind the Chamber's responsibility to safeguard the right of the accused to have adequate time

¹ ICC-01/04-01/07-1350.

² ICC-01/04-01/07-1345.

to prepare. To assist the Chamber in assessing the impact of the late submission of new incriminating evidence on the Defence, the Prosecution must explain how the new evidence relates to its overall evidentiary case and the manner in which it is proposed it will be entered into evidence during the trial.³

5. Having reviewed the evidence annexed to the First Motion, the Defence does not object to their addition to the List of Incriminating Evidence.
6. The Defence is not in position to assess the Second Motion without having sight of the material the motion seeks to have admitted. Therefore the Defence requests the reclassification as confidential *ex parte* available to the Prosecution and the Defence only of the annexes to the Second Motion.
7. Given the late character of the mission led in March 2009, the eventual prejudicial character of the evidence resulting from this mission and the short time left for the preparation of the Defence, the Defence reserves its right to object to the addition to the List of Incriminating Evidence of any other evidence resulting from this mission and reserves its position as regards their admissibility as evidence.

Respectfully submitted,



David HOOPER

Dated this 5 August 2009

At The Hague

³ ICC-01/4-01/07-1336, Decision on 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)", 27 July 2009.