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

Date: **14 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 Proposals to Remedy Deficiencies in the Notice to the Accused

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**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 12th March 2009, the Defence for Germain Katanga (“Defence”) filed the Defence Application for an Amended Document Containing the Charges.¹ On 13th March 2009, the Trial Chamber issued its Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol,² in which it instructed the Prosecutor to compile a Table of Incriminating Evidence no later than 3 April 2009. The Prosecutor filed the Table on 27 May 2009,³ having been granted extensions of time. Having reviewed the Table consisting of 1166 pages, on 17th July 2009 the Defence for Mr Katanga then filed a Renewed Application⁴ for a new charging document updated to reflect the Decision on the Confirmation of Charges,⁵ and for consequential amendments to the Table of Incriminating Evidence.
2. While the Trial Chamber sees that the excessive cross-referencing required by the document may pose practical difficulties, it appears that it is not entirely clear to the Trial Chamber why it is being suggested by the Defence that the Table does not provide the necessary information. In its Order of 27th July 2009, the Trial Chamber states the following:

Although the Chamber understands that the Table in its present form may pose practical difficulties in terms of excessive cross-referencing, it considers that neither the Defence for Germain Katanga nor the Defence for Mathieu Ngudjolo have advanced any specific suggestion as to why the Table is not providing them with the necessary information.⁶

3. The Trial Chamber therefore goes on to state that:

Before deciding on the Request, the Chamber therefore orders the Defence teams to submit precise proposals to the Chamber indicating why and how they wish the Prosecution to amend the present Table.⁷

¹ ICC-01/04-01/07-954.

² ICC-01/04-01/07-956.

³ ICC-01/04-01/07-1174 and annexes, *Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l'Accusation et de la liste des pièces à charge*.

⁴ ICC-01/04-01/07-1310, Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges.

⁵ ICC-01/04-01/07-716-Conf, 26 September 2008.

⁶ ICC-01/04-01/07-1337, Order on the submissions by the Defence on the Table of Incriminating Evidence and on the sequence of Prosecution witnesses, para. 9.

⁷ *Ibid.*

4. In its renewed motion of 17th July 2009, the Defence makes two requests: first that the Prosecutor be ordered to file an amended document containing the charges; and second that he re-file the Table of Incriminating Evidence making reference to this new charging document. The first request is for a new document distinct from the table, which is short, but comprehensive not as to the evidence, but solely as to the legal and factual foundation of the charges against the accused. The second request is for appropriate amendments to the Table so as to ensure that in the column dealing with the factual underpinning of the charges, it is the updated document containing charges which is referred to and not the outdated document which is referred to; and that such cross-referencing is clear.
5. The Defence has set out in paragraphs 7 *et seq* of its renewed motion its reasons for considering that the Table in its present form does not, by itself, fulfil the function of giving precise notice of the case against the accused. In sum, there are two difficulties, one substantive and the other practical.
6. The substantive problem is that the Table cross-references back to the Amended Document Containing the Charges filed by the Prosecutor prior to the Decision on the Confirmation of the Charges as its point of reference for the factual underpinning of the charges. Also, it is not always clear which parts of that document are being relied upon as being the factual underpinning of the charges. Instead of referring to specific paragraph numbers or repeating verbatim the relevant parts, the Table frequently repeats a line or two followed by '[...]'. The Defence fears that there may be room for ambiguity as to which sentences in the old amended charging document the Prosecutor is asserting constitute the factual underpinning of the charge, and also as to whether the factual underpinning has in any way been altered by the Decision on Confirmation of the Charges. It may be difficult to identify specific examples until the problem arises in the form of a dispute over what is the actual extent of the factual underpinning of a particular charge.
7. The practical problem is that when one has to work with such a large document, which requires cross-referencing to two other documents, it is difficult to have a clear picture of the case while presenting arguments and dealing with witnesses. Almost every step taken in the adversarial process requires an assessment of relevance to the charges. It is far easier to have a document drafted by the Prosecutor, which is separate from the

Table of Incriminating Evidence, and which serves as a short and comprehensive exposition of the prosecutor's case: that is the legal and factual foundation of the charges (excluding reference to the evidence to be adduced – a matter which is well served by the table).

8. Thus, in precise terms what the Defence proposes is as follows: that the Prosecutor draft a document, as concise as possible, setting out only the legal and factual foundation of the charges against the accused as they stand in the light of the Decision on the Confirmation of Charges, and excluding any reference to the evidence which is to be adduced during the trial. This document would thus be short, probably of no more than about 15 pages. It could serve as a simple and common point of reference for the parties and the Trial Chamber, when considering issues of relevance and identification of issues in the case. Cross-reference to larger documents such as the Decision on the Confirmation of the Charges or the Table of Incriminating Evidence would then only be necessary in specific cases for specific purposes. So there would be one document containing the charges and another document (the Table) setting out the evidence to be adduced and connecting them to the charges.
9. With such a document in existence, the Table of Incriminating Evidence should then in the second column entitled 'factual allegation' simply refer to the new charging document by paragraph number. This then largely removes room for ambiguity as to the nature of the Prosecutor's case in terms of the factual underpinnings of a charge. It also means that constant reference is not required to three documents, one of which has an outdated status.

Respectfully submitted,



David HOOPER

Dated this 14 August 2009

At London