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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 Response to the Prosecution's Application to Redact, Disclose and
to Add to its List of Incriminating Evidence the Interview Transcripts
of Witnesses 28 and 250 (ICC-01/04-01/07-1415)***

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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Introduction

1. The Defence for Germain Katanga (“the Defence”) hereby responds to the Public Redacted Version of the *Prosecution’s Application to Redact, Disclose and to Add to its List of Incriminating Evidence the Interview Transcripts of Witnesses 28 and 250*, filed on 21 August 2009 (“Prosecution’s Application”)¹, whereby the Prosecution seeks to add to its list of incriminating evidence a redacted version of the transcripts of new interviews conducted by the Prosecution of witnesses 28 and 250. The two witnesses are already on the Prosecution’s list of witnesses and their initial interviews have been disclosed to the Defence within the deadline set for disclosure of all incriminating evidence of 30 January 2009.²
2. The said transcripts contain the recordings of new interviews with witnesses 28 and 250 made on 3rd and 4th July 2009. The reasons for re-interviewing these witnesses so long after the deadline of disclosure of all incriminating evidence has passed are unknown to the Defence. The Defence is merely informed that something came to light on 16 June 2009, which in the Prosecution’s submission necessitated the additional interviews of witnesses 28 and 250 on 3 and 4 July 2009.³
3. The Prosecution submits that the grounds, which have been withheld from the Defence, “represent good cause and reasons outside the Prosecution’s control to depart from the Court’s time limit, as provided in Regulation 35(2)”.⁴ Since the Defence has no idea what the grounds are that are relied upon to justify the delay, the Defence are unable to provide an informed response. However, admission of material so long after the deadline appointed by the Chamber should *prima facie* be inadmissible as incriminating material except in wholly exceptional circumstances. The Defence is in the hands of the Chamber as to whether such criteria is satisfied in the present case and seeks the protection of the Chamber as guarantor of the Defence’s right to timely disclosure.

¹ ICC-01/04-01/07-1415, with Annexes A and B – Confidential, ex parte, only available to the Office of the Prosecutor.

² ICC-01/04-01/07-846, 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), 23 January 2009.

³ Prosecution’s Application, para. 5.

⁴ Prosecution’s Application, para. 6.

4. In order for the Prosecution to demonstrate good cause for the delay caused by reasons outside its control, it must demonstrate that what came to light on 16 June 2009 was highly significant to the case and could not have come to light earlier through due diligence.⁵ Even if these requirements are met, the Defence submits that the Chamber should be very careful to grant the request in light of the serious prejudice the adding of the statements as incriminating material would likely cause. Given that the Defence has not been provided with the transcripts of the new incriminating interviews, the Defence can only speculate on the prejudice arising from the additional incriminating material the Prosecution seeks to add.
5. When the Trial Chamber ordered the Prosecution to disclose to the Defence by 30 January 2009 the evidence on which it intended to rely at trial the Chamber emphasised the importance of the Prosecution disclosing incriminating evidence by the scheduled time limit.⁶ In line with this emphasis, the Defence objects to the Prosecution's request to add the statements as incriminating material because of its lateness and, thus, prejudicial effect. The Defence also objects to the redactions sought. The Defence does, however, request that the statements be disclosed, not as incrimination material, but pursuant to Rule 77. Fuller arguments are set forth in this Response.

Applicable Legal Provisions

6. Disclosure arrangements must be made in full respect of the rights of the Accused as set out in Article 67 of the Statute. Article 67 covers, *inter alia*, the right "to be informed promptly and in detail of the nature, cause and content of the charge" (Article 67(1)(a)); and "to have adequate time and facilities for the preparation of the defence" (Article 67(1)(b)).

⁵ See, *inter alia*, ICC-01/04-01/07-1336, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, para. 25, where the Chamber held that a delay caused by ongoing investigations which could have conducted earlier is not justified.

⁶ ICC-01/04-01/07-846-tENG, Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence), 23 January 2009, par 5 "Nonetheless, it is important that, by the scheduled deadline of 31 January 2009, the Chamber and the participants should be aware of the total number of items of incriminatory evidence on which the Prosecutor is intending to rely at the trial, and of the applications for redaction submitted by him."

7. Article 64(3)(c) of the Rome Statute further states that the Trial Chamber “shall ... provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial” (emphasis added).
8. Moreover, Rule 76 of the Rules of Procedure and Evidence obliges the Prosecutor to provide the Defence with the names of witnesses whom the Prosecutor intends to call and copies of their prior statements. This must be done “sufficiently in advance to enable the adequate preparation of the defence.”
9. Rule 84 provides that, “[i]n order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence.” It expressly requires that “[t]o avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber” (emphasis added).
10. Finally, pursuant to Regulation 35(2) of the Regulations of the Court, the 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 can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control” (emphasis added).

Conditions set by ICC Jurisprudence

11. The new incriminating evidence in the present application was discovered in the course of the Prosecution’s continued investigation. Whilst the Prosecution has a right to continue to investigate post confirmation,⁷ the Chamber has a responsibility to safeguard that this right “does not in any way undermine the right of the defence to

⁷ ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, paras. 49-55.

have adequate time and facilities for the preparation of the trial, in accordance with article 64 (3)(c).”⁸

12. This Chamber held that, “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” (emphasis added).⁹

13. The Chamber will also consider whether the material sought to be added is significant and relevant, and contributes to a better understanding of the case and the establishment of the truth.¹⁰ In granting another request for late addition of evidence, the Chamber has further given due consideration to the fact that no redactions were sought and, thus, disclosure could take place without further delay.¹¹

14. The Chamber has further held that, in order to add new incriminating evidence after the deadline set, the obligations described under Articles 64(2) and 64(3)(c) of the

⁸ ICC-01/04-01/07-1336, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, para. 26; also see para. 30.

⁹ *Ibid*, para. 28.

¹⁰ *Ibid*, para. 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 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.”

Also see: Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, par 5: “Pour autant, la Chambre considère que la déposition de ce témoin est pertinente, qu'elle est de nature à contribuer à une meilleure compréhension des débats ainsi qu'à la manifestation de la vérité.” Also see: Décision relative à la requête urgente du Procureur aux fins d'autorisation d'utilisation d'une vidéo en tant qu'élément de preuve à charge (norme 35 du Règlement de la Cour), ICC-01/04-01/07-1144, 18 May 2009, para 7.

¹¹ Décision aux fins de communication de photographies à charge, ICC-01/04-01/07-1143, 18 mai 2009, para. 8.

Statute must be duly considered.¹² In accordance with these obligations, the Chamber must ensure for each proposed new element of evidence that its addition does not cause any prejudice to the Defence.¹³

15. In order to evaluate whether adding evidence causes prejudice, the Chamber may consider factors such as (1) the quantity of the evidence sought to be added; (2) whether the proposed new evidence raises a new issue; (3) whether the Defence is able to process it sufficiently in advance of the commencement of the trial to have adequate time and facilities for the preparation of the trial.¹⁴

16. Similarly, in *Lubanga*, the Trial Chamber held that the Prosecution may, exceptionally, be allowed to add incriminating evidence to its list of evidence to be presented at trial, provided that such evidence is “directly related to material previously disclosed”,¹⁵ does not contain “new evidence”,¹⁶ and its addition would not “unduly prejudice the accused”.¹⁷

17. The Chamber in *Lubanga* has further noted that, previously, it had held in its 24 April 2008 "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" that “any request to add evidence will be resolved on its merits and decisions would be made within the context of the history and the requirements of this case”. The Trial Chamber underlined that the “prosecution may not add witnesses or documents to its trial evidence without the leave of the Chamber, and given the length of time afforded to the prosecution to investigate these alleged crimes, the delays to date and the requirement of guaranteeing the accused a fair trial,

¹² Version publique 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), ICC-01/04-01/07-1281, 08 July 2009, para. 8.

¹³ Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, para. 2.

¹⁴ Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, para. 2. Also see Version publique 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), ICC-01/04-01/07-1281, 08 July 2009, para. 9.

¹⁵ ICC-01/04-01/06-1633, Decision on the "Prosecution's Submission pursuant to the Trial Chamber's 'Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008'" and the Prosecution's related application for authorisation to add one item to the evidence to be relied on at trial, 20 January 2009, para. 19.

¹⁶ *Ibid*, para 19.

¹⁷ *Ibid*, para. 20.

any request to add evidence hereafter will be scrutinised with great care"¹⁸ (emphasis added).

18. Accordingly, it is clear from the Statute, Rules and Jurisprudence that the addition of new incriminating elements after the deadline set can be authorised only if the Accused is not unduly prejudiced and his statutory rights are not violated.

Conditions under Regulation 35(2)

19. The Trial Chamber has further held that Regulation 35(2) is applicable in deciding whether to extend the time limits to disclose incriminating and exculpatory evidence set by the Trial Chamber.¹⁹

20. Regulation 35(2) imposes two conditions for extending time limits, namely, that good cause is shown and that the delay was caused by reasons outside the control of the party seeking an extension pursuant to this Regulation. The Chamber has, however, held that, in a situation where the time limit has already elapsed, the moving party is only required to satisfy the second condition of Regulation 35(2).²⁰

21. The Appeals Chamber has held that the second condition of Regulation 35(2) indicates that the deadline to submit a document may only be extended in "exceptional circumstances".²¹ With reference to this Appeals Chamber's Decision, this Trial

¹⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1377, Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008, 4 June 2008, para 26, referring to ICC-01/04-01/06-1311, paragraph 86; ICC-01/04-01/06-T-79-ENG, page 10, lines 3-13.

¹⁹ Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, para. 2; ICC-01/04-01/07-1144, Décision relative à la requête urgente du Procureur aux fins d'autorisation d'utilisation d'une vidéo en tant qu'élément de preuve à charge (norme 35 du Règlement de la Cour), 18 May 2009, par 6: "La Chambre rappelle que la norme 35-2 du Règlement de la Cour prévoit que la prorogation d'un délai fixé, une fois ce dernier échu, n'est possible qu'à la condition que le participant qui en fait la demande prouve qu'il était incapable de présenter celle-ci dans le délai imparti pour des raisons échappant à son contrôle." Also, ICC-01/04-01/07-1143, Décision aux fins de communication de photographies à charge, 18 May 2009; and ICC-01/04-01/07-1336, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, para 7.

²⁰ ICC-01/04-01/07-1336, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, para 24: "The Chamber first points out that for the purpose of regulation 35 (2), last sentence, the Prosecution is not required to show 'good cause'. Instead, in order to justify an extension after the lapse of a time limit, the party requesting late submission must establish that it was 'unable to file the application within the time limit for reasons outside [its] control.'"

²¹ "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", 21 February 2007, ICC-01/04-01/06-834, paras 9- 10.

Chamber has confirmed that the exception of Regulation 35 (2) (last sentence) “is only available in case the applicant can show the existence of "exceptional circumstances", such as incapacitating illness, to demonstrate that there is a "reason outside his/her control”.”²²

22. The Chamber stressed that, for instance, a persistent lack of resources cannot be considered as an exceptional circumstance and “can never be an excuse for not complying with legal obligations or for not respecting deadlines, much less for ignoring the rights of the Defence to have adequate time for preparation and to be tried without undue delay”.²³

23. Similarly, the Chamber recently considered that the Prosecution failure to obtain a declaration from witness P-387 prior to the deadline did “clearly not amount to an ‘exceptional circumstance’ in the sense of the Appeals Chamber decision of 7 February 2007.”²⁴ Nonetheless the Chamber held it “must weigh the interests of the Defence in being informed of this witness and his declarations against the Prosecution’s obligation to disclose all evidentiary material in time” and ordered disclosure.²⁵ This was also subject to “there being an adequate amount of time for the Defence to employ its time and facilities to process the new information”.²⁶

24. In other decisions, the Trial Chamber also considered that Regulation 35(2) was not met because the Prosecution did have the material in its control before the deadline and thus it failed to show that the delay was caused by reasons outside its control.²⁷ This is, however, not an absolute requirement. Exceptionally and provided that the

²² Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 7.

²³ *Ibid*, paras. 6-8.

²⁴ ICC-01/04-01/07-1423, Decision on the Prosecutor's request for late disclosure of exculpatory evidence (Witness P-387), (ICC-01/04-01/07-1296), 25 August 2009, para. 8, citing in its footnote as authority "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", 21 February 2007, ICC-01/04-01/06-834, paras 9- 10.

²⁵ *Ibid*, par 9.

²⁶ *Ibid*, par 10.

²⁷ Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, para 4: “Elle n'est pas pleinement convaincue de l'incapacité, pour le Procureur, de présenter sa demande de communication dans le délai imparti « pour des raisons échappant à son contrôle ». Elle estime plutôt que sa décision de recourir à ce témoin a été dictée par des considérations d'ordre stratégique qui ne s'inscrivent pas directement dans les prévisions de la norme 35 précitée.” Also see: Décision relative à la requête urgente du Procureur aux fins d'autorisation d'utilisation d'une vidéo en tant qu'élément de preuve à charge (norme 35 du Règlement de la Cour), ICC-01/04-01/07-1144, 18 May 2009.

requirements of fairness set out above are met, the Chamber may grant a request to add new evidence to the list.²⁸

25. In addition, it is entirely within the discretion of the Chamber to dismiss a request to extend the time limit for disclosure of evidence even where the conditions of Regulation 35 are met. This is apparent from the choice of words in this Regulation: it refers to “may”, rather than “shall”. Accordingly, the core issue is prejudice to be considered in light of the criteria set out above. Regulation 35 must be interpreted in light of the rights and obligations set out in the Statute and the Rules.

Jurisprudence of ICTY

26. The right of an accused to a fair and expeditious trial and to have adequate time and facilities for the preparation of defence is of similar importance in considering requests for late amendments of the list of evidence at the International Criminal Tribunal for Yugoslavia (“ICTY”).²⁹

27. In considering a Prosecution’s request to add documents to its list of exhibits after the deadline has passed, the Chamber must satisfy itself that the adding of the documents is in the interests of justice and that, “taking into account the specific circumstances of a case, good cause is shown for amending the original list and that the newly offered material is relevant and of sufficient importance to justify the late addition. Moreover, a Trial Chamber must carefully balance any amendment to the lists in Rule 65 ter with an adequate protection of the rights of the accused.”³⁰

²⁸ *Ibid.* Indeed, in its Decision of 14 May 2009, the Chamber granted the Prosecution’s request for late addition of evidence, notwithstanding that the conditions under Regulation 35(2) were not met, given that the late addition would not prejudice the Accused in light of the criteria set out in paragraph 2 of the same Decision (see above, para. 15, footnote 14). In its Decision of 19 May 2009, the Chamber authorised the Prosecution to rely on the proposed additional evidence because it was relevant for the Defence and could contribute to a better understanding of the case and for the determination of the truth (para. 7).

²⁹ *Prosecutor v. Stanisic and Simatovic*, Trial Chamber “Decision on Fifth, Sixth, Seventh and Eighth Prosecution Motions for Leave to Amend its Rule 65ter Exhibit list”, 24 April 2009, para. 5; *Prosecutor v. Dragomir Milosevic*, Trial Chamber “Decision on the Prosecution Motion to Amend its Rule 65 ter Exhibit List”, 21 December 2006, p. 2; *Prosecutor v. Seselj*, Trial Chamber “Decision on Prosecution Motion to Amend 65 ter Exhibit list”, 27 April 2009, p. 2; *Prosecutor v. Prlic et al*, Trial Chamber “Decision on Prosecution Motion to Add to the Exhibits List”.

³⁰ *Prosecutor v Popovic et al*, Appeals Chamber “Decision on Appeals Against Decision Admitting Material Related to Borovcanin’s Questioning”, 14 December 2007, para. 37; *Prosecutor v. Stanisic and Simatovic*, Trial Chamber “Decision on Fifth, Sixth, Seventh and Eighth Prosecution Motions for Leave to Amend its Rule 65ter Exhibit list”, 24 April 2009, para. 5; *Prosecutor v. Seselj*, Trial Chamber “Decision on Prosecution Motion to Amend 65 ter Exhibit list”, 27 April 2009, p. 2

28. Thus, the Trial Chamber will consider whether (i) the proposed evidence is *prima facie* relevant and probative, (ii) whether it is of sufficient importance to justify a late addition, (iii) whether the Prosecution has shown good cause to add the documents at that stage of proceedings, and (iv) the extent to which the new documents create additional burden for defence.³¹ The Chamber must ensure that the rights of the Defence are respected by making sure that any additional exhibits are disclosed sufficiently in advance and will not inhibit the Defence in the preparation of its defence.³²

29. In terms of relevance and probative value of exhibits, in its decision Chambers have considered that the relevance and probative value of exhibits was demonstrated by the Prosecution by specifically noting the relevance to issues e.g. notice, crime-base, command and control, the widespread and systematic nature of attacks and other military issues.³³ In terms of showing “good cause”, as an example, in the *Dragomir Milosevic* case the Trial Chamber considered good cause was shown in circumstances when material was only recently obtained as a result of newly-opened archives, recently conducted interviews with Prosecution witnesses, and a thorough re-examination of the Prosecution’s evidence.³⁴

Application of criteria to the present Application

30. As indicated in the introduction, the Defence has insufficient information to assess whether the reason for the Prosecution’s delay in obtaining the new evidence in question was beyond the control of the Prosecution and can, therefore, be qualified as an ‘exceptional circumstance’ or whether it was simply caused by an issue that came up during the Prosecution’s ongoing investigations which they could have conducted much earlier. The Defence is also not in a position to assess the exact prejudice that such late addition of incriminating evidence would cause.

³¹ *Prosecutor v. Stanisic and Simatovic*, Trial Chamber “Decision on Fifth, Sixth, Seventh and Eighth Prosecution Motions for Leave to Amend its Rule 65ter Exhibit list”, 24 April 2009, para. 6.

³² *Prosecutor v. Prlic et al*; Trial Chamber “Decision on List of Exhibits”, 7 September 2007, p. 4; *Prosecutor v. Dragomir Milosevic*, Trial Chamber “Decision on the Prosecution Motion to Amend Its Rule 65 ter Exhibit List”, 21 December 2006, p. 2.

³³ *Prosecutor v. Dragomir Milosevic*, Trial Chamber “Decision on the Prosecution Motion to Amend Its Rule 65 ter Exhibit List”, 21 December 2006, p. 2-3

³⁴ *Prosecutor v. Dragomir Milosevic*, Trial Chamber “Decision on the Prosecution Motion to Amend Its Rule 65 ter Exhibit List”, 21 December 2006, p. 3

31. The Defence notes, however, that the witnesses are not new and the Prosecution could have interviewed them at any time.
32. The Defence further notes that the request comes very late. Even though the trial commencement date of 24 September 2009 has been postponed to a date not yet indicated, the trial date is not expected to be put off for very long. The Defence is in the midst of preparing for trial. Although the Defence is fully and effectively using all its resources and manpower, a lot of preparation work still has to be carried out. The Defence is dealing with disclosure of thousands of pages and is required to file written submissions almost on a daily basis, and often more than one a day. An adequate preparation for trial and cross-examination further requires a full and thorough investigation in the DRC. For that purpose, one of the team members is currently on a mission.
33. Further, the Defence are very concerned that the Prosecution has waited until now to make this application even though the interviews took place almost two months ago. No reason is given for this two month delay which occurs at a crucial time in Defence case preparation when the trial was expected, at the time, to start in just a few weeks. There is no apparent justification for such delay.
34. The Defence would also like to point out that the request for adding the incriminating information to the list of evidence is joined by a request for redactions. As indicated,³⁵ the Trial Chamber has previously taken into consideration as a factor in favour of granting a request for late addition of incriminating evidence, the fact that no redactions were sought and, thus, disclosure could take place promptly.³⁶
35. In these circumstances and so close to the commencement of the trial, the Defence would suffer serious prejudice if it had to analyse new allegations over and above all other outstanding tasks. The Defence does not know what is meant by the observation that the transcripts are not voluminous and limited to one topic.³⁷ The one topic the transcripts are limited to may be significant. It may also require further investigations in the DRC to prepare adequately for cross-examination of the witnesses concerned. Given that a mission is currently being undertaken, it may be difficult to organize

³⁵ See above, para. 13.

³⁶ Décision aux fins de communication de photographies à charge, ICC-01/04-01/07-1143, 18 mai 2009, para. 8.

³⁷ Prosecution Application, para. 10.

another mission prior to trial given the time and budget restraints. Accordingly, even if the transcripts are not voluminous, the prejudice their addition as incriminating evidence would cause at this stage of the proceedings is great.

36. On the other hand, the Defence would have a keen interest and be entitled to disclosure of the interview transcripts pursuant to Rule 77. The Prosecution has this material now and the Defence would be at an unfair disadvantage if it were not in possession of the same materials as the Prosecution and the Chamber. Disclosure of these transcripts would further assist the Defence in preparing cross-examination of witnesses 28 and 250 as well as other witnesses and may clarify certain matters in their previous interviews. The Defence, however, requests that the Prosecution be disallowed to lead the witnesses on the new incriminating information.

37. A distinction has been made between the late addition of incriminating and exonerating evidence. The Chamber has held that, when the evidence "is potentially exculpatory in character, the right of the Defence to be informed about evidence in the Prosecution's possession, which the Prosecution believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence, trumps the time limits imposed by the Chamber. Indeed, it would be antithetical to the role of the Chamber to guarantee that the accused receive a fair trial, if it were to withhold important exonerating material from the Defence."³⁸

38. Similarly, in its latest Decision of 25 August 2009, the Chamber held that, notwithstanding the Prosecution's failure to show exceptional circumstances justifying the delay of disclosure of exculpatory evidence, it "must weigh the interests of the Defence in being informed of this witness and his declarations against the Prosecution's obligation to disclose all evidentiary material in time". Accordingly, it ordered disclosure.³⁹ In both cases, disclosure was dependent on "there being an adequate amount of time for the Defence to employ its time and facilities to process the new information".⁴⁰

³⁸ ICC-01/04-01/07-1336, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, para. 29.

³⁹ Decision on the Prosecutor's Request for Late Disclosure of Exculpatory Evidence (Witness P-387), ICC-01/04-01/07-1423, 25 August 2009, par 9.

⁴⁰ *Ibid*, par 10; ICC-01/04-01/07-1336, para. 29.

39. On the same grounds, the Defence requests the Trial Chamber to allow the late disclosure of an unredacted version of the transcript interviews of witnesses 28 and 250 pursuant to Rule 77. If the new information is too voluminous for the Defence to process it at this stage of the proceedings, the Defence would request for additional time and facilities in order to adequately assess the relevance of the information.

Request for Redactions

40. The Defence requests that the Chamber denies all requests for redactions on the grounds stated in ‘Defence Observations on Prosecution's *Requête sollicitant le maintien de versions expurgées d'éléments de preuve*’.⁴¹

41. In particular, the Defence stresses the importance of full disclosure of the identities of intermediaries, ICC staff members and interpreters. As for the intermediaries, the Defence reiterates that “Intermediaries play important roles in collecting evidence. Their interactions with the witnesses must be examined in order to assess whether the witnesses were free from any influence from their intermediaries. Well-intended guidance from intermediaries may have an impact on the witness’s testimony. It would further be helpful to speak to the intermediary, if he or she is so willing, about the witness and his background given the close proximity between the witness and the intermediary. The Defence fails to see any danger for the intermediary if his or her identity is disclosed to the Defence. There is no incentive for the accused to harm the intermediary who is not a witness against him.”⁴²

42. Similarly in regard to interpreters, the Defence reiterates its arguments previously stated⁴³ and is awaiting a Trial Chamber’s Decision on the issue of disclosure of the identity of other interpreters.⁴⁴

43. As for the ICC staff members, the Defence cannot see any legitimate ground for withholding their identities. It cannot be argued that such staff members have a

⁴¹ ICC-01/04-01/07-1414, 21 August 2009.

⁴² ICC-01/04-01/07-1414, para. 16.

⁴³ See, *inter alia*, ICC-01/04-01/07-1012-Conf, Defence Observations in response to *Prosecution's Requête aux fins d'expurgation d'informations et aux fins de maintien et de levée d'expurgations dans certains éléments de preuve relevant de la Règle 77* (W-26, W-36, W158, W-180), 31 March 2009, para. 11.

⁴⁴ There are two pending Prosecution’s Requests for the permanent redaction of the names of interpreters. See ICC-01/04-01/06-1567-Conf-Exp and ICC-01/04-01/07-1205.

subjective fear, which is objectively justified, for their safety if the Defence was aware of their identity. The Prosecution does not give any explanation or foundation for this request for redactions. Hence, the Defence does not understand why the ICC staff members concerned would want to hide from the Defence. Contrary to the Prosecution's submission, knowledge of their identities is important in order to assess potential bias, influence or impact from those ICC staff members on those witnesses. This may become evident by comparing different statements taken in presence of the same ICC staff members.

Conclusion

44. On the grounds set forth in this Response, the Defence prays the Trial Chamber to dismiss the Prosecution's request to redact, disclose and add to its list of incriminating evidence the interview transcripts of witnesses 28 and 250 and to order disclosure of an unredacted version of the transcripts pursuant to Rule 77.

Respectfully submitted,



David HOOPER

Dated this 31 August 2009

At London