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Date: 31 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 *Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'un élément à charge, d'autorisation, d'expurgation et de modification de la liste des éléments à charge - Témoin P-233*
(ICC-01/04-01/07-1412)

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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1. The Defence for Germain Katanga (“the Defence”) hereby responds to the Prosecution’s *‘Mémoire de l’Accusation, en application de la norme 35, aux fins de divulgation d’un élément à charge, d’autorisation, d’expurgation et de modification de la liste des éléments à charge - Témoin P-233’*, filed on 21 August 2009.¹ In this Response, the Defence relies on the legal analysis it set out in its 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), filed this 31st of August 2009.
2. In its Application, the Prosecution seeks to add a new incriminating statement from witness P-233, who was already on the list of witnesses before confirmation. The Defence objects to this addition of further incriminating material at this stage on the grounds that the Prosecution has not met the conditions of Regulation 35(2) of the Regulations of the Court and the addition sought would cause prejudice in violation of the Rome Statute and the Rules of Procedure and Evidence.
3. The Prosecution indicates that the need for this additional declaration of witness P-233 only arose after the scientific and medico-legal mission was undertaken at the Bogoro Institute at the end of March 2009. The results of that mission made further questioning of P-233 necessary. The Prosecution submits that the need for further clarifications from P-233 was created after the deadline for disclosure of all incriminating evidence had passed. Accordingly, it was not in a position to disclose the requested additional statement within the time limit set by the Chamber for reasons beyond the control of the Prosecution, in accordance with Regulation 35(2).
4. The Defence disagrees with the Prosecution’s arguments. The need to take an additional declaration from P-233 was not caused by factors outside the control of the Prosecution but is a direct result of the Prosecution’s continuing investigations. Regulation 35(2) does not cover the present situation because it is a self-inflicted delay, thus, well within the control of the Prosecution. Whilst the Defence welcomes the initiative of undertaking scientific research into the crime itself, it submits that the Prosecution should have taken this initiative much earlier. The Prosecution has had years to investigate the alleged crimes committed at Bogoro. This research goes to the heart of the case as it helps establish the crime-base. A diligent Prosecutor would have commenced with such a scientific mission at the initial stages of his or her

¹ ICC-01/04-01/07-1412, Public avec Annexe A – confidentielle, ex parte, réservée à l’Accusation.

investigations.

5. The Defence submits that there is no justification for the late discovery of this new evidence. Accordingly, the Defence submits that any new evidence arising from this scientific and medico-legal mission carried out at the end of March 2009 should be found inadmissible due to lateness of disclosure to the Defence without any justification.
6. Even if the Chamber finds that it was acceptable for the Prosecution to conduct this mission in March 2009 rather than a year or two earlier, the Defence still submits that the statement from P-233 deriving from that mission should not be submitted. The mission was conducted in March 2009, well outside the deadline set by the Chamber. Yet, it took the Prosecution over two months and half to conduct a new interview with P-233. P-233 is well within the Prosecution's reach, and could have been contacted at any time. There was no need for the Prosecution to wait so long to ask P-233 for further clarifications.
7. The Prosecution took more than two months to seek to add this declaration to its list of evidence. Being fully aware of its disclosure obligations under the Statute and the need for the Defence to receive all incriminating materials as soon as possible with full respect for the rights of the Accused, a diligent Prosecutor would have ensured disclosure of the new incriminating information at the earliest opportunity. The trial is soon to start and the Defence is still not in possession of the declaration in question. Given the Prosecution's request for redactions, the disclosure of the declaration is further delayed.
8. As long as the new declaration of P-233 is not disclosed to the Defence, it is not in a position to evaluate the prejudice that would be caused by the late addition of this evidence. However, the Defence submits that, on similar grounds as those set forth in its 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*,² it would in any event be prejudiced in view of the advanced stage of the proceedings. The new declaration may be short, yet, it may require additional investigations which would be difficult for the Defence to arrange before commencement of the trial given time and budget restraints. Moreover, it is difficult to arrange any mission outside Bunia given the current, delicate security situation in

² See, in particular, para. 32.

Ituri.

9. There is a valid reason for setting a time limit for submitting all incriminating evidence and the Prosecution is urgently requested to stick to this time limit. As the Trial Chamber noted, "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."³
10. On the other hand, the Defence would have a keen interest and be entitled to disclosure of the new declaration of P-233 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 witness P-233 as well as other witnesses and may clarify certain matters in his previous interviews. The Defence, however, requests that the Prosecution be disallowed to lead the witnesses on the new incriminating information.
11. As indicated in the 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*, 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."⁴
12. 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

³ 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, para 5.

⁴ 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.

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.⁵ 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".⁶

13. On the same grounds, the Defence requests the Trial Chamber to allow the late disclosure of the new declaration of P-233 pursuant to Rule 77. The Prosecution has indicated that the statement is short. Accordingly, the Defence would most likely have adequate time and facilities to process this new declaration, provided it is not used as incriminating evidence requiring further defence investigations.

14. As for the request for the redaction of the identity of the mother of P-233, the Defence reiterates its objection against any permanent redaction sought.⁷ The Defence further submits that the specific redaction sought is unnecessary given that there is no incentive for the Accused or his Defence team to harm or threaten her.

15. On these grounds, the Defence requests the Chamber to reject the Prosecution's *Mémoire*. Instead, the Defence requests disclosure of the new declaration of P-233 pursuant to Rule 77.

Respectfully submitted,



David HOOPER

Dated this 31 August 2009

At London

⁵ 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.

⁶ *Ibid*, par 10; ICC-01/04-01/07-1336, para. 29.

⁷ ICC-01/04-01/07-1414, Defence Observations on Prosecution's *Requête sollicitant le maintien de versions expurgées d'éléments de preuve*, 21 August 2009.