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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 Requests to Disclose New Incriminating
Evidence Relative to its Mission to Bogoro
(ICC-01/04-01/07-1360 and 1401)**

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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Unrepresented Victims

**Unrepresented Applicants for
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**Victims Participation and Reparations
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Other

1. The Defence for Germain Katanga (“the Defence”) hereby responds to the *Requête de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge, de modification de la liste des éléments à charge et de modification de la liste des témoins à charge* (« First Motion »)¹ and to 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, et de modification de la liste des éléments à charge et de la liste des témoins à charge* (« Second Motion »)²
2. In the First Motion, the Prosecution requests leave to disclose as additional incriminating evidence an expert report of 111 pages containing conclusions in respect of tests carried out on the blood allegedly found on the walls of the Bogoro Institute. The report is signed by two persons whose names the Prosecution seeks to add to its list of witnesses to be called during trial. The report includes 91 pages of annexes which were disclosed to the Defence on 20 August 2009.³ These annexes include pictures of samples of the wall in the Bogoro Institute and detection of blood prints.
3. In the Second Motion, the Prosecution seeks leave to disclose and add incriminating evidence resulting from a mission to Bogoro in March 2009, including an exhumation report of 275 pages allegedly confirming the presence of cadavers next to the Bogoro Institute; 6 pictures showing the perimeter of exhumation and trenches; 162 pictures taken during exhumation and analysis of bones used in the report; 6 videos filmed within the Bogoro Institute; several documents describing the videos; 8 seals containing evidence collected during the mission; 5 documents relative to the chain of custody of the evidence; and 4 pictures taken in The Hague relative to two of the six seals. The Prosecution wishes to add one of the authors of the exhumation report to the list of incriminating witnesses. The Prosecution requests leave to disclose, pursuant to Rule 77, 395 pictures taken during the mission not used in the exhumation report. Finally, it requests leave to disclose and add to the list of incriminating evidence the originals of the 15 pictures included in the ballistic report which are of a better quality than the images in the report.
4. The Defence welcomes the Prosecution’s initiative to conduct scientific research onto the blood allegedly found in the Bogoro Institute and on the corpses allegedly found in the surrounding area. The Defence further acknowledges the importance and relevance

¹ ICC-01/04-01/07-1360, filed on 11 August 2009.

² ICC-01/04-01/07-1401, filed on 18 August 2009.

³ Pursuant to the Trial Chamber’s Order of 20 August 2009, the annex 1360-Conf-Exp-AnxA containing the report was reclassified as “Confidential Ex Parte Prosecution and Defence teams only” and was accordingly disclosed to the Defence.

of the two reports and the need if admitted in evidence to call as expert witnesses the persons who conducted the research. The Defence also notes that the trial has been postponed by two months. Nonetheless, the Defence objects to the Prosecution's request to add the reports to their list of incriminating evidence and to call three additional expert witnesses. In addition to the arguments set forth in this Response, the Defence relies on its recent responses to late requests for additions of incriminating evidence, notably, 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 (ICC-01/04-01/07-1415)*,⁴ and the *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)*.⁵

5. The Defence is concerned with the Prosecution's lack of due diligence in conducting its investigations. There was no legitimate reason to conduct this research so late in the day. The Prosecution alleges that, due to security reasons, it was not in a position to conduct this research on any earlier planned date. It alleges that the security situation did not allow the mission to take place in April and September 2008. In this regard, the Defence notes that the security situation did not deteriorate until October 2008 when a new rebellious group, notably the FPJC, became active in the region. Notwithstanding this decrease in security, the Defence conducted an investigative mission to Bogoro and surroundings at the beginning of December 2008. As for the earlier date of April 2008, the Defence is unaware of security issues. At the end of March 2008, it conducted an investigative mission to Bogoro and its surroundings. There were no notable problems at the time.
6. It should further be noted that the Prosecution applied for warrants of arrest in June 2007, over two years ago. Hence the investigations into the Bogoro crimes have been going on for a significant period prior to any problems occurred in the region. The Prosecution could therefore easily have made arrangements for a proper investigation and mission prior to the purported security "problems" in 2008. Also, the ICC Prosecutor, whose core mandate includes investigating alleged crimes in conflict areas, should have the means and ability to conduct investigations at times when security problems exist.

⁴ 1441, filed on 31 August 2009.

⁵ 1443, filed on 31 August 2009.

7. Accordingly, the Defence does not accept that security concerns provide a legitimate reason for delay of the planned mission for almost a year. Additionally, the Prosecution has provided no valid reason for disclosing the results of the mission conducted in March 2009 nearly five months after completion of the mission. Thus, the delay of presenting these reports and three new expert witnesses is wholly caused by the Prosecution's own conduct, not by reasons outside its control. The second condition of Regulation 35(2) is, therefore, not met.
8. Moreover, the reports are both lengthy and technical. The report relative to the blood allegedly found within the Bogoro Institute is confusing given that it is not always clear who among the proposed experts is responsible for any particular part of the report. The Defence will need time to evaluate the details contained in the two reports. It further must be able to investigate matters raised in the reports, and take steps to counter them, if necessary. If a need arises for the Defence to call a counter-expert witness, the Prosecution has left the Defence with very little time to do so. Even though the trial has been postponed until November 2009, two additional months is still relatively short given all other outstanding tasks the Defence must carry out in that same period and in light of its budget restraints. The Defence is, therefore, prejudiced by the lateness of the submission of this additional incriminating evidence and the addition of three expert witnesses. As noted in the *Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1345 and 1360)*,⁶ the mission "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."
9. 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. [...]

⁶ ICC-01/04-01/07-1406, 19 August 2009.

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.⁷

10. There is a valid reason for setting a time limit for submitting all incriminating evidence and the Prosecution is requested to abide by this 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."⁸
11. Absent any justification for the late discovery of this new evidence, and given the prejudice caused by its late disclosure, 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.
12. On these grounds, the Defence requests the Chamber to reject the Prosecution's First and Second Motions.

⁷ 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.

⁸ 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.

Respectfully submitted,



David HOOPER

Dated this 2 September 2009

At The Hague