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**International
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Court**

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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

**Decision on the disclosure of evidentiary material relating to the Prosecutor's site
visit to Bogoro on 28, 29 and 31 March 2009
(ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Unrepresented Victims

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Defence**

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

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Detention Section

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to articles 64(3)(c) and 67(1)(b) of the Rome Statute of the International Criminal Court ("Statute") and regulations 35(2) and 44 of the Regulations of the Court ("Regulations"), issues the following decision with regard to a number of separate but related applications by the Office of the Prosecutor ("Prosecution"):

- "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" of 15 July 2009 ("Request 1305")¹;
- "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" of 30 July 2009 ("Request 1345")²;
- "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" of 11 August 2009 ("Request 1360")³
- "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 modifications de la liste des éléments à charge et de la liste des témoins à charge" of 18 August 2009 ("Request 1401")⁴
- "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" of 21 August 2009 ("Request 1412")⁵

¹ ICC-01/04-01/07-1305

² ICC-01/04-01/07-1345

³ ICC-01/04-01/07-1360

⁴ ICC-01/04-01/07-1401

⁵ ICC-01/04-01/07-1412

- “Addendum et corrigendum à certaines Requêtes de l’Accusation déposées en application de la norme 35 aux fins de dépôt d’expertises”, 4 September 2009, ICC-01/04-01/07-1456 (“Request 1456”)

I. BACKGROUND

1. On 23 January 2009, the Chamber ordered that all incriminating evidence be disclosed to the Defence no later than 30 January 2009 and that all potentially exonerating and rule 77 materials be disclosed no later than 27 February 2009.⁶ Despite these deadlines, the Prosecution has continued its investigation and has conducted a number of forensic examinations of the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009. These investigations have yielded a number of additional materials, for which the Prosecution now seeks authorisation to disclose out of time and to add to the List of Incriminating Evidence or to communicate as rule 77 materials.

A. Prosecution requests

2. In total, the Chamber received five requests and one addendum relating to the late disclosure of additional evidentiary material, which were obtained in the wake of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009. For the sake of clarity, the Chamber lists the items to which the respective requests pertain below:

1. *Addition of new evidentiary materials*

a) The items to which Request 1305 pertains are:

- (a) A digital 360° visual representation of the ‘Institut de Bogoro’.⁷
- (b) A report by the visual technician on the production of the visual representation.⁸

⁶ “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”, 23 January 2009, ICC-01/04-01/07-846

⁷ DRC-OTP-1044-0099, Annex A to Request 1305

- (c) Over 200 photographs, taken by the visual expert and by drone, which were used for the production of the visual presentation.⁹
- (d) 7 photos of human remains.¹⁰
- (e) A ballistic expert report (28 pages)¹¹ and a number of annexes thereto.
- (f) A video showing footage of the crime scene investigation by the ballistic experts¹² and the log of this video.¹³
- (g) 3 sealed containers, containing the core of a projectile, several empty shell casings and one live round, and the related Evidence Logs.¹⁴

b) The items to which Request 1345 pertains are:

- (a) A forensic report (36 pages) concerning blood stains found on the walls of classroom 1 of the 'Institut de Bogoro' and annexes thereto.¹⁵
- (b) One Evidence Log, pertaining to samples taken from the walls in classroom 1 of the 'Institut de Bogoro'.¹⁶
- (c) 15 photographs of the forensic examination of the 'Institut de Bogoro'.¹⁷

⁸ DRC-OTP-1044-0088, Annex B to Request 1305

⁹ Annex G to Request 1305

¹⁰ DRC-OTP-1041-0135; DRC-OTP-1041-0161; DRC-OTP-1041-0208; DRC-OTP-1041-0205; DRC-OTP-1041-0209; DRC-OTP-1041-0227 and DRC-OTP-1041-0217, Annex F to Request 1305

¹¹ DRC-OTP-1044-0037, Annex C to Request 1305

¹² DRC-OTP-1039-0019, Annex D1 to Request 1305

¹³ DRC-OTP-1039-0021, Annex D2 to Request 1305

¹⁴ Annex E to Request 1305

¹⁵ DRC-OTP-1044-0551, Annex A to Request 1345

¹⁶ DRC-OTP-1040-0005, Annex B to Request 1345

- (d) 5 sealed containers, containing fragments of walls of the 'Institut de Bogoro'.¹⁸

c) The items to which Request 1360 pertains are:

- (a) A forensic report (19 pages) concerning the analyses of wall fragments taken from the 'Institut de Bogoro' and the morphological analysis of traces on the walls of the 'Institut de Bogoro', photographed in February/March 2007, and the annexes thereto (79 pages).¹⁹

d) The items to which Request 1401 pertains are:

- (a) A forensic report about the exhumation and autopsy of a number of human remains discovered in close vicinity to the 'Institut de Bogoro'.²⁰ On 4 September 2009, the Prosecution asked for authorisation to substitute the report with a version that contains some missing references.²¹
- (b) Six aerial photographs of the 'Institut de Bogoro' and immediate surrounding area.²²
- (c) 162 photographs of the exhumation and human remains, which are used by the experts in their report.²³

¹⁷ DRC-OTP-1044-0506 to 0520, Annex C to Request 1345

¹⁸ DRC-OTP-1040-0007-0010 and DRC-OTP-1040-0012, Annex D to Request 1345

¹⁹ DRC-OTP-1045-0208, Annex A to Request 1360

²⁰ DRC-OTP-1046-0861, Annex A to Request 1401. On 4 September 2009, the Prosecution asked for authorisation to substitute the version of the exhumation report annexed to Request 1401, which was incomplete and unsigned, with a complete and signed version. "Addendum et corrigendum à certaines Requêtes de l'Accusation déposées en application de la norme 35 aux fins de dépôt d'expertises", 4 September 2009, ICC-01/04-01/07-1456. This new version carries the following ERN number : DRC-OTP-1049-0002

²¹ See Request 1456

²² DRC-OTP-1037-0014, 0018, 0025, 0050, 0060 and 0065, Annex B to Request 1401

²³ Annex C to Request 1401

- (d) Six videos, recorded during the site visit of the 'Institut de Bogoro', showing the exhumation and examination of human remains.²⁴ A video log for each of these videos is also provided.²⁵
- (e) Four 'Evidence Logs', pertaining to the collection of human remains.²⁶
- (f) Eight sealed containers, containing human remains and other items discovered in their vicinity, together with the Evidence logs that pertain to them.²⁷
- (g) Four photographs of the contents of two of the sealed containers mentioned in the preceding subparagraph (f), although it is not specified which ones.²⁸
- (h) 395 photographs that were taken of the exhumation and autopsy, but were not used by the experts for their report. The Prosecution asks for authorisation to disclose these photographs as rule 77 material.²⁹
- (i) 15 photographs, which do not relate to the exhumation or autopsy report. Instead, they are relevant for the ballistic report, mentioned under a)(e).³⁰

²⁴ DRC-OTP-1039-0002, 0006, 0010, 0014, 0025 and 0032, Annex D-I of Request 1401

²⁵ Annex J to Request 1401

²⁶ Annex K to Request 1401

²⁷ The containers are not disclosed physically; they carry the ERN DRC-OTP-1040-0016, 0018, 0023, 0025, 0027, 0033, 0037 and 0039. The evidence logs are contained in Annex L to Request 1401

²⁸ The photographs carry the ERN DRC-OTP-1040-340 and 343 and DRC-OTP-1046-0317 and 0392, but it is not specified to which sealed container they relate.

²⁹ Annex N to request 1401

³⁰ DRC-OTP-1046-0113 to 0127, Annex O to Request 1401

e) The items to which Request 1412 pertains are:

- (a) The declaration of witness P-233³¹, dated 17 June 2009, and a small number of photographs which are discussed in the declaration. This witness is already on the List of Incriminating Witnesses and previous statements were disclosed to the Defence. The Prosecution asks for the redaction of the identity of the mother of the witness.

f) The items to which Request 1456 pertains are:

- (a) A new version of the exhumation report, which was previously submitted with Request 1401.
- (b) 101 photographs depicting the exhumation by the experts and the subsequent inhumation of the remains. These photographs are submitted as rule 77 materials and the Prosecution admits that they should have been attached to Request 1401.³²
- (c) The Crime Scene Entry Log for 28, 29, 30 and 31 March 2009.³³
- (d) A Summary of Experience of the visual technician who produced the digital 360° visual representation of the 'Institut de Bogoro', which formed part of Request 1305, as well as the instructions of the Prosecution to this visual technician, dated 8 May 2009.³⁴
- (e) The signed version of the instructions to the ballistic expert, dated 20 May 2009.³⁵

³¹ DRC-OTP-1042-0289

³² Annex B to Request 1456

³³ Annex E to Request 1456

³⁴ DRC-OTP-1044-0091 and DRC-OTP-1044-0095, both under Annex C to Request 1456

³⁵ Annex D to Request 1456; an unsigned version of the instructions was attached to the ballistic report.

2. *Addition of experts to Prosecution Witness List*

3. In addition to Dr. Eric Baccard, who already figures on the Prosecution Witness List, the Prosecution further seeks permission to add the following experts to its list:

- (a) Mr. Zoran LESIĆ, Visual technician
- (b) Mr. Gilles BOURGEOT, Ballistic expert
- (c) Mr. Philippe ESPERANÇA, expert in morphologic analysis of blood traces
- (d) Professor Jean-Paul MOISAN, DNA expert

The Chamber notes that none of these experts are included in the list of experts, as maintained by the Registry in accordance with regulation 44 of the Regulations. However, the Prosecution provided detailed information about their education and experience, which allows the Chamber to evaluate their qualification as experts.

B. Justification for late submission

4. The Prosecution invokes two main reasons as to why this evidentiary material could not be disclosed earlier. First, the Prosecution argues that it was unable to obtain the material before because the organisation of the mission required the coordination of several institutional and private actors and the deployment of considerable human, financial and technical resources.³⁶ Moreover, the Prosecution claims that the security situation in and around Bogoro has been such that the mission had to be postponed a number of times.³⁷ The Prosecution lists a number of failed attempts for organising the joint expert

³⁶ ICC-01/04-01/07-1305, par. 10; ICC-01/04-01/07-1345, par. 9; ; ICC-01/04-01/07-1360, par. 9

³⁷ Idem

mission, which are said to indicate its intention to conduct the investigation in good time.

5. The Prosecution considers that because it did not have the relevant information in its possession before the mission of March 2009, it was not in a position to submit an application for an extension of time limit before the expiration thereof.³⁸

C. Defence responses

1. Request 1305

6. In relation to Request 1305, the Defence for Mr. Germain Katanga has stated not to have any objection to the addition to the List of Evidence of the material in question.³⁹

7. The Defence of Mr. Mathieu Ngudjolo raised some questions about the fact that the Prosecution included 7 photos of human remains⁴⁰ in Request 1305, which are not related to the ballistic report.⁴¹ With regard to the ballistic report and the related material, the Defence for Mr. Ngudjolo argues that the Chamber should reject the request, because the timing of the disclosure of the report does not leave the Defence sufficient time to request a counter-expertise.⁴² It is argued that the relative brevity of the report⁴³ and the fact that the Defence was aware that this report was forthcoming⁴⁴ do not alter the fact that there is insufficient time for the Defence to obtain a counter-expertise. Moreover, the Defence is of the

³⁸ ICC-01/04-01/07-1305, par. 13; ICC-01/04-01/07-1345, par. 11

³⁹ "Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1305 and 1345)", 5 August 2009, ICC-01/04-01/07-1352, par. 5

⁴⁰ See par. I.A.1.a)(d)

⁴¹ "Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1305", 17 July 2009, ICC-01/04-01/07-1317, par. 5

⁴² ICC-01/04-01/07-1317, par. 9

⁴³ ICC-01/04-01/07-1317, par. 11

⁴⁴ ICC-01/04-01/07-1317, par. 17

view that the Prosecution has not demonstrated any justification for the lateness of the report and indeed maintains that the Prosecution could have conducted the ballistic examination of the 'Institut de Bogoro' at a much earlier stage.⁴⁵ The Defence also expresses concerns about the possible alteration of the material collected by the experts, six years after the alleged facts.⁴⁶ Finally, the Defence questions the Prosecution's argument that the experts who drafted the report would be credible, because they are foreign to the investigation.⁴⁷

2. Request 1345

8. The Defence for Mr. Katanga does not object to the addition to the List of Incriminating Evidence of the items to which Request 1345 pertains.⁴⁸

9. The Defence for Mr. Ngudjolo is firmly opposed to Request 1345.⁴⁹ The Defence questions the credibility that may be attached to material that has been collected six years after the alleged facts, especially since the building has since been renovated.⁵⁰ The Defence also challenges the validity of the Prosecution's justification for not having been able to conduct the examination of the site earlier.⁵¹ It is questioned why, if the Prosecution had indeed planned the mission to Bogoro long in advance, as it alleges, the Prosecution did not apply for an extension of time limit before the deadline.⁵² The Defence also argues that a complex medical forensic report necessarily requires a counter-expertise and a good many investigations by the Defence's expert.⁵³ It is further submitted that it is not possible, at the moment, to predict how much time such a counter-

⁴⁵ ICC-01/04-01/07-1317, par. 14

⁴⁶ ICC-01/04-01/07-1317, par. 15

⁴⁷ ICC-01/04-01/07-1317, par.16

⁴⁸ "Defence Response to the Prosecution Request to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1345 and 1360)", 19 August 2009

⁴⁹ "Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1345", 7 August 2009, ICC-01/04-01/07-1355

⁵⁰ ICC-01/04-01/07-1355, par. 13

⁵¹ ICC-01/04-01/07-1355, par. 14-17

⁵² ICC-01/04-01/07-1355, par. 32

⁵³ ICC-01/04-01/07-1355, par. 20

expertise would take, which imperils the Defence's right to have adequate time and facilities for the preparation of its case. Finally, the Defence argues that the report does not assist in the manifestation of the truth and has no added value with regard to the other evidentiary material already disclosed.⁵⁴

3. Request 1360

10. The Defence for Mr. Ngudjolo strongly opposes Request 1360 and argues that the Prosecution is far from fulfilling the conditions of regulation 35.⁵⁶ The Defence further emphasises that the expert report introduces completely new elements into the case and that it does not have sufficient time to process this new information, or indeed to arrange for a counter-expertise ahead of the start of the trial hearings.⁵⁷ It is furthermore argued, that the alleged importance of the new information is not a relevant basis for the Chamber in assessing the criteria of regulation 35.⁵⁸ The Defence also reiterates its previous arguments that the Prosecution does not sufficiently explain why the expert mission could not take place earlier and argues that since six years have passed since the alleged events, there are serious concerns about the loss and alteration of the physical evidence collected.⁵⁹

11. The Defence for Mr. Katanga⁶⁰ initially also opposed Request 1360, stating that the Prosecution had not demonstrated valid reasons for not having conducted the investigation earlier. The Defence noted, in this regard, that the

⁵⁴ ICC-01/04-01/07-1355, par. 23 and 32

⁵⁶ "Observations de la Défense de Mathieu Ngudjolo relatives à la requête de l'Accusation déposée en vertu de la norme 35 du RC et référencée sous ICC-01/04-01/07-1360", 18 August 2009, ICC-01/04-01/07-1387

⁵⁷ Ibid., par. 11-17

⁵⁸ Ibid. 14

⁵⁹ Ibid., par. 18-23

⁶⁰ "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)", 2 September 2009, ICC-01/04-01/07-1451

security situation in the region only started to deteriorate as of October 2008 and that it is only as a result of a lack of diligence on the part of the Prosecution that it was unable to collect the scientific information within the time limit.⁶¹

12. It was also argued that the late disclosure of this new material would seriously prejudice the Defence, even with the postponement of the start of the hearing on the merits. The Defence claimed that it would have insufficient time to investigate the matters raised in the report and that there was very little time for a counter-expertise, should the need therefore arise.⁶²

13. However, during a status conference held on 2 October 2009, in the context of a debate on agreed facts, the Defence for Mr. Katanga appears to have withdrawn its opposition to the late disclosure of all the expert reports, stating that, after having reviewed the material and examining whether it was required for the Defence to conduct further investigations that would make it difficult to adequately prepare for the case, the Defence for Mr. Katanga was "content to admit the scientific material."⁶³ The Defence for Mr. Katanga also expressed its willingness to consider certain agreements on facts contained in the reports or even to admit the entirety of the contents of certain expert reports as an agreed fact.

14. The Defence for Mr. Ngudjolo, for its part, maintained its objection to the late admission of the reports and stated expressly that it still considered calling for a counter-expertise.⁶⁴

⁶¹ Ibid., par. 5-7

⁶² Ibid., par. 8

⁶³ ICC-01/04-01/07-T-72-ENG ET WT, page 18, lines 11-12

⁶⁴ ICC-01/04-01/07-T-72-ENG ET WT, page 22, lines 11-12

4. Request 1401

15. With regard to Request 1401, the Defence for Mr. Katanga initially made the same observations as in relation to Request 1360⁶⁵, but abandoned them at the status conference of 2 October 2009.⁶⁶

16. The Defence for Mr. Ngudjolo, on the other hand, strongly objects to Request 1401 and points out that the several requests for addition of new evidence is highly disruptive of its preparations for the trial.⁶⁷ The Defence is of the view that the Prosecution cannot invoke simple problems of coordination of agendas or logistical obstacles to extract itself from its responsibilities under article 54 of the Statute and accuses the Prosecution of a lack of diligence.⁶⁸ It is further argued that since the mission took place in March 2009, the Prosecution could easily have applied to the Chamber for an extension of time limit at that point.⁶⁹

17. The Defence for Mr. Ngudjolo also reiterates its concerns about the possible alteration and loss of evidence, given that six years have passed between the alleged facts and the expert mission and raises questions about the late stage in which the Prosecution decided to carry out such important investigations.⁷⁰

18. With regard to the alleged security problems, the Defence opposes the Prosecution's affirmation of the risks given that it does not present a serious evaluation of the threat level.⁷¹ The Defence further argues that alternative solutions could have been envisaged and that it must have been possible to

⁶⁵ See par. 11-12 above

⁶⁶ See par. 13

⁶⁷ "Observations de la Défense de Mathieu Ngudjolo relatives aux requêtes de l'Accusation déposées en vertu de la norme 35 du RC et référencées sous ICC-01/04-01/07-1401 et ICC-01/04-01/07-1412", 27 August 2009, ICC-01/04-01/07-1435-Conf-Exp, par. 9

⁶⁸ Ibid., par. 17-18

⁶⁹ Ibid., par. 19

⁷⁰ Ibid., par. 20-21

⁷¹ Ibid., par. 24

conduct the investigations at an earlier point in time, given that the Prosecution has had several years since the arrest of Mr. Katanga and Mr. Ngudjolo.⁷²

19. With regard to the Defence's ability to process the new information contained in the exhumation report and related materials, the Defence for Mr. Ngudjolo claims it would be 'severely prejudiced' if the material were admitted at this late stage. It argues that several in-depth examinations will be necessary⁷³ and that the report raises additional questions, which may necessitate further investigations, for example into the local customs with regard to the burial of human remains.⁷⁴ The Defence also points out that the information contained in the report is linked to the testimony of P-233, who is scheduled to testify as the Prosecution's first witness.⁷⁵

20. Finally, the Defence for Mr. Ngudjolo raises doubts about the relevance of the information contained in the exhumation report, considering that it was not possible to determine for how long the bodies had been buried.⁷⁶ Nevertheless, the Defence demands the disclosure of all elements deemed to be exculpatory in nature, to which Request 1401 pertains.⁷⁷

5. Request 1412

21. The Defence of Mr. Katanga objects to the Prosecution's request, arguing that the late submission of the additional declarations of P-233 is a direct result of the Prosecution's ongoing investigations and that the delay is therefore 'self-inflicted'.⁷⁸ The Defence argues that the investigations carried out at the 'Institut de Bogoro' go to the heart of the case,⁷⁹ but nevertheless asks the

⁷² Ibid., 25-26

⁷³ Ibid., 29

⁷⁴ Ibid., par. 31

⁷⁵ Ibid., par. 29

⁷⁶ Ibid., par. 33

⁷⁷ Ibid., par. 36

⁷⁸ "Defence Response to the *Mémoire de l'Accusation de la norme 35, aux fins de divulgation d'un élément à charge, d'austorisation d'expurgation et de modification de la liste des éléments à charge – Témoin P-233* (ICC-01/04-01/07-1412)", 31 August 2009, ICC-01/04-01/07-1443, par. 4

⁷⁹ Idem.

Chamber to declare “any new evidence arising from this scientific and medico-legal mission carried out at the end of March 2009” inadmissible, due to the lateness of disclosure to the Defence without any justification.⁸⁰ More specifically, the Defence for Mr. Katanga states that allowing the new statement of P-233 may require additional investigations, which would be difficult for the Defence to arrange before the commencement of the trial, considering the time and budget restraints and the “delicate security situation in Ituri.”⁸¹ It is not clear how the Defence’s recent withdrawal of opposition against the late submission of the expert reports affects its position with regard to P-233’s additional statement.

22. Nevertheless, the Defence for Mr. Katanga asks the Chamber to allow the late disclosure of P-233’s new declaration, but only on the basis of rule 77 of the Rules.⁸² The Prosecution should, according to the Defence, not be allowed to “lead the witness on the new incriminating information.”⁸³

23. As regards the request for redactions in the declaration of P-233, the Defence for Mr. Katanga opposes the permanent character thereof and challenges the necessity for them, since there are no incentives for the Defence to harm the mother of the witness.⁸⁴

24. The Defence for Mr. Ngudjolo, for its part, equally opposes Request 1412.⁸⁵ Apart from raising questions about the justifications invoked by the Prosecution for the late submission, the Defence argues that the new declaration of P-233 must be read in conjunction with the four expert reports and considers that, since the Prosecution intends to call P-233 as its first witness,⁸⁶ it will not

⁸⁰ Ibid., par. 5

⁸¹ Ibid., par. 8

⁸² Ibid., par. 13

⁸³ Ibid., par. 10

⁸⁴ Ibid., par. 14

⁸⁵ “Observations de la Défense de Mathieu Ngudjolo relatives aux requêtes de l’Accusation déposées en vertu de la norme 35 du RC et référencées sous ICC-01/04-01/07-1401 et ICC-01/04-01/07-1412”, 27 August 2009, ICC-01/04-01/07-1435-Conf-Exp

⁸⁶ “Prosecution’s order of witnesses it intends to call at trial”, 14 August 2009, ICC-01/04-01/07-1378

have sufficient time to prepare. Moreover, the Defence contests the “convincing character” of P-233’s declaration.⁸⁷

25. With regard to the requested redactions, the Defence of Mr. Ngudjolo opposes the proposed redactions as a matter of principle and argues that the Prosecution has not sufficiently justified its request.⁸⁸

⁸⁷ ICC-01/04-01/07-1435-Conf-Exp, par. 39

⁸⁸ Ibid., par. 40

II. ANALYSIS AND CONCLUSION

26. In analysing the several Prosecution requests, the Chamber must first assess whether the applications for extension of time are sufficiently motivated and justified. If this is not the case, the Chamber may assess whether the new material is more compelling than evidence already disclosed to the Defence, or if it brings to light previously unknown facts, which have a significant bearing upon the case. If this is the case, the Chamber may, using its authority under article 64(3)(c) and (6)(d) and article 69(3), allow for its late submission if it deems this necessary for the determination of the truth and as long as this does not jeopardise the Defence's right to have adequate time in order to prepare.⁸⁹ The Chamber will thus have to weigh the interest in having the additional information against the need for the Defence to usefully prepare its response to it. If the length of time and resources that are reasonably required by the Defence to prepare a meaningful response to the new items of evidence are disproportionate to the limited interest of the Chamber in having the additional item of evidence discussed at trial, the item may still be rejected.

A. Late submission

1. *General observations pertaining to Request 1305, 1345, 1360 and 1401*

27. With regard to the question as to whether the criteria of Regulation 35(2), last sentence, have been met, the Chamber agrees with the Defence of Mr. Ngudjolo⁹⁰ that the Prosecution does not satisfactorily explain why it did not apply for an extension of time limit before it expired, considering that the

⁸⁹ "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, ICC-01/04-01/07-1336, par. 30

⁹⁰ ICC-01/04-01/07-1355, par. 32

Prosecution had been planning this mission at least one year before it actually took place.⁹¹ The Chamber understands that the security situation in the region was an important factor in this regard, which made it difficult for the Prosecution to predict when the mission would be able to take place. However, as the Chamber stated before, the parties must, to the extent possible, keep the Chamber informed of ongoing or planned fact-finding missions, before the expiration of the deadline, when it is reasonable to think that they might lead to a request for additional disclosure after the set time limit, based on regulation 35 of the Regulations.⁹² From the Prosecution's own account, it seems quite clear that the forensic mission to Bogoro was planned before the 30 January 2009 deadline expired, but did not take place because of a combination of reasons. Despite the passing of the deadline, the Prosecution did not abandon its plans for the mission and continued to make arrangements, yet it did not inform the Chamber or the Defence.

28. The Chamber does not doubt that the security situation in the region sometimes poses very real difficulties and may at times prevent the carrying out of investigations. This may thus constitute 'good cause' for a request for an extension of time limit under regulation 35(2), first sentence. The Chamber does not accept, however, that the practical impossibility of conducting the mission in time and the resulting uncertainty as to whether and when the resulting reports would be finalised, constitute justification under Regulation 35(2), last sentence, for not making an application for extension of time limit before the expiration thereof. Deplorable and grave as the security situation in Ituri may be, this is unfortunately a persistent and well-known problem. It can, for this reason, not be considered as an 'exceptional circumstance' in the sense of regulation 35(2)⁹³, last sentence, for not applying for an extension within the time limit.

⁹¹ ICC-01/04-01/07-1305, par. 10

⁹² "Décision sur les témoins 002, 030, 323 et 373", 14 May 2009, ICC-01/04-01/07-1135, par. 18

⁹³ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit

29. Moreover, as the Defence have argued, the security situation in the region has not constantly been at such a level that it was impossible to conduct any investigations. Indeed, the public sources to which the Prosecution refers to support its claim that the region was too dangerous to conduct the expert mission⁹⁴ pertain to events involving the Front Populaire pour la Justice au Congo (FPJC), starting in October 2008. The Prosecution has not offered any information about the security situation prior to that period. It is thus not clear that the security situation prior to October 2008 was such that it made the expert mission impossible.

30. The Chamber is particularly concerned about the Prosecution's practice of presenting the Chamber with a *fait accompli*. The purpose of regulation 35(2) is to allow for variations of deadlines, if good cause can be demonstrated. It must be stressed that this possibility must remain fully subject to the control of the Chamber, who has to balance the several different interests affected when a time limit is extended.

31. The Chamber is conscious of its previous ruling, in which it said that "[i]t is incumbent upon the party applying for a variation of time limit to explain why it cannot meet the original time limit and to propose and justify a specific new date. The Chamber cannot entertain applications for extension of time limit that are not sufficiently precise and specific and it must therefore reject open-ended applications for extension of time limit that are based on hypothetical arguments."⁹⁵ However, the fact that the Prosecution was not able to indicate a specific new date is not a justification for not making an application for extension

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, par. 9-10

⁹⁴ ICC-01/04-01/07-1401, par. 18

⁹⁵ "Decision on the 'Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol' and the 'Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", 1 May 2009, ICC-01/04-01/07-1088, par. 39 [emphasis added]

of time limit at all. When the party applying for an extension is not certain as to the required duration, it should still apply for an extension and propose a reasonable new date. If the Chamber accepts the request, but it turns out that this first extension is not sufficient and good cause continues to exist, nothing prevents that party from applying for a second or third extension, as indeed the Prosecution did in relation to the time limit imposed by the Chamber for the Table of Incriminating Evidence.⁹⁶ This gives the party an opportunity to safeguard its interests, whilst at the same time allowing the Chamber to exercise its supervisory role and responsibilities under article 64(3)(c). Crucially, by not formally applying for an extension before the expiration of the time limit, the Prosecution also circumvented a key provision of regulation 35(2), which allows for the other participants to be heard on the matter *before* the deadline is violated.

32. The Prosecution argues that it had informed the Chamber in previous filings about the expert mission and the circumstances under which it was delayed. It is true that when the Prosecution submitted the Table of Incriminating Evidence, it announced that it would still ask for the inclusion of a number of additional experts, who had carried out the mission to the 'Institut de Bogoro'.⁹⁷ The Chamber notes, however, that the time limit for disclosing incriminating evidence was 30 January 2009. The mere act of informing the Chamber and the parties, at the time of the filing of the Table of Incriminating Evidence, does not constitute a formal application under regulation 35(2) and would, moreover, have been out of time, unless the Prosecution had been able to demonstrate that there were reasons outside the Prosecution's control for not filing the application

⁹⁶ "Prosecution's Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol', 19 March 2009, ICC-01/04-01/07-969; "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", 28 April 2009, ICC-01/04-01/07-1080; "Prosecution's Motion to File Partial Table of Incriminating Evidence and Related Material, Confidential - Ex Parte, available to the Prosecution Only", on 4 May 2009, 1 May 2009, ICC-01/04-01/07-1090

⁹⁷ "Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste de témoins de l'Accusation et de la liste des pièces à charge", 27 May 2009, ICC-01/04-01/07-1174, par. 7

before the end of the deadline. As the Chamber found, no such reasons have been advanced by the Prosecution.

33. When a party knows that it will not be able to meet a set time limit, but still has every intention of obtaining the material in order to present it at a later stage, it must, for the reasons outlined above, file a formal application under regulation 35(2) before the deadline. This duty of putting on notice the Chamber and the participants is all the more imperative when the foreseeable volume and complexity of new evidence is as important as it is in the present case. This was not done, even though the Prosecution, by its own admissions, still had the intention of carrying out the expert mission after the deadline. As the Chamber finds that no reasons beyond the Prosecution's control existed that prevented it from filing a formal application under regulation 35(2), it cannot accept the application for an extension of time limit.

2. Observations in relation to Request 1412

34. The situation with regard to Request 1412 is somewhat different from the other requests in that it pertains to a witness declaration that was not obtained until after the experts had investigated the 'Institut de Bogoro'. The Prosecution states that the necessity to re-interview P-233 only became apparent when the experts had conducted their mission and that the purpose of the interview was to clarify certain questions raised by this mission.⁹⁸ The Prosecution argues that it can therefore rely on the same justifications as invoked for the other requests to justify the late submission of Request 1412.⁹⁹

35. The Chamber notes that the interview took place on 17 June 2009. This was more than two months after the experts conducted their mission to Bogoro. Request 1412 dates from 21 August 2009, which is another two months later. All in all, it has thus taken well over four months for the Prosecution to make its

⁹⁸ Request 1412, par. 9

⁹⁹ Request 1412, making reference to Request 1401

request for extension of time limit, even though the declaration in question¹⁰⁰ is only six pages long. The Prosecution does not attempt to explain why it has taken so long after the expert mission to interview P-233 or why it was unable to file its request sooner.

36. Even if the Chamber were to accept that the expert mission and the interview with P-233 had to be sequential, the unexplained and considerable amount of time that passed between the mission and the filing of Request 1412 casts serious doubts on any argument that there were exceptional circumstances that prevented the Prosecution from applying for an extension of time limit under regulation 35(2), last sentence. Although regulation 35(2), by its very nature, cannot prescribe a cut-off date for filing applications for extension of time limit after the expiration thereof, it is clear that it is incumbent upon a party wishing to obtain a belated extension, to take action as soon as the circumstances which, in its opinion, would justify the extension, have become known to it. Accordingly, the application for extension of time limit cannot be accepted under the present circumstances.

B. Relevance and nature of the other new material

37. As the Chamber has rejected the application for extension of time limit, it must now analyse the remaining new items of evidence in order to assess their significance and relevance to the case. In the case of newly discovered incriminating evidence, the Prosecution must show that the new evidence is either 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.¹⁰¹ The Chamber will then evaluate whether the new material is of such a

¹⁰⁰ DRC-OTP-1042-0289

¹⁰¹ Ibid., par. 30

nature that it will contribute to a better understanding of the case and the establishment of the truth.¹⁰²

38. Although the Chamber cannot discuss every single item in detail, or indeed form a definite opinion about the significance of any particular item of evidence prior to their presentation during the hearings on the merits, it is necessary to evaluate the potential evidentiary importance of the new elements to which the above requests pertain. The Chamber has done so in the light of the information available to it and especially the incriminating evidence contained in the Table of Incriminating Evidence.

*1. Visual representation of the 'Institut de Bogoro',
accompanying report and photographs*

39. Although the visual representation is submitted after the deadline imposed by the Chamber, for both incriminating and rule 77 material, the Chamber is of the view that this photographic representation of the 'Institut de Bogoro'¹⁰³ may assist the Chamber and the parties in visualising the 'Institut' and its surroundings. The material in itself is not incriminating and has very limited evidentiary value. It is simply a tool for orientation, just like a diagram or drawing.

40. The Defences' right to have adequate time and facilities to prepare is not in any way jeopardised by the late submission of this visual representation, or indeed by the accompanying report¹⁰⁴ and photographs¹⁰⁵ that formed the graphical material with which the visual representation was produced.

¹⁰² "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, ICC-01/04-01/07-1336

¹⁰³ DRC-OTP-1044-0099, Annex A to Request 1305

¹⁰⁴ DRC-OTP-1044-0088, Annex B to Request 1305

¹⁰⁵ Annex G to Request 1305

2. *Ballistic expert report and related materials*

41. The ballistic expert report¹⁰⁶ contains three parts. The first part deals with the analysis of the core of a bullet which was discovered in the eastern wall of classroom 1 of the 'Institut de Bogoro'. The expert has determined the calibre of the projectile, but was not able to establish its origin, or indeed the approximate time it was fired. The report advances the hypothesis that the round was fired from within the classroom, probably from the door or the farthest window in the northern wall.

42. The second part of the report describes the analysis of a number of spent cartridges and a live round. However, apart from establishing the calibre and the country of origin, the analysis did not yield any apparently useful information and the Prosecution did not attempt to explain its relevance.

43. The third part of the report is the analysis by the expert of photographs and videos made in 2007¹⁰⁷ by the Prosecution (before the 'Institut de Bogoro' was renovated) for traces of impacts by gunfire. However, apart from speculating that two impacts on the eastern wall and three impacts on the northern wall of classroom 1 are probably the result of gunfire, as well as identifying traces of gunfire on the eastern outside wall, the expert is unable to determine the calibre, the type of weapon used or the distance from which they were fired.

44. Although the Chamber cannot exclude that the ballistic report is relevant to the case of the Prosecution, it is of the view that the findings of the expert as such are of a very limited value for obtaining a better understanding of the case. The report does not offer particularly compelling information, as the expert was unable to provide even a rough estimation of the date when the bullets were fired or match them to a particular weapon; nor does it, as the

¹⁰⁶ DRC-OTP-1044-0037, Annex C to Request 1305

¹⁰⁷ These photographs were previously disclosed to the Defence with authorisation of the Chamber. "Décision aux fins de communication de photographies à charge", 18 May 2009, ICC-01/04-01/07-1143

Prosecution admits,¹⁰⁸ bring to light previously unknown facts which have a significant bearing upon the case.

45. For these reasons, the Chamber does not authorise the Prosecution to add the ballistic report to the List of Incriminating Evidence. Nevertheless, the report does contain information that is potentially relevant to the Defence and therefore should be communicated to it under rule 77 of the Rules.

3. Forensic expert report regarding traces on walls, the taking of samples from those walls and related materials

46. The forensic expert report by Dr. BACCARD, of 2 June 2009, deals with traces left on the walls of classroom 1 of the 'Institut de Bogoro'.¹⁰⁹ The report concludes that traces visible on photographs taken in 2007, on the northern and eastern wall of classroom 1, are compatible with blood traces. However, apart from a general assertion that the traces are compatible with being blood traces, the report does not contain more specific information and states explicitly that it is currently impossible to determine scientifically how old the traces are.

47. The report further details efforts to restore the walls of classroom 1 to their state before being renovated (efforts which apparently were unsuccessful) and the taking of samples from the walls, containing the traces in question.

48. The Chamber considers that the importance of this report lies in the fact that it forms the basis for the more detailed analysis of the blood stains in classroom 1, which is the subject of the report by Professor MOISAN and Mr. ESPERANÇA, discussed below. For this reason, the Chamber will consider the significance of the report of 2 June 2009 together with that of the report of 17 July 2009, which is discussed next.

¹⁰⁸ ICC-01/04-01/07-1305, par. 29

¹⁰⁹ DRC-OTP-1044-0551, Annex A to Request 1345

4. Expert report on the analysis of blood stains and related materials

49. The third expert report, dated 17 July 2009, prepared by Professor MOISAN and Mr. ESPERANÇA, is divided in two parts. The first part describes how the experts checked samples from the walls in classroom 1 for human blood. On three samples a DNA analysis has allegedly revealed that there was blood of at least two different persons, one of whom was female, on the wall. The second part of the report contains the morphological analysis of several blood stains on the walls of classroom 1. The expert concludes that the shape and position of the blood stains indicates the repeated use of a sharp/cutting weapon on at least two victims, who found themselves in a low position, near the north-eastern corner of classroom 1. However, the expert is not able to confirm that all the bloodstains are the result of the same or different incidents. There is no indication about how long the stains had been on the wall.

50. According to the Prosecution, this expert report, which complements the report by Dr. BACCARD of 2 June 2009, is an important part of their case, in that it corroborates the declarations of certain witnesses that persons were injured or killed inside classroom 1 of the 'Institut de Bogoro'.¹¹⁰ Without taking any position on the evidentiary value of the report, or indeed whether the blood stains were left as a result of the attack of 24 February 2003, the Chamber accepts that the reports could potentially be relevant for the determination of what happened in classroom 1. However, the Chamber is not convinced that the two reports offer significantly more compelling evidence than other evidence already disclosed to the Defence and it is not argued that they bring to light previously unknown facts. Given the rather limited pertinence of the information contained in the reports, the Chamber will only allow their late addition if the added value of having the information contained in the expert reports discussed at trial,

¹¹⁰ ICC-01/04-01/07-1360, par. 12

outweighs the procedural implications caused by the late disclosure to the Defence. This question will be discussed in part C of the present decision.

5. Exhumation and autopsy report

51. The exhumation and autopsy report contains a description of the exhumations carried out around the 'Institut de Bogoro' and an analysis of the human remains that were discovered. According to the report, human remains were found on four different locations, designated BOG06, BOG07, BOG08 and BOG09. In the case of BOG06 and BOG09, the human remains were found in open air, whereas the human remains buried in BOG07 and BOG08 were located with the help of detection dogs and had to be exhumed. In total, the forensic experts discovered the remains (some of which very incomplete) of 18 individuals, which were analysed to determine the sex, age, civilian or combatant status and possible cause of death. The experts were explicitly told not to undertake any investigation in order to ascertain the identity of the deceased persons to whom the remains belonged.¹¹¹

52. It appears from the report that the state of the remains found at BOG09 did not allow for a determination of the cause of death or injuries or indeed to establish the probable sex of many of the remains discovered there. The experts did find, however, that the remains belonged to seven adults and one child of between 2.5 and 3.5 years of age. Together with the remains a torn T-shirt¹¹² was found, with a design depicting two okapis and the words "Planet Okapi".

53. The five remains found in BOG08 are, according to the report, those of two children¹¹³, two women of between 30 and 60 years of age¹¹⁴ and one younger person of between 18 and 30 years, whose sex could not be determined.¹¹⁵ On some of the remains traces of violence and burning were found, but for one of

¹¹¹ Request 1401, Annex A11

¹¹² BOG09/006

¹¹³ BOG08/001 (+/- 11 years) and BOG08/002 (3-6 years)

¹¹⁴ BOG08/003 and BOG08/004

¹¹⁵ BOG08/005

them no traces of injuries were found and the cause of death could not be established. The experts found traces on several of the remains which indicate the use of a long cutting weapon, compatible with a machete.

54. In BOG07, the remains of four individuals were found. They all showed signs of a violent death and three of them could be identified as male, whereas the sex of a fourth one could not be established. Their estimated age at the time of dying was between 16 and 21 years for two of the individuals (BOG07/003 and BOG07/008), between 18 and 30 for BOG07/001 and between 25 and 40 for BOG07/002. Remnants of arrows or spears were found in the immediate vicinity of two of the remains and one of the skulls showed signs of bullet wounds.¹¹⁶

55. BOG06/001 is a single skull of a man of between 16 and 35 years of age, which showed signs of injuries inflicted with a sharp weapon (machete) and appeared to have been bleached.

56. Arguing the significance of the exhumation report, the Prosecution cites a number of alleged factual elements, which, in its opinion, demonstrate the link between the report and other items of evidence already disclosed. However, in the absence of more specific indications about how the many different findings of the experts relate to specific factual allegations of the Prosecution and the other evidence in support of these allegations, it is difficult for the Chamber to assess the significance of the information contained in the report. The fact that the report allegedly offers "independent scientific material evidence"¹¹⁷ is in itself insufficient to convince the Chamber of the significance of the new information. Nevertheless, the Chamber accepts that the Prosecution may have an interest in trying to prove that human remains were found near the scene of one of the alleged crimes. Given the rather limited pertinence of the information contained in the report, the Chamber will only allow its late addition if the added value of

¹¹⁶ BOG07/003

¹¹⁷ Request 1401, par. 28

having the information contained in it discussed at trial outweighs the procedural implications caused by the late disclosure to the Defence. This question will be discussed in part C of the present decision.

6. Statement by witness P-233

57. The Prosecution wishes to add the new declaration by P-233 because it allegedly provides important additional information about the issue of bullet holes in classroom 1 of the 'Institut de Bogoro', sheds light on the renovation of the 'Institut' in 2009, and deals with 'questions of identification' that are new.¹¹⁸ It is argued, therefore, that the new declaration is useful for the establishment of the truth.

58. P-233 does seem to provide information which is helpful to put the findings of the several experts in a temporal context. The witness states that he observed many bullet holes in the 'Institut de Bogoro', when he returned to Bogoro in 2005. He also states that prior to his fleeing Bogoro on 24 February 2003, he was not aware of any holes behind the 'Institut'. A number of people told P-233 that a particular hole behind the school contained corpses of persons killed during the attack of 24 February 2003.

59. P-233 was also shown a piece of fabric, which was found by the forensic experts at a location near the 'Institut de Bogoro' (BOG09) together with some human remains. P-233 stated that he recognised the fabric as being used for making popular polo shirts that were sold in Bogoro and Bunia, around the time of the attack. The witness also describes that the 'Institut de Bogoro' was renovated by MONUC in December 2008 and that prior to that children had already removed most bullets from the walls. P-233 also states to have personally removed one bullet.

60. The Chamber is of the view that the additional statement of P-233 is closely related to the findings of the expert mission and that without these

¹¹⁸ Request 1412, par. 16

findings, the statement loses much of its significance. For this reason, insofar as the Chamber decides not to admit the late submission of the reports, it does not consider that the additional statement will contribute to a better understanding of the case and the establishment of the truth. Indeed, if the reports are not added to the List of Incriminating Evidence, the witness will not be allowed to testify to the facts contained in his statement that are directly related to the findings of the experts.

61. Nevertheless, the statement does contain information that is potentially relevant to the Defence and therefore should be communicated to it under rule 77 of the Rules.

C. Adequate time for the Defence

62. Before authorising the late disclosure of any new items of evidence, the Chamber must first be satisfied that the late submission does not interfere with the Defence's right to have adequate time to prepare for the trial. This evaluation must be done on a case by case basis, taking into consideration the nature and volume of the new elements. To be better able to carry out this assessment, the Chamber specifically instructed the Prosecution to explain how each new item of evidence relates to its overall evidentiary case and the manner in which it is proposed it will be entered into evidence during the trial.¹¹⁹ The Chamber regrets that the Prosecution has not provided sufficiently detailed information in this respect. Despite this lack of argumentation, the Chamber has analysed each new item of evidence in the light of the relevant parts of the Table of Incriminating Evidence.

1. Visual representation of the 'Institut de Bogoro'

63. As pointed out above, the Chamber does not consider that the late addition of the visual presentation of the 'Institut de Bogoro' to the List of Incriminating Evidence would cause any prejudice to the Defence.

¹¹⁹ ICC-01/04-01/07-1336, par. 30

2. *Expert reports o blood stains and exhumation*

64. The Defence for Mr. Ngudjolo argues strenuously that the late disclosure of the expert reports will severely disrupt their preparation for the trial. They also state that in order to be able to respond to the expert reports, it will be necessary for them to appoint their own experts. However, they claim that they do not have the necessary funds for this and that this may cause very substantial delays.

65. Before analysing whether the Defences' allegations of prejudice are well-founded, the Chamber will first assess the way in which the expert reports were compiled and whether it would have been possible for the Prosecution to minimise the burden for the Defence. It is obvious that the manner of selecting and instructing experts determines to a large extent how their evidence is received by the opposing parties. The Chamber is of the view, in this regard, that considering the very advanced stage of the proceedings before the hearings on the merits, it was incumbent upon the Prosecution to organise the expert mission in such a way so as to reduce the preparation required by the Defence, avoid unnecessary surprises and respect the adversarial nature of the proceedings.

66. In the present case, the experts were selected and instructed by the Prosecution, acting entirely unilaterally. To the knowledge of the Chamber, the Defence was neither properly informed nor consulted on this matter. The Chamber is surprised that the Prosecution chose to act in this manner. It is recalled that the Chamber, almost from the moment it was seized of the present case, expressly asked the Prosecution and the Defence whether they intended to instruct expert witnesses and, if so, whether they would consider jointly instructing them.¹²⁰ In response, the Prosecution stated that "Les parties ne s'opposent pas à l'idée de donner des instructions aux témoins experts communs.

¹²⁰ "Order Instructing the Participants and the Registry to Respond to Question of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute)", 13 November 2008, ICC-01/04-01/07-747-tENG, par. 11, fourth point

Les parties évaluent en ce moment les domaines pour lesquels le témoignage d'experts pourrait contribuer à la présentation de l'affaire et à sa bonne compréhension par la Chambre de première instance."¹²¹ During the first status conference of the Chamber, held on 27 and 28 November 2008, the issue of experts as 'technical witnesses' was mentioned by the Prosecution, but not elaborated upon,¹²² despite the fact that it had envisaged the expert mission to take place in September 2008, but had decided to postpone it due to security concerns.¹²³ In other words, despite the fact that the mission was imminent and that the Chamber had expressly asked the parties to consider the joint instruction of experts, the Prosecution did not mention the planned mission during the status conference.

67. The Chamber and the participants were for the first time informed about the experts' mission, after it had taken place.¹²⁴ Later the Prosecution announced that it would seek the modification of the Prosecution Witness List to add a number of experts who had participated in the mission to Bogoro.¹²⁵ However, the full extent of the mission and the resulting volume of additional evidence only became apparent at an even later stage, when the Prosecution

¹²¹ "Réponse de l'Accusation à l'Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut) du 13 novembre 2008", 24 November 2008, ICC-01/04-01/07-764, p. 14. It is to be noted that the Defence for Mr. Ngudjolo expressed a preference for appointing its own experts, but that it did not exclude the possibility of jointly instructing experts, "Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance II en vue de la conférence de mise en état du 27 novembre 2008 (article 64-3-a du Statut)", 24 November 2008, ICC-01/04-01/07-758, par. 15. The Defence for Mr. Katanga informed the Chamber that it intended to instruct one or more experts, but that, at that moment, "the parties do not intend to instruct a joint expert, but are willing to reconsider this at a later stage if considered appropriate", "Defence Response to the Order dated 13 November 2008", 24 November 2008, ICC-01/04-01/07-763, p. 6.

¹²² ICC-01/04-01/07-T-52-ENG ET WT, 27 November 2008, p. 67, lines 22-25

¹²³ Request 1401, par. 17

¹²⁴ As far as the Chamber is aware, the first time that the Prosecution made any reference to the mission was in its filing of 9 April 2009, "Mémoire de l'Accusation, en vertu de la norme 35, en modification de la *Requête de l'Accusation [ICC-01/04-01/07-912] aux fins d'expurgations d'informations dans une bande vidéo relevant de la Règle 77* en 'Requête de l'Accusation aux fins d'expurgations d'informations dans une bande vidéo à charge'", ICC-01/04-01/07-1052, par. 5 et seq.

¹²⁵ "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", 27 May 2009, ICC-01/04-01/07-1174-Corr

started filing the several applications for extension of time limit. This was only done a few months before the scheduled start of the hearings on the merits.¹²⁶

68. The Chamber observes that the requirements of fair and expeditious trial generally, and the adversarial principle in particular, demand that the opposing party must have an opportunity to comment *effectively* on expert reports.¹²⁷ This does not entail an automatic or absolute right for the Defence to be associated in the entire process of selecting and instructing the experts, including the carrying out of the actual investigations and compiling of the report by the expert. Nevertheless, considering the advanced stage of the proceedings before the hearings on the merits, the Chamber is of the view that, unless there are imperative reasons to the contrary, the opposing party should, to the extent possible, be invited to participate in the expertise from an early stage onwards. In particular, the Defence should be allowed to comment upon the selection of a qualified expert (whether or not he or she is on the list of experts in accordance with regulation 44) and the precise nature and scope of the instructions given to him or her. To the extent that this is appropriate under the circumstances, the Defence should also be given an opportunity to make comments upon the working method of the experts, in particular with regard to the selection of sources, and to make suggestions for additional investigative measures to be carried out by the expert, before he or she finalises the report. This approach not only guarantees the adversarial nature of the proceedings, it also saves the parties time and effort because it allows the early resolution of any possible disputes surrounding the expertise.¹²⁸ Furthermore, early involvement of all parties prevents parties from being caught off-guard by the findings of the expert and avoids challenges to the qualifications of the expert after he or she has completed the work. Finally, early involvement of both sides to the case will enable the expert to take into consideration all relevant concerns and suggestions

¹²⁶ Request 1305 is dated 15 July 2009, whereas Request 1456 is dated 3 September 2009

¹²⁷ European Court of Human Rights, "Mantovanelli v. France", 18 March 1997, par. 36, 24 EHRR 370

¹²⁸ Trial Chamber I, *Prosecution v. Thomas Lubanga Dyilo*, "Decision on the procedures to be adopted for instructing expert witnesses", 10 December 2007, ICC-01/04-01/06-1069, par. 15

to prepare a balanced report.¹²⁹ The Chamber emphasises that the role of experts is to assist the Chamber in establishing the facts in a neutral and impartial manner. It is not their role to support either side of the case and therefore their work can only benefit from receiving the input of all parties.

69. Considering that the mission took place in March 2009, long after the accused were transferred to the Court and several months after the confirmation of charges, the Chamber can see no reason for the Prosecution not to have, at the very least, informed the Defence about the scope of the expert mission before it took place. The Chamber is of the view that the extremely late stage of the proceedings, during which the mission was planned, made it even more imperative to involve the Defence from the very beginning in the expert mission, as this would have limited the need for counter-expertise or additional investigations. In case of disagreement about the nature or scope of the expert mission, the Prosecution could have come before the Chamber for an order under regulation 44 of the Regulations.

70. The Chamber notes, in this regard, that regulation 51(d) of the Regulations of the Office of the Prosecutor,¹³⁰ expresses the intention to “consider the joint instruction of experts by the Prosecution and the defence, or an agreement relating to the instruction of expert witnesses by the Court under regulation 44 of the Regulations of the Court.” This is said to be in order to promote the efficient conduct of the proceedings. The Chamber welcomes this policy, especially considering the Prosecution’s obligation under article 54(1)(b) of the Statute to “take appropriate measures to ensure the *effective* investigation and prosecution of crimes within the jurisdiction of the Court” [emphasis added].

71. It is furthermore crucial to recall the provisions of regulation 44 of the Regulations, which expressly authorise the Chamber to “direct the joint instruction of an expert by the participants” and grant it the power to “issue any

¹²⁹ *idem*

¹³⁰ ICC-BD/05-01-09

order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their reports". Moreover, paragraph 3 of regulation 44 limits the participants' right to instruct their own expert on the same issue for which the Chamber has instructed an expert. Although regulation 44 does not impose an obligation on the parties to seek authorisation of a chamber before instructing an expert, this regulation was adopted with the clear purpose of expediting the proceedings and saving costs. Moreover, regulation 44 should be read in conjunction with regulation 54(m), which gives the Chamber the authority to order "the joint or separate instruction by the participants of expert witnesses", if this in the interests of justice for the purposes of the proceedings.

72. As the expert reports were all compiled unilaterally by the Prosecution, the Defence teams are now put in a position where they are almost compelled to either accept the findings of the experts at face value or to appoint their own experts, if they wish to challenge them. In fact, given the nature of the reports and the very specific findings they contain, if the Defence teams want to comment effectively upon the reports, they are almost forced into a position where they need to engage their own experts, with all the important financial and time implications this entails. The late filing of the requests further imposes an important additional burden upon the Defence, for which they could not have previously prepared themselves and which comes at a very inconvenient time in the proceedings.

73. The Chamber is not in a position now to prevent the Defence from demanding a counter-expertise, as they were completely ignorant about the preparation and execution of the expert mission. It is true that the Defence were invited to participate in the laboratory analysis of the samples taken from the

walls of the 'Institut de Bogoro',¹³¹ which took place in the laboratory of the *Institut génétique Nantes Atlantique*, (France), but this was not sufficient to alleviate the fact that the Defence was not involved in the process earlier on.

74. This unfortunate situation could have been almost entirely avoided if the Prosecution had invited the Defence to take part in the expert mission to Bogoro from the beginning, as the Chamber had clearly requested. The Chamber sees no reason why the Defence could not have been consulted about the selection of the experts or indeed the formulation of the questions that were asked from them, especially seeing that the Prosecution only formulated the final instructions to the experts two months after their return from Bogoro. Depending on the precise circumstances, it may even have been conceivable for the Defence to participate in the expert mission as observers or to assign their own experts to accompany the mission.

75. For these reasons, the Chamber rejects the request for late submission of the four expert reports and related material as incriminating evidence. However, the Chamber does consider that the reports and related material fall within the ambit of rule 77 and orders their communication on this basis.

III. REQUESTS FOR REDACTIONS

76. In relation to the Prosecution's request for redaction of the identity of P-233's mother¹³², the Chamber notes that the Prosecution agreed to withdraw its request for the redaction of the name of P-233's mother.¹³⁵

¹³¹ ICC-01/04-01/07-1360, par. 16

¹³² Request 1412, Annex A1

¹³⁵ ICC-01/04-01/07-T-69-COF-EXP-ENG ET, page 47, lines 20-21

FOR THESE REASONS,

THE CHAMBER,

REJECTS the application for extension of time limit;

AUTHORISES the Prosecution to disclose the visual representation of the 'Institut de Bogoro' and add it to its List of Incriminating Evidence;

ORDERS the Prosecution to communicate the statement of P-233, the expert reports and the related items of evidence as rule 77 material; and

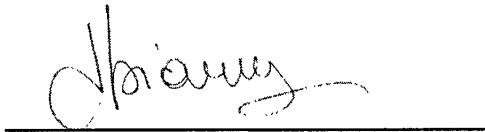
REJECTS the application to add Mr. Gilles BOURGEOT, Mr. Philippe ESPERANÇA and Professor Jean-Paul MOISAN to the List of Incriminating Witnesses.

Done in both English and French, the version being authoritative.

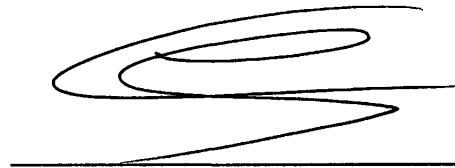


Judge Bruno Cotte

Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 7 October 2009

At The Hague, the Netherlands