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No.: **ICC-01/04-01/07**
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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 CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

PUBLIC

**Public Redacted Version of the
Defence Response to the Prosecution's Application to be permitted to add the
Statement of Witness 317 to its List of Evidence and to Add Witness 317 to its List
of Witnesses pursuant to Regulation 35 (ICC-01/04-01/07-1537)**

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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A – INTRODUCTION

1. The Defence for Germain Katanga (“the Defence”) hereby responds to the *Prosecution's Application to be permitted to add the Statement of Witness 317 to its List of Evidence and to Add Witness 317 to its List of Witnesses pursuant to Regulation 35*,¹ filed on 19 October 2009 (“Prosecution Application”).
2. In its Application, the Prosecution seeks leave to add the statement of Witness 317 to its List of Incriminating Evidence and to add Witness 317 to its List of Witnesses. According to the Prosecution Application, on 24 February 2003 Witness 317 was operating as a Human Rights Officer, working for MONUC. In March 2003 she led an investigative team which looked into, *inter alia*, the incident at Bogoro of 24 February 2003 – the said team visited Bogoro on 26 March 2003. The Special Investigation Team submitted its final report on 20 June 2003.² Witness 317 also took part in the drafting of the UN's Special report on the events in Ituri, January 2002 - December 2003.³ The redacted statement of Witness 317 was disclosed to the Defence on 23 October 2009.⁴
3. The Defence objects to the addition at this late stage of the statement of Witness 317 to the List of Incriminating Evidence and to the addition of Witness 317 to the Prosecution List of Witnesses, principally on the ground that the Prosecution has not met the conditions of Regulation 35(2) of the Regulations of the Court. Also, the addition sought at this particularly advanced stage of the proceedings (i.e. less than one month prior to the commencement of trial) would cause prejudice to the Defence in violation of the Rome Statute and the Rules of Procedure and Evidence.
4. The Defence relies herein 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),

¹ ICC-01/04-01/07-1537.

² DRC-OTP-0152-0286.

³ DRC-OTP-0129-0267.

⁴ It was submitted in Annex C, Confidential, *ex parte*, only available to the Prosecution, on 19 October (ICC-01/04-01/07-1537-Conf-Exp-AnxC). On 21 October 2009, the Defence requested the reclassification as Confidential, *ex parte*, only available to the Prosecution and the Defence of the Annex C (ICC-01/04-01/07-1545, Defence Motion Requesting the Disclosure of the Redacted Statement of Witness 317)..

filed this 31st of August 2009.⁵

B – APPLICATION OF REGULATION 35(2)

5. In its *Decision on Prosecution requests ICC-01/04-01/07-1386 and ICC-01/04-01/07-1407 made pursuant to regulation 35 of the Regulations*, the Chamber confirmed that, when a party wishes to submit new items of evidence after the expiration of the applicable time limit, it will, in accordance with its prior rulings on this matter, consider the following elements:

14. First, it will consider whether there is a timely and sufficiently motivated application for extension of time limit in accordance with regulation 35(2) of the regulations. If this is the case, the Chamber will in principle allow the late submission, unless this would cause undue prejudice to the Defence. If this is not the case, the Chamber will in principle reject the late addition of new items of evidence, unless the new material must be disclosed to the Defence in accordance with article 67(2) of the Statute or falls under rule 11 of the Rules. If the new material is incriminating, the Chamber may still consider late addition, using its powers under article 64(6)(d) and 69(3) of the Statute, but only if it can be shown that (i) the new material is either significantly more compelling than other items of evidence already disclosed to the Defence, or brings to light a previously unknown fact which has a significant bearing upon the case, and (ii) the late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(1)(b) of the Statute.⁶

6. The Chamber further held in its *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)*, that in analyzing the Prosecution requests for the late disclosure of incriminating evidence pursuant to Regulation 35, it has “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

⁵ ICC-01/04-01/07-1441.

⁶ ICC-01/04-01/07-1552, 23 October 2009.

interest of the Chamber in having the additional item of evidence discussed at trial, the item may still be rejected.”⁷

7. Thus it is clear from the Statute, the Rules and the jurisprudence that the addition of new incriminating elements after the set deadline can be authorised only if Mr Katanga is not unduly prejudiced and his statutory rights are not violated.

C – FAIR TRIAL THE ULTIMATE QUESTION

8. In its *Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence* of 23 October 2009, the Chamber confirmed that even where the conditions of Regulation 35 are met, it is entirely within the discretion of the Chamber to dismiss a request to extend the time limit for disclosure of evidence. The Chamber considered “that the fact that an applicant can show that it fulfils the requirements of regulation 35(2) of the Regulations, does not automatically oblige the Chamber to grant the extension of time limit which is being sought. Rather, the Chamber, bearing in mind its obligation under article 67(1) of the Statute, must ensure that the accused receive a fair trial and that they have adequate time and facilities for the preparation of their respective cases. This judicial discretion is vested in the Chamber by virtue of the fact that, according to regulation 1(1) of the Regulations, they "shall be read subject to the Statute and the Rules". Moreover the Chamber has an overall responsibility to apply the law consistently with internationally recognized human rights in accordance with article 21(3) of the Statute.” The Chamber concluded that, accordingly, before authorising the late disclosure of a witness' statements, it has to assess the extent of the prejudice the late addition of the witness to the Prosecution Witness List would cause to the Defence.”⁸

⁷ ICC-01/04-01/07-1515-Corr, 9 October 2009, para. 26.

⁸ ICC-01/04-01/07-1553.

D – DELAY IN THIS CASE

9. The Defence maintains that the Prosecution did not demonstrate that it was unable to file its application within the time limit for reasons outside his control, as required pursuant to Regulation 35(2) of the Regulations of the Court.
10. The Prosecution does not say when it first sought access to the witness, referring only to a UN response on 6th December 2007 to the Prosecutor's inquiry.⁹ The Prosecution's investigation into the present case long preceded this date.
11. It would appear that conditions existed for the interview with Witness 317 to take place following the acceptance by the Prosecutor on 6 December 2007 of the conditions set by the UN Department of Peacekeeping Operations.¹⁰ However, the subsequent delays with the UN are not adequately explained. For example, the Prosecutor does not substantiate the use of the word 'repeatedly' in paragraph 5 of the Prosecution Application. Nor has the Defence seen copies of the correspondence referred to at paragraph 5. The Defence does not accept that the fault lay outside the control of the Prosecution to the extent claimed and certainly not to such an extent justifying a delay of 'almost two years' in its attempts to interview the witness in question.
12. On 16th January 2008, the Prosecutor made a request to the OHCHR to interview Witness 317, after which nothing more was done by the Prosecutor until 3 November 2008 – some ten months later – when he 'reiterated' his request.¹¹ This very lengthy delay is unexplained in the Prosecutor's present request and cannot be excused, particularly given that the disclosure difficulties relating to this class of witness were well-known to the Prosecutor.
13. The Defence submits that when a circumstance is persistent and well-known, it cannot be qualified as 'exceptional', as so confirmed in the *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)*, wherein the Chamber considered that "Deplorable and grave as the security situation in Ituri may

⁹ Prosecution Application, para. 2.

¹⁰ Prosecution Application, para. 2.

¹¹ Prosecution Application, para. 4.

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) last sentence, for not applying for an extension within the time limit.”¹²

14. In losing almost one year in progressing the matter, fault and responsibility lie with the Prosecutor in terms of the delay and the consequent failure to disclose the material in a timely manner. It is therefore incorrect to say that ‘the Prosecution had no control over the process, but depended on the willingness of the information provider to agree to the interview of the witness’.¹³ For instance, the Prosecution could have requested the assistance of the Pre-Trial Chamber and/or the Trial Chamber to obtain the agreement of the UN. No such measures were taken, however. The Prosecution seems to have been too passive.

15. Furthermore, and despite the deadline for evidential material set for 30th January 2009,¹⁴ the Prosecutor made no mention of this potential witness until 14 August 2009,¹⁵ at which time he then referred to the said witness in only the most general terms. Given the nature of the witness, it was apparent that it was more probable than not that the Prosecutor would seek to rely on the witness. It was thus incumbent on the Prosecution in such circumstances to seek an extension of the time limit. The Defence shares the Chamber’s concerns “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.”¹⁶

16. The Defence is very surprised by the Prosecutor’s assertion that he was ‘unaware that the witness’s evidence would be relevant to the case’¹⁷ given that the witness was at all times known by the Prosecutor to have been the team leader of the MONUC investigation into the events at Bogoro. Neither the Chamber nor the parties were informed of the potential reliance by the Prosecutor on Witness 317. The Chamber

¹² ICC-01/04-01/07-1515-Corr, 9 October 2009, Para. 28.

¹³ Prosecution Application, para. 25.

¹⁴ ICC-01/04-01/07-846, *Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d'une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 23 January 2009.

¹⁵ ICC-01/04-01/07-1378-Conf-Exp-AnxB.

¹⁶ ICC-01/04-01/07-1515-Corr, 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), 9 October 2009, para. 30.

¹⁷ Prosecution Application, para. 27.

was consequently not placed in a position to manage the matter or to facilitate the production of material from the witness and the Defence was not put on notice such a witness may be called to give evidence. No specific mention was made of the witness to the Chamber until August 2009, after the witness had been interviewed.

17. The Prosecutor states – unconvincingly, the Defence adds – that he was not able ‘to propose a reasonable new date’ by which time he could come forward with the material after the deadline of 30th January as it was ‘impossible to propose any meaningful date or even a range of dates’.¹⁸ This by no means justifies his not bringing the matter before the Chamber, knowing that it was his intention to interview Witness 317 and the deadline set. As noted by the Chamber,

31. [It] 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." 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 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. 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. [...]

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. [...]¹⁹

18. In any event, had the Prosecutor acted more expeditiously no such difficulty would have arisen. The loss of time in 2008 was crucial to the good management of the witness and preparation thereof by the Defence. The Defence therefore submits that the Prosecution did not demonstrate the existence of exceptional circumstances

¹⁸ Prosecution Application, para. 26.

¹⁹ ICC-01/04-01/07-1515-Corr, 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), 9 October 2009.

warranting an extension of time limit pursuant to Regulation 35(2) of the Regulations of the Court.

E – PREJUDICE TO THE DEFENCE

19. In the alternative, if the Chamber were to consider that the Prosecution had demonstrated the existence of such exceptional circumstances justifying its late application, the Defence submits that the prejudice caused to the Defence by the late addition of Witness 317 to the list of incriminating witnesses and of her statement to the list of incriminating evidence outweighs the interest, if any, of having the material admitted. In such circumstances, the Defence requests the Chamber to use its discretionary power to deny the Prosecution Application, in order to protect the rights of the Defence.

20. The Defence wishes to emphasize that even if it has now had sight of the statement of Witness 317, the fact remains that oral testimony is significantly different to statements contained in documents. A witness requires preparation and investigation, in a way that a document, for its part, rarely does. It is obvious that the addition of Witness 317 will warrant further investigations by the Defence in the DRC. In the *Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence*, the Chamber acknowledged that the late disclosure of the statement of an incriminating witness may lead the Defence to request an adjournment of the proceedings, implying that the late disclosure of the statement of an incriminating witness may *justify* an adjournment of the proceedings.²⁰ The Defence notes that the Prosecutor refers to the statement being '15 pages long' - though the interview was conducted over three days.²¹ The Defence, of necessity, requires the full transcripts of the interview of Witness 317.

²⁰ ICC-01/04-01/07-1533, 23 October 2009, para. 19 : "If the Defence considers it necessary to conduct specific additional investigations in relation to P-219, which necessitate travelling to the DRC, and if it can be demonstrated that the Defence is unable to conduct these investigations once the hearings on the merits have commenced, then the Defence may request the Chamber for a short adjournment of the proceedings."

²¹ Prosecution Application, para. 9.

21. The new evidence is said by the Prosecutor not to 'present an overwhelming or complex matter against which the Accused will be required, at a late date, to prepare.'²² Yet in paragraph 35 of his Application the Prosecutor is at pains to list the probative and significant value of the evidence from Witness 317. It is plainly both material that will require the Defence to prepare, and preparation will be 'at a late date', the trial being less than a month away.
22. Furthermore, the material cannot be limited to the statement taken by the Prosecutor. The Defence notes with concern the undertakings given to the UN in respect of this witness. The witness is said, according to the MONUC report, to have led a team that questioned 420 witnesses. In the event that the Prosecution is permitted to rely on Witness 317, the Defence will necessarily seek access to the Witness, the material available to the Witness, the Witness's sources and informants and access to the six other members of the investigative team that she led at the relevant time, together with their notes and other material produced in the course of the investigation.
23. The Defence must where possible be placed in a position to take into account the evidence of each and every incriminating witness in its cross-examination of every witness. Evidence in a trial will be viewed in its totality and not in isolation. Therefore, in testing the evidence, the Defence should, unless there are factors rendering it unavoidable, be afforded the opportunity to test the evidence of a witness in the light of all the evidence. Accordingly, the Defence must have sufficient time to study the proposed evidence and exhibits of the witness, investigate the same and consider how this evidence affects its approach to other witnesses before the commencement of the presentation of the evidence. It is submitted that the time left for the preparation of trial does not permit this. In the Defence submission this should be an important consideration for the Chamber when determining whether the admission of the evidence of this witness at trial serves the interests of a fair trial.
24. Last but not least, the conditions agreed by the Prosecution with the UN for the testimony of Witness 317 appear to be unfair for the Defence. The OLA requests the implementation of strict protective measures, as a condition for permitting the testimony - that during the examination and re-examination of the Witness no questions be asked that would require her to disclose, *inter alia*:

²² Prosecution Application, para. 29.

- in open or closed session, information the disclosure of which would endanger the safety or security of current or former UN personnel or of others persons;
- in open or closed session, the identity of persons, groups or organisations that provided information to Witness 317 or the UN on condition that their identities remain confidential and not be disclosed.

The OLA further requests that a representative of the UNSG be permitted to attend the hearings of Witness 317 and that this representative, with the Chamber's consent, be permitted to consult with or be consulted by Witness 317 and to make submissions to the Chamber that Witness 317 not be required to answer a question or to supply certain information²³.

25. Thus, the Defence may be prevented from knowing the sources of information of the Witness, who provides an incriminating statement which goes to the act and conduct of the Accused, relying mainly on the testimonies of alleged victims. This limitation *a priori* seems unreasonable, especially given that the Defence is bound by the same deontology and duty to respect the confidentiality of any information as the members of the Prosecution or the Chamber. Less restrictive protective measures are available, such as an order that the Prosecutor, the Defence or any other participant in the proceedings be prohibited from disclosing such information to a third party pursuant to Rule 87(3)(b) of the Rules of Procedure and Evidence. Besides, the restrictions on the disclosure of the sources of information of Witness 317 may affect the weight of her testimony,²⁴ and thus render it useless – were Witness 317 to merely repeat her reports while being prevented from adding new elements relative to some of her sources, her evidence would not be more compelling than the two reports already disclosed. Where the Prosecution Application to be granted, the Defence would be entirely in the hands of the Chamber as to which information Witness 317 may or may not disclose, and thus prays the Chamber to ensure the respect of the rights of Mr Katanga to a fair trial.

²³ Prosecution Application, paras 40-41.

²⁴ *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges (2 September 2005), *inter alia*, paras 13, 15

RELIEF SOUGHT

26. For the foregoing reasons, the Defence respectfully requests the Chamber to deny the Prosecution Application.

27. In the alternative, were the Prosecution Application to be granted, the Defence respectfully requests the Chamber to order the immediate disclosure of the transcripts of interview of Witness 317 dated 7, 8, 9 August 2009, and of any other material in possession of the Prosecution relative to this Witness, pursuant to Rule 77, such as investigator's notes or information relative to the other members of the investigative team who looked into the events of Bogoro of 24 February 2003, such as their names. [REDACTED],²⁵ [REDACTED].²⁶

Respectfully submitted,



David HOOPER

Dated this 29 October 2009

At The Hague

²⁵ [REDACTED].

²⁶ [REDACTED].