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No.: **ICC-01/04-01/07**

Date: **16 April 2010**

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 Document

Defence Response to the *Notification écrite de l'Accusation concernant le report des témoins P-157 et P-238 à la fin de la présentation des éléments à charge*
(ICC-01/04-01/07-2024)

Source: Defence for Mr Germain Katanga

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

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Unrepresented Victims

**Unrepresented Applicants for
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REGISTRY

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. By his filing 2024 of April 16th 2010 '*Notification écrite de l'Accusation concernant le report des témoins P-157 et P-238 à la fin de la présentation des éléments à charge*' the Prosecutor makes written submissions in support of its intention, first declared on April 1st to place witnesses 157 and 238 to the end of the Prosecution's list of witnesses.¹
2. In its oral statement to the Chamber, notifying the parties of its intention, the Prosecutor stated 'The Prosecution would like to inform the Trial Chamber that we are moving two witnesses to the end of the order of appearance, and these are Witnesses 157 and Witness 238.'² The Defence submits that, as reflected in the wording of paragraph 8 of the Chamber's *Directions for the conduct of the proceedings and testimony in accordance with rule 140*,³ the Prosecution's intentions are subject to the authority and consent of the Chamber and that the present filing must be regarded as an application for leave to alter the order of witnesses and not as a *fait accompli*.
3. The Defence also notes that the Prosecution stated that it intended that witness 157 and 238 would appear 'after witness 28 who himself was shifted to the end'.⁴ The Defence understood that witness 28 had not been 'shifted to the end' but merely taken out of the established order of witnesses, given some security concern, to be called at a later time.⁵ Taken altogether, and with the proposal to call witness 219 early, these proposals constitute substantial changes in the order of the witnesses and will cause inevitable disruption to the preparation of the case by the Defence.
4. The Defence has filed a separate response in strong opposition to the Prosecution's application to call witness 219 early. The Defence acknowledges that different considerations arise in respect of this present application.
5. In respect of the application to place witnesses 157 and 238 to the end of the Prosecution list the Defence recognises that it is fully in the hands of the Court as to whether change in the ordering be permitted. A change to the extent requested, also taking into account the situation of Witnesses 219 and 28, is prejudicial to the Defence and disruptive of its preparations as it means putting to one side preparation that has been made and advancing instead witnesses due to be called later and consequently

¹ ICC-01/04-01/07-T-128-CONF-ENG ET 01-04-2010, page 63.

² *Idem*.

³ ICC-01/04-01/07-1665-Corr, 20 November 2009.

⁴ ICC-01/04-01/07-T-128-CONF-ENG ET 01-04-2010, page 64, line 2.

⁵ See, *inter alia*, ICC-01/04-01/07-2012-Conf, footnote 3, and ICC-01/04-01/07-2012-Conf-AnxA.

less prepared by the Defence. As the Chamber noted any changes ‘...should not handicap the preparation of the Defence teams which do not have many members’.⁶

6. Notice was given by the Prosecutor late - notice was first given at the very end of the last session. The Prosecutor has then chosen not to make the written submissions requested of him for a full two weeks. Consequently, the Easter recess has been a time of unnecessary uncertainty for the Defence, who are the most effected by these proposals.
7. However, the Defence recognises that the Prosecutor’s stated intention that he is likely not to rely on these witnesses at all, in the light of other evidence, is a significant factor, and one, which, in anticipation of it being given effect, will doubtless weigh heavily with the Chamber in its approach to the re-ordering of witnesses 157, 219 and even perhaps 28.
8. However, the Defence is concerned that there may be other, unstated reasons for the Prosecutor to consider deferring or abandoning those witnesses – particularly witnesses 157 and 28.
9. Witness 157 has given evidence in the Lubanga case where concerns were expressed as to his reliability and truthfulness. It is unclear whether the Prosecutor intends to include witness 28 among those he may consider abandoning. Witness 28’s credibility is also in issue. It was in respect to these issues of credibility that the Defence referred, on April 1st to « une importance réduite », now referred to out of context in paragraph 10 of the Prosecution’s present filing. The Defence in fact referred to those witnesses being ‘*considerably reduced and discredited from material that we’ve seen. And indeed, as we know, as one of them has already given evidence before ...another Chamber of this Court.*’⁷ Indeed substantial doubt has been thrown on the characterisation of witness 157 as a child soldier in the course of the *Lubanga* case and it is to be noted that the Prosecution in our case no longer relies on 157 with that characterisation. If there are unstated reasons why the Prosecution does not wish to call these witnesses in their established order, or at all, particularly if such reasons touch on the credibility of the witnesses, then the Defence submits that such should be the subject of strict and frank disclosure by the Prosecutor.
10. The Defence respectfully requests the Chamber to preserve the interests of the Defence in this matter by scrutinising the Prosecutor’s declared reasons for the change

⁶ ICC-01/04-01/07-T-128-CONF-ENG ET 01-04-2010, page 64 lines 15-16.

⁷ ICC-01/04-01/07-T-128-CONF-ENG ET 01-04-2010, page 69, line 23.

in the order in which witness 157 and 219 are to be called, and by allowing the Defence such time as may be necessary to adapt to any change in the order in which witnesses are called.

Respectfully submitted,



David HOOPER

Dated this 16 April 2010

At The Hague