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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

**Defence Response to Requête de l'Accusation aux fins d'ajout d'un Rapport de
l'Accusation relatif à P-268 à la liste des éléments à charge**

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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Defence Response

1. The Defence for Mr. Katanga (“Defence”) hereby responds to the *Requête de l’Accusation aux fins d’ajout d’un Rapport de l’Accusation relatif à P-268 à la liste des éléments à charge*, filed on 7 May 2010.¹ The Prosecution requests the Chamber to allow it to add a report to its list of incriminating evidence.
2. The Defence objects to the Prosecution’s request on two principal grounds: (1) the request to add incriminating evidence is made long past the deadline to submit all incriminating evidence; (2) the Prosecution seeks to introduce the report through the bar after the relevant witnesses have already concluded their testimony.

(1) Late request to add additional incriminating evidence to the list

3. The deadline for the Prosecution to produce its final list containing all incriminating evidence it intends to rely on in the proceedings against Mr. Katanga and Mr. Ngudjolo was 30 January 2009. When the Trial Chamber ordered the Prosecution to disclose to the Defence by 30 January 2009 the evidence on which it intended to rely at trial; the Chamber emphasised the importance of the Prosecution disclosing incriminating evidence by the scheduled time limit.²
4. In line with the Appeals Chamber’s criteria,³ only in exceptional cases has the Chamber allowed the Prosecution to add incriminating elements to this list after the deadline has passed.⁴ The Prosecution has to demonstrate that the

¹ ICC-01/04-01/07-2088-Conf-Exp. A public redacted version was filed on 12 May 2010.

² ICC-01/04-01/07-846-tENG, Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence), 23 January 2009, par 5 “Nonetheless, it is important that, by the scheduled deadline of 31 January 2009, the Chamber and the participants should be aware of the total number of items of incriminatory evidence on which the Prosecutor is intending to rely at the trial, and of the applications for redaction submitted by him.”

³ “Reasons for the ‘Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit 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, paras 9- 10.

⁴ Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to

delay in submitting incriminating evidence is for good cause and for reasons outside the Prosecution's control, as provided in Regulation 35(2) of the Regulations of the Court.⁵

5. In order for the Prosecution to demonstrate good cause for delay due to reasons outside its control, it must demonstrate that what came to light after the deadline was highly significant and relevant to the case and could not have come to light earlier through due diligence.⁶ It is submitted that in order to preserve the fairness of the trial for the accused, these must be the primary considerations. The Chamber will then also consider whether the material sought to be admitted contributes to a better understanding of the case and the establishment of the truth.⁷
6. The Defence submits that, in the present application, the Prosecution failed to meet these requirements. The Prosecution's application is made at a moment when the deadline is long overdue and the prosecution case is well advanced.
7. Importantly, the Defence notes that the Prosecution was already in possession of the information it presently seeks to admit long before the deadline had passed. The information concerns the date of P-268's departure from DRC.

Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 7.

⁵ Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, para. 2; ICC-01/04-01/07-1144, Décision relative à la requête urgente du Procureur aux fins d'autorisation d'utilisation d'une vidéo en tant qu'élément de preuve à charge (norme 35 du Règlement de la Cour), 18 May 2009, par 6: "La Chambre rappelle que la norme 35-2 du Règlement de la Cour prévoit que la prorogation d'un délai fixé, une fois ce dernier échu, n'est possible qu'à la condition que le participant qui en fait la demande prouve qu'il était incapable de présenter celle-ci dans le délai imparti pour des raisons échappant à son contrôle." Also, ICC-01/04-01/07-1143, Décision aux fins de communication de photographies à charge, 18 May 2009; and ICC-01/04-01/07-1336, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, para 7.

⁶ See, *inter alia*, ICC-01/04-01/07-1336, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, para. 25, where the Chamber held that a delay caused by ongoing investigations which could have been conducted earlier is not justified.

⁷ *Ibid.*, para. 30; also see: Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, par 5: "Pour autant, la Chambre considère que la déposition de ce témoin est pertinente, qu'elle est de nature à contribuer à une meilleure compréhension des débats ainsi qu'à la manifestation de la vérité." Also see: Décision relative à la requête urgente du Procureur aux fins d'autorisation d'utilisation d'une vidéo en tant qu'élément de preuve à charge (norme 35 du Règlement de la Cour), ICC-01/04-01/07-1144, 18 May 2009, para 7.

The Prosecution did not admit it earlier because it did not consider it relevant until it became aware, during the cross-examination of P-323, that the date of departure of P-268 from DRC may be in dispute. This in itself could be a ground for the Chamber to dismiss the Prosecution's request as it is an issue the Prosecution could easily have anticipated. Accordingly, the delay was not caused by reasons outside the Prosecution's control.⁸

8. In addition, the Defence submits that the information on its own is not relevant and does not contribute to a better understanding of the truth, particularly if the relevant witnesses are not offered an opportunity to comment on the report. The issue in dispute is whether P-323, who referred to a UPC soldier with the same name as P-268, was in fact referring to P-268 or another person with exactly the same name. This issue is relevant because P-268 testified under oath that he was a civilian, not a UPC soldier. P-323 places this UPC soldier in a location in DRC when the Prosecution claims P-268 was already out of the DRC. According to the Prosecution, the report it seeks to admit demonstrates this and, therefore, confirms that P-323 did not refer to P-268 but to a UPC soldier with the exact same three names.

9. Without further explanations from both witnesses, the Defence would invite the Chamber to decline to accept that the report concerned supports the Prosecution's proposed conclusion. Without further supporting evidence, it must, it is submitted, be viewed as highly unlikely that P-323 was referring to a different person who carries the exact same three names as P-268. Unless clarified by the witnesses concerned, the new information, therefore, only creates confusion and certainly does not shed conclusive light to the issue at hand. Therefore, standing on its own the report is not relevant to the case and undermines the Chamber's fair evaluation of the truth. Accordingly, on this basis alone, the Prosecution's request should be rejected.

⁸ Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, para 4: "Elle n'est pas pleinement convaincue de l'incapacité, pour le Procureur, de présenter sa demande de communication dans le délai imparti « pour des raisons échappant à son contrôle ». Elle estime plutôt que sa décision de recourir à ce témoin a été dictée par des considérations d'ordre stratégique qui ne s'inscrivent pas directement dans les prévisions de la norme 35 précitée." Also see: Décision relative à la requête urgente du Procureur aux fins d'autorisation d'utilisation d'une vidéo en tant qu'élément de preuve à charge (norme 35 du Règlement de la Cour), ICC-01/04-01/07-1144, 18 May 2009.

(2) Admission of evidence through the bar after the conclusion of testimony

10. The Defence submits that, not only does the Prosecution attempt to introduce this report long after the deadline of 30 January 2009, but also after the relevant issue arose in the proceedings. P-268 testified from 23 until 25 February 2010. As stated above, he asserted under oath that he was a civilian. The Prosecution did not produce the report concerned in the course of his testimony, apparently because it did not consider it relevant information, not knowing that the date of P-268's departure from the DRC could be in dispute. On 17 March 2010, P-323 testified in cross-examination about a certain UPC soldier who has the same names as P-268. During re-examination of P-323, the Prosecution did not produce the report, which it claims demonstrates that P-323 did not refer to P-268 but to another person who has the same names. Neither did the Prosecution confront P-323 with the information contained in the report, namely, that P-268 was out of the country when P-323 said a UPC soldier with the same names was in a place in DRC.

11. The Defence submits that, if the Prosecution is of the view that a piece of evidence contradicts a fact established in cross-examination, it should produce the relevant information at the relevant time, that is, immediately after the close of cross-examination. In that way, everyone, including the witness concerned, has a fair opportunity to respond to the new information. The Prosecution was already in possession of this report and has omitted to give any reason as to why it failed to produce it when it became an apparent issue in the proceedings. It is one thing for the Prosecution not to anticipate that the departure date of P-268 may become an issue in the proceedings, it is quite another thing not to use the relevant information when the issue was addressed. This deprives the Defence of the opportunity of dealing with this new information through the witness.

12. The Prosecution's failure to produce the report at the relevant moment is all the more surprising given that it was the Prosecution itself, during re-examination, asking P-323 to confirm that the person bearing the same name

as P-268 was living in a place in DRC in August 2008,⁹ which demonstrates that the Prosecution was already aware of the relevance of the information in proving the alleged status of civilian of P-268. The Prosecution should, at that time, have made clear to P-323, the Defence and the Chamber, the relevance of the question concerning dates and produce the report to demonstrate that at the date mentioned by P-323, P-268 had already left DRC. Despite having the opportunity to do so, the Prosecution failed to produce the report at the appropriate time.

13. The Prosecution is now seeking to introduce this report through the bar after P-268 and P-323 have both concluded their testimony. As previously noted, the Defence does not accept that the report suggests that P-323 was referring to a different person. On the contrary, the Defence considers it highly unlikely that there was a UPC soldier with the exact same three names as P-268. P-323 should have been confronted with the proposition that the person he was referring to was out of the country at the time he claims this person was at a location in DRC. The veracity of the Prosecution's proposition that there is another person with the same names as P-268 could have been established through the testimony of P-323 or P-268 but not merely on the report it is presently seeking to produce. P-323 may have been confused about dates or there may have been another explanation for his assertion that the person was in a location in DRC when, according to the Prosecution, he was outside the country. The Defence does not accept that the Prosecution's proposed conclusion is the only reasonable inference that can be drawn from the report. Without giving an opportunity to P-268 and P-323 to clarify these matters, the Defence submits that this report cannot be fairly admitted.

14. The admission of the report without dealing with the issue through or the Defence being afforded the opportunity to deal with this assertion through the relevant witnesses would create unfairness to the accused. The accused has a right to test the evidence. Otherwise, such information may distort the truth without knowing whether there is an explanation for the alleged contradiction. The Chamber has held that, in order to add new incriminating evidence after

⁹ ICC-01/04-01/07-T-118-CONF-ENG ET, dated 17 March 2010, page 55.

the deadline set, the obligations described under Articles 64(2) and 64(3)(c) of the Statute must be duly considered.¹⁰ In accordance with these obligations, the Chamber must ensure for each proposed new element of evidence that its addition does not cause any prejudice to the Defence.¹¹

15. Accordingly, if we were dealing with a situation where the prosecution acted with due diligence and missed highly significant and probative evidence, the Defence submits that the Prosecution should only be allowed to produce the report if it calls back P-268 and P-323 to ask further questions to establish whether P-323 was speaking about P-268 or another person. This would be essential for ascertaining the truth because only then can it correctly be established whether P-268 was a UPC soldier, contrary to his claim under oath that he was a civilian. However, in this instance it is submitted that the Prosecutor has not acted with the necessary diligence in relation to this evidence and the evidence is not of such a significant and conclusive nature as to justify a disruption in the expeditiousness of the trial.

Relief sought

16. On the above mentioned grounds, the Defence requests that the Chamber dismiss the Prosecution's request to introduce the proposed report on the basis that good cause has not been shown.
17. In the alternative, and only on the showing of good cause, admission should be subject to recall of the said witnesses.

¹⁰ Version publique expurgée de la « Décision relative à la requête du Procureur aux fins de mesures de protection et d'expurgation d'informations dans des éléments de preuve relevant de la règle 77 (témoins 132, 249 et 287) (ICC-01/04-01/07-1194) du 2 juillet 2009 (ICC-01/04-01/07-1265-Conf-Exp), ICC-01/04-01/07-1281, 08 July 2009, para. 8.

¹¹ Décision sur les témoins 002,030,323 et 373, ICC-01/04-01/07-1135, 14 May 2009, para. 2.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'D Hooper', with a long horizontal stroke extending to the right.

David Hooper Q.C.

Dated this 31st May 2010,
At The Hague, Netherlands