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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 Document

Defence Response to *Requête de la Défense de Mathieu Ngudjolo en vue de solliciter l'autorisation d'ajouter sur sa liste des pièces et de communiquer aux parties et participants des documents*

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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Other

1. The Defence for Mr Katanga (« Defence ») hereby responds to the *Requête de la Défense de Mathieu Ngudjolo en vue de solliciter l'autorisation d'ajouter sur sa liste des pièces et de communiquer aux parties et participants des documents en application des règles 78 et 79-4 du Règlement de procédure et de preuve, et de la norme 35-2 du Règlement de la Cour*, notified on 21 July 2011 (the « Motion »).¹

Background

2. The Trial Chamber determined the starting date for the presentation of the defence case on 21 March 2011² and ordered both defence teams to disclose their List of evidence and the evidence themselves by the 7 March 2011, 9am.³
3. The defence for Mr Ngudjolo disclosed its List of evidence, as well as the evidence on 4 March 2011,⁴ and the Defence for Mr Katanga disclosed them on 7 March 2011.⁵
4. On 30 June 2011, the Defence for Mr Katanga submitted a request pursuant to regulation 35 of the Regulations to vary the time limit for disclosure and to add 132 additional items to its Defence Evidence List.⁶ The Trial Chamber partially granted this request by its Decision on the Defence Request to Vary Time Limit for Disclosure of 132 items of documentary evidence of 5 July 2011.⁷
5. By its Motion of 21st July 2011, the defence for Mr Ngudjolo requests leave to use during its case, which will start on the 15th August 2011, certain documents which were not indicated on its List of evidence of 4 March 2011.
6. The Defence for Mr Katanga objects to the addition at this stage of two documents to List of evidence of the defence for Mr Ngudjolo: DRC-D03-0001-0375 and DRC-OTP-0028-0421.

¹ ICC-01/04-01/07-3082 and annex, 21 July 2011.

² ICC-01/04-01/07-2602, Ordonnance portant calendrier de la comparution des témoins a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 et de l'ouverture de la cause de la Défense de Germain Katanga, 1st December 2011.

³ ICC-01/04-01/07-2388, Decision on the "Prosecution's Application Concerning Disclosure Pursuant to Rules 78 and 79(4) ", 14 September 2010, and email from P. Baranes of 14 February 2011, RE: Date butoir pour recevoir divulgation des éléments de preuve de la Défense.

⁴ ICC-01/04-01/07-2756-Conf and annexes, Exécution par la Défense de Mathieu Ngudjolo de la « Décision relative à la requête de l'Accusation concernant la communication d'éléments par la Défense en application des règles 78 et 79-4 » (ICC-01/04-01/07-2388), 4 March 2011

⁵ ICC-01/04-01/07-2759-Conf and Annexes, Disclosure of the List of Defence Witnesses and of the Legal and Factual Issues that It Intends to Raise during its Defence Case, 7 March 2011.

⁶ ICC-01/04-01/07-3050-Conf, Urgent Defence Request to Vary Time Limit for Disclosure Under Regulation 35 of the Regulations of the Court", 30 June 2011,

⁷ ICC-01/04-01/07-3059, 5 July 2011.

Legal Grounds

7. Pursuant to its Decision on the Defence Request to Vary Time Limit for Disclosure of 132 items of documentary evidence, in analysing the Motion, the Trial Chamber ‘must first assess whether the application for extension of time limit is sufficiently motivated and justified’. The defence is therefore ‘under the obligation to demonstrate that there were ‘exceptional circumstances’ which prevented it from filing an application for variation of time limit before it lapsed.’
8. Nevertheless, the Chamber

may still allow documents to be added late, even if the criteria of regulation 35(2) of the Regulations for variation of time limits have not been met. However, before doing so, the Chamber must be convinced 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 is not prejudicial to the fairness of the proceedings, especially in terms of providing the opponent with adequate time to respond to the new material.⁸
9. The Defence submits that the two documents disputed were in the possession of the defence for Mr Ngudjolo before the deadline of the 7 March 2011, and that it has not demonstrated that there were exceptional circumstances which prevented it from adding them to its List of Evidence of 4 March 2011, or indeed from submitting a request to vary the time limit earlier.
10. And whilst the defence for Mr Ngudjolo indicates that the testimony of the co-accused’s witnesses reinforced its idea to use them,⁹ the significance of these documents was apparent prior to the testimony of Defence witnesses, for both documents mention Bogoro and/or the Accused,
11. The Defence further contends that even if the two documents may appear significant in some aspects, their late addition would be prejudicial to the Defence, especially in light of their low probative value.

⁸ ICC-01/04-01/07-3059 05-07-2011, paras 8, 9, 21.

⁹ Motion, paras 28-29.

12. More precisely, DRC-D03-0001-0375 is an excerpt of the UPC website, entitled '*Bunia s'est réveillé sous une tension très vive entre les troupes de l'UPC/RP et de l'UPDF*', dated 2 March 2003. It mentions attacks on Bogoro and Tchai on the 24th and 28th February 2003, by a coalition FAC, APC, Mai-Mai, FIPI, Interahmwe, among which there were UPDF elements.
13. This document is part of a batch of excerpts from the UPC website as of April 2004, disclosed informally on a CD by OTP on 24 June 2008, and re-disclosed formally by the Prosecution in Ringtail format on 24 November 2008 pursuant to Rule 77,¹⁰ with the following chain of custody: 17 February 2007: From NGO.
14. The defence for Mr Ngudjolo disclosed it to the Chamber, parties and participants on the 24th August 2010 for the cross-examination of DRC-OTP-P-0030. This document is not a new document, and the defence for Mr Ngudjolo should have included it in its List of 4 March 2011.
15. Furthermore, the defence for Mr Ngudjolo does not intend to call any witness from the UPC: it would then not be appropriate to introduce such a document from anyone who is not inherently linked to the UPC/the drafting of the article¹¹. This can be identified as a kind of propaganda article, which has little, if indeed no probative value.
16. In particular, the Defence underlines that it has never heard of an attack at Tchai on 28 February 2011 and even less with such a coalition. It is not part of the Prosecution case or the Confirmation Decision; also, no witness has mentioned such an attack, and the defence for Mr Ngudjolo has never put such a fact to any witness. It would then be prejudicial to the Defence to introduce such evidence in the case at this stage, while the probative value of the document is low, and its content not even an issue in the case.

¹⁰ Cf. ICC-01/04-01/07-772, Prosecution's Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 24 November 2008, Document DRC-OTP-0193-0296 mentioned in ICC-01/04-01/07-772-Conf-AnxA and B.

¹¹ See, for example, ICC-01/04-01/07-1665, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, 20 November 2010, para. 97 ("If there is an inherent correlation between an item of documentary evidence and a particular witness, the party calling that witness may introduce the item through that witness [...]); ICC-01/04-01/07-T-96-CONF-ENG CT (04/02/10), pp 1-10 (Trial Chamber : No direct link is required between evidence and the witness to whom it is presented, but there must be convergence between the two) ; ICC-01/04-01/07-T-206-CONF-ENG ET (19/10/10), pp 59-70(Trial Chamber : The witness said in his testimony, that he had not seen any written or signed documents at the relevant time. Whilst the elements of convergence do exist, they are less well-founded than in the case of DRC-OTP-P-0250. Admission of DRC-OTP-0029-0076 through DRC-OTP-P-0 219 denied).

17. For its part, DRC-OTP-0028-0421 is the typed PV of a meeting between a FRPI unit and DDR/MONUC dated 6 November 2003, partially illegible, mentioning *inter alia*, Mr Germain Katanga as President of the FRPI, Mr Ngudjolo among the Lendu leader of the FNI, and Dark, who seems to refer to a liaison agent at Bogoro.
18. The document is not signed. Its chain of custody is as follow: Sept 2004 (est.): From TGI Bunia to MONUC; Oct. 2004: From MONUC to OTP. The author is unknown. The document was disclosed by the Prosecution as incriminating evidence on 21 January 2009, and so the defence for Mr Ngudjolo was in possession of this document a long time ago and should have included it in its List of 4 March 2011.
19. Moreover, the Prosecution requested leave to admit it through the Bar,¹² but the Trial Chamber denied this request for lack of authentication.¹³ Given that the defence for Mr Ngudjolo does not intend to call any person whose name appears as a participant in this alleged meeting, it is inappropriate to tender the document through witnesses not inherently linked to the document¹⁴, who would not be able to authenticate it. Its prejudicial effect would then outweigh its probative value.

Relief sought

20. For the reasons mentioned above, the Defence respectfully requests the Trial Chamber to deny the defence for Mr Ngudjolo's request to add the documents DRC-D03-0001-0375 and DRC-OTP-0028-0421 to its List of Evidence.

¹² ICC-01/04-01/07-2290, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, 19 July 2010.

¹³ ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, paras 22, 23 and 36.

¹⁴ See footnote 11 *supra*, and accompanying text.

Respectfully submitted,



David HOOPER Q.C.

Dated this 9 August 2011

At London