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No.: ICC-01/04-01/07
Date: 28 November 2011

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 *Proposition du représentant légal du groupe des victimes enfants soldats quant à la comparution de témoins supplémentaires à citer par la Chambre*

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

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A. Introduction

1. On the 25th October 2011, with only the evidence of Mathieu Ngudjolo remaining as defence testimony, the Trial Chamber ordered that any remaining motions for the admission of evidence, through bar table or through witnesses called by the Chamber, be filed by the 21st November 2011, and that any response be filed by the 28th November 2011.¹ On the 11th of November 2011, the party driven oral evidence in the trial of Germain Katanga and Mathieu Ngudjolo drew to a close. On the 21st and 22nd November, two motions were notified, both from the legal representatives of victims.
2. The *Proposition du représentant légal du groupe des victimes enfants soldats quant à la comparution de témoins supplémentaires à citer par la Chambre* was notified on 22 November 2011. This motion requests that the Chamber call the authorities of the DRC and Uganda as witnesses.² The Defence notes that the motion was filed out of time and could be dismissed on this ground alone.³

B. Inadequate information to respond

3. In the request for relief, the legal representative does not specify which authority the Chamber should call, nor on which specific subjects they should testify. This is left completely in the hands of the Chamber. One is left with a mere hint of possible areas. This is by reference to an unreferenced discussion on the opposing theories of the prosecution and defence, which, misleadingly, does not appear to distinguish between the defence position of the first and second accused.⁴ And further, by reference to the potential knowledge of these states about the existence and situation regarding child soldiers, without clearly defining which aspects of their knowledge should be probed.⁵
4. It is difficult in such circumstances for the Defence to respond constructively. It has not been provided with sufficient elements. Therefore, in the event that the Chamber is minded to consider calling any state or state authority, it is respectfully submitted that the

¹ Email of 25 October 2011, entitled '*Informations relatives à la conduite de l'instance*', sent by the Legal Assistant of the Trial Chamber.

² ICC-01/04-01/07-3206, 22 November 2011.

³ See for instance ICC-01/04-01/07-478, Decision on the Defence's Applications for the Admission of its Late Filing and Leave to Appeal, 15 May 2008.

⁴ ICC-01/04-01/07-3206, para. 13.

⁵ ICC-01/04-01/07-3206, para. 18.

Defence should be afforded the opportunity to make observations on the Chamber's proposition before the Chamber finally decides on the matter.

C. Parameters of potential state evidence

5. At this juncture the Defence submits that, in the event that a state gives evidence there are two prerequisites. First, the topics on which that state testifies should be clearly circumscribed. Second, the subjects addressed should be limited to collateral matters which are not potentially incriminating.
6. With regard to the first condition, it is important to limit and define the scope of the evidence in order to protect the fairness of the proceedings. This would ensure that the Defence has adequate and clear notice of the issues to be addressed. Additionally, it is not at this late stage of the proceedings that all the issues which have been addressed during the trial can now be subject to a complete review in the light of the observations of the governments of Uganda and the DRC. This would place the accused in the position where he may have to file motions for the recalling of other witnesses, including Mr Katanga himself, and for the calling of new witnesses to counter new assertions. It is submitted that such a situation would not be compatible with the right to a trial without undue delay in terms of article 67(1)(c) of the Rome Statute.
7. As to the second condition, to allow incriminating evidence at this stage of the proceedings would also be contrary to the right of the accused to a trial without undue delay under article 67(1)(c) of the Statute, since the Defence would have to be given a proper opportunity to investigate, cross-examine and, if need be, to call further evidence.
8. So, when the legal representative refers to the knowledge of states with respect to child soldiers, in so far as this is meant to invite states to comment on the presence of child soldiers in the ranks of groups led by the two Accused, this should not be permitted.

Respectfully submitted,



David HOOPER Q.C.

Dated this 28 November 2011

At The Hague