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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**

Public Redacted Version

Defence Reply to 'Réplique de l'Accusation aux "Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)'"

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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**Victims Participation and Reparations
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Other

Introduction

1. The defence for Mr Katanga (“defence”) hereby responds to the prosecution’s filing ‘*Réplique de l’Accusation aux “Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)*” ICC-01/04-01/07-3379-Conf-Corr’,¹ the Chamber having requested that any response be submitted by June 17th.²
2. This reply is filed confidentially because it refers to identifying information of prosecution witnesses. A public redacted version will be filed as well.

Submissions

3. As yet no decision has been taken to change the mode of liability. It may be that the Chamber, in light of previous submissions made by the defence and in particular in the last filing 3379, may decide to provide the defence with further and better particulars of the facts and circumstances upon which a charge under Article 25(3)(d) can be sustained. Without those details, the defence, as previously submitted, is significantly and unfairly handicapped.
4. The defence is operating on a ‘reduced basis’ following the new legal aid scheme introduced by the Registry.³ It has no investigator or co-counsel at the present time. It has been unable to initiate further investigations. Without knowing the product of further investigations, the defence is not in a position to provide the Chamber with specific requests for recall of particular witnesses. Jean Logo, the defence ‘resource person’, is due in The Hague next week for preliminary discussions with the defence.
5. Concerning the prosecution’s observations, at paragraph 6, on the defence’s submission that the defence “may require the recalling of prosecution crime scene witnesses as to the accuracy of their identification of Ngiti or of particular Ngiti committing crime”, the defence makes the following observations.
6. Firstly, the prosecution observes that the defence did not identify which witnesses it would wish to recall. Indeed, the defence have difficulty in doing so at this stage as any

¹ ICC-01/04-01/07-3384-Conf-Red-Corr and ICC-01/04-01/07-3384-Red2, 12 June 2013.

² Mail from the Trial Chamber dated 12 June 2013.

³ *Je* one counsel and one legal assistant full time (or two legal assistants part time).

witness recall would necessarily have to be made in light of the investigations the defence sought leave of the Chamber to make. Indeed, without such leave, the Registry will not, or so it appears to the defence, grant it the necessary increased facilities. A request to recall or to present any further witness will not be made lightly.

7. The prosecution observes in paragraph 7 of its reply *‘que la Défense a eu l’opportunité d’interroger les témoins de l’Accusation - présents à Bogoro lors de l’attaque - sur l’identité des attaquants ainsi que de vérifier la fiabilité de cette identification. Ainsi est-ce le cas pour des témoins comme P-132, P-161, P-233, P-249 ou encore P-353’*. The defence submits that any previous questioning, or opportunity to question, any prosecution witness was done in the context of the then charge of perpetration through common plan theory.
8. It must be emphasised that once evidence has been given an accused is confronted by an inherent difficulty when the basis of a charge is subsequently changed, particularly to the extent proposed and when the evidence was given long ago. The trajectory and dynamic of the defence case is run, and addressing such issues piecemeal now has limited effect. A remedy to the problem cannot be found simply by giving an accused the opportunity to recall witnesses. In the case of this witness, and the others listed above, the evidence was given over three years ago.
9. In respect of the prosecution’s reference to the five prosecution witnesses listed above, the defence makes the following response.
10. In respect to witness P-132, the prosecution appears, as with the other witnesses referred to, to have taken the opportunity to bolster up their submissions in their closing brief. P-132 is not a credible witness. As submitted in the defence closing brief⁴ at paragraph 986, the contradictions in her evidence ‘[...] simply cannot be reconciled. The evidence of P-132 cannot then be safely relied on for the charges in question’. She spoke of ‘Lendus’ in a general way, stating that when she referred to Lendus, there was a mixture of Ngiti and Lendu.⁵ Even as to those who seized her, the witness could not distinguish between their ethnicities.⁶ Her account of her abduction and stay in ‘Yuda’s’ camp, and subsequent events, is beset with such striking contradictions that it would wrong to place any weight on it. However, the defence did not focus on those aspects of the ‘new’ case that have now

⁴ ICC-01/04-01/07-3266-Conf-Corr2, Second Corrigendum to the Defence Closing Brief, 23 April 2012.

⁵ DRC-OTP-P-0132, ICC-01/04-01/07-T-138-CONF-ENG ET (10/05/10), p. 77.

⁶ DRC-OTP-P-0132, ICC-01/04-01/07-T-139-CONF-ENG ET (11/05/10), p. 12.

come to the fore, such as who committed the crimes. To take an example, the witness identified the Lendu by their way of dressing: ‘some of them had small bottles whilst others were dressed in leaves’.⁷ No attempt was made by the defence to further explore that aspect. Did the Ngiti carry bottles, or were these Lendu, or Bira ? The defence did not ask such questions or otherwise explore the issue of ethnicity of the group, as it was not relevant to common plan. Nor did the defence construct its arguments in its final brief to address such an issue. However, in light of the nature of her evidence, the defence has no wish to recall such a witness. What could be the point, given her unreliability ?

11. Similarly with P-161. The prosecution reviews his evidence in their recent filing as if such evidence could be viewed as reliable, when, as demonstrated in the defence final brief (pages 101 to 109), his evidence was such that no reliance can reasonably be placed upon it. The defence notes again that aspects of his evidence were simply not gone into as they were not viewed as particularly significant at the time. For example, his evidence of the attack on the Bogoro Institute – a key event in many respects – was subject to some questioning but not to the extent that it would be now.⁸ However, given the extent of his unreliability and contradictions the defence, again, do not see any purpose served in seeking his recall, particularly given his plain prejudice to the accused.⁹

12. P-233 was, as the prosecution observes, ‘*contre-interrogé par la Défense sur l’identité des assaillants et l’implication des Bira*’.¹⁰ Indeed P-233 described the enemies as those who had come from the locality where the Biras were living, and believes that they were Biras in civilian clothing.¹¹ He later learnt that the Bira had ambushed people fleeing Bogoro.¹² He also stated that he had not seen any Ngiti in the earlier attacks – those of January 2001 and August 2002. The defence notes that it made little mention of him in its final brief - he appears essentially only at paragraphs 869 and 900 - which illustrates the relative lack of importance attached to evidence which, with the proposed changes, becomes far more relevant.

⁷ DRC-OTP-P-0132, ICC-01/04-01/07-T-139-CONF-ENG ET (11/05/10), p. 13.

⁸ DRC-OTP-P-0161, ICC-01/04-01/07-T-112-CONF-ENG ET (04/03/10), p. 72.

⁹ The Chamber will recall he made up a completely fictional account of his dealings [REDACTED] with the accused. Cf. ICC-01/04-01/07-T-111-CONF-ENG, p. 58 and ICC-01/04-01/07-3266-Conf-Corr2, paras 394-395.

¹⁰ ICC-01/04-01/07-3384-Red2, para. 7, p. 6.

¹¹ DRC-OTP-P-0233, ICC-01/04-01/07-T-83-CONF-ENG CT (26/11/09), p. 59 ; DRC-OTP-P-0233, ICC-01/04-01/07-T-88-CONF-ENG ET (01/12/09), pp 22-23 (The witness saw attackers arrive from the Bira collectivite at approximately 0600 hours. They had dogs and were mainly carrying machetes and spears (i.e. traditional or edged weapons).)

¹² DRC-OTP-P-0233, ICC-01/04-01/07-T-88-CONF-ENG ET (01/12/09), p. 27.

13. The defence would seek to meet the witness - in the presence of the prosecution of course - before deciding whether in fact to seek his recall. The issues the subject of such a meeting would be those that concern any change or proposed change of mode of liability. Aside from identifying whether the re-calling of a prosecution witness is necessary, a meeting is necessary to help guard against the risk of self-incrimination by an accused that the recalling a prosecution witness entails.
14. P-249, as submitted in the defence final brief,¹³ ‘[...] gave very limited evidence. By her own account, she had very little opportunity to view, or to have knowledge of, what was happening at Bogoro.’¹⁴ Her identification of assailants as being Ngiti was weak, saying she could tell that they were Ngiti because “Ngiti are small people and dirty.”¹⁵ She did not know the ethnicity of those that raped her, but could say that they were Ngiti because they were small in stature.¹⁶ She did not identify Yuda, despite the alleged prominence of his role in her account. Again, cross-examination as the identity of her assailants was limited as not seen as significant in the context of the common plan, and her vulnerability as a witness was respected. Her evidence generally was unreliable. The defence would not wish to recall her.
15. P-353 *‘a été interrogée par la Défense sur un homme dont elle avait dit qu’il donnait les ordres et sur deux protagonistes au camp ngiti de Gety [...]’*¹⁷ Again, the defence bore in mind her relevance to the core matters in the case as it then stood, and her vulnerability.¹⁸ The defence may have questioned her more had the charge been based on 25(3)(d). Her evidence touching on common plan was very limited. However, she could not identify the attackers, nor her assailants or abductors,¹⁹ despite spending, allegedly, several months with them - other than “[...] they were among the assailants, the attackers who caught us in Bogoro.”²⁰ Her account is deeply flawed. It was reviewed, very briefly, at paragraphs 988-989 of the final brief. The defence see no proper purpose being served by her recall.
16. The prosecution observes that regardless of whether the defence questioned such or such prosecution witness on the identity of the attackers ‘it had the opportunity to do so’.²¹ That comment reflects a failure to grasp the essence of the problem confronting the accused. At

¹³ Her evidence was reviewed at paragraphs 950-959, and 987.

¹⁴ ICC-01/04-01/07-3266-Conf-Corr2, paragraph 959.

¹⁵ DRC-OTP-P-0249, ICC-01/04-01/07-T-135-CONF-ENG ET (04/05/10), pp 46-47.

¹⁶ DRC-OTP-P-0249, ICC-01/04-01/07-T-135-CONF-ENG ET (04/05/10), pp 41, 50.

¹⁷ ICC-01/04-01/07-3384-Red2, para. 7, pp. 5-6.

¹⁸ DRC-OTP-P-0353, ICC-01/04-01/07-T-213-CONF-ENG ET (04/11/10), pp 70-71.

¹⁹ DRC-OTP-P-0353, ICC-01/04-01/07-T-215-CONF-ENG ET (08/10/11), p. 59.

²⁰ DRC-OTP-P-0353, ICC-01/04-01/07-T-213-CONF-ENG ET (04/11/10), pp 62-63.

²¹ ICC-01/04-01/07-3384-Red2, paragraphs 7 and 9.

the time the prosecution witnesses were called, neither the accused, nor any party, nor the judges themselves, appreciated that the focus of the case was not to be Katanga's common plan with Ngudjolo, but his knowing contribution to a group's criminal purpose, thereby effecting a change of narrative and a consequent shift in the evidential focus. An opportunity to ask any question under the sun is no benefit without knowing the focus of the case and the accused's defence to it.

17. In respect of other crime scene witnesses, the defence briefly reviews the position as follows.

18. P-268 was caught and put in the school for the night.²² He is an example of a witness that arguably had implicated Lendu in his original pre-trial statements to a greater extent than Ngiti. While there was some aspect of that in his evidence (he referred to Lendu and to being taken before the 'chief' in the morning who was Lendu) – it is likely that more could have been asked of him relating to the Lendu in the context of the Bogoro Institute. It was irrelevant to the then charge of common plan. He was questioned about the presence of Bira – but again only to a limited extent. The defence would seek to meet him, in the presence of the prosecution, before deciding whether to seek his recall.

19. P-323 was a UPC soldier at the camp²³ who spoke in a general manner as to the attackers and was not specifically questioned as to any particular groups ethnicity, very little attention being focused on that aspect of his evidence, which was reviewed briefly by the defence in its final submissions at page 291. The defence would seek to meet him, in the presence of the prosecution, before deciding whether to seek his recall.

20. P-287 spoke very generally: "the attackers were Lendu, Ngiti, and Bira combatants or fighters" and 'I cannot distinguish between the Lendu, the Ngiti, and the Bira when I see them. I know that it was the Lendu and the Ngiti on that day, because they always came to attack us.'²⁴ She said 'They were speaking Lendu, Ngiti.'²⁵ She made no other reference to Ngiti and was no more specific than that, except that later she met their chief and could see that he was of Lendu origin.²⁶ Also that those she met at that later stage [...] 'I think

²² DRC-OTP-268, ICC-01/04-01/07-T-107-Red2-ENG CT (24/02/10), pp. 16, 40-41, 53 ; DRC-OTP-268, ICC-01/04-01/07-T-108-Red2-ENG CT (25/02/10), p. 6 (He spent the night on the day of the attack in the first classroom of the Bogoro Institute).

²³ DRC-OTP-323, ICC-01/04-01/07-T-116-Red-ENG (15/03/10), pp 70-72.

²⁴ DRC-OTP-P-0287, ICC-01/04-01/07-T-130-CONF-ENG ET (20/04/10), p. 61.

²⁵ DRC-OTP-P-0287, ICC-01/04-01/07-T-129, p. 30.

²⁶ DRC-OTP-P-0287, ICC-01/04-01/07-T-129-CONF-ENG ET (19/04/10), p. 40.

that they were Lendus because they were the ones who had taken control of the area'.²⁷
The defence would not seek her recall.

21. In respect of the prosecution's observations at paragraphs 17 to 19, as to the defence's indication that it may seek the recall of defence witnesses, the defence does not limit its interest to events at Bogoro itself, but will address other issues, most of which have been listed in defence filings 3369 and 3379, including events that preceded Bogoro, such as Nyankunde. The fact that such witnesses have previously given evidence, including evidence on specific areas that are currently of particular interest, does not mean that their potential as witnesses has been exhausted. Nor is it a sufficient bar to their recall that they have been questioned on some or any of those subjects listed in the defence filings. It is only in light of future investigations that the defence will know whether or not in fact to seek their recall and such recall will only be justified by the relevance of their proposed testimony.
22. Where the defence seek to call or recall a defence witness, and in response to the concerns expressed in paragraph 17 and 19 of the prosecution's reply, the defence volunteers, it having no duty to do so, to provide the Chamber, prosecution and victim's representatives with a written statement indicating the proposed testimony. This equally applies, in response to paragraph 25, to any new defence witnesses the defence, after investigation, may seek to call. In addition, the defence will be amenable to video link testimony being taken where this is appropriate.

Respectfully submitted,



David HOOPER Q.C.

Dated this 17 June 2013
At The Hague

²⁷ DRC-OTP-P-0287, ICC-01/04-01/07-T-129, p. 53.