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

Date: 5 August 2013

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 Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*

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 Applicants for
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**The Office of Public Counsel for
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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The defence for Germain Katanga (“defence”) hereby submits its observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*.¹
2. This filing is submitted confidentially since it refers to the locations of interview of protected prosecution witnesses. A public redacted version will be submitted as well.

Procedural Background

3. On 21 November 2012, the Trial Chamber notified the parties and participants that the mode of liability under which Germain Katanga stands charged is subject to legal recharacterisation on the basis of article 25(3)(d) of the Statute, pursuant to Regulation 55 of the RoC.²
4. On 26 June 2013, the Trial Chamber issued the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, by which it authorised the defence to conduct further investigations on the new mode of liability envisaged against Mr Katanga.³
5. In its decision 3388, the Chamber observed:

‘[...] As already stated by the Chamber, echoing words from the 27 March Judgment on Appeal,⁴ it may indeed be that the narrative of facts and circumstances, as based on the newly proposed legal characterisation, is markedly different from the narrative given by the Pre-Trial Chamber in the Confirmation Decision. The Chamber therefore fully accepts that in the light of this new account of the facts, the Defence might consider it necessary to expand on certain aspects of the case file which were not considered to be of paramount importance in the initial legal characterisation.⁵ [...]’⁶
6. The Chamber identified in particular (at para. 58) ‘the following subjects to be of particular relevance for the possible re-characterisation of the mode of liability: (1) the attack on Nyankunde and/or other attacks prior to the attack on Bogoro, (2) the

¹ ICC-01/04-01/07-3388, 26 June 2013.

² ICC-01/04-01/07-3319-tENG/FRA, p. 29.

³ ICC-01/04-01/07-3388.

⁴ ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", 27 March 2013, para. 58.

⁵ ICC-01/04-01/07-3371-tENG, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), 15 May 2013, para. 17.

⁶ ICC-01/04-01/07-3388, para. 56.

identification of the perpetrators of the crimes, and (3) the nexus between the weapons supplied to the Ngiti combatants and the crimes committed in Bogoro.’

7. Consequently, at the defence request, Chamber authorised the defence to interview three witnesses called by the prosecution, P-233, P-323, and P-268 [REDACTED], in the presence of the prosecution, in order for the defence to determine whether it would be necessary to recall them, and on which topics.⁷
8. The Chamber ordered the defence to submit by the 29th of July 2013 (extended to 5th August)⁸ its first list of witnesses – namely those prosecution or defence witnesses whose recall was sought, and by the 17th of September 2013 its final list of witnesses and evidence.⁹

Submissions

9. The defence conducted a mission to the Democratic Republic of Congo (“DRC”) at the end of July 2013, in order to meet, and question further, the three prosecution witnesses - P-323, P-233, and P-268 - on particular issues that the defence identified as areas of relevance to the Regulation 55 proposed change of mode of responsibility.
10. It had been intended that Counsel Andreas O'Shea would lead the defence mission with Sophie Menegon but, just days before the mission was due to commence, Mr O'Shea suffered a family bereavement. Given the degree of organisation entailed in presenting and meeting the witnesses, and the time limits set by the Chamber, the defence decided to press ahead with the mission in any event and Sophie Menegon met with three prosecution witnesses, P-323, P-233 [REDACTED], and P-268 [REDACTED], in the presence of the OTP representative, Krisztina Varga.
11. The defence extends its thanks to the Registry, the VWU and the OTP in facilitating the mission, and the DRC field office in securing the safety of that mission.
12. While there were undoubtedly areas of further and relevant information provided by these three identified witnesses, and particularly P-323, that could assist both the Chamber

⁷ ICC-01/04-01/07-3388, paras 36, 59.

⁸ ICC-01/04-01/07-3392, *Ordonnance autorisant une prorogation de délai*, 12 July 2013.

⁹ ICC-01/04-01/07-3388, p. 32.

and the accused, the defence does not seek the recall of these witnesses nor that of any other prosecution witness.

13. In conducting the mission, the difficulties posed to an accused by post-trial questioning of prosecution witnesses became even further apparent to the defence. Not least among them being that such questioning takes place separate and distinct from the trial process. Issues relating to the new mode of liability, that would normally be pursued in the course of the trial, become difficult to deal with when isolated from the rest of a witness's evidence. A further matter, that became ever more apparent, was the extent of some of the issues and the impracticality of dealing with them by the *ad hoc* recall of a particular prosecution witness. The defence are also concerned that witnesses who are prosecution witnesses could be recalled at the behest of the defence with no clear determination as to the issues the prosecution could, in their turn, choose to put to a recalled witness. It would be a risk, and probably an unwise one, for a defence to seek recall of a prosecution witness in such circumstances.
14. The defence has reviewed the position in respect of the three detained defence witnesses. The witness D2-350 has been very unwell since he gave evidence and has suffered considerable memory loss and some mental confusion. It is not proposed to seek his recall. It is not thought that D2-236 is in a position to further assist on the issues at hand. In respect of D2-228, the defence met with him but did not have time to conclude the interview and further time will be required before deciding whether or not to seek his recall. In any event, any such request for recall will necessarily be made in light of the availability of other defence evidence or material, the difficulties of obtaining which are dealt with in the next paragraph.
15. In respect to defence witnesses, for which leave to recall may be sought, the defence are unable to meet the requirement to name them by today as required by the Chamber's decision of 26 June 2013. As with all future, potential defence witnesses, the defence have been handicapped by the current, extreme, security difficulties pertaining in Ituri and North Kivu, rendering investigations either extremely difficult or impossible to conduct.
16. At present, no investigations can be conducted in or around Walendu Bindi, Beni, or Goma. Despite Mr Logo being present in Bunia for several weeks, very limited contact with witnesses has been made. This applies as much to those defence witnesses who have

given evidence, but whose re-attendance may be sought, as to new witnesses relevant to the issues in hand.

17. The defence is required, by the Chamber's decision 3388, paragraph 62, to "submit to the Chamber, by 17 September 2013, the final list of all of the persons, who, in its view, could potentially provide useful information and new documentary evidence which it would like to tender during the proceedings." The defence is endeavouring to effect further missions and investigations and will report to the Chamber on their progress in due course.

Respectfully submitted,



David HOOPER Q.C.

Dated this 5 August 2013

At London