

**Cour
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**International
Criminal
Court**

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TRIAL CHAMBER II

Before: Judge Bruno Cotte, President
Judge Fatoumata Dembele Diarra

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Second Application for Extension of Time Limit Pursuant to
Regulation 35 to Submit a Table of Incriminating Evidence and related material in
compliance with Trial Chamber II "Order concerning the Presentation of
Incriminating Evidence and the E-Court Protocol"**

Source: Office of the Prosecutor

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

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Introduction

1. Trial Chamber II has ordered the Prosecution to file a Table of Incriminating Evidence ("Table").¹ It originally directed that the Table be filed by 3 April 2009. It subsequently granted the Prosecution's Application for an extension of time and authorised the filing of the Table by 4 May 2009.²

2. The Prosecution herein asks that the Chamber vacate the date currently set for filing the Table and that it not set a date until after it decides the Prosecution's pending Application for Leave to Appeal. Counsel for the Accused Mathieu Ngudjolo Chui does not oppose this request. The Defence for Germain Katanga do not agree that the Prosecution be granted a delay in the filing of the document pending the decision on whether it be granted leave to appeal. In the current circumstances it is uncertain when the Trial Chamber will be able to render such a decision. The Defence are concerned at the delay that may result. The Defence need the document in order to prepare the case. The Defence cannot see what prejudice the Prosecution will incur by producing the document. However, the Defence for Germain Katanga recognises that this is a complex and important document that may require some further time in order for the Prosecution to produce the best document it can. For that reason the Defence agrees, subject to the Chamber's view, that the Prosecution be allowed to submit the document no later than the 25th May next.

3. The 13 March 2009 Order directing the Prosecution to file the Table is the subject of a pending Application for Leave to Appeal, filed 23 March 2009. The Application presents serious issues concerning the requirement that the Prosecution create a document that analyses in depth and great detail all its

¹ Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", ICC-01/04-01/07-956, pp. 17-18 ("Order").

² Decision on the Prosecution's Application for Extension of Time Limit to Submit a Table of Incriminating Evidence and Related Material, ICC-01/04-01/07-1017. See also Prosecution's Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, ICC-01/04-01/07-969.

incriminating evidence, link every piece of evidence to every alleged fact and to every element of each confirmed charge including to the modes of liability, all for the convenience of the Chamber and the two Accuseds. The Prosecution's application addresses the breadth and nature of the ordered Table as well as the timing of its production.

4. The Chamber has not yet issued a decision on the Prosecution's Application and it will not be feasible to provide a decision by 4 May.
5. If the Prosecution is required to produce the table before the Chamber issues its decision on the pending Application, the production will render the Prosecution's Application moot. The Chamber thus will have deprived the Prosecution of its right to a full and fair judicial consideration of legitimate challenges to the underlying Order. It will also have deprived the Appeals Chamber of the right and ability to consider issues on which appeal might otherwise have been granted.
6. The extension will not cause prejudice to the Defence. First, production of the analytical table in no way substitutes for disclosure of the evidence. The Defence has had the vast majority of the incriminatory evidence for many months and has been fully able to prepare for trial. Second, though the trial is currently scheduled to begin on 24 September and the Prosecution strongly favors that such calendar is respected, it is not certain that trial can begin on the scheduled date. The Chamber also has not decided a pending admissibility challenge, resolution of which is itself likely to be appealed, and that appeal will likely postpone the trial proceedings. Third, if the Chamber denies the pending Application for Leave to Appeal within a reasonable time, the Defence still will have ample opportunity to use the Table before the start of trial.

Procedural Background

7. On 10 February 2009, Germain KATANGA filed a motion challenging the admissibility of the case.³
8. On 13 March 2009, Trial Chamber II (“Chamber”) ordered the Prosecution to submit the Table.
9. On 23 March 2009, the Prosecution filed an Application for leave to appeal the 13 March Order.⁴ That Application remains pending.
10. On 27 March 2009, the Chamber set 24 September 2009 as the first day of trial.⁵
11. On 3 April 2009, the Chamber granted the Office of Public Counsel for Victims (OPCV) an extension until 29 April 2009 to file observations regarding a currently pending admissibility challenge filed by Germain KATANGA.⁶

Submissions

12. The Chamber has not ruled on the Prosecution’s application for leave to appeal. If the Prosecution were to file the Table before the Chamber rules on the application, its action will effectively render moot the requested appeal. The Prosecution believes that the Application presents serious issues arising under the Statute and Rules that go to the heart of the roles and rights of the parties. It is important that the Chamber not thwart the ability of the Prosecution to seek leave and to have its application seriously addressed by requiring production and thereby rendering moot the appeal application.

³ ICC-01/04-01/07-891-Conf-Exp.

⁴ Prosecution’s Application for Leave to Appeal the “Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol”, ICC-01/04-01/07-982 (“Application for leave”).

⁵ Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve), ICC-01/04-01/07-999.

⁶ ICC-01/04-01/07-1019-Conf.

13. Second, though the Prosecution shares the Chamber's desire that trial begin on 24 September, it also notes that the admissibility challenge is still pending and indeed has not yet been fully briefed.⁷
14. While impossible to predict with certainty that the decision on admissibility will be appealed, it is reasonable to assume that an appeal will follow. As noted in the Prosecution's Application for Leave to Appeal, a decision on admissibility is appealable automatically and without leave of the Chamber.
15. The fact that there is the possibility of delay because of a likely admissibility appeal could have serious consequences for the Prosecution. Once the Table is filed the Prosecution's ability to substitute or add evidence is restricted. That restriction does not similarly apply to the Defence. For that reason, it would be unfairly prejudicial to the Prosecution's interest to require production of the Table several months before the start of the trial.
16. The foregoing sets out the reasons why an extension is appropriate. As to the timing of the production of the Table, the Prosecution requests that the Chamber vacate the date on which the Table must be submitted and that it postpone a decision setting a new date until there is greater clarity as to whether the trial is likely to begin on 24 September.
17. The requested extension would permit the Chamber to consider fully the pending Application for Leave to Appeal and issue a decision. It would allow the Prosecution to complete the task with greater certainty that the final product is complete and accurate. It would also permit production of the

⁷ On 3 April 2009, the Chamber granted the Office of Public Counsel for Victims (OPCV) an extension until 29 April 2009 to file observations regarding the admissibility challenge, ICC-01/04-01/07-1019-Conf. The Prosecution and Defence may thereafter respond to the OPCV filing. Thus, final briefing on the admissibility matter will not be concluded before mid-May 2009.

Table “sufficiently in advance of the commencement of the trial” under the current schedule. In that regard, the Prosecution reminds the Chamber that the Table does not offer any new proof, but merely analyses all the evidence that was already disclosed to the Defence.

Conclusion

18. For the foregoing reasons, the Prosecution requests that the Chamber vacate the date currently set – 4 May 2009 – for the production of the Table. The Prosecution further requests that the Chamber defer setting a new date for production until such time as it can reasonably determine when trial is likely to start.



Luis Moreno-Ocampo, Prosecutor

Dated this 28th day of April 2009

At The Hague, The Netherlands