



Original: English

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

Date: 17 August 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, President
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

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

Public
**with Annexes A and B – Confidential, *ex parte*, only available to the Office of the
Prosecutor and the Defence**

**Prosecution's Application to add to the List of Incriminating Evidence the
transcript and translation for video DRC-OTP-1042-0006 and to rely upon the
video's new material pursuant to Regulation 35**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for the Defence of Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Vincent Lurquin
Mr Jean Chrysostome Mulamba Nsokoloni
Ms Flora Mbuyu Anjelani
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Mr Jean-Louis Gilissen
Mr Joseph Keta

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Office of the Prosecutor ("Prosecution") seeks permission from Trial Chamber II ("Chamber") to add to its List of Incriminating Evidence ("List") the transcript and translation related to video DRC-OTP-1042-0006 and to rely as incriminatory evidence upon new material contained in video DRC-OTP-1042-0006, pursuant to Regulation 35 of the Regulations of the International Criminal Court ("Court").

Request for Receipt of Annexes as Confidential

The Prosecution requests that Annexes A¹ and B² attached to this filing be received by the Chamber as confidential, *ex parte*, only available to the Office of the Prosecutor and the Defence, as they relate to evidence which the Prosecution seeks to add to the List.

Background

1. On 23 January 2009, the Prosecution was ordered to disclose all incriminating evidence to the Defence by 30 January 2009 ("Order").³
2. In compliance with the Order, the Prosecution disclosed to the Defence, *inter alia*, 24 videos as incriminating evidence prior to 30 January 2009. Additionally, on 18 May 2009, the Prosecution was permitted to add video DRC-OTP-0155-0004 to its List,⁴ which had been previously disclosed on 20 June 2008 pursuant to Rule 77⁵ and later as incriminating evidence on 5 May 2009.⁶
3. On 8 June 2009, the Prosecution received video DRC-OTP-1042-0006 from Witness 444, who was interviewed on 20 and 21 July 2009. Witness 444

¹ Transcript of video DRC-OTP-1042-0006. The transcript has ERN DRC-OTP-1046-0240.

² Translation of the transcript of video DRC-OTP-1042-0006. The translation has ERN DRC-OTP-1047-0005.

³ ICC-01/04-01/07-846.

⁴ ICC-01/04-01/07-1144. See further Prosecution's Urgent Application to be Permitted to Present as Incriminating Evidence a Video Previously Disclosed to the Defence Pursuant to Rule 77 [Regulation 35], ICC-01/04-01/07-1128.

⁵ Pre-confirmation Rule 77 Package 17.

⁶ INCRIM Package 34. See further Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 5 May 2009, ICC-01/04-01/07-1110.

confirmed that some of the footage contained in video DRC-OTP-1042-0006 was provided by Witness 2, who was called to testify in the proceedings of the *Prosecutor v. Lubanga*, and who is in a position to comment upon the contents of this video as well as the similar incriminating video DRC-OTP-0155-0004. On this basis, the Prosecution confirms that it will not seek to add the witness statement of Witness 444.⁷

4. On 30 June 2009, the Prosecution sought to include video DRC-OTP-1042-0006 on the List,⁸ and confirmed that a request would be made to add the transcript and translation to the List once they were completed.⁹
5. As previously explained, the Prosecution was made aware of the existence of P-444 during an interview with Witness 30 on 20 February 2009. The Prosecution was only able to make contact with Witness 444 on 5 May 2009, after which the Prosecution received video DRC-OTP-1042-0006 from Witness 444 on 8 June 2009.¹⁰
6. On 27 July 2009, Trial Chamber II (“the Chamber”) allowed video DRC-OTP-1042-0006 to be added to the List in so far as it contains identical material to previously disclosed video footage, because it is of superior video and audio quality.¹¹
7. However, the Chamber stated that to admit new evidence it would require the Prosecution to demonstrate either “that the new evidence is more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case.”

⁷ The Prosecution is in the process of finalizing a request to disclose the statement of witness 444 pursuant to Rule 77.

⁸ ICC-01/04-01/07-1260.

⁹ See ICC-01/04-01/07-1336, para. 4: Trial Chamber II referred to the electronic correspondence with the Prosecution on 7 July 2009.

¹⁰ ICC-01/04-01/07-1260, para. 12.

¹¹ ICC-01/04-01/07-1336, para.20.

The Chamber further indicated that the Prosecution would need to explain “how the new evidence relates to its overall evidentiary case and the manner in which it proposed it will be entered into evidence during the trial.”¹²

8. The Chamber indicated that as it had not been provided with the transcript and translation of video DRC-OTP-1042-0006 it was not in a position to evaluate whether the new evidence was either more compelling than previously disclosed evidence or brought to light a significant new fact. In those circumstances it did not accept the submission of new material contained in video DRC-OTP-1042-0006.¹³
9. The Prosecution hereby submits as confidential Annexes A and B to this filing, the recently completed transcript and translation for video DRC-OTP-1042-0006.¹⁴

Application pursuant to Regulation 35

10. The Prosecution has reviewed the translation of video DRC-OTP-1042-0006¹⁵ and compared it with the translation of video DRC-OTP-0155-0004¹⁶ in combination with a review of the video footage contained in both videos.
11. The Prosecution submits that video DRC-OTP-1042-0006 contains additional video footage, not found in DRC-OTP-0155-0004 or any other incriminatory video on the List, which is more compelling than previously disclosed video footage. The Prosecution seeks that this new footage (and the transcript and translation for video DRC-OTP-1042-0006) be used primarily as incriminatory evidence to support its charges regarding the use of child soldiers by the accused Mathieu Ngudjolo and Germain Katanga. The Prosecution also seeks

¹² ICC-01/04-01/07-1336, para. 30.

¹³ ICC-01/04-01/07-1336, paras. 31-32.

¹⁴ The translation of the video and its registration as evidence was completed in the week of 10 August 2009.

¹⁵ DRC-OTP-1047-0005.

¹⁶ DRC-OTP-1043-0012.

that it be used to demonstrate the senior role and authority of Mathieu Ngudjolo within the relevant time period in 2003, and his role as the most senior Lendu commander in overall command of the Lendu child soldiers shown in this video footage.

12. The Prosecution observes that this additional video footage contains images of armed young Lendu child soldiers, under the age of 15 years, present in Bunia in May 2003.¹⁷ Moreover, the footage of the Lendu child soldiers must be seen together with the additional video footage (and translation of DRC-OTP-1042-0006), which demonstrate that these child soldiers were members of forces under the command of Mathieu Ngudjolo in Bunia.¹⁸

13. The Prosecution refers especially to the video footage of an armed Lendu child soldier shown at timestamp 01:21:30 to 01:22:12, who is carrying a gun which is almost of the same height as him.

14. From the translation of this video, the Prosecution will argue that this young child soldier is a Lendu combatant based in Bunia at the relevant time period. At 01:21:37 the child soldier states that he wants the FAC forces to come to Bunia.¹⁹ He is surrounded by other combatants, one of whom standing by him similarly states: “Et je veux euh...que les FAC viennent, que les munitions arrivent. Nous combattons pour tout le monde et pas seulement **pour nous les Lendu**. Nous voulons qu’il y ait la paix, afin que tout le monde puisse circuler librement. Plus jamais l’UPC.” [Emphasis added].²⁰ Prior footage at timestamp 01:17:15 indicates that the subsequent footage with this child soldier was filmed in Bunia on 9 May 2003.²¹

¹⁷ In this regard, the Prosecution refers to the additional footage of young armed child soldiers found at 00:04:52, 00:06:04 to 06:20; 00:06:52; 00:11:54; 00:24:48; 00:43:27 to 00:44:37; 01:21:30 to 01:22:12; 01:37:03 to 01:38:08.

¹⁸ The Prosecution refers to additional footage at 01:37:03 to 01:38:08; and from 01:38:21 to 01:46:25.

¹⁹ DRC-OTP-1047-0005, p. 41, line 1470: “Je veux que les FAC viennent ici”.

²⁰ DRC-OTP-1047-0005, p. 41, lines 1472-1474.

²¹ DRC-OTP-1047-0005, p. 39, lines 1386-1387.

15. The Prosecution submits that the translation of DRC-OTP-1042-0006 of the additional video footage in combination with the visual footage, demonstrates that this Lendu child soldier and other young child soldiers depicted in DRC-OTP-1042-0006 (and DRC-OTP-0155-004) were members of forces under the command of Mathieu Ngudjolo at Bunia in May 2003.

- a. First, video DRC-OTP-1042-0006 contains footage of commanders known to be within forces of the FNI-FRPI and under the command of Mathieu Ngudjolo at Bunia in May 2003. The Prosecution refers in particular to the new footage of the well-known senior Commander²² shown with young Lendu child soldiers and combatants at 01:37:03 and 01:38:09, and referred to by name at line 1847 of DRC-OTP-1047-0005, after a timestamp indicating a date of 9 May 2003.²³
- b. Second, the video shows images of “Colonel” Mathieu Ngudjolo in Bunia in May 2003, which supports and corroborates existing incriminatory evidence that he was the most senior Lendu commander and in charge of Lendu forces in Bunia at that time (including the Lendu child soldiers depicted in this video). The Prosecution refers in particular to the footage in which Mathieu Ngudjolo is referred to as “Colonel” and responds to this address.²⁴ The Prosecution also refers to footage that demonstrates Mathieu Ngudjolo’s senior position of authority within Bunia at the time, by addressing public crowds to seek to assuage their fears.²⁵

²² Because of the public nature of this filing, the Commander is not identified here by name.

²³ See DRC-OTP-1047-0005, p. 50, lines 1798-1799. See also images of another Commander with young Lendu combatants at 01:37:16 to 01:38:09.

²⁴ See for example time stamps 01:38:21 to 01:46:33 and lines 1976 to 1979 at page 55 of DRC-OTP-1047-0005, and at 01:45:08, lines 2020-2026, at page 56. This follows time stamps at 01:34:29, 01:41:51, 01:42:13, 01:43:27 and 01:43:45, and 01:43:51 dated 9 May 2003.

²⁵ See for example at timestamp 01:38:21; and 01:46:19, at page 57-58 of DRC-OTP-1047-0005, lines 2059 to 2064.

16. Whilst video DRC-OTP-0155-0004 does contain images of Lendu child soldiers, it is submitted that the images of the Lendu child soldier as described above (and other additional child soldier footage) is particularly compelling; especially when seen in conjunction with the additional footage of senior commanders under the command of Mathieu Ngudjolo with child soldiers, and footage of “Colonel” Mathieu Ngudjolo himself in Bunia in May 2003.

17. The Prosecution further submits that a close analysis of the translations for DRC-OTP-0155-0004 and DRC-OTP-1042-0006 indicates that the translation for video DRC-OTP-1042-0006 (and its related transcript) should be admitted to the List, and the additional video footage admitted as incriminatory evidence, for the following reasons.

- a. First, the new translation shows that there were passages from DRC-OTP-0155-0004 that could not be translated due to poor audio quality, that have now been able to be transcribed and translated.²⁶
- b. Second, there is additional footage or passages found in DRC-OTP-1042-0006 that come prior to or follow from scenes in DRC-OTP-0155-0004 that help to explain or complete the context of those scenes; so assist in providing a better understanding of DRC-OTP-0155-0004.²⁷
- c. Third, there is new video footage not contained in DRC-OTP-0155-0004 or any other incriminatory video previously disclosed, commencing from timestamps 01:17:15 to 01:46:25, at DRC-OTP-1047-0005, pages 39 to 68; which includes the compelling new evidence as described above of footage of Lendu child soldiers in Bunia in May 2003 (and context of comments they make regarding the FAC), the presence of senior commanders under the control of Mathieu Ngudjolo, and of ‘Colonel’

²⁶ Consider for example DRC-OTP-1047-0005, page 2, lines 37-44, lines 51-52; page 3, line 80, line 98; and page 5, lines 147-160.

²⁷ Consider for example DRC-OTP-1047-0005, pages 16-20, lines 570-693; page 21, lines 723-750; pages 28-30, lines 1002-1054.

Mathieu Ngudjolo, the most senior Lendu commander in Bunia in May 2003.

Relief Sought

18. For the foregoing reasons, the Prosecution requests that pursuant to Regulation 35, the transcript and translation for video DRC-OTP-1042-0006 be added to the List and that the additional video footage contained in DRC-OTP-1042-0006 be admitted as incriminatory evidence.



Luis Moreno-Ocampo, Prosecutor

Dated this 17th day of August 2009

At the Hague, the Netherlands.