



Original English

No.: ICC-01/04-01/07
Date 25 August 2009

TRIAL CHAMBER II

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

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

Public Document

**Decision on the Prosecutor's request for late disclosure of exculpatory evidence
(Witness P-387)
(ICC-01/04-01/07-1296)**

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

The Office of the Prosecutor

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Mr Eric MacDonald

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Mr David Hooper

Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

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Legal Representatives of the Applicants

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Ms Flora Mbuyu Anjelani

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Ms Magali Pirard

Mr Dieudonné Kaluba Didwa

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, having regard to article 67(2) of the Rome Statute of the International Criminal Court ("Statute"), regulations 23 and 35 (2) of the Regulations of the Court ("Regulations"), issues the following decision on the "Requête de l'Accusation sur la base de la norme 35 du Règlement aux fins de communication à la Défense d'éléments de preuve à décharge (témoin P-387)" of 13 July 2009 ("Application")¹

I. BACKGROUND

1 On 23 January 2009, the Chamber ordered that all exculpatory evidence and evidence falling within the ambit of article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence ("Rules"), including those items of evidence that were still being analysed at the time, be disclosed to the Defence no later than 27 February 2009.²

2. The Office of the Prosecutor ("Prosecution") now requests the Chamber's authorisation to disclose the transcript of the declaration of witness P-387 and a limited number of annexes thereto, despite the fact that the deadline has expired. In support of its request, the Prosecution argues that it was only able to meet with witness P-387 for the first time when the deadline had already elapsed and that it had therefore not been in a position to know whether or not the witness would be willing to meet with the Prosecution and to make a declaration prior to the lapse of the said deadline.³ It is further argued that the transcript of the interviews held with witness P-387 was finalised only recently

¹ ICC-01/04-01/07-1296

² "Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d'une conférence de mise en état", 23 January 2009, ICC-01/04-01/07-846

³ Ibid, par 3 and 6

3 The Prosecution does not intend to call the witness and states that the declaration contains mainly exculpatory information or rule 77 materials.⁴

4 No response was filed by either Defence team.

II. PRELIMINARY OBSERVATIONS

5 The Chamber accepts that the Prosecution was not in a position to know whether or not the witness would agree to meet with the Prosecution and that it might therefore have been premature to ask for an extension of time limit before the lapse of the deadline. Nevertheless, as the Chamber has stated previously, the parties must, to the extent possible, keep the Chamber informed of ongoing discussions or contacts with witnesses *before the expiration of the deadline*, when it is reasonable to believe, with sufficient certainty, that these discussions or contacts may lead to a request for an extension of time limit based on regulation 35 of the Regulations.⁵

6 The Chamber notes in this regard, that the first contact with witness P-387 was made on 6 February 2009⁶, several weeks before the deadline of 27 February 2009. This is a clear indication that the Prosecution had the intention of pursuing this witness's declaration and, even though the chances for success were not known at the time, the Prosecution should have informed the Chamber of the existence of this potential witness.

7. The Chamber further notes with concern that it took several months to transcribe the recordings of the interviews and that the resulting transcripts amount to over 400 pages. It is of the view that, even though witness P-387 was questioned as a potential suspect and that therefore it was necessary to record the declaration in accordance with rule 112 (1) of the Rules, it would have been

⁴ ICC-01/04-01/07-1296, par. 7

⁵ "Decision sur les témoins 002, 030, 323 et 373", 14 May 2009, ICC-01/04-01/07-1135, par. 18

⁶ ICC-01/04-01/07-1296, par. 3

preferable if the witness had also signed a written statement containing the essence of his testimony in the sense of rule 111 (1) of the Rules.

III. ANALYSIS AND CONCLUSION

8. The Prosecution argues that the conditions of regulation 35(2), last sentence, are met because it could not in good time anticipate whether witness P-387 would accept to make a declaration.⁷ The Chamber is not convinced by this argument. It is obvious that the witness's declaration was obtained in the context of the Prosecution's ongoing investigation, which does clearly not amount to an 'exceptional circumstance' in the sense of the Appeals Chamber's decision of 7 February 2007.⁸ On a previous occasion, this Chamber has held that "the Prosecution cannot rely on its right to continue investigating in order to justify the late submission of newly discovered material."⁹ The same reasoning inevitably applies in the present instance.

9. However, since the material is, according to the Prosecution, essentially exonerating in character, the Chamber must weigh the interests of the Defence in being informed of this witness and his declarations against the Prosecution's obligation to disclose all evidentiary material in time. Having examined the statement, the Chamber is convinced that there is such an interest, and that the statements must for that reason be disclosed to the Defence.

10. As the Chamber has previously held, late submission of exonerating evidence is subject to there being an adequate amount of time for the Defence to

⁷ ICC-01/04-01/07-1296, par 6

⁸ "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", 21 February 2007, ICC-01/04-01/06-834, par 9-10

⁹ "Decision on the 'Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OIP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, ICC-01/04-01/07-1336, par 28

employ its time and facilities to process the new information ¹⁰ In this regard, the Chamber notes that neither of the Defence teams has manifested any objections in response to the Application. Moreover, the Chamber considers that the volume of the evidence is not of such an excessive nature as to make it impossible for the Defence to process it in good time. In case the Defence would like to call this witness, there is still sufficient time for that, considering that the trial hearings have not yet started and that the Prosecution's presentation will in all likelihood last for several months.

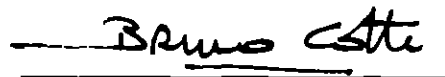
¹⁰ Ibid, par 29

FOR THESE REASONS,

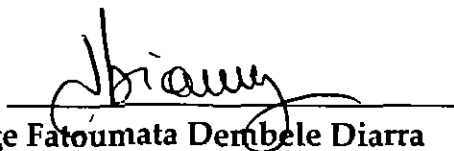
THE CHAMBER

ALLOWS the late submission of the transcript of the declaration of witness P-387 and the related annexes.

Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Hans-Peter Kaul

Dated this 25 August 2009

At The Hague, the Netherlands