

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 THE CONGO

**IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI**

Public Document

**Decision on the "Prosecution's application for leave to appeal Trial Chamber II's
'Decision on the disclosure of evidentiary material relating to the Prosecutor's site
visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1401, 1412,
and 1456)' of 7 October 2009"**

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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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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 82(1)(d) of the Rome Statute of the International Criminal Court ("Statute"), issues the following decision on the "Prosecution's application for leave to appeal Trial Chamber II's 'Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412, and 1456)' of 7 October 2009" ("Application")¹.

I. BACKGROUND

1. On 23 January 2009, the Chamber ordered that all incriminating evidence be disclosed to the Defence no later than 30 January 2009. It further ordered that all potentially exonerating material, as well as material falling under rule 77 of the Rules of Procedure and Evidence ("Rules"), be disclosed no later than 27 February 2009.² After the lapse of the said deadlines, the Office of the Prosecutor ("Prosecution") filed a number of requests pursuant to regulation 35 of the Regulations of the Court ("Regulations"). In these requests, it sought the late addition of several expert reports and items of evidence that resulted from a forensic mission to Bogoro.³

¹ ICC-01/04-01/07-1527

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 "Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge", 15 July 2009, ICC-01/04-01/07-1305; "Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge et de modification de la liste des éléments à charge", 30 July 2009, ICC-01/04-01/07-1345; "Requête de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge, de modification de la liste des éléments à charge et de modification de la liste des témoins à charge", 11 August 2009, ICC-01/04-01/07-1360; "Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, et de modifications de la liste des éléments à charge et de la liste des témoins à charge", 18 August 2009, ICC-01/04-01/07-1401; "Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'un élément à charge, d'autorisation d'expurgation et de modification de la liste des éléments à charge", 21 August 2009, ICC-01/04-01/07-1412; "Addendum et corrigendum à

2. On 7 October 2009, the Chamber rendered a consolidated decision on these requests.⁴ A corrigendum to the decision was issued on 9 October 2009⁵ (“impugned decision”). In the impugned decision, the Chamber declined to grant the Prosecution’s request for an extension of time limit pursuant to regulation 35 of the Regulations. After analysing the material and the procedure by which it was obtained, the Chamber refused permission for the late addition to the Prosecution List of Incriminating Evidence of most of the evidentiary material collected during, or as a consequence of the forensic mission to Bogoro. The Chamber authorised the addition of a 360° photographic representation of the ‘Institute de Bogoro’ as a tool for orientation for all the parties involved in the proceedings. It also authorised the addition of the visual expert who produced it to the Prosecution List of Incriminating Witnesses. Permission for the addition to the Prosecution Witness List of four other experts who had been involved in the forensic mission and the compilation of the related reports was denied.⁶

A. Prosecution Application

3. On 13 October 2009, the Prosecution filed its Application, seeking leave to appeal the impugned decision. In its Application, the Prosecution submits that the Trial Chamber erred in its application of regulation 35 of the Regulations in that “the [impugned] Decision misconstrues the Chamber’s authority under Regulation 35 and intrudes into the Prosecution’s autonomy in relation to investigative matters.”⁷ It is further argued that “the Chamber’s powers are confined to authorizing the additional presentation of evidence by the parties once a list of

certaines Requêtes de l'Accusation déposées en application de la norme 35 aux fins de dépôt d'expertises”, 4 September 2009, ICC-01/04-01/07-1456

⁴ “Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)”, 7 October 2009, ICC-01/04-01/07-1515

⁵ “CORRIGENDUM Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29, and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)”, 9 October 2009, ICC-01/04-01/07-1515-Corr

⁶ ICC-01/04-01/07-1515-Corr, par. 76

⁷ Ibid., par. 3

evidence has been completed; they do not extend to the conduct of additional investigative activities by the Prosecution which the Chamber cannot authorize or otherwise regulate.”⁸

4. According to the Prosecution, the Chamber’s erroneous interpretation of its powers under regulation 35 of the Regulations, gives rise to a distinct issue within the meaning of article 82(1)(d) of the Statute. It therefore seeks leave to appeal pursuant to article 82(1)(d) and rule 155 of the Rules of Procedure and Evidence (“Rules”). The issue for which leave to appeal is sought is formulated as follows:

“Whether the Prosecution is required by Regulation 35 to request authorization from the Trial Chamber to carry out fact-finding missions after the deadline imposed by the Chamber for disclosure of all incriminating evidence has expired.”⁹

5. It is argued that the issue arises from paragraph 27 of the impugned decision. According to the Prosecution, the Chamber erred in allegedly reasoning that it “does not just authorize, under Regulation 35(2), the disclosure of additional incriminating evidence after the deadline set by the Chamber; [but] rather, [that] its permission should have been obtained, in advance, before carrying out the investigative mission to gather forensic evidence.”¹⁰ The Prosecution considers that the decision rests “on a defective interpretation of the Chamber’s powers under Regulation 35, in particular vis-à-vis the Prosecution’s investigatory authority under the Statute.”¹¹ It is not disputed “that the disclosure of incriminating evidence after expiry of the deadline set by the Trial Chamber requires approval by the Chamber under Regulation 35”.¹² However, the Prosecution argues that “the same does not hold true in relation to ‘ongoing or planned fact-finding missions’”.¹³ Such ongoing or planned fact-finding

⁸ Ibid.,

⁹ ICC-01/04-01/07-1527, par. 9

¹⁰ Ibid., par. 13

¹¹ Ibid., par. 14

¹² Idem.

¹³ Idem.

missions are, according to the Prosecution, “activities that fall within the exclusive domain of the Prosecution.”¹⁴

6. In the Prosecution’s view, the issue also affects the fair conduct of the proceedings. The issue prejudices the Prosecution in “effectively [rendering] the Prosecution’s exercise of its investigative powers subject to the Trial Chamber’s approval through a Regulation 35 decision, once the Chamber has established a deadline for the disclosure of incriminating evidence”.¹⁵ This, it is argued, effectively deprives the Prosecution of its autonomy to decide whether specific circumstances justify supplementary investigations, once a Trial Chamber has established a deadline for disclosure of incriminating evidence.¹⁶ The Prosecution further argues that the “automatic rejection of a substantial body of relevant and probative evidence that the Prosecution considers important for the full presentation of its case at trial, without analyzing its merit, affects the fair conduct of the proceedings vis-à-vis the Prosecution.”¹⁷

7. Furthermore, the Prosecution states that “the issue affects the expeditious conduct of the proceedings, as it excludes an important body of evidence corroborating the Prosecution’s case regarding the events at the *Institut de Bogoro* during the attack on 24 February 2003.”¹⁸ In particular, the Prosecution advances that “[if] the Trial Chamber were to consider the Prosecution’s other evidence was insufficient, and thus acquit the accused in relation to these events, then the Prosecution would be forced to appeal the erroneous and premature exclusion of this expert evidence. Such an appeal could result in the case being remanded to a different Trial Chamber to consider the totality of the evidence.”¹⁹

¹⁴ ICC-01/04-01/07-1527, par. 14

¹⁵ *Ibid.*, par. 18

¹⁶ *Idem.*

¹⁷ ICC-01/04-01/07-1527, par. 20

¹⁸ *Ibid.*, par. 22

¹⁹ *Ibid.*, par. 23

8. Therefore, the Prosecution argues, “[t]he impossibility to bring before the Chamber relevant and probative evidence, capable of assisting the Chamber in establishing the truth about the crimes committed in Bogoro, [affects] the outcome of the trial”.²⁰ It is in particular averred that the exclusion of important items of evidence going to the heart of the incidents being prosecuted on purely procedural grounds, must necessarily affect the outcome of the trial.²¹

9. In conclusion, the Prosecution contends that according to the impugned decision, the Prosecution would have to ask authorisation for every investigative mission and the gathering of potentially relevant evidence, once a deadline for the disclosure of evidence has elapsed.²² It therefore seeks the immediate resolution of the issue by the Appeals Chamber. It is argued that such an immediate resolution of the issue may materially advance the proceedings, as the system established by the impugned decision “infringes upon the autonomy of the Prosecution to conduct investigative steps.”²³

B. Defence Observations

10. Neither Defence filed observations in relation to the Prosecution Application. The Legal Representatives for Victims did equally not submit observations.

²⁰ ICC-01/04-01/07-1527, par. 24

²¹ *Idem.*

²² ICC-01/04-01/07-1527, par. 25

²³ *Ibid.*, par. 27

II. ANALYSIS AND CONCLUSION

11. In reaching its decision on the Prosecution's Application, the Trial Chamber has followed the criteria laid down by the Appeals Chamber in its "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal"²⁴ of 13 July 2006. It considers the issues raised by the Prosecution in light of the following criteria:

- a) Whether the matter is an "appealable issue";
- b) Whether the issue at hand could significantly affect:
 - (i) The fair and expeditious conduct of the proceedings; or
 - (ii) The outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

12. The requirements set out in a), b) and c) above are cumulative. The failure to fulfil one or more of them is fatal to an application for leave to appeal.²⁵

A. Whether the matter is an appealable issue

13. As the Chamber has previously stated²⁶, basing itself on the jurisprudence of the Appeals Chamber,²⁷ an issue is an identifiable subject or topic requiring a

²⁴ "Judgement on the Prosecutor's Application for Evidentiary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, par. 9-20

²⁵ Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, "Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application to Lift the Stay of the Proceedings'", 24 September 2008, ICC-01/04-01/06-1473, par. 22

²⁶ Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "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'", 1 May 2009, ICC-01/04-01/07-1088, par. 17 to 18

decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.²⁸ Further, “a right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber.”²⁹

14. In its analysis of whether an issue raised for which leave to appeal is being sought amounts to an ‘appealable issue’, the Chamber must first ascertain whether the issue, as formulated by the party requesting leave, veritably arises from the impugned decision or order. If the impugned decision does not contain the putative issue as defined by the party seeking leave to appeal, the Chamber cannot grant the leave requested.

15. In the contested paragraph 27 of the impugned decision, the Chamber states that “the Prosecution does not satisfactorily explain why it did not apply for an extension of time limit before it expired, considering that the Prosecution had been planning this mission at least one year before it actually took place.”³⁰ It goes on to state that “the parties must, to the extent possible, keep the Chamber informed of ongoing or planned fact-finding missions, before the expiration of the deadline, when it is reasonable to think that they might lead to a request for additional disclosure after the set time limit, based on regulation 35.”³¹ The Chamber does not see how this paragraph can be read as imposing an obligation on the Prosecution that would require it to request authorisation from the Trial Chamber to carry out fact-finding missions. The Prosecution may freely choose to conduct further investigations after the time limit for the disclosure of evidence has expired. However, if it wishes to preserve the possibility of using the results of such investigations in the current proceedings in relation to the charges which are

²⁷ “Judgment on the Prosecutor's Application for Evidentiary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, par. 9

²⁸ *Idem*.

²⁹ *Ibid.*, par. 20

³⁰ ICC-01/04-01/07-1515-Corr, par. 27

³¹ *Ibid.*, par. 28

pending before the Chamber, it must seek an extension of time limit under regulation 35(2) of the Regulations. It is for this purpose that the Chamber requires the Prosecution to inform the Chamber.

16. It follows from the aforementioned that, although the right to collect additional information after the deadline for disclosure has expired is not subject to the Chamber's authorisation, the right to submit this information as evidence in the trial proceedings after the lapse of that time limit is subject to such authorisation. Therefore, even if the Chamber declines to grant an extension of time limit for the disclosure of additional evidence, this does not prevent the Prosecution from still going ahead with the investigation. Indeed, the Prosecution may wish to use the newly obtained evidence in support of an application for the confirmation of further charges against the accused before the Pre-Trial Chamber for the purposes of another case. Also, further investigations may yield additional exculpatory evidence, which may have to be disclosed to the Defence. Moreover, as the Chamber has held on several previous occasions, when new incriminating evidence is discovered and no variation of the time limit can be justified under the criteria of regulation 35(2), the Chamber may still consider late addition of newly discovered items of evidence, using its powers under article 64(6)(d) and 69(3) of the Statute, but only if it can be shown that (i) the new material is either significantly more compelling than other items of evidence already disclosed to the Defence or brings to light a previously unknown fact which has a significant bearing upon the case, and the late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(1)(b) of the Statute.³²

17. Contrary to its understanding of the impugned decision, the Prosecution was thus never required to have its internal working methods and investigations

³² ICC-01/04-01/07-1336; ICC-01/04-01/07-1515; ICC-01/04-01/07-1590

approved by the Chamber or disclosed to other parties. The Prosecution can conduct its investigation as it sees fit.

18. As a consequence of the aforementioned, the Chamber considers that the issue identified in the Application does not arise from the impugned decision. It is therefore not an appealable issue which requires the immediate resolution by the Appeals Chamber, within the meaning of criterion a) set out in paragraph 11 above.

19. Given that the criteria laid down by the Appeals Chamber are to be treated as being cumulative³³, there is thus no need for the Chamber to consider any of the subsequent criteria; the application falls at the first hurdle.

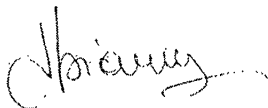
**FOR THESE REASONS,
THE CHAMBER,**

REJECTS the Prosecution request for leave to appeal the impugned decision.

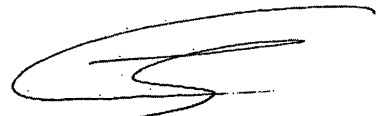
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**Judge Bruno Cotte
Presiding Judge**



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 18 December 2009

At The Hague, the Netherlands

³³ See paragraph 11 above.