

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07
Date: 15 February 2010

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 *and* MATHIEU NGUDJOLO
CHUI**

Public

**Decision on Prosecution requests ICC-01/04-01/07-1726-Conf-Exp and
ICC-01/04-01/07-1738-Conf-Exp made pursuant to regulation 35 of the
Regulations**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

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**

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention 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 articles 64(3)(c) and 67(1)(b) of the Rome Statute of the International Criminal Court ("Statute"), rule 77 of the Rules of Procedure and Evidence ("Rules"), and regulation 35(2) of the Regulations of the Court ("Regulations"), issues the following decision on two separate, but related requests filed by the Office of the Prosecutor ("Prosecution"):

I. BACKGROUND

1. On 23 January 2009, the Chamber ordered the Prosecution to disclose to the Defence all incriminating evidence by 30 January 2009, and all potentially exonerating material pursuant to rule 77 of the Rules of Procedure and Evidence ("Rules") by 27 February 2009.¹ The Prosecution now seeks extensions of this time limit, under regulation 35(2) of the Regulations, to disclose material to the Defence and to add material to its List of Incriminating Evidence.

A. Prosecution Requests

1. Application Relating to an Interview with Witness P-30 and a Document Related to Video DRC-OTP-0080-0004²

2. The Prosecution disclosed to the Defence, pursuant to rule 77 of the Rules, video DRC-OTP-0080-0004 and the audio-recordings of P-30's interview on 4 December 2008 and 27 February 2009 respectively.³

¹ "Ordonnance fixant le calendrier de communication des éléments de preuve à décharge avant le procès et la date d'une conférence de mise en état" 23 January 2009, ICC-01/04-01/07-846

² ICC-01/04-01/07-1726-Conf-Exp

3. In its application, the Prosecution seeks permission to disclose to the Defence document DRC-OTP-0087-0211, which contains comments by P-2 on video DRC-OTP-0080-0004. According to the Prosecution, this document was not disclosed within the time limit due to an oversight.⁴ The Prosecution submits that disclosure at this stage will not prejudice the Defence as it will facilitate their analysis of material already in their possession.⁵

4. It also informs the Chamber that this document was previously disclosed in the case of *Prosecutor v. Thomas Lubanga Dyilo* with redactions under rule 81(2) of the Rules. The Prosecution has sought a variation of that protective measure before Trial Chamber I. No redactions are sought before this Chamber.⁶

5. The Prosecution also seeks permission to disclose the transcripts of P-30's interview pursuant to regulation 35(2). In support of its application, the Prosecution submits that it was not able to meet the deadline of 27 February 2009, because the interview could not be conducted before 20 February 2009, and because the transcripts were not finalized until the end of August 2009.⁷

6. The Prosecution argues that disclosure of the above-mentioned documents will facilitate the work of the Defence, and informs the Chamber that it will not rely on this material at trial.⁸

³ Disclosed in Pre-Trial rule 77 package 24 and 36

⁴ ICC-01/04-01/07-1726-Conf-Exp, par. 7

⁵ Ibid., par. 8

⁶ Ibid., par. 9

⁷ "Prosecution's Application to Disclose the Transcripts of an interview with Witness 30 and a Document Related to Video DRC-OTP-0080-0004 Pursuant to Regulation 35", 17 December 2009, ICC-01/04-01/07-1726-Conf-Exp, par. 4

⁸ ICC-01/04-01/07-1726-Conf-Exp, par. 5 and 8

2. *Application Concerning a Document Related to
Witness P-249*⁹

7. The first statement of Witness 249 and the French translation were disclosed in redacted form to the Defence of Germain Katanga on 13 December 2007 and 4 January 2008 respectively,¹⁰ and to the Defence of Mathieu Ngudjolo on 27 May 2008. The transcripts of the second interview, conducted in February 2009, were disclosed on 26 May 2009.¹¹ On 25 March 2009, the Chamber authorized the disclosure of a forensic report by the Prosecution forensic expert,¹² containing results of a medical examination of injuries allegedly sustained by Witness P-249 during the Bogoro attack ("Forensic Report").¹³

8. The Prosecution seeks permission on the basis of regulation 35(2) of the Regulations to add document DRC-OTP-1028-0100 to its List of Incriminating Evidence. This document contains the copies of 2 medical expense receipts and a "*Fiche de consultation*" issued in the name of Witness 249.¹⁴ The Prosecution claims it did not meet the deadline for disclosure of incriminating evidence due to an oversight.¹⁵

9. The Prosecution submits that the dates on the "*Fiche de consultation*" and receipts, together with the date of a medical report annexed to the Forensic Report, corroborate the statements of Witness 249 regarding

⁹ ICC-01/04-01/07-1738-Conf-Exp

¹⁰ The original statement in English, DRC-OTP-1004-0115, was disclosed in INCRIM Package 1; the French translation, DRC-OTP-1015-0833, was disclosed in INCRIM Package 3

¹¹ Disclosed in Trial INCRIM package 36

¹² ICC-01/04-01/07-988, para. 3; the Forensic Report was disclosed as incriminatory evidence in Trial INCRIM package 31 on 8 April 2009

¹³ "Rapport d'Expertise Médico légale – Examen de W-249", DRC-OTP-1033-0046; the medical report was disclosed as an individual document on 30 January 2009 in Pre-Trial INCR package 27

¹⁴ ICC-01/04-01/07-1738-Conf-Exp, par. 6

¹⁵ Ibid., par. 7

when she allegedly escaped from captivity, and the date and duration of the medical treatment she received.¹⁶ Furthermore, the Prosecution submits that document DRC-OTP-1028-0100 introduces new facts significant to the case, but that the content of it has been previously discussed in detail in the transcripts of the second interview with Witness P-249.¹⁷

B. Observations by the Defence

10. The Chamber did not receive any observations on behalf of the Defence.

II. ANALYSIS AND CONCLUSION

A. Late Submission

11. When a party applies for authorization to submit new evidence after the applicable time limit, the Chamber will, in accordance with its prior rulings,¹⁸ consider the following elements:

12. First, it will consider whether there is a timely and sufficiently motivated application to extend the time limit in accordance with regulation 35(2) of the Regulations. If this is the case, the Chamber will in principle allow the late submission, unless it would cause undue prejudice to the Defence. If this is not the case, the Chamber will in principle reject the late addition of new items of evidence, unless the new material must be disclosed to the Defence in accordance with article 67(2) of the Statute or falls under rule 77 of the Rules. If the new material is incriminating, the Chamber may still consider late addition, using its

¹⁶ Ibid., par. 9

¹⁷ Ibid., par. 11 - 12

¹⁸ ICC-01/04-01/07-1336; ICC-01/04-010/7-1515 ; ICC-01/04-01/07-1552

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 (ii) 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.

*1. Application Relating to an Interview with Witness 30
and a Document Related to Video DRC-OTP-0080-0004*

13. The Chamber notes the significant delay in the disclosure of document DRC-OTP-0087-0211, for which it considers the Prosecution has not provided sufficient justification. However, the Chamber considers that the material falls under rule 77 of the Rules and that its disclosure would facilitate the preparation of the Defence.

14. With regard to the transcripts of the interview with P-30, the Chamber notes that the Prosecution does not justify the delay between the end of August 2009 when the transcripts were finalized, and 17 December 2009, the date of the current application. As mentioned above, in principle the Chamber will not accept new material that does not meet the conditions of regulation 35(2) of the Regulations.

15. The Chamber also does not accept that the transcripts, or indeed the audio-recordings of the interview with P-30, are material which falls under rule 77 of the Rules. Witness P-30 is a Prosecution witness and accordingly the disclosure of the transcripts falls under rule 76 of the Rules. As the Chamber pointed out earlier, transcripts and translations form an integral part of the video and must for that reason be considered

as constituting one and the same piece of evidence.¹⁹ The Prosecution's application therefore does not concern new or additional evidentiary material, but rather constitutes a request to accomplish its disclosure obligations under rule 76 of the Rules and regulation 39(1) of the Regulations.

16. Accordingly, considering that the accused are entitled to have all this material, and that neither Defence team has voiced any objection against this late disclosure, the Chamber orders the Prosecution to disclose to the Defence the transcripts of the interview with P-30 as well as document DRC-OTP-0087-0211.

2. *Application Concerning a Document Related to Witness
P-249*

17. The Chamber notes that the material was not disclosed in accordance with the deadline due to an oversight on the part of the Prosecution in its review of *Ringtail*. The Chamber considers that this does not constitute good cause to grant an extension of the time limit for disclosure of incriminating evidence pursuant to regulation 35(2).

18. The Prosecution argues that the dates on the medical expense receipts and the *Fiche de consultation*, "bring to light previously unknown facts that have a significant bearing upon the case"²⁰ because together with the date of the medical report annexed to the Forensic Report, they de-limit the period during which P-249 was receiving medical

¹⁹ "Decision on the Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-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. 13

²⁰ ICC-01/04-01/07-1738-Conf-Exp, par. 10

treatment.²¹ As the Prosecution itself states in its application, however, the content of document DRC-OTP-0087-0211 was previously discussed in detail in the second interview with P-249, the transcripts of which were disclosed on 26 May 2009.²² The Chamber considers therefore that contrary to the Prosecution's submission, the document does not contain new facts. Instead, document DRC-OTP-0087-0211 appears to corroborate the information contained in the second interview of P-249.

19. Furthermore the Chamber has repeatedly demanded that the party asking for the late submission of additional incriminating evidence explain with sufficient precision how the new material is more compelling than evidence already disclosed to the Defence, or brings to light previously unknown facts which have a significant bearing upon the case.²³ In the present case, the Prosecution has not explained why the dates mentioned in the document are so significant that they would warrant the Chamber's exercise of its discretion under articles 64(6)(d) and 69(3) of the Statute in relation to DRC-OTP-0087-0211.

²¹ Ibid., par. 9

²² Ibid., par. 10-12

²³ ICC-01/04-01/07-1336, par. 30

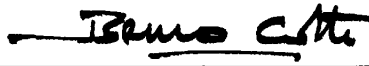
FOR THESE REASONS,

THE CHAMBER,

ORDERS the Prosecution to disclose the Defence the transcripts of interview with Witness P-30 and document DRC-OTP-0087-0211; and

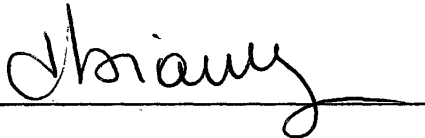
REJECTS the application to disclose document DRC-OTP-0087-0211 and to add it to the List of Incriminating Evidence.

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



Judge Bruno Cotte

Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 15 February 2010

At The Hague, the Netherlands