

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-01/07
Date: 3 December 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 THE CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Confidential

**Prosecution's Response to "Defence Request for Guidelines on the scope of the
Prosecution Disclosure Obligations in respect of Defence Witnesses"**

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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Other

1. On 29 November 2010, the Defence team of Germain Katanga ("Defence") filed a *"Request for Guidelines on the scope of the Prosecution Disclosure Obligations in respect of Defence Witnesses"* ("Request")¹ and on 1 December 2010, the Defence team of Mathieu Ngudjolo joined this Request.² The Defence requests Trial Chamber II ("Chamber") to order the Prosecution to disclose all relevant information that relates to the witnesses the Defence intends to call "as soon as the Prosecution has knowledge of who the defence witnesses are and is in possession of such information".³
2. The Prosecution submits that it has complied with its disclosure obligations under the Rome Statute and the Rules of Procedure and Evidence and it will continue to do so throughout the trial. The Prosecution also submits that a distinction must be drawn between the Prosecution's disclosure obligations pursuant to Articles 54(1) and 67(2) and Rule 77 and the obligation to identify documents that a party intends to use in cross-examination (see paragraph 108 of the Chamber's *"Directions for the conduct of the proceedings and testimony in accordance with rule 140"*).⁴
3. The Defence submits that in preparation of the upcoming presentation of its case, it is entitled to disclosure from the Prosecution of (1) the evidence it intends to use for the purpose of cross-examining defence witnesses and (2) any information in its possession which is relevant to the assessment of the credibility of defence witnesses. The Defence further submits that this disclosure should take place as soon as the Prosecution is informed of the identities of the defence witnesses and the information is in its possession.

¹ ICC-01/04-01/07-2584.

² « *Adjonction de la Défense de Mathieu Ngudjolo à la Requête ICC-01/04-01/07-2584 intitulée « Defence Request for Guidelines on the scope of the Prosecution Disclosure Obligations in respect of Defence Witnesses » introduite par la Défense de Germain Katanga le 29 novembre 2010* », ICC-01/04-01/07-2601.

³ ICC-01/04-01/07-2584, see conclusion at p. 5.

⁴ ICC-01/04-01/07-1665-Corr and as recalled in decision ICC-01/04-01/07-2388, see paras 33 and 34.

A. Disclosure of any information in the Prosecution's possession relevant to the credibility of defence witnesses

4. The Prosecution is mindful that its disclosure obligations continue throughout the trial.⁵ The Prosecution recalls that Trial Chamber I held that the Prosecution is under no obligation "to disclose its theories or its tactics, but instead it must provide all relevant information and material as regards the defence witnesses".⁶ The Prosecution also accepts that the disclosure of "information that undermines or supports the evidence, or the credibility, of proposed defence witnesses"⁷ should be disclosed as soon as the Prosecution is informed of the identities of the defence witnesses, since this will "assist trial efficiency [...], increase the likelihood that only those witnesses are called who are, on an examination of all the relevant material, credible and reliable".⁸
5. To date, the Defence has not provided the Prosecution with any names and/or statements of witnesses it intends to call. Once the Prosecution receives this information, it will comply with its disclosure obligations.⁹ Therefore, the sooner the Defence provides such information, the sooner the Prosecution can identify any relevant material that falls under Article 67(2) or Rule 77 and that has not already been disclosed.

B. Obligation to notify the Defence of the evidence it intends to use during cross-examination

6. In its "*Directions for the conduct of the proceedings and testimony in accordance with rule 140*", the Chamber clearly indicated that:

⁵ ICC-01/04-01/06-2624, para. 20 *in fine*.

⁶ ICC-01/04-01/06-2624, para. 18 *in fine* and as cited by Defence in its request at para. 8.

⁷ ICC-01/04-01/06-2624, para. 18.

⁸ ICC-01/04-01/06-2624, para. 18.

⁹ A large volume of material/evidence has already been disclosed to the Defence either as incriminating evidence or pursuant to Article 67(2) and Rule 77. Therefore, the Prosecution may have already disclosed all relevant material in its possession in relation to potential defence witnesses.

108. If a cross-examining party knows in advance that it will make reference to a document that is not already in evidence during cross-examination of a particular witness, it must inform the Chamber and the Court Officer at least three (3) full working days before the scheduled hearing and provide it in electronic form, in accordance with regulation 52(2) of the Regulations of the Registry.¹⁰

7. Therefore, the Prosecution will provide, for each Defence witness called to testify, the list of documents it intends to show the witness during its cross-examination as per the Chamber's *"Directions for the conduct of the proceedings and testimony in accordance with rule 140"*.
8. Finally, the Prosecution recalls that Trial Chamber I also held that *"the questioning of a witness by a party not calling that witness is to some extent reactionary, and as such could entail on occasion the unanticipated use of documents"*.¹¹ As a consequence, it may occur that the Prosecution will have to disclose additional documents whose relevance was not foreseeable before the cross-examination.

¹⁰ ICC-01/04-01/07-1665-Corr and as recalled in decision ICC-01/04-01/07-2388, see paras 33 and 34.

¹¹ ICC-01/04-01/06-1140, para. 34 which was reaffirmed in ICC-01/04-01/06-2624 at paras 14 and 20.

Conclusion

9. As stated above, the Prosecution is aware of its disclosure obligations pursuant to Articles 54(1) and 67(2) and Rule 77 and therefore the requested Order or guidelines would be superfluous.



Luis Moreno-Ocampo, Prosecutor

Dated this 3rd day of December 2010

At The Hague, The Netherlands