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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

**Prosecution's response to Defence for Mathieu Ngudjolo's requests
ICC-01/04-01/07-3082 and ICC-01/04-01/07-3085**

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. The two Defence teams were required to disclose by 7 March 2011 the evidence they intended to rely on at trial.
2. On 21 July 2011, the Defence for Mathieu Ngudjolo ("Defence") filed a request to add new items to the List of documents it intends to use at trial, including 28 new documents that were never disclosed to the Prosecution and that were allegedly obtained after 4 March 2011 ("Request").¹ On 2 August 2011, in response to an e-mail from Trial Chamber II ("Chamber"), the Defence clarified its Request, and made an additional request to redact the identity of the provider of document DRC-D03-0001-0707.²
3. The Prosecution herein objects to the addition of the 28 new documents never previously disclosed on the basis that the Defence has not complied with Regulation 35(2) of the Regulations of the Court and the Chamber's interpretation of that Regulation. If the Request was to be granted, in part or in whole, the Prosecution reserves its right to make objections to some or all documents that form part of the Request pursuant to the Directions for the conduct of the proceedings.³ The Prosecution also submits that the request to redact the identity of the provider of document DRC-D03-0001-0707 should be denied.

Submission

4. The advance notice of the material intended to be relied upon at trial is required to avoid unnecessary surprises or delays to the proceedings. There is flexibility to depart from this requirement based on good cause. If the departure itself is sought out of time, Regulation 35(2) requires the proponent

¹ ICC-01/04-01/07-3082 with Confidential Annex. ICC-01/04-01/07-3082-Conf-Anx mentions 24 new documents that were never disclosed to the Prosecution. DRC-D03-0001-0695 consists of five pages, each page having been communicated to the Prosecution by e-mail as a separate document. The Prosecution has counted DRC-D03-0001-0695, DRC-D03-0001-0696, DRC-D03-0001-0697, DRC-D03-0001-0698 and DRC-D03-0001-0699 as five documents for purposes of this filing.

² ICC-01/04-01/07-3085.

³ ICC-01/04-01/07-1665-Corr.

to demonstrate that he could not, for reasons outside his control, file the application for an extension of time within the time limit. The Chamber has ruled, when examining requests pursuant to Regulation 35, that it will first determine if the requesting party has filed a request for extension of time before the set deadline.⁴

5. The Chamber has also stated that *“When a party knows that it will not be able to meet a set time limit, but still has every intention of obtaining the material in order to present it at a later stage, it must ... file a formal application under regulation 35(2) before the deadline.”*⁵ Recently, the Chamber clarified that *“it can only expect parties to file a request for extension before the time limit lapses when the party in question could reasonably have foreseen that it would still be able to obtain the additional evidence ... This is an issue which must be assessed on a case-by-case basis.”*⁶
6. The Prosecution submits that the Defence for Mathieu Ngudjolo has failed to provide the justifications for not filing the application within the time limit of 7 March 2011 nor has it shown good cause for adding the documents to its List of Evidence at this late stage.

The conflict in Ituri is not an “exceptional circumstance” within the meaning of Regulation 35(2)

7. The Ngudjolo Defence claims that the consequences of the conflict in Ituri prevented it from obtaining certain documents relating to the education and professional activities of Mathieu Ngudjolo and witness DRC-D03-P-0410.⁷ The existence of the conflict and its impact on investigative activities is not new and has persisted since well before the beginning of the proceedings in the *Katanga and Ngudjolo* case. It is well-known to all the Parties and

⁴ ICC-01/04-01/07-1552, paras. 13-14.

⁵ ICC-01/04-01/07-1515-Corr, para. 33.

⁶ ICC-01/04-01/07-3059, para. 19.

⁷ ICC-01/04-01/07-3082, paras. 26-27.

Participants and does not represent an “exceptional circumstance”. The Defence was in a position to inform the Chamber, before the deadline of 7 March 2011, of its attempts to obtain certain documents from specific institutions and locations in Ituri whose archives might have been affected by the conflict⁸ and any difficulties it might have had in trying to obtain such documents. The Defence does not explain in its submission what change in circumstances made it possible to obtain, now, documents that were previously inaccessible due to the conflict, nor does it provide an exhaustive list of documents that were allegedly not previously accessible and specific reasons for each of these documents. Moreover, the Prosecution notes that a number of these documents are “affidavits” or “attestations” from persons that were available before the 7 March 2011 deadline.

The Ngudjolo Defence could have anticipated the need to obtain the documents it now wishes to add to its List of Evidence

8. With the exception of the brief mention of document DRC-D03-0001-0707, the Ngudjolo Defence does not detail its argument, which consists of stating that some documents were only sought and obtained after the testimony of Katanga Defence witnesses. However, even document DRC-D03-0001-0707 does not relate to a “new” issue, since the alleged involvement of the Kinshasa government and FAC and APC forces in the Bogoro attack is an issue that was well-known even before the commencement of the Defence’s case. Other documents relate to previously existing issues in the case and did not arise out of the testimony of the witnesses for Germain Katanga.⁹
9. The Defence knew before 7 March 2011 that it would call witnesses DRC-D03-P-0707, DRC-D03-P-0410 and DRC-D03-P-0088 to testify. The Prosecution recalls that on 10 March 2011, the Chamber ordered both Defence teams to

⁸ See *ibid.*, para. 29.

⁹ See for example DRC-D03-0001-0375, DRC-D03-0001-0376.

provide additional biographic details in relation to their witnesses by 14 March 2011.¹⁰ Even if the Defence did not have in its possession at the time the documents relating to the education and professional activities of DRC-D03-P-0707,¹¹ as well as the documents related to DRC-D03-P-0410¹² and DRC-D03-P-0088,¹³ the Defence could have disclosed to the Prosecution and Participants, even if in another form, the biographical data contained in those documents as the Chamber ordered.

10. Many of the documents existed before 7 March 2011:

- o Documents relating to the education and professional activities of Mathieu Ngudjolo existed before March 2011; in the case of at least documents DRC-D03-0001-0689 and DRC-D03-0001-0695, Mathieu Ngudjolo knew of their existence since at least 2005;
- o Documents DRC-D03-0001-0709 and DRC-D03-0001-0710 are letters sent from the Defence to MONUSCO in January 2011 and December 2010, respectively;
- o Documents DRC-D03-0001-0375 and DRC-D03-0001-0376, published in March 2003, are open source articles that concern previously known issues, and the Defence has been in possession of these documents since June 2008 according to the chain of custody.

The Documents are not relevant, do not bring to light new significant facts and lack prima facie the indicia of reliability

11. The Chamber has repeatedly ruled that even if it finds that the requirements of Regulation 35(2) have not been complied with, it can still grant the late addition of the material, if it is convinced that (i) the new material is either

¹⁰ ICC-01/04-01/07-T-237-ENG ET, p. 4, lines 11-14.

¹¹ DRC-D03-0001-0683; DRC-D03-0001-0684; DRC-D03-0001-0686; DRC-D03-0001-0688; DRC-D03-0001-0689; DRC-D03-0001-0690; DRC-D03-0001-0692; DRC-D03-0001-0695; DRC-D03-0001-0696; DRC-D03-0001-0697; DRC-D03-0001-0698; DRC-D03-0001-0699.

¹² DRC-D03-0001-0685 and DRC-D03-0001-0687 and DRC-D03-0001-0694.

¹³ DRC-D03-0001-0700 and DRC-D03-0001-0701.

“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 is not prejudicial to the fairness of the proceedings, especially in terms of providing the opponent with adequate time to respond to the new material.”¹⁴

12. The Prosecution submits that the materials proffered by the Ngudjolo Defence do not meet the criteria set by the Chamber as they do not bring to light any new significant facts to the case, nor are they more compelling than other items of evidence already disclosed:

- o Most documents relating to the activities and education of Mathieu Ngudjolo¹⁵ and Witness DRC-D03-P-0410¹⁶ do not fall within the relevant time period.
- o The photographs DRC-D03-0001-0703, DRC-D03-0001-0704, DRC-D03-0001-0705 and DRC-D03-0001-0706 and especially documents DRC-D03-0001-0700 and DRC-D03-0001-0701 are of poor quality.
- o Documents DRC-D03-0001-0682, DRC-D03-0001-0709 and DRC-D03-0001-0710 have no relevance to the case.
- o Regarding newspaper articles DRC-D03-0001-0375 and DRC-D03-0001-0376, the Chamber previously ruled that newspaper articles contain opinion evidence, and as such cannot be given sufficient probative value, unless additional information is made available to the Chamber regarding the objectivity and professionalism of journalists and their sources.¹⁷ They cannot therefore be regarded to offer more compelling evidence than that already before the Chamber.

¹⁴ See for example ICC-01/04-01/07-3059, para. 21.

¹⁵ DRC-D03-0001-0683; DRC-D03-0001-0684; DRC-D03-0001-0686; DRC-D03-0001-0688; DRC-D03-0001-0689; DRC-D03-0001-0690; DRC-D03-0001-0692; DRC-D03-0001-0695; DRC-D03-0001-0696; DRC-D03-0001-0697; DRC-D03-0001-0698; DRC-D03-0001-0699.

¹⁶ DRC-D03-0001-0685; DRC-D03-0001-0687 and DRC-D03-0001-0694.

¹⁷ ICC-01/04-01/07-2635, para. 31.

13. In the event that the Defence's request is granted, the Prosecution preserves its right to make objections regarding the use of these documents in court or their admission into evidence pursuant to the Directions for the conduct of the proceedings.¹⁸ The Prosecution may submit, amongst other objections, that some of these documents should not be admitted into evidence as they contravene the rule of orality of the presentation of the evidence.¹⁹

Request for the lifting of the redaction to the source of document DRC-D03-0001-0707

14. Finally, the Prosecution requests that the identity of the redacted source of document DRC-D03-0001-0707 be lifted. As the Prosecution has previously argued in its response to the Katanga Defence's request to redact the name of a document provider,²⁰ it opposes the request for the following three reasons:

- o the Defence has not shown that the person's security is at risk if his identity is communicated to the Prosecution. Beyond stating in general terms that the person involved is in an "imminently dangerous situation" (*dans une situation éminemment dangereuse*) and that the revelation of his identity could have "immeasurable consequences" (*conséquences incommensurables*) for his life, the Defence does not provide any specifics of that situation or the exact nature of the threat to the source.
- o without the identity of the provider of the material the Prosecution is unable to discharge its duties under Article 54 to establish the truth; and
- o disclosure to the Chamber alone, as the Ngudjolo Defence proposes doing, is improper and ineffective in terms of establishing the truth since the

¹⁸ ICC-01/04-01/07-1665-Corr.

¹⁹ ICC-01/04-01/07-3046.

²⁰ ICC-01/04-01/07-3053-Conf., in particular paras. 3-6.

Chamber does not have the means to investigate information coming from a provider simply based on his identity.

15. The Prosecution further reiterates its duties pursuant to Articles 54 and 68(1) of the Statute, which it takes very seriously, and the existence of internal procedures and policies to protect the security of the persons with whom the Office of the Prosecutor comes in contact during its investigative activities. In the absence of concrete information supporting the allegations of imminent danger to the source and lack of any link between such alleged danger and the potential revelation of the source's identity to the Prosecution, the Prosecution should be granted access to the redacted name of the provider.

Conclusion

16. For all the foregoing reasons, the Prosecution submits that the Defence's Request, in relation to the 28 documents never previously disclosed, should be denied as should the request to redact the name of the provider of document DRC-D03-0001-0707.



Luis Moreno Ocampo, Prosecutor

Dated this 9th day of August 2011

At The Hague, The Netherlands