

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07

Date: 20 July 2012

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

**Decision on the Defence Application for Disclosure of
Confidential Documents to Dutch Asylum Lawyers
Representing Pitchou Iribi and Ndjabu Ngabu**

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

The Office of the Prosecutor

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

States Representatives

The Office of Public Counsel for the Defence

REGISTRY

Registrar

Ms Silvana Arbia

Mr Marc Dubuisson

Victims and Witnesses Unit

Counsel Support Section

Mr Esteban Peralta Losilla

Others

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 21, 54, 64 and 68 of the Rome Statute of the International Criminal Court (“Statute”) and rule 82 of the Rules of Procedure and Evidence (“Rules”), decides as follows:

1. Between 30 March 2011 and 3 May 2011, three witnesses who were detained by the authorities of the Democratic Republic of the Congo (“DRC”), including Mr. Pichou Iribi and Mr. Ndjabu Ngabu, appeared before the Chamber. They had been transferred to The Hague for that purpose in cooperation with the DRC authorities in accordance with article 93(7) of the Statute. On 12 May 2011, the three detained witnesses filed an application for asylum with the competent authorities of The Netherlands.¹
2. On 17 July 2012, the Defence for Mr. Katanga seized the Chamber of a request for leave to provide the Dutch lawyers representing Mr. Pichou Iribi and Mr. Ndjabu Ngabu in their asylum proceedings in The Netherlands with six documents that were admitted into evidence before this Chamber.² The Request states that Mr. Pichou Iribi and Mr. Ndjabu Ngabu have to present their observations to the Dutch authorities by 23 July 2012.
3. Given the urgency of the matter, the Office of the Prosecutor (“Prosecution”) submitted observations via email.³ According to the Prosecution, the content of EVD-OTP-00253 is identical to that of EVD-OTP-00233 and EVD-OTP-00234. The only difference between the two versions is that the former has been authenticated by a member of an international NGO.

¹ “Request for leave to submit Amicus Curiae Observations by mr. Schuller and mr. Sluiter, Counsel in Dutch Asylum proceedings of witnesses D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350”, 26 May 2011, ICC-01/04-01/07-2968, para. 2

² “Defence Application for Disclosure of Confidential Documents to Dutch Asylum Lawyers Representing Pichou Iribi and Ndjabu Ngabu”, 17 July 2012, ICC-01/04-01/07-3311 (“Request”)

³ Email message of 19 July 2012 at 11hh21, annex 1

Only this document is confidential; EVD-OTP-00233 and EVD-OTP-00234 are public.

4. As the Request does not explain why the two witnesses need to have two versions of the same document, the Chamber considers that it is not necessary to authorise the release of document EVD-OTP-00253 to the Dutch counsel of Mr. Pichou Iribi and Mr. Ndjabu Ngabu.

5. In relation to EVD-OTP-00227 and EVD-OTP-00228, the Prosecution states that these documents were obtained from the *Auditeur militaire* of the DRC on condition of confidentiality for reasons of protection of third parties and confidentiality of national investigations and procedures. The Prosecution believes that the prior consent of the DRC is required before these two documents can be released to the Dutch counsel of Mr. Pichou Iribi and Mr. Ndjabu Ngabu.

6. The Chamber observes, in this regard, that the date and content of document DRC-OTP-00227 were discussed before this Chamber in open court on 1 June 2009.⁴ The Chamber further notes that document DRC-OTP-00228 is a "Procès-Verbal d'Audition" of Mr. Ndjabu Ngabu. As the Prosecution acknowledges, his Congolese lawyer is probably in possession of a copy of this document.

7. However, considering the urgency of the matter, the Chamber decides that documents EVD-OTP-00227 and EVD-OTP-00228 can be released to the Dutch counsel of Mr. Pichou Iribi and Mr. Ndjabu Ngabu on strict condition of confidentiality. The condition for release is that both documents may only be shared with the Dutch authorities that are competent to rule on the asylum request and no one else. To the extent that it is necessary to show these

⁴ ICC-01/04-01/07-T65-ENG CT WT, p. 18

documents during a hearing, the Chamber asks that the relevant parts of the hearing be conducted in closed session.

8. In relation to EVD-OTP-00217, the Prosecution states that this document was provided by the United Nations under article 54(3)(e) of the Statute. Accordingly, to the extent that the UN has only consented to allow for the disclosure of this document to the parties in this case, the Chamber cannot authorise its release to the Dutch counsel for Mr. Pichou Iribi and Mr. Ndjabu Ngabu. If the Defence for Mr. Katanga or Counsel for Mr. Pichou Iribi and Mr. Ndjabu Ngabu consider this document to be essential for making their case in the Dutch asylum proceedings, they must therefore seize the Prosecution and request that the latter contact the United Nations in order to obtain permission to use the document for other purposes than the trial against Mr. Katanga and Mr. Ngudjolo.

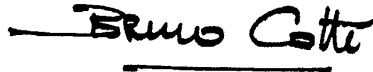
**FOR THESE REASONS,
THE CHAMBER,**

AUTHORISES the release of EVD-OTP-00233 and EVD-OTP-00234;

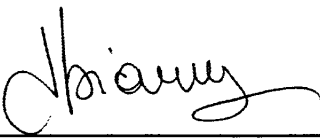
AUTHORISES the release of EVD-OTP-00227 and EVD-OTP-00228 under the conditions mentioned in paragraph 7;

REJECTS the remainder of the Request.

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 20 July 2012

At The Hague, The Netherlands