

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 14 May 2009

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte , Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Hans-Peter Kaul

**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 to Amend Paragraph 14 of the Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol of the Rome Statute (Article 64)"**

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

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**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Trial Chamber II ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, issues the following Decision on the "Prosecution's Application to Amend Paragraph 14 of the Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol of the Rome Statute (Article 64)" of 11 May 2009<sup>1</sup> ("Application").

## I. BACKGROUND

1. On 13 March 2009 the Chamber issued the "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol"<sup>2</sup> ("Order"). By virtue of this order, the Office of the Prosecutor ("the Prosecution") was instructed to submit a Table of Incriminating Evidence according to the guidelines set out by the Chamber as well as those contained within Annex A of the said decision, no later than Friday 3 April 2009 at 4 p.m.

2. The Prosecution applied for a variation of this time limit three times:

- On 19 March 2009 the Prosecution filed an urgent "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.'"<sup>3</sup> On 1 April 2009, the Chamber granted this request for extension of time limit until 4 May 2009.<sup>4</sup>
- On 28 April 2009 the Prosecution filed an additional application for extension of time limit for submitting the Table of Incriminating

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<sup>1</sup> ICC-01/04-01/07-1127

<sup>2</sup> ICC-01/04-01/07-956

<sup>3</sup> ICC-01/04-01/07-969

<sup>4</sup> "Decision on the Prosecution's Application for Extension of Time Limit to Submit a Table of Incriminating Evidence and Related Material", 1 April 2009, ICC-01/04-01/07-1017

Evidence.<sup>5</sup> In this application, the Prosecution requested the Chamber to vacate the time limit of 4 May 2009 and to defer setting a new date “until such time as it can reasonably determine when trial is likely to start”.<sup>6</sup> The Chamber rejected this application on 1 May 2009.<sup>7</sup>

- Immediately thereafter, the Prosecution filed a third urgent application for extension of time limit, this time requesting a further extension until 20 May 2009.<sup>8</sup> The Chamber granted this request on 4 May 2009.<sup>9</sup>

3. The present application<sup>10</sup> seeks the amendment of paragraph 14 of the Order, which reads as follows:

If a particular item of evidence is relied upon in relation to more than one factual allegation, the Prosecution shall indicate in each instance where the evidence is mentioned and to which other factual allegation it relates. This may be done by way of reference to the “Claim number” of the other factual allegation(s), to which the item of evidence pertains, in the column entitled “Other References.”

4. What the Chamber wishes to obtain, through this paragraph, is:

- (a) A precise overview of how many times each single item of evidence is invoked by the Prosecution; and
- (b) For which precise factual allegations each item of evidence is invoked in support.

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<sup>5</sup> “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’”, 28 April 2009, ICC-01/04-01/07-1080

<sup>6</sup> *Ibid.*, par. 18

<sup>7</sup> “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

<sup>8</sup> “Prosecution’s Motion to File Partial Table of Incriminating Evidence and Related Material, Confidential – *Ex Parte*, available to the Prosecution Only, on 4 May 2009 – Regulation 35”, 1 May 2009, ICC-01/04-01/07-1090

<sup>9</sup> “Decision on the “Prosecution’s Motion to File Partial Table of Incriminating Evidence and Related Material, Confidential – *Ex Parte*, available to the Prosecution Only, on 4 May 2009 – Regulation 35”, 4 May 2009, ICC-01/04-01/07-1095

<sup>10</sup> ICC-01/04-01/07-1127

It is thus important that the link between each item of evidence and all the factual allegations it supports is made apparent.

5. According to the Prosecution, this objective cannot be achieved by the Table of Incriminating Evidence, as it is currently conceived. The only reason which is given for this assertion is that the Prosecution, in filling in the column “Factual allegations”, has copied verbatim excerpts from the Amended Document Containing the Charges<sup>11</sup> but that it has not always reproduced these excerpts in their entirety. According to the Prosecution, this has as a consequence that the “Claim numbers” in the first column of the Table of Incriminating Evidence are not unique identifiers of the *Factual allegations*, as was the intention of the Order, but just a means of numbering them.<sup>12</sup> As a result, the Prosecution is of the view that it would serve no purpose to fill in the column “Other References”, as the information it would contain would neither assist the Chamber nor the Defence.<sup>13</sup>

6. As an alternative, the Prosecution suggests that it may submit a separate document, in the form of a spreadsheet<sup>14</sup>, “containing all items of evidence which the Prosecution intends to rely on at trial”.<sup>15</sup> The spreadsheet would be composed of fifteen columns, the first two of which would contain all the ERNs of the items of evidence included in the Table of Incriminating Evidence and a short description of each item of evidence. The remaining thirteen columns, which correspond to sections of the Table of Incriminating Evidence (*dealing with individual criminal responsibility, the contextual elements of the crimes against humanity and war crimes, and the ten specific*

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<sup>11</sup> “Prosecution’s Submission of Amended Document Containing the Charges and Additional List of Evidence”, 12 June 2008 ICC-01/04-01/07-584-Anx1A

<sup>12</sup> ICC-01/04-01/07-1127, par. 7

<sup>13</sup> ICC-01/04-01/07-1127, par. 11

<sup>14</sup> ICC-01/04-01/07-1127-Conf-Exp-Anx2

<sup>15</sup> ICC-01/04-01/07-1127, par. 8

charges) would be 'populated' "with the reference as to where [the item of evidence] appears within a section".<sup>16</sup>

7. The Chamber appreciates this suggestion and considers it useful. However, the Chamber cannot fail to note that the Prosecution's proposal omits an important element of the Order, namely the specific link between each item of evidence and every "Factual allegation" it supports. This omission, according to the Prosecution's own submissions, is due to the fact that it has chosen to fill in the column "Factual allegation" by copying whole and partial excerpts from the Amended Document Containing the Charges, which, it is alleged, makes it impossible to provide each "Factual allegation" with a unique identifier.

8. The Chamber has two preliminary remarks in relation to this issue. First, the Order dates from 13 March 2009, but the Prosecution waited to raise this putative problem until the 7<sup>th</sup> of May 2009, thirteen days before the expiration of the second extended deadline. Secondly, the problem faced by the Prosecution in complying with the Order is, at least in part, of its own creation. The Order did not require the Prosecution to copy and paste excerpts from the Amended Document Containing the Charges.

9. However, given the fact that neither of the Defence teams opposes the Prosecution's proposal<sup>17</sup>, and given the short period of time left until the lapse of the deadline for the submission of the Table of Incriminating Evidence, the Chamber is willing to accept the Prosecution's alternative proposal. However, if, after assessing its usefulness in practice, the Chamber concludes that it still needs the Prosecution to provide it with a document specifying the link between each item of evidence and each individual factual allegation it supports, it may order the Prosecution to comply with the Order in its entirety.

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<sup>16</sup> ICC-01/04-01/07-1127, par. 8

<sup>17</sup> Email communication of 13 May 2009 between the Chamber and the two Defence teams.

**FOR THESE REASONS,****The Chamber**

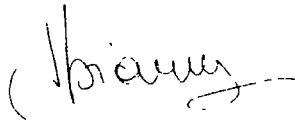
- 1) **REJECTS** the Prosecution's submissions that complying with paragraph 14 of the Order would result in the inclusion of information in the column entitled "Other References" that would not assist the Chamber and/or enable Defence Counsel to prepare the case in the manner initially foreseen by the Order;
- 2) **PROVISIONALLY ALLOWS** the Prosecution not to fill in the column "Other References" in the Table of Incriminating Evidence;
- 3) **ACCEPTS** the Prosecution's suggestion that it provide the Chamber and the Defence with a separate document, structured as proposed in Annex 2 of the application.

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



**M. le juge Bruno Cotte**

**Juge président**



**Mme la juge Fatoumata Dembele Diarra**



**M. le juge Hans-Peter Kaul**

Dated this Thursday, 14 May 2009

At The Hague, The Netherlands