

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

**Decision on Prosecution requests ICC-01/04-01/07-1386 and ICC-01/04-01/07-1407
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
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Legal Representatives of the Applicants

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support 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") 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 that all incriminating evidence be disclosed to the Defence no later than 30 January 2009 and that all potentially exonerating material as well as material falling under rule 77 of the Rules of Procedure and Evidence ("Rules"), be disclosed no later than 27 February 2009.¹ The Prosecution has continued its investigation after the aforementioned deadlines elapsed, and it now seeks extensions of time limit pursuant to regulation 35(2) of the Regulations to add newly discovered material to its List of Incriminating Evidence, as well as to communicate to the Defence material falling under rule 77 of the Rules.

A. Prosecution Requests

1. *Application Relating to DRC-OTP-1042-0006*

2. In an earlier request before the Chamber², the Prosecution sought the addition of video DRC-OTP-1042-0006 to its List of Incriminating Evidence. Part of this video overlaps with a previously disclosed video, DRC-OTP-0155-0004, but other parts are new and contain, according to the

¹ "Ordonnance fixant le calendrier de communication des éléments de preuve à charge et 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 "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos an Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions", 30 June 2009, ICC-01/04-01/07-1260

Prosecution, incriminating material. However, in its Decision of 27 July 2009, the Chamber rejected the Prosecution application under regulation 35(2) of the Regulations and only authorised the Prosecution to substitute those parts of video footage contained within the previously disclosed video DRC-OTP-0155-0004 with the identical footage of higher audio-visual quality contained within video DRC-OTP-1042-0006.³ The Chamber refused to exercise its discretion to allow the late submission of the new parts of DRC-OTP-1042-0006, because the Prosecution did not provide a transcript or a translation of the video.⁴

3. On 17 August 2009, the Prosecution filed a new application in relation to the same video, entitled "Prosecution's Application to add to the List of Incriminating Evidence the transcript and translation for video DRC-OTP-1042-0006 and to rely upon the video's new material pursuant to Regulation 35"⁵ ("Application"). In the Application, the Prosecution again seeks permission of the Chamber pursuant to regulation 35(2) of the Regulations, to add video DRC-OTP-1042-0006 to its List of Incriminating Evidence in its entirety. It also requests permission for the addition of the transcript⁶ and translation⁷ of the aforementioned video to its List of Incriminating Evidence.⁸

4. In support of its application for an extension of time limit within the meaning of regulation 35(2) of the Regulations, the Prosecution reiterates its

³ "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. 32

⁴ Idem.

⁵ "Prosecution's Application to add to the List of incriminating Evidence the transcript and translation for video DRC-OTP-1042-0006 and to rely upon the video's new material pursuant to Regulation 35", 17 August 2009, ICC-01/04-01/07-1386

⁶ DRC-OTP-1046-0240

⁷ DRC-OTP-1047-0005

⁸ ICC-01/04-01/07-1386, introductory paragraph

earlier submissions,⁹ outlining that it was only made aware of the existence of witness P-444 on 20 February 2009, that it only made contact with the said witness on 4 May 2009, and that it received video DRC-OTP-1042-0006 from witness P-444 on 8 June 2009.¹⁰ Furthermore, the Prosecution advances that it reviewed the said video in conjunction with its transcript and translation after these had been finalised in the week of 10 August 2009.¹¹

5. Having regard to the Chamber's ruling of 27 July 2009, the Prosecution reformulates its earlier request in relation to video DRC-OTP-1042-0006, in arguing that the parts of the footage it identifies in the Application¹² are "not found in DRC-OTP-0155-0004 or any other incriminatory video on the List."¹³ The Prosecution further argues that the said footage is "more compelling than previously disclosed video footage"¹⁴ and it seeks to use this new footage, as well as its related transcript and translation, as incriminatory evidence to support its charges regarding the use of child soldiers by the accused Mathieu Ngudjolo and Germain Katanga.¹⁵ It further wants to use the aforementioned footage to demonstrate (i) the senior role and authority of Mathieu Ngudjolo within the relevant time period in 2003, and (ii) his role as the most senior commander of the Lendu child soldiers shown in the video footage in question.¹⁶

⁹ ICC-01/04-01/07-1260, par. 12

¹⁰ ICC-01/04-01/07-1386, par. 5

¹¹ *Ibid.*, par. 9

¹² *Ibid.*, paragraphs 11-17

¹³ *Ibid.*, par. 11

¹⁴ *Idem.*

¹⁵ *Idem.*

¹⁶ *Idem.*

2. *Request Relating to Rule 77 Video and Declaration of P-444*

6. A second, related, request pursuant to regulation 35 of the Regulations, entitled “Requête de l’Accusation, en application de la norme 35 et de la règle 77, aux fins de l’expurgation et de la divulgation de la déclaration du témoin 444” (“Request”) was filed on 19 August 2009.¹⁷ In the Request, the Prosecution seeks the Chamber’s permission pursuant to regulation 35(2) of the Regulations, to communicate a redacted statement of witness P-444 to the Defence. It submits that the statement falls under rule 77 of the Rules as it contains information that is material to the preparation of the defence.¹⁸ In relation to the declaration, the Prosecution seeks to be given permission to redact the names of the parents of witness P-444¹⁹ for the duration of the proceedings.²⁰

7. The Prosecution equally seeks permission to communicate video DRC-OTP-1042-0008 as well as a series of photographs that have been received by the Prosecution from witness P-444, as material falling under rule 77 of the Rules. The photographs are commented upon by the witness in the abovementioned statement.²¹ The Prosecution argues that, even at this late stage in the proceedings, the communication of the aforementioned material, including the applied redactions, does not cause any prejudice to the Defence.²² The aforementioned photographs are registered under the following ERN numbers:

¹⁷ “Requête de l’Accusation, en application de la norme 35 et de la règle 77, aux fins de l’expurgation et de la divulgation de la déclaration du témoin 444”, 19 August 2009, ICC-01/04-01/07-1407

¹⁸ ICC-01/04-01/07-1407, par. 8

¹⁹ Ibid., par. 11

²⁰ Ibid., Annex A2, p.1

²¹ Ibid., par. 8

²² Ibid., par. 9

DRC-OTP-1042-0079; DRC-OTP-1042-0080; DRC-OTP-1042-0081;
 DRC-OTP-1042-0082; DRC-OTP-1042-0083; DRC-OTP-1042-0084;
 DRC-OTP-1042-0085; DRC-OTP-1042-0086; DRC-OTP-1042-0087;
 DRC-OTP-1042-0088; DRC-OTP-1042-0089; DRC-OTP-1042-0090;
 DRC-OTP-1042-0091; DRC-OTP-1042-0092; DRC-OTP-1042-0093;
 DRC-OTP-1042-0094; DRC-OTP-1042-0095; DRC-OTP-1042-0096;
 DRC-OTP-1042-0097; DRC-OTP-1042-0098; DRC-OTP-1042-0099;
 DRC-OTP-1042-0100; DRC-OTP-1042-0101; DRC-OTP-1042-0102;
 DRC-OTP-1042-0103; DRC-OTP-1042-0104; DRC-OTP-1042-0105;
 DRC-OTP-1042-0106; DRC-OTP-1042-0107; DRC-OTP-1042-0108;
 DRC-OTP-1042-0109; DRC-OTP-1042-0110; DRC-OTP-1042-0111;
 DRC-OTP-1042-0112.

8. In relation to the request for extension of time limit, the Prosecution reiterates the arguments advanced in the Application, discussed in paragraph 4 above. The Prosecution states that it was only after having analysed video DRC-OTP-1042-0006 that it decided to interview witness P-444. The Prosecution does not advance any explanation as to why it did not include its request for an extension of time limit for communicating video DRC-OTP-1042-0008, as well as the series of photographs, in its first application pertaining to DRC-OTP-1042-0006.²³ These items were apparently transmitted to the Prosecution by witness P-444 on the same day as video DRC-OTP-1042-0006.²⁴

²³ ICC-01/04-01/07-1260

²⁴ The Prosecution states in paragraph 6 of the Request, that it received two videos of which one was DRC-OTP-1042-0006, as well as some photographs on 8 July 2009. It is only by way of a subsequent reference in footnote 6 of the Request that it becomes apparent that the second video received on 8 July 2009 is video DRC-OTP-1042-0008, and that the photographs are photographs DRC-OTP-1042-0079 to DRC-OTP-1042-0112.

B. Defence Responses

9. The Defence for Mathieu Ngudjolo replied to both Prosecution requests in one consolidated filing.²⁵ The Defence for Germain Katanga did not file observations in relation to either the Application or the Request.

1. *Response in Relation to the Application*

10. The Defence for Mathieu Ngudjolo objects to the increase in the number of Prosecution requests filed pursuant to regulation 35(2) of the Regulations. It further objects to the addition of video DRC-1042-0006 to the List of Incriminating Evidence, as well as the addition of the corresponding additional passages of the transcript and translation thereof.²⁶

11. It argues that, given the approaching start of the hearings on the merits, the work of the Defence is greatly disrupted, due to the fact that it has to respond to the frequent requests related to the disclosure of additional evidence.²⁷ In addition, the Defence does not accept the Prosecution's assertion that the evidence in the new passages of video DRC-OTP-1042-0006 is more compelling than other evidence already disclosed.²⁸ The Defence stresses that the Prosecution does not advance any form of comparative analysis that would assist in identifying in what way the said extracts are allegedly more compelling than others already disclosed to the Defence.²⁹ In conclusion, the Defence submits that the Application greatly prejudices the Defences' right to dispose of sufficient time to exploit the disputed evidence and to prepare for trial.³⁰

²⁵ "Réponse consolidé de la Défence de Mathieu Ngudjolo aux requêtes ICC-01/04-01/07-1386 et ICC-01/04-01/07-1407 en vertu de la norme 35 du Règlement de la Cour de l'Accusation ", 24 August 2009, ICC-01/04-01/07-1420

²⁶ *Ibid.*, par. 7

²⁷ *Ibid.*, par. 8

²⁸ *Ibid.*, par. 13

²⁹ *Idem.*

³⁰ *Ibid.*, par. 14

2. *Response in Relation to the Request*

12. The Defence for Mathieu Ngudjolo stresses that although it is strongly opposed to Prosecution requests pursuant to regulation 35(2) of the Regulations at this late stage in the proceedings for lack of valid justification, it submits that the rights of the Defence to adequately prepare for trial can only truly be respected, if it is provided with all the necessary exonerating information, including the statement of witness P-444.

II. ANALYSIS AND CONCLUSION

A. Late Submission

13. When a party wishes to submit new items of evidence after the expiration of the applicable time limit, the Chamber will, in accordance with its prior rulings on this matter,³¹ consider the following elements:

14. First, it will consider whether there is a timely and sufficiently motivated application for extension of 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 this 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 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)

³¹ ICC-01/04-01/07-1336 ; ICC-01/04-010/7-1515

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. *The Application*

a) Video DRC-OTP-1042-0006

15. As noted in paragraph 2 above, the Prosecution had already submitted a previous request under regulation 35(2) of the Regulations in relation to this video. In the present Application no new arguments are advanced to justify an extension of time limit. As the Chamber has already rejected these same arguments, it will not revisit them.

16. The Prosecution does develop a number of additional arguments in the Application about the significance of the new parts of the video in relation to other evidence already disclosed, and argues that they contain more compelling material and even new information. The Prosecution does not attempt to explain why these arguments were not made in the initial request.³² It appears that the only justification given is that the Prosecution was unable to analyse the video before it had finalised the transcript and translation. However, the Prosecution cannot invoke the fact that the transcript and translation of the item of evidence in question had not yet been finalised at the time the earlier request was made, to, in effect, re-file an identical request with some additional arguments.

17. As a matter of general principle, the Chamber will not entertain the same application in respect of a specific item of evidence more than once. The Chamber therefore declines to consider the Prosecution's additional

³² ICC-01/04-01/07-1260

arguments and rejects the request to add the new parts of video DRC-OTP-1042-0006 to the List of Incriminating Evidence.

18. However, the Chamber considers that the information contained in the new parts of video DRC-OTP-1042-0006 falls under rule 77 of the Rules, and therefore orders the communication of the entire video to the Defence on that basis, together with both transcript DRC-OTP-1046-0240 and translation DRC-OTP-1047-0005, as they form an integral part of the DRC-OTP-1042-0006.

b) DRC-OTP-1046-0240 and DRC-OTP-1047-0005

19. Despite the above, the Chamber must still consider the Prosecution's request to add both the transcript and translation of video DRC-OTP-1042-0006 to its List of Incriminating Evidence. As the Chamber has already allowed those parts of the footage of DRC-OTP-1042-0006 which overlap with DRC-OTP-0155-0004 to be added to the List of Incriminating Evidence,³³ the Chamber sees no impediment to the corresponding pages of the transcript and translation being added to that List as well.

2. *The Request*

20. As the Request pertains to material falling under rule 77 of the Rules and the only Defence team to respond to the Request demands the material to be disclosed, the Chamber sees no impediment to granting the Request.

21. With respect to the request for redactions in the statement of witness P-444, the Chamber refers to its decision of 22 October 2009, entitled "Décision relative à la levée, au maintien et au prononcé de mesures d'expurgations".

³³ ICC-01/04-01/07-1336, par. 20

**FOR THESE REASONS,
THE CHAMBER,**

REJECTS the application for the addition to the List of Incriminating Evidence of video DRC-OTP-1042-0006, except for those passages that overlap with video DRC-OTP-0155-0004;

AUTHORISES the Prosecution to add to the List of Incriminating Evidence those parts of transcript DRC-OTP-1046-0240 and translation DRC-OTP-1047-0005 that correspond to the passages of video DRC-OTP-1042-0006 which overlap with video DRC-OTP-0155-0004;


INSTRUCTS the Prosecution to communicate video DRC-OTP-1042-0006 as well as transcript DRC-OTP-1046-0240 and translation DRC-OTP-1047-0005 thereof in their entirety to the Defence pursuant to rule 77 of the Rules;

AUTHORISES the Prosecution to communicate the statement of witness P-444, video DRC-OTP-1042-0008 and photographs DRC-OTP-1042-0079 to DRC-OTP-1042-0112 under rule 77 of the Rules.


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 23 October 2009

At The Hague, the Netherlands