

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07
Date: 3 November 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

**Urgent
Public**

**Decision on the Prosecution's Application to Add P-317 to the Prosecution
Witness List (ICC-01/04-01/07-1537)**

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

The Office of the Prosecutor

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Unrepresented Victims

**Unrepresented Applicants for
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Defence**

REGISTRY

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Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention 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"), rule 77 of the Rules of Procedure and Evidence ("Rules") and regulation 35(2) of the Regulations of the Court ("Regulations"), issues the following decision:

I. BACKGROUND AND SUBMISSIONS

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 and rule 77 material be disclosed no later than 27 February 2009.¹ Despite these deadlines, the Office of the Prosecutor ("Prosecution") has continued gathering further evidence and has submitted several applications for variation of time limit under regulation 35(2) of the Regulations. This decision deals with the latest such request, filed on 16 October 2009, namely the "Prosecution's Application to Be Permitted to Add the Statement of Witness 317 to its List of Evidence and to Add Witness 317 to its List of Witnesses pursuant to Regulation 35" ("Application").²

2. With the Application, the Prosecution wishes to obtain authorisation of the Chamber to add P-317 to the Prosecution Witness List and to disclose her statement to the Defence as incriminating evidence. However, as this witness is an employee of the United Nations ("UN"), her testimony is subject to a number of conditions, and her statement contains a number of redactions that were imposed by the UN.³

3. The Application therefore raises a number of different questions, namely (i) whether the Application satisfies the requirements of regulation 35(2)

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 ICC-01/04-01/07-1537

³ *Idem.*, par. 39-43

of the Regulations for a variation of time limit, as interpreted by the Chamber, and (ii) whether the conditions imposed by the UN are of such a nature as to impact on the fairness of the proceedings.

A. Justification for late submission

4. The Prosecution explains that, although it knew of the existence of P-317 since at least late 2007 when it first asked the UN for permission to interview her, it has taken until 2 June 2009 for this permission to be granted. Due to the limited availability of P-317, the interview only took place on 7-9 August 2009. Subsequently, it took until 7 October 2009 for the UN to agree to the disclosure of P-317's statement (conditional upon the maintenance of certain redactions) and to allow her to be called to testify.⁴

5. The Prosecution argues that it bears no responsibility for the delay and instead asserts that it was "attributable to the consultation process required within the UN and between the UN Secretariat (Office of Legal Affairs), the OHCHR, and the Peacekeeping missions on the ground".⁵ It is further stated that until the UN waived the immunity of P-317 on 5 October 2009, it could not seek permission to include her on the Prosecution Witness List.⁶ In this regard, the Prosecution alleges that it was impossible for it to ask for an extension of time limit before its expiration, because it had no control over the process and depended fully on the willingness of the UN. It argues that it was therefore faced with the impossibility of proposing, in good faith, any meaningful date or even range of dates for the extension of the time limit.⁷ The Prosecution advances three arguments for this contention: (a) it had no guarantee that the witness would be available to provide the statement; (b) it was unaware that the witness's evidence would be relevant to the case; and (c) it had no guarantee that even if the witness

⁴ICC-01/04-01/07-1537, par. 13

⁵ Idem., par. 17

⁶ Idem., par. 22

⁷ Idem., par. 25-26

was interviewed and provided relevant information, the witness would thereafter be willing to testify.⁸

6. According to the Prosecution, these factors distinguish the present request from the previous applications in relation to the forensic examinations of the 'Institut de Bogoro',⁹ mainly because in the present case the Prosecution was completely dependent upon the willingness of the UN.¹⁰ The Prosecution therefore draws a parallel with the situation of P-373¹¹, in that it also knew of the existence of P-317 prior to the expiration of the time limit and equally had difficulty in contacting the witness.¹²

B. Defence responses

1. *The Defence for Mr. Katanga*

7. On 29 October 2009, the Defence for Mr. Katanga responded to the Application.¹³ The Defence asks the Chamber to reject the application for an extension of time limit, on the basis of regulation 35(2). It invokes the following arguments to support this request: (i) there are lengthy and unexplained delays between the initial request to obtain permission to interview P-317 and the 'reminders' of this request; (ii) the Prosecution failed to request the assistance of the Pre-Trial Chamber or the Trial Chamber in obtaining the agreement of the UN; (iii) the Prosecution does not justify why it did not inform the Chamber and the Defence in due time about the existence of this witness and that it had the intention of calling her as Prosecution witness.

⁸ ICC-01/04-01/07-1537, par. 27

⁹ See "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)", 7 October 2009, ICC-01/04-01/07-1515

¹⁰ ICC-01/04-01/07-1537, par. 25

¹¹ P-373 was dealt with by the Chamber in its "Décision sur les témoins 002, 030, 323 et 373", 14 May 2009, ICC-01/04-01/07-1135

¹² ICC-01/04-01/07-1537, par. 28

¹³ "Defence Response to the Prosecution's Application to be permitted to add the Statement of Witness 317 to its List of Evidence and to Add Witness 317 to its List of Witnesses pursuant to Regulation 35 (ICC-01/04-01/07-1537)", 29 October 2009, ICC-01/04-01/07-1573-Conf-Exp

8. In case the Chamber were to find the Prosecution's Application well-founded under regulation 35(2), the Defence still asks the Chamber to deny the motion, because it would unduly prejudice the Defence. The Defence argues, in this regard, that "a witness requires preparation and investigation, in a way that a document, for its part, rarely does."¹⁴ The Defence announces that, in case the witness were to be admitted, it "will necessarily seek access to the Witness, the material available to the Witness, the Witness's sources and informants and access to the six other members of the investigative team that she led at the relevant time, together with their notes and other material produced in the course of the investigation."¹⁵ More specifically, the Defence demands that any document relative to P-46 must be revealed to it, given that she has declared to have co-authored one of the reports with P-317.¹⁶ It is argued that the time left for the preparation of the trial does not permit to study the proposed evidence and exhibits of the witness, investigate the same and consider how this evidence affects its approach to other witnesses before the commencement of the presentation of the evidence.¹⁷

9. In addition, the Defence objects to the protective measures required by the UN as a precondition for the testimony of P-317. It argues that the measures would prevent the Defence from knowing the sources of information of the witness, which may affect the weight of the testimony. Moreover, the Defence is of the view that less restrictive measures are available to protect the interests which the UN is seeking to protect, such as an order under rule 87(3)(b) of the Rules.

¹⁴ ICC-01/04-01/07-1573-Conf-Exp, par. 20

¹⁵ *Idem.*, par. 22

¹⁶ *Idem.*, par. 27

¹⁷ *Idem.*, par. 23

2. *The Defence for Mr. Ngudjolo*

10. The Defence for Mr. Ngudjolo, for its part, also raises objections against the Application.¹⁸ Like the Defence for Mr. Katanga, the Defence for Mr. Ngudjolo rejects the Prosecution's arguments to justify the request for a variation of time limit and argues that the late addition of this new witness would cause an objective and real prejudice to it.¹⁹ Nevertheless, the Defence for Mr. Ngudjolo does not object to the addition of this witness, in case the Chamber considers her testimony to be important for the manifestation of the truth.²⁰ However, in that case the Defence insists that the witness must be allowed to testify freely, without the protective measures required by the UN.²¹ The Defence argues, in this respect, that there is no risk whatsoever that P-317 might reveal information that is not already known to it, which could put in danger UN staff or other persons.²²

¹⁸ "Réponse de l'équipe de défense de Mathieu Ngudjolo à la requête 1537 du Bureau du Procureur", 29 October 2009, ICC-01/04-01/07-1572-Conf-Exp

¹⁹ *Idem.*, par. 33

²⁰ *Idem.*, par. 24 and 34

²¹ *Idem.*, par. 25-31

²² *Idem.*, par. 31

II. ANALYSIS AND CONCLUSION

A. Late submission

11. When a party wishes to submit a new item of evidence after the expiration of the applicable time limit, the Chamber will, in accordance with its prior rulings on this matter,²³ consider the following elements:

12. 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) 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.

13. In analysing the Application, the Chamber must thus first assess whether it was made in time. The Chamber recalls, in this regard, that regulation 35(2) requires that the party who knows that it will not be able to meet a certain deadline, but still has every intention of obtaining the material in question in order to present it at a later stage, must file a formal application under regulation 35(2) before the deadline expires.²⁴

²³ ICC-01/04-01/07-1336; ICC-01/04-010/7-1515

²⁴ ICC-01/04-01/07-1515, par. 33

14. The Application clearly presents an example of such a scenario. Although it may be true that the Prosecution did not have control over whether or when the UN would agree to waive the immunities of P-317, it is clear from the Prosecution's own account that it continued pursuing this possibility even after the time limit had lapsed. By not informing the Chamber of the existence of this potential additional witness, the Prosecution has prevented the Chamber from exercising its control over the timely disclosure of all evidentiary material in accordance with article 64(3)(c) of the Statute and regulation 35(2) of the Regulations. The Prosecution knew of P-317 and it was clearly interested in obtaining her testimony for the purposes of this trial. The Chamber does not find the Prosecution's assertion that it was unaware of the potential relevance of P-317's declaration convincing.²⁵ In fact, the only factor of uncertainty was whether the UN would consent in time for her testimony to be used in the current proceedings.

15. The fact that the UN took a long time to decide does not constitute an 'exceptional circumstance' in the sense of regulation 35(2) last sentence.²⁶ The Prosecution knew before the expiration of the time limit that the consent of the UN was a pre-requisite for obtaining P-317's testimony and *a fortiori* for disclosing her statement. The Prosecution could thus easily have informed the Chamber of this situation before the deadline and obtained the extension of the deadline under regulation 35(2) first sentence.

16. For these reasons, the Chamber must reject the request for variation of time limit.

²⁵ ICC-01/04-01/07-1537, par. 27

²⁶ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", 21 February 2007, ICC-01/04-01/06-834, par. 9-10

B. Relevance and nature of P-317's testimony

17. As stated previously, even if the conditions of regulation 35(2) are not fulfilled, the Chamber may still assess whether the new material is more compelling than evidence already disclosed to the Defence, or if it brings to light previously unknown facts, which have a significant bearing upon the case. If this is the case, the Chamber may, using its authority under article 64(3)(c) and (6)(d) and article 69(3) of the Statute, allow for its late submission, if it deems this necessary for the determination of the truth and as long as this does not jeopardise the Defence's right to have adequate time in order to prepare.²⁷ The Chamber must therefore evaluate whether the new material is of such a nature that it will contribute to a better understanding of the case and the establishment of the truth.²⁸

18. In evaluating the potential significance of P-317's statement, the Chamber must place it in the context of the Prosecution's overall case and compare it with other evidence that is already on the List of Incriminating Evidence. The Chamber notes, in this regard, that, according to the Prosecution,²⁹ P-317's testimony will bear chiefly upon the two reports she authored for the UN, entitled 'Special report on the events in Ituri, January 2002-December 2003'³⁰ and 'Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003'³¹, both of which were disclosed to the Defence during the confirmation stage.

19. The Chamber notes that the Defence for Mr. Katanga has stated in the context of the question of admissibility of evidence, that in order for this kind of

²⁷ "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. 30

²⁸ *Idem*.

²⁹ "Thèmes principaux sur lesquels le témoin 317 déposerait" 26 October 2009, ICC-01/04-01/07-1562-Conf-AnxA

³⁰ DRC-OTP-0129-0267

³¹ DRC-OTP-0152-0286

report to be admissible, it would be a prerequisite for the person who produced the report to be available for cross-examination “in order to give an opportunity to the Defence to ask questions about the person’s methodology in collecting the evidence and the foundation for the conclusions drawn from it.”³² Considering the extent to which the Pre-Trial Chamber relied on the reports in question in its Decision on the confirmation of charges,³³ the Chamber deems that it is important to hear P-317 and allow the Defence to cross-examine her on the methodology used in compiling and drafting the reports.

C. Presence of a Representative of the UN Secretary-General

20. With regard to the ‘protective measures’ imposed by the UN as a pre-condition to the waiver of P-317’s immunity from process, the Chamber notes that the presence of a representative of the UN Secretary-General is a possibility which is expressly provided for by article 16(2) of the Relationship Agreement between the International Criminal Court and the United Nations.³⁴ Moreover, the only purpose of this measure is to ensure that P-317 will not be compelled to divulge information which (i) would endanger the safety or security of current or former UN personnel or of other persons, or (ii) would prejudice the security or proper conduct of any current or future operation or activity of the UN, or (iii) would breach an obligation of confidentiality which it is incumbent upon the UN, and upon P-317 as one of its officials, to respect.³⁵

21. On the basis of the information currently at its disposal, it seems to the Chamber that the risk that P-317, in answering questions from the Prosecution or indeed the Defence, will have to provide information that would fall in any of these categories is very small. The putative prejudice to the Defence is therefore mainly hypothetical. However, in case the situation arises where P-317 is asked a

³² “Defence Objections to Admissibility in Principle and in Substance”, 23 October 2009, ICC-01/04-01/07-1558, par. 101

³³ ICC-01/04-01/07-717

³⁴ The relationship agreement entered into force on 4 October 2004, ICC-ASP/3/Res.1, annex

³⁵ ICC-01/04-01/07-1537-Conf-Exp.AnxB

question which she must decline to answer, the Chamber will take this into consideration when attributing the appropriate weight to her testimony.

22. With regard to the presence in the courtroom of a representative of the Secretary-General during the testimony of P-317, the Chamber stresses that any intervention of the said representative will be subject to the control of the Chamber. The fear of the Defence that the representative may prohibit P-317 from testifying freely is thus largely unfounded. The Chamber is the guarantor of the fair conduct of the proceedings before it and it will ensure that the presence of the representative will not disrupt the testimony of P-317. The Chamber will therefore not allow the representative to interrupt the witness or to communicate directly with her in the courtroom, without prior leave of the Chamber. Moreover, the representative will have to request permission before addressing the Chamber.³⁶

D. Request of the Defence for Mr. Katanga

23. The Chamber also took note of the request of the Defence for Mr. Katanga for the disclosure of the transcripts of interview of P-317 dated 7, 8, 9 August 2009, and of any other material in possession of the Prosecution relative to this Witness, pursuant to Rule 77, such as investigator's notes or information relative to the other members of the investigative team who looked into the events of Bogoro of 24 February 2003, such as their names. In particular, the Defence requests the disclosure of any document relating to Witness 46, pursuant to rule 77 of the Rules .

24. With regard to the request for the transcripts of the interview of P-317, the Chamber notes that, since P-317 was not heard as a suspect, the Prosecution was not under an obligation to record the interview or to produce a transcript

³⁶ Trial Chamber I adopted a similar approach in the Lubanga case, see "Decision on the 'Prosecution's provision of information on conditions to testimony of witness DRC-OTP-WWWW-0046 and Request to permit the participation of a representative of the United Nations in the witness' familiarisation process' of 10 June 2009" 26 June 2009, ICC-01/04-01/06-1999-Conf and especially ICC-01/04-01/06-T-204-CONF-ENG-ET

thereof. The Chamber recalls that rule 111 of the Rules only requires the Prosecution to produce a signed record of formal statements made in connection with an investigation or with proceedings. It does not require a transcript to be made.

25. With regard to the other material requested by the Defence, the Chamber cannot intervene in this process before the Defence has requested the said documents from the Prosecution. The Chamber therefore considers that it is incumbent upon the Prosecution to respond to the Defence's request as soon as possible. In case the Prosecution possesses any of the requested material and agrees to communicate it to the Defence, the Chamber hereby authorises the communication of this material under rule 77 of the Rules.

E. Adequate time for the Defence

26. Before authorising the late disclosure of any new items of evidence, the Chamber must first be satisfied that the late submission does not interfere with the Defence's right to have adequate time to prepare for the trial. This evaluation must be done on a case by case basis, taking into consideration the nature and volume of the new elements.

27. In the present case, the Chamber does not think that the mere addition of P-317 to the Prosecution Witness List will unduly prejudice the Defence. In coming to this conclusion, the Chamber has taken into consideration the relatively limited length of P-317's statement, as well as the fact that it does not raise any new questions. However, if her declaration reveals the necessity for the Defence to make additional inquiries in the field, which cannot be carried out in parallel with the ongoing proceedings, the Defence may petition the Chamber, by way of a motivated request, for a short adjournment in the proceedings.

F. Redactions

28. The Chamber notes that the statement of P-317 exists in two versions, one unredacted (DRC-OTP-1046-0098) and one redacted (DRC-OTP-1050-0037). The redactions were applied by the United Nations and are a pre-condition for the disclosure to the Defence. However, the Chamber notes that in applying for these redactions, the Prosecution did not conform with the Chamber's instructions of 12 January 2009,³⁷ nor did it invoke article 54(3)(e). The Chamber is not in a position to authorise or reject redactions without knowing the precise legal foundation on the basis of which they are requested. The Prosecution must therefore urgently inform the Chamber of the legal and factual arguments in support of the requested redactions.

³⁷ "Décision relative à la procédure d'expurgation", 12 January 2009, ICC-01/04-01/07-819

FOR THESE REASONS,

THE CHAMBER,

REJECTS the application for extension of time limit;

AUTHORISES the Prosecution to add P-317 to the Prosecution Witness List;

ORDERS the Prosecution to specify the legal foundation as well as the reasons justifying the requested redactions, no later than 4 November 2009 at 4 p.m.;

ORDERS the Prosecution, in the interval, to communicate to the Defence the redacted version of P-317's statement (DRC-OTP-1050-0037); and

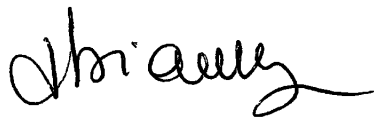
ORDERS the Prosecution to respond immediately to the request by the Defence for Mr. Katanga for the disclosure of additional material under rule 77 of the Rules, in accordance with paragraph 25.

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



Judge Bruno Cotte

Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 3 November 2009

At The Hague, the Netherlands