

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 July 2011

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 Request to Vary Time Limit for
Disclosure of 132 items of documentary evidence**

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
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

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

REGISTRY

Registrar

Counsel Support Section

Victims and Witnesses Unit

Others

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 64 and 67 of the Rome Statute (“the Statute”), rules 78 and 79 of the Rules of Procedure and Evidence (“the Rules”), and regulations 35 and 54 of the Regulations of the Court (“the Regulations”) decides as follows:

I. PROCEDURAL HISTORY

1. On 14 September 2010, the Chamber ordered the Defence to:

“permit the Prosecution to inspect any books, document, photographs, and tangible objects in the Defence possession or control under Rule 78 which are intended for use by the Defence at trial not less than two weeks prior to the commencement of the Defence case; the Defence shall facilitate this process, where possible, by disclosing such material in electronic format”

As well as to:

“provide the Prosecution, the co-Accused, the Legal Representatives of Victims and the Chamber, after completion of the Prosecution case and not less than two weeks prior to the commencement of the Defence case, with
[...]

ii. the statements of the witnesses whom it intends to call to testify, or a summary of the key elements that each witness will address during his or her testimony”¹

2. On 1 December 2010, the Chamber determined the starting date for the presentation of the Defence case on 21 March 2011.² In light of the

¹ Decision on the “Prosecution’s Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)”, 14 September 2010, ICC-01/04-01/07-2388

² “Ordonnance portant calendrier de la comparutions des témoins a/0363/09 , a/0018/09, a/0191/08 et pan/0363/09 et de l’ouverture de la cause de la Défense de Germain Katanga ” 1 December 2010, ICC-01/04-01/07-2606

aforementioned Order of 14 September 2010, the latest date for disclosure of the evidence list by the Defence was set for 7 March 2011.

3. On 4 March 2011, the Defence for Mr. Katanga disclosed a list of witnesses it intended to call as well as an overview of the legal issues which it intended to raise during its case.³ The Defence also disclosed a total of 108 items of documentary evidence, consisting of photographs of different locations and two videos of Bogoro, on an *inter partes* basis. On 7 March 2011 the Defence for Mr. Katanga also submitted a list of 120 items of documentary evidence.⁴ Apparently, this list did not include any of the 108 items of evidence that were disclosed on 4 March 2011.

4. On 29 June 2011, the Defence for Mr. Katanga informed the Chamber and the parties that it intended to use 222 items of documentary evidence during the examination-in-chief of witness DRC-D02-P-0258.⁵ 132 of the items were not on the Defence Evidence List. Accordingly, on 30 June 2011, the Defence for Mr. Katanga filed a request pursuant to regulation 35 of the Regulations to vary the time limit for disclosure and to add 132 additional items to the Defence Evidence List ("Request").⁶ These items consist of the CV of witness DRC-D02-P-0258, three documents in relation to EMOI, maps and sketches drawn by the witness, photographs, videos, and statements of Defence witnesses. The Defence submits that the Prosecution will not suffer any material prejudice if the Request

³ "Disclosure of the List of Defence Witnesses and of the Legal and Factual Issues that It Intends to Raise during its Defence Case", 4 March 2011, ICC-01/04-01/07-2459-Conf

⁴ "Disclosure of the Summaries of the Testimony of the Defence Witnesses and of the List of Documents that the Defence Intends to Use during its Case", 7 March 2011, ICC-01/04-01/07-2760-conf ("the Defence Evidence List")

⁵ Electronic message by Case Manager of the Katanga Defence Team, 29 June 2011 at 18h51

⁶ "Urgent Defence Request to Vary Time Limit for Disclosure Under Regulation 35 of the Regulations of the Court", 30 June 2011, ICC-01/04-01/07-3050-Conf

is granted and that the use of the documents will “assist the Chamber in ascertaining the truth concerning the charges against Mr. Katanga”.⁷

5. The same day, the Defence filed a request to use the three documents in relation to EMOI and redact the source.⁸ The Defence stresses its efforts to obtain the documents in a timely manner and contends that the lateness of disclosure is due to the reluctance on the part of the DRC government to cooperate.⁹

6. On 4 July 2011, the Prosecution responded to the Request.¹⁰ The Prosecution objects to the Request on the basis that the Defence has not complied with regulation 35(2).¹¹ First, the Prosecution submits that the Defence had the opportunity to include the items which were disclosed on 4 March 2011 in the list of evidence on 7 March 2011.¹² Second, the Prosecution alleges that the items disclosed on 1 and 17 June 2011, as well as the aforementioned items disclosed on 4 March 2011, were created before 7 March 2011. In this regard, the Defence was obliged to seek authorisation of the Chamber to vary the time limit before the deadline.¹³ Third, in relation to the documents disclosed on 29 June 2011, the Prosecution argues that the mere fact that the CV may not have been typed or the sketch not drawn until after the deadline does not justify the late submission of the documents.¹⁴ Furthermore, the Prosecution contends that the Defence could have informed the Chamber that it was attempting to obtain and intending to use the three government documents with regard to EMOI.¹⁵ As a final point, the

⁷ ICC-01/04-01/07-3050-Conf, para. 10

⁸ “Urgent Defence Request to Use New Documents and Redact Source”, 30 June 2011, ICC-01/04-01/07-3044-Conf

⁹ ICC-01/04-01/07-3044-Conf, para. 13

¹⁰ “Prosecution’s Response to the Defence request to vary time limit for disclosure under Regulation 35 of the Regulations of the Court”, 4 July 2011, ICC-01/04-01/07-3055-Conf

¹¹ ICC-01/04-01/07-3055-Conf, para. 2

¹² ICC-01/04-01/07-3055-Conf, para. 7

¹³ ICC-01/04-01/07-3055-Conf, paras. 7-8

¹⁴ ICC-01/04-01/07-3055-Conf, para. 11

¹⁵ ICC-01/04-01/07-3055-Conf, para. 12

Prosecution observes that the disclosure of the statements of Defence witnesses is not in violation of the 7 March deadline.¹⁶

7. Also on 4 July 2011, the Legal Representatives of the Victims (“Legal Representatives”) filed their observations.¹⁷ The Legal Representatives submit that there is a lack of due diligence on the part of the Defence in respecting the deadline imposed by the Chamber.¹⁸ In their view, the Defence could have added the photographs and sketches to the list of evidence immediately when the items were in its possession.¹⁹ Furthermore, the Legal Representatives observe that one sketch was only recently drawn without any explanation from the Defence.²⁰ As regards to the three government documents relating to EMOI, the Legal Representatives note that there is a 10 day delay between receipt of the documents by the Defence on 17 June 2011 and disclosure to the other parties on 29 June 2011. The Legal Representatives argue that, in this regard, it would have been more appropriate for the Defence to bring these documents to the attention of the parties earlier.²¹

¹⁶ ICC-01/04-01/07-3055-Conf, para. 13

¹⁷ “Observations sur les requêtes de la Défense de G. Katanga en vue de pouvoir utiliser de nouveaux documents via la déposition de son enquêteur (ICC-01/04-01/07-3044-Conf et ICC-01/04-01/07-3050-Conf)”, 4 July 2011, ICC-01/04-01/07-3054-Conf

¹⁸ ICC-01/04-01/07-3054-Conf, paras. 12-15

¹⁹ ICC-01/04-01/07-3054-Conf, para. 16

²⁰ ICC-01/04-01/07-3054-Conf, para. 16

²¹ ICC-01/04-01/07-3054-Conf, para. 17

II. ANALYSIS

8. In analysing the Request, the Chamber must first assess whether the application for extension of time limit is sufficiently motivated and justified. For the purpose of this decision, the Chamber will rely on the “List of Defence Documents disclosed after 7 March 2011 that may be tendered through Jean Logo”.²²

A. Whether the requirements of regulation 35 have been met

9. As the Request was filed after the deadline expired, the Defence was under the obligation to demonstrate that there were ‘exceptional circumstances’ which prevented it from filing an application for variation of time limit before it lapsed.²³

1. Pictures and videos disclosed after 7 March 2011

10. Although the Defence claims that a number of the pictures were not yet in existence at the time of the filing of the Defence Evidence List, this is not reflected by the dates provided in the column “Main Date” of the Table. Therefore, the Chamber will assume that the 106 pictures and two videos were all taken before the 7 March 2011 deadline. The Defence has neither provided a convincing explanation as to why it did not include them on the Defence Evidence List within the time limit, nor as to why it did not request an extension of that time limit before it expired. Under those circumstances, the Chamber can only conclude that the criteria of regulation 35 of the Regulations have not been met.

²² ICC-01/04-01/07-3050-Conf-Anx (“the Table”)

²³ Regulation 35(2) and Appeals Chamber, *Prosecutor v. Thomas Lubanga*, “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, paras. 9-10

2. *Six Sketches and one annotated photographs*

11. The Chamber notes that, apart from DRC-D02-0001-0948, all items under the 3rd tab of the Table existed before the deadline of 7 March 2011. For the same reasons as explained in the previous paragraph, the Chamber concludes that the criteria of regulation 35 of the Regulations have not been met.

12. As far as DRC-D02-0001-0948 is concerned, the Chamber agrees with the Prosecution that the Defence has not provided a convincing argument as to why it could not have asked Mr. Logo to produce this sketch before the deadline. The mere fact that it was created after the deadline is not an 'exceptional circumstance' under regulation 35(2) of the Regulations and therefore cannot justify a variation of time limit.

3. *Curriculum vitae of witness DRC-D02-P-0258*

13. In relation to the curriculum vitae of Mr. Logo, the Defence admits that it has not been previously disclosed as a result of an oversight on its part.²⁴ It is clear that an oversight does not qualify as an 'exceptional circumstance' in the sense of regulation 35(2) of the Regulations and the request for variation of time limit thus cannot be justified on this basis.

4. *Signed statements of Defence witnesses*

14. As the Prosecution acknowledges,²⁵ the 13 statements of Defence witnesses were not subject to the same deadline of 7 March 2011. The Defence produced and disclosed these statements on a voluntary basis. Moreover, none of the statements existed before the deadline, so they could not have been included on the Defence Evidence List.

15. The purpose of the Defence in including the 13 statements is not to introduce them into evidence through witness DRC-D02-P-0258, but merely to

²⁴ ICC-01/04-01/07-3050-Conf, para. 22

²⁵ ICC-01/04-01/07-3055-Conf, para. 13

refer to those “parts in the statement in respect of which alleged misconduct has been alluded to by the Prosecution.”²⁶ The Chamber sees no reason to prohibit this type of use of the 13 statements and therefore sees no harm in their inclusion in the Defence Evidence List.

5. *Three documents linked to EMOI/Etat-Major Interarmées*

16. In relation to the late disclosure of documents DRC-D02-0001-0932, DRC-D02-0001-0937 and DRC-D02-0001-0941, the Defence asserts that it only received them on 17 June 2011 through no fault of its own.²⁷

17. The Chamber recalls, in this regard, that the Defence for Mr. Katanga solicited the help of the Chamber in obtaining the cooperation of the Democratic Republic of the Congo (“the DRC”) for the provision of documents relating to a number of issues, including “the role of the Central Government at Kinshasa, the *Etat-Major Opérationnel Intégré* (EMOI), RCD-K/ML, APC and other armed or political groups in offering training, delivery of weapons and other supplies, or providing assistance in any other way to the Lendu and Ngiti militia in Ituri.”²⁸ At a hearing on 3 May 2010, held in accordance with article 57(3)(b) and rule 116(2) of the Rules, the Prosecution explained that it often took the DRC authorities several months to respond to requests for cooperation and offered to facilitate contacts between the Defence and the competent Congolese authorities.²⁹ However, after additional efforts to obtain the information bilaterally, the Defence renewed its request for cooperation.³⁰ On 6 December 2010, the Chamber partially granted this request and ordered the Registry to

²⁶ ICC-01/04-01/07-3050-Conf, para. 19

²⁷ ICC-01/04-01/07-3044-Conf

²⁸ ICC-01/04-01/07-1900-Conf-Exp; At the request of the Chamber, the Defence provided additional information on 3 March 2010, “Defence Additional Information to Motion for Cooperation of the DRC Government”, 3 March 2010, ICC-01/04-01/07-1931-Conf-Exp

²⁹ ICC-01/04-01/07-T-T-134-EXP, 3 May 2010

³⁰ “Second Defence Motion for Cooperation of the DRC Government”, 27 September 2010, ICC-01/04-01/07-2418-Conf-Exp

transmit a cooperation request to the DRC in order to obtain lists of militia combatants who were integrated in the Congolese army, as well as the ranks they were offered.³¹ According to the Defence, no response from the DRC has been forthcoming.³²

18. The Prosecution does not contest that the Defence received the documents after the deadline, but it submits that the Defence should have informed the Chamber that it was still attempting to obtain and intending to use Government documents after the time limit.³³

19. The Chamber is mindful of its previous jurisprudence in which it required parties to apply for an extension before the time limit had lapsed, if it was reasonably foreseeable that additional evidence would still be disclosed. This was to allow the Chamber to exercise its supervisory functions and maintain control over the proceedings.³⁴ However, when the prospect of obtaining additional evidence after the expiration of the deadline is so speculative and hypothetical that only very tentative and open-ended requests for extension of time limit can be formulated, the level of control by the Chamber would be futile. The Chamber is therefore of the view 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. Consequently, if this possibility was only minimal and beyond the control of the party, it would be unreasonable to expect parties to systematically request an extension of time-limit on the off-chance that additional evidence

³¹ "Décision relative à la seconde requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo", 6 December 2010, ICC-01/04-01/07-2619-Conf-Exp, para. 17

³² ICC-01/04-01/07-3044-Conf, para. 7

³³ ICC-01/04-01/07-3055-Conf, para. 12

³⁴ "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009", 7 October 2009, ICC-01/04-01/07-1515

might still be obtained. This is an issue which must be assessed on a case-by-case basis.

20. In the present case, the Chamber accepts that the Defence did not know on 7 March 2011 that it would still be able to obtain any documentary evidence concerning the implication of the DRC authorities in the events in Ituri. In reaching this conclusion, the Chamber has considered the Defence's failed efforts to obtain from the Congolese government any information about the role it played in Ituri. It is significant to note, in this respect, that, even despite the Prosecution's best efforts in assisting the Defence with obtaining cooperation from the Congolese authorities, the Defence did not receive any response to its repeated requests for information on this issue. As these documents were all presumably in the custody of the DRC, the Defence thus had very little influence over whether or not it would still be able to get hold of any relevant documents after the 7 March 2011 deadline. Under these circumstances, the Chamber considers that the fact that the documents were obtained *in extremis* through non-official channels, constitutes an 'exceptional circumstance' under regulation 35(2) of the Regulations. The Chamber therefore allows the late addition of DRC-D02-0001-0932, DRC-D02-0001-0937 and DRC-D02-0001-0941 to the Defence Evidence List. However, this decision is without prejudice to the question of whether these three documents can be admitted into evidence.

B. Whether late addition can still be allowed

21. As the Chamber has indicated on a number of previous occasions, it may still allow documents to be added late, even if the criteria of regulation 35(2) of the Regulations for variation of time limits have not been met.³⁵ However, before doing so, the Chamber must be convinced 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 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.

1. Pictures and videos disclosed after 7 March 2011

22. The Defence did not provide the Chamber with any detailed information about the pictures, which would allow it to assess the significance of their content. Instead, the Defence argues generally that the photographs and videos will assist the Chamber in comprehending the geography of the area.³⁶

23. As the Chamber held in relation to the Prosecution's 360° visual representation of the *Institut de Bogoro* and surroundings, such exhibits have very limited evidentiary value, but may assist the Chamber and the parties in visualising the geographic background.³⁷ As the Chamber has not yet visited any of the locations depicted in the photographs, they may be useful for providing it with an idea of the general topography. Accordingly, the Chamber allows the photographs and videos under tab 16 of the Table to be added to the Defence Evidence List.

³⁵ ICC-01/04-01/07-1336; ICC-01/04-01/07-1515; ICC-01/04-01/07-1552; ICC-01/04-01/07-1553; ICC-01/04-01/07-1591

³⁶ ICC-01/04-01/07-3050-Conf, para. 24

³⁷ ICC-01/04-01/07-1515, para. 39

24. However, considering the large volume of the photographs, the Chamber instructs the Defence to make a careful selection of the most instructive photographs and to provide detailed information about each selected picture as to the precise location from which it was taken and in which direction the camera was aimed.

25. As regards to photograph DRC-D02-0001-0736, linked to the testimony of DRC-D02-P-0279 and DRC-D02-P-0280, in the absence of further information, the Chamber is not in a position to evaluate the significance of what is shown. As the Chamber has noted on previous occasions, it is for the party requesting the late addition of new evidentiary material to show that the new evidence is either more compelling than evidence already disclosed or brings to light previously unknown facts which have a significant bearing upon the case.³⁸ The Chamber therefore rejects the Request to add photograph DRC-D02-0001-0736 to the Defence Evidence List.

26. Finally, in relation to the nine photographs of Defence witnesses, the Chamber is of the view that they do not provide any significant new information. The Chamber has met the witnesses in person when they testified and it does not see how the nine photographs could assist in any way. Accordingly, the Chamber rejects the Request to add photographs DRC-D02-0001-0890; DRC-D02-0001-0892; DRC-D02-0001-0893; DRC-D02-0001-0894; DRC-D02-0001-0895; DRC-D02-0001-0896; DRC-D02-0001-0897; DRC-D02-0001-0898 and DRC-D02-0001-0899 to the Defence Evidence List.

2. *Six sketches and one annotated photograph*

27. As regards the six sketches and the annotated photograph, the Chamber has not been persuaded that they contain any new significant information. The Defence argues that it submitted them "simply to facilitate the examination of

³⁸ ICC-01/04-01/07-1515, para. 37

Mr. Logo.”³⁹ However, as the Prosecution objects to their late addition,⁴⁰ the Chamber must deny the Defence’s request in relation to the documents under the 3rd tab of the Table.

28. If the Defence considers this necessary, nothing prevents it from asking witness DRC-D02-P-0258 to draw new sketches during his testimony.

3. Curriculum vitae of witness DRC-D02-P-0258

29. Although the curriculum vitae of witness DRC-D02-P-0258 contains information that was previously unknown, it does not relate to the substance of this case or reveals any information that is crucial to assessing the witness’s credibility. Moreover, it is to be expected that the Defence will solicit the most relevant aspects about the professional background of witness DRC-D02-P-0258 directly from him during testimony. Under these circumstances, the Chamber sees no need to make an exception to the time limit of 7 March 2011.

³⁹ ICC-01/04-01/07-3050-Conf, para. 20

⁴⁰ ICC-01/04-01/07-3055-Conf, para. 11

FOR THESE REASONS,

THE CHAMBER,

GRANTS the Request in relation to DRC-D02-0001-0932, DRC-D02-0001-0937 and DRC-D02-0001-0941, the signed statements, as well as all photographic and video exhibits listed under tab 16 of the "List of Defence Documents disclosed after 7 March 2011 that may be tendered through Jean Logo (D-258)", ICC-01/04-01/07-3050-Conf-Anx;

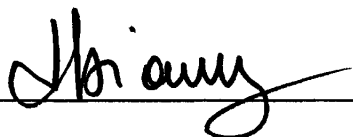
ORDERS the Defence to inform the Chamber, the parties and participants by 5 July 2011 at 17h00 of which items from tab 16 of the "List of Defence Documents disclosed after 7 March 2011 that may be tendered through Jean Logo (D-258)", ICC-01/04-01/07-3050-Conf-Anx, it intends to use for the examination of witness DRC-D02-P-0258; and

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 5 July 2011

At The Hague, The Netherlands