

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 12 August 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 Addition
to Defence Evidence List**

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
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Legal Representatives of the Victims

Mr Fidel Nsita Luvengika
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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 “Order”) 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

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, p. 22-23

2. On 1 December 2010, the Chamber determined the starting date for the presentation of the Defence case to be 21 March 2011.²
3. In light of the Order, the latest date for disclosure of the evidence list by the Defence was set for 7 March 2011.
4. On 4 March 2011, the Defence for Mr. Ngudjolo (“the Defence”) complied with the Chamber’s Order and disclosed, among other things, a list of 130 items of documentary evidence (“the Defence Evidence List”).³
5. On 30 June 2011, the Defence for Mr. Katanga submitted a request pursuant to regulation 35 of the Regulations to vary the time limit for disclosure and to add 132 additional items to its Evidence List.⁴ This request was partially granted on 5 July 2011.⁵
6. On 21 July 2011, the Defence submitted a request for authorisation to add a number of exhibits to the Defence Evidence List (the “Request”).⁶ The Request pertained to the following items of evidence:

² “Ordonnance portant calendrier de la comparution 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-01/04-01/07-2602

³ “Exécution par la Défense de Mathieu Ngudjolo de la ‘Décision relative à la requête de l’Accusation concernant la communication d’éléments par la Défense en application des règles 78 et 79-4’ (ICC-01/04-01/07-2388)”, 4 March 2011, ICC-01/04-01/07-2756-Conf

⁴ “Defence Request for Additional Material to be Admitted as evidence to the Case”, 8 December 2010, ICC-01/04-01/07-2622-Conf

⁵ “Decision on the Defence Request to Vary Time Limit for Disclosure of 132 items of documentary evidence”, 5 July 2011, ICC-01/04-01/07-3059

⁶ “Requête de la Défense de Mathieu Ngudjolo en vue de solliciter l’autorisation d’ajouter sur sa liste des pièces et de communiquer aux parties et participants des documents en application des règles 78 et 79-4 du Règlement de procédure et de preuve, et de la norme 35-2 du Règlement de la Cour”, 21 July 2011, ICC-01/04-01/07-3082

Category a) - 24 Items which are already in evidence:

- 16 video excerpts, which were introduced by the Prosecution through witness DRC-OTP-P-0002.

EVD-OTP-00164	EVD-OTP-00174
EVD-OTP-00165	EVD-OTP-00175
EVD-OTP-00167	EVD-OTP-00176
EVD-OTP-00169	EVD-OTP-00177
EVD-OTP-00170	EVD-OTP-00178
EVD-OTP-00171	EVD-OTP-00179
EVD-OTP-00172	EVD-OTP-00187
EVD-OTP-00173	EVD-OTP-00184

- 8 photographs, which were introduced by the Prosecution through witness DRC-OTP-P-0373.

EVD-OTP-00074	EVD-OTP-00079
EVD-OTP-00076	EVD-OTP-00080
EVD-OTP-00077	EVD-OTP-00081
EVD-OTP-00078	EVD-OTP-00084

Category b) - 1 document admitted by way of bar table motion.

EVD-OTP-00242

Category c) - 5 Items which were disclosed by the Prosecution but not yet admitted into evidence.

DRC-OTP-0194-0348
 DRC-OTP-0039-0309
 DRC-OTP-0028-0421
 DRC-OTP-1038-0053
 DRC-OTP-0107-0701

Category d) - 28 previously undisclosed items.

DRC-D03-0001-0375	DRC-D03-0001-0695
DRC-D03-0001-0376	DRC-D03-0001-0696
DRC-D03-0001-0682	DRC-D03-0001-0697
DRC-D03-0001-0683	DRC-D03-0001-0698
DRC-D03-0001-0684	DRC-D03-0001-0699
DRC-D03-0001-0685	DRC-D03-0001-0700
DRC-D03-0001-0686	DRC-D03-0001-0701
DRC-D03-0001-0687	DRC-D03-0001-0703
DRC-D03-0001-0688	DRC-D03-0001-0704
DRC-D03-0001-0689	DRC-D03-0001-0705
DRC-D03-0001-0690	DRC-D03-0001-0706
DRC-D03-0001-0691	DRC-D03-0001-0707
DRC-D03-0001-0692	DRC-D03-0001-0709
DRC-D03-0001-0694	DRC-D03-0001-0710

7. With regard to the items which are already in evidence, i.e. category a) and b), the Defence is of the view that their late addition to the Defence Evidence List should not raise any objection.⁷

8. The Request contained no submissions in relation to category c).

9. The Defence justified the Request for late addition of the items under category d) on the basis of two separate grounds. First, that the war destroyed the archives of government offices, which made it particularly difficult for the Defence to obtain a number of documents relating to Mr. Ngudjolo's education and professional background.⁸ Second, the Defence submitted that the idea to look for certain items of evidence only arose after hearing the testimony of certain witnesses called by the co-accused.⁹

⁷ ICC-01/04/01/07-3082, para. 23

⁸ ICC-01/04/01/07-3082, para. 26-7

⁹ ICC-01/04/01/07-3082, para. 28

10. On 2 August 2011, the Defence requested permission to redact the identity of the source of document DRC-D03-0001-0707 (the "Source").¹⁰ The Defence asserted that the Source provided the document on condition of anonymity and that disclosure of his or her identity would engender grave consequences for the lives of the Source and his or her family.¹¹ The Defence declared it was prepared to provide the Chamber with the identity of the Source if so ordered by the Chamber.¹² It argued furthermore that the redaction would not cause any prejudice to the parties and participants as they can investigate on the document without knowing the identity of the Source.¹³

11. On 9 August 2011, the Prosecution objected to the addition of the 28 new documents on the basis that the Defence had not complied with regulation 35(2) of the Regulations and the Chamber's interpretation of that regulation.¹⁴ The Prosecution argued that the documents do not meet the requirements outlined by the Chamber for several reasons. First, the documents do not bring to light any new facts which are significant to the case.¹⁵ Second, many of these documents are not relevant, not related to the time frame at issue and are of poor quality.¹⁶ Third, these documents do not offer more compelling evidence than that already before the Chamber.¹⁷

¹⁰ "Précision concernant la 'Requête de la Défense de Mathieu Ngudjolo en vue de solliciter l'autorisation d'ajouter sur sa liste des pièces et de communiquer aux parties et participants des documents en application des règles 78 et 79-4 du Règlement de procédure et de preuve, et de la norme 35-2 du Règlement de la Cour' (ICC-01/04-01/07-3082) et Requête en vue de solliciter l'expurgation de la source du document DRC-D03-0001-0707", 2 August 2011, ICC-01/04-01/07-3085

¹¹ ICC-01/04-01/07-3085, para. 13

¹² ICC-01/04-01/07-3085, para. 16

¹³ ICC-01/04-01/07-3085, para. 15

¹⁴ ICC-01/04-01/07-3094, para. 4

¹⁵ ICC-01/04-01/07-3094, para. 11

¹⁶ ICC-01/04-01/07-3094, para. 12

¹⁷ ICC-01/04-01/07-3094, para. 12

12. The Prosecution further submitted that the Defence failed to provide justification for not filing the application within the time limit of 7 March 2011.¹⁸ The Prosecution noted that the existence of the conflict in Ituri and its impact on investigative activities is not an “exceptional circumstance” or “new” issue as it is well-known to all parties.¹⁹ The Prosecution argued that the Defence was in a position to inform the Chamber, prior to the deadline of 7 March 2011, of any attempts or difficulties it faced while trying to obtain certain documents from Ituri.²⁰ The Prosecution submitted that the issues contained in the documents do not arise out of the testimony of the witnesses for Germain Katanga.²¹

13. The Prosecution also submitted that the request to redact the identity of the Source should be denied.²² The Prosecution tendered three main reasons. First, the Defence has not shown that the security of the Source is at risk if his or her identity is communicated to the Prosecution.²³ Second, without knowing the identity of the Source, the Prosecution is unable to discharge its duties under Article 54 to establish the truth.²⁴ Lastly, disclosure to the Chamber alone is an improper and ineffective method of establishing the truth.²⁵ In the absence of concrete information supporting the Defence’s allegation that the Source would be in danger if his or her identity is revealed, the Prosecution submits it should be granted access to the redacted name of the Source.²⁶

14. The Defence for Mr. Katanga objected to the addition of two documents, DRC-D03-0001-0375 and DRC-OTP-0028-0421, and put forth several reasons for its objection. First, the Defence noted that these two documents were in the

¹⁸ ICC-01/04-01/07-3094, para. 6

¹⁹ ICC-01/04-01/07-3094, para. 7

²⁰ ICC-01/04-01/07-3094, para. 7

²¹ ICC-01/04-01/07-3094, para. 8

²² ICC-01/04-01/07-3094, para. 16

²³ ICC-01/04-01/07-3094, para. 14

²⁴ ICC-01/04-01/07-3094, para. 14

²⁵ ICC-01/04-01/07-3094, para. 14

²⁶ ICC-01/04-01/07-3094, para. 15

possession of Mr. Ngudjolo before the deadline of 7 March 2011 and that the Defence has not established exceptional circumstances which prevented them from adding the documents to their List of Evidence by the deadline.²⁷ Second, the significance of these documents was apparent prior to the testimony of Mr. Katanga's witnesses.²⁸ Third, the late addition of these documents would be prejudicial to the Defence for Mr. Katanga, especially in light of their low probative value.²⁹

15. With respect to document DRC-D03-0001-0375, an excerpt from the UPC website, the Defence for Mr. Katanga submitted that the inclusion of this document would be inappropriate given that Mr. Ngudjolo does not intend to call any witnesses from the UPC who could authenticate the document.³⁰ The Defence for Mr. Katanga indicated that it has never heard of an attack on Tchai on 28 February 2003 and consequently, it would be prejudicial to Mr. Katanga to introduce such evidence at this stage of the case.³¹

16. The Defence for Mr. Katanga also argued against the inclusion of document DRC-OTP-0028-0421, because the document is partially illegible, unsigned, and has an unknown author.³² Further, Mr. Ngudjolo does not intend to call as a witness any person whose name appears as a participant at this alleged meeting and, therefore, the authenticity of the document will not be verifiable.³³ For these reasons, the Defence of Mr. Katanga submitted that allowing this document would not be appropriate, as its prejudicial effect would outweigh its probative

²⁷ ICC-01/04-01/07-3095, para. 9

²⁸ ICC-01/04-01/07-3095, para. 10

²⁹ ICC-01/04-01/07-3095, para. 11

³⁰ ICC-01/04-01/07-3095, paras. 12-15

³¹ ICC-01/04-01/07-3095, para. 16

³² ICC-01/04-01/07-3095, paras. 17-18

³³ ICC-01/04-01/07-3095, para. 19

value,³⁴ and as such, the request of the Defence to include these two documents should be denied.³⁵

17. The Victims' Legal Representatives submit that the Defence had ample prior opportunity to evaluate the documents, particularly since these documents have been in existence for several years.³⁶ The Victims' Legal Representatives submit that a circumstance which is linked to the Defence's strategy cannot be considered as a circumstance which is outside the control of the Defence as required by regulation 35(2) of the Regulations.³⁷ The Victims' Legal Representative submitted that there is not enough justification to form a basis for the Defence's extension request³⁸ and that these new documents do not seem any more convincing than the other pieces of evidence the Defence has already put forward.³⁹

18. The Victims' Legal Representative submitted that the complete redaction of a source of information is only to be done in exceptional circumstances and that the party making the application must show that revealing the source would put that source in danger.⁴⁰ The Victims' Legal Representative argues that the Defence does not give any indication of what danger the Source may be facing if his or her identity is revealed.⁴¹ The Victims' Legal Representative therefore submits that the request of the Defence to maintain anonymity of the Source should be denied.⁴²

19. On 10 August 2011, the Defence submitted a request for authorization to reply to the submissions ICC-01/04-01/07-3094, ICC-01/04-01/07-3092 and ICC-

³⁴ ICC-01/04-01/07-3095, para. 19

³⁵ ICC-01/04-01/07-3095, para. 20

³⁶ ICC-01/04-01/07-3092, para. 22

³⁷ ICC-01/04-01/07-3092, para. 25

³⁸ ICC-01/04-01/07-3092, para. 37

³⁹ ICC-01/04-01/07-3092, para. 38

⁴⁰ ICC-01/04-01/07-3092, para. 40

⁴¹ ICC-01/04-01/07-3092, para. 42

⁴² ICC-01/04-01/07-3092, para. 44

01/04-01/07-3095.⁴³ The Chamber authorised this on the same day, instructing the Defence to provide more information about how, in its view, the conditions of regulation 35(2) of the Regulations were fulfilled.⁴⁴

20. On 11 August 2011, the Defence filed its *Réplique aux écritures ICC-01/04-01/07-3094, ICC-01/04-01/07-3092 et ICC-01/04-01/07-3095* ("Reply").⁴⁵ The Defence argues that whereas the 30 documents in category a), b) and c) were known to the Defence before 4 March 2011, it did not think it needed to rely on them until it heard the incriminating remarks made by witness DRC-D02-P-0176.⁴⁶ The Defence would like Mr. Ngudjolo to have the opportunity to explain these documents in his own testimony.

21. In relation to the newly obtained documents, the Defence submits that it had been attempting to obtain original documents regarding the academic and professional activities of Mr. Ngudjolo, but ultimately found that most of them were destroyed during the conflict in Ituri.⁴⁷

22. In light of the difficulties obtaining original documents, the Defence decided to request affidavits from people who could attest to Mr. Ngudjolo's academic and professional career.⁴⁸ The Defence submits it could not contact these people, and obtain affidavits from them, prior to 7 March 2011.⁴⁹ It further submits these affidavits are essential to the Defence as these documents establish, more convincingly than the other testimonies already on record, Mr. Ngudjolo's capabilities and qualifications as a nurse.⁵⁰

⁴³ "Demande d'autorisation de Réplique aux écritures » ICC-01/04-01/07-3094, ICC-01/04-01/07-3092 et ICC-01/04-01/07-3095", 10 August 2011, ICC-01/04-01/07-3096

⁴⁴ Electronic message by Chamber's Legal Officer, sent on 10 August 2011 at 17h17

⁴⁵ ICC-01/04-01/07-3099.

⁴⁶ ICC-01/04-01/07-3099, para. 11

⁴⁷ ICC-01/04-01/07-3099, para. 17

⁴⁸ ICC-01/04-01/07-3099, para. 19

⁴⁹ ICC-01/04-01/07-3099, para. 20

⁵⁰ ICC-01/04-01/07-3099, para. 21

23. The Defence argues it did not decide to utilize the photographs until after the decision of the Chamber to authorize the addition of witnesses DRC-D03-P-0963 and DRC-D03-P-0965.⁵¹ The Defence submits these photographs should be allowed as they will serve to assist the Chamber in understanding the events described by certain witnesses.⁵²

24. With respect to document DRC-D03-0001-0375 (of which DRC-D03-0001-0376 forms an integral part), which is opposed by the Defence for Mr. Katanga, the Defence argues this document describe the realities of the field.⁵³ The Defence disagrees that the Defence for Mr. Katanga would be prejudiced by the inclusion of the document and argues that the Defence for Mr. Katanga has had ample time to review the documents.⁵⁴

25. With regard to the redaction request, the Defence reiterates that it will reveal the identity of the Source in an *ex parte* hearing.⁵⁵ The Defence argues that providing any further information to the parties could lead to the identification of the Source.⁵⁶

⁵¹ ICC-01/04-01/07-T-290-Red-FRA WT, 12 July 2011, page 62, lines 14-17, as cited in ICC-01/04-01/07-3099, para. 28

⁵² ICC-01/04-01/07-3099, para. 32

⁵³ ICC-01/04-01/07-3099, para. 33

⁵⁴ ICC-01/04-01/07-3099, para. 33

⁵⁵ ICC-01/04-01/07-3099, para. 34

⁵⁶ ICC-01/04-01/07-3099, para. 34

II. ANALYSIS

26. In analysing the Request, the Chamber must first assess whether the application for extension of time limit is sufficiently motivated and justified.

A. Whether the requirements of regulation 35 have been met

27. 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.⁵⁷

1. *Previously admitted items - categories a) and b)*

28. As regards items which are already admitted into evidence, the Chamber considers that all parties have the right to use them for the presentation of their case. The fact that the Defence did not include them on the Defence Evidence List cannot prevent it from relying on items which are already part of the case record.

2. *Previously disclosed items - category c)*

29. As the items in this category were previously disclosed by the Prosecution, they were well-known to the Defence prior to the deadline. The Defence explains that it only found that it needed to rely on the 5 items after witness DRC-D02-P-0176 made incriminating statements about Mr. Ngudjolo. The Defence argues that it did not realise that this witness was going to incriminate

⁵⁷ 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

its client at the time it filed the Defence Evidence List and that it now needs to have an opportunity to defend itself against the allegations.⁵⁸

30. Although the Chamber is of the view that the Defence has not provided sufficient arguments to explain how all 5 items are related to the incriminating aspects of witness DRC-D02-P-0176's testimony, it notes that the Prosecution did not object to their late addition.⁵⁹ The Defence for Mr. Katanga only objects to the late addition of DRC-OTP-0028-0421, which will be dealt with separately.

31. The Chamber considers that, for those items against which no objections have been raised by the parties, it can give the Defence the benefit of the doubt without further inquiring into the reasons for which it could not have requested an extension of the deadline. It therefore allows their late addition to the Defence Evidence List.

32. As far as DRC-OTP-0028-0421 is concerned, this is a report about an alleged meeting that took place in Bogoro between representatives of MONUC and a number of individuals, including Mr. Katanga. The origin of the report is uncertain and the Chamber previously rejected its admission in the Decision on the Prosecutor's Bar Table Motions for lack of authentication.⁶⁰ The Chamber observes that the Defence had argued in response to the Prosecution's bar table motion that "Le Rapport Bogoro du 6 novembre 2003 n'a pas de lien avec la saisine de la Chambre. Il a été établi à une date où Mathieu Ngudjolo était en prison."⁶¹ The Defence does not explain the reason for its drastic change of position about the significance of this document. The Chamber is not persuaded that the testimony of DRC-D02-P-0176 could have changed the Defence's

⁵⁸ ICC-01/04-01/07-3099, para. 14

⁵⁹ ICC-01/04-01/07-3094

⁶⁰ ICC-01/04-01/07-2635, para. 36

⁶¹ "Observations de la Défense de Mathieu Ngudjolo sur l'écriture du Procureur référencée ICC-01/04-01/07-2290 et intitulée 'Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute'", 30 August 2010, ICC-01/04-01/07-2347-Conf, para. 30

appreciation of the significance of this document so radically that it would qualify as an exceptional circumstance under regulation 35(2) of the Regulations.

3. *New Items – category d)*

33. From the information contained in the chain of custody information provided by the Defence, which is not challenged by any of the parties, it appears that a number of documents were obtained after the deadline for disclosure. The Chamber accepts the explanation given by the Defence as to why it was not able to obtain the said documents earlier. Therefore, and without prejudice to the admissibility of the items, the Chamber allows their addition to the Defence Evidence List.

a) Photographs

34. For items DRC-D03-0001-0703, DRC-D03-0001-0704, DRC-D03-0001-0705 and DRC-D03-0001-0706, which are photos of the health centre of Kambutso, the Chamber accepts that the Defence only decided to take these photographs after the Chamber allowed it to add witnesses DRC-D03-P-0963 and DRC-D03-P-0965 to its Witness List.

b) Letters written by Defence - DRC-D03-0001-0709 and
DRC-D03-0001-0710

35. The Chamber notes that there are a number of documents, which the Defence lists as new, that appear to have already been in the Defence's possession before the deadline. In particular, items DRC-D03-0001-0709 and DRC-D03-0001-0710 emanated from the Defence itself, so there is no reason why the Defence could not have included these items in the Defence Witness List and the Defence does not attempt to explain this omission. In this regard, the Chamber is particularly surprised by the Defence's assertion that it only received

these items after the deadline, whereas it is the author.⁶² This assertion is even more surprising, considering that the Defence itself indicated in the chain of custody column of its Request⁶³ that it had the documents several months before the deadline expired. Under these circumstances, the Chamber finds that the conditions of regulation 35(2) of the Regulations have not been met.

c) UPC web-page

36. Finally, the Chamber notes that the Defence included two items under the heading New Items, which in reality did not belong there. Indeed, item DRC-D03-0001-0375 (of which DRC-D03-0001-0376 forms an integral part) was disclosed to the Defence in 2008. The Defence even added DRC-D03-0001-0375 to its list of items intended to use for cross-examination of witness DRC-OTP-P-0030.⁶⁴ Both the Prosecutor and the Defence for Mr. Katanga argue that the item is not admissible for lack of probative value.⁶⁵ Moreover, they argue that the Defence knew of its significance before the deadline.⁶⁶ The Chamber agrees that the Defence has not provided a convincing explanation as to why it did not include DRC-OTP-0001-0375 in the Defence Evidence List before the deadline. Considering these circumstances, the Chamber finds that the conditions of regulation 35(2) of the Regulations have not been met.

B. Whether late addition can still be allowed

37. 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.⁶⁷ However, before

⁶² ICC-01/04-01/07-3099, para. 24

⁶³ ICC-01/04-01/07-3082-Conf-Anx, p. 5

⁶⁴ Electronic message from Defence Case Manager sent on 24 August 2010 at 18h01

⁶⁵ ICC-01/04-01/07-3094, para. 12; ICC-01/04-01/07-3095, para. 12-16

⁶⁶ ICC-01/04-01/07-3094, para. 10; ICC-01/04-01/07-3095, para. 10

⁶⁷ 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

doing so, the Chamber must be convinced that (i) the new material is either significantly more compelling than other items of evidence already disclosed, 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. *Items DRC-D03-0001-0709 and DRC-D03-0001-0710*

38. The Chamber notes that the Defence has not attempted to explain how these two items present any new material or previously unknown fact. Nor has the Defence explained their relevance.

39. 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 item is either more compelling than evidence already disclosed or brings to light previously unknown facts which have a significant bearing upon the case.⁶⁸ The Chamber cannot be required to speculate in this regard.

2. *Items DRC-D03-0001-0375 and DRC-D03-0001-0376*

40. As regards DRC-D03-0001-0375, the Chamber does not accept that this item provides a more convincing description of the reality in the field.⁶⁹ Although the document mentions an alleged attack on "Tchai" on 28 February 2003, which has not previously been mentioned, the Defence has not explained how this new information has any bearing on the case. As regards the other information contained in the document, the Chamber finds that it is not significantly more compelling than other items of evidence already disclosed.

⁶⁸ ICC-01/04-01/07-1515, para. 37

⁶⁹ ICC-01/04-01/07-3099, para. 33

3. *Item DRC-OTP-0028-0421*

41. The Chamber is not persuaded that this document, with its doubtful authenticity, provides more compelling evidence or brings to light facts that were previously unknown. The Chamber therefore rejects the request to add it to the Defence Evidence List.

C. Redaction of identity of source

42. As the Defence has not yet provided the additional information which the Chamber had asked for, it will postpone deciding on this issue. However, the Chamber instructs the Defence to file the requested information in an *ex parte* filing. The Chamber notes, in this regard, that it must not necessarily be informed about the name of the source. However, the Defence must provide sufficient information allowing the Chamber to evaluate the risk the Source would run if his or her identity were to be disclosed as well as information about the feasibility of alternative measures that might adequately protect the Source in case of disclosure.

FOR THESE REASONS,

THE CHAMBER,

REJECTS the Request in relation to the following items:

DRC-D03-0001-0375

DRC-D03-0001-0710

DRC-D03-0001-0376

DRC-OTP-0028-0421

DRC-D03-0001-0709

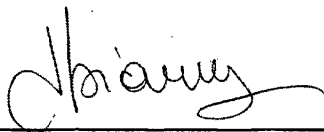
GRANTS the remainder of the Request, without prejudice to the admissibility of any of the items; and

ORDERS the Defence to file a fully motivated request for the redaction of the identity of the Source of DRC-D03-0001-0707 not later than 16 August 2011 at 16h00.

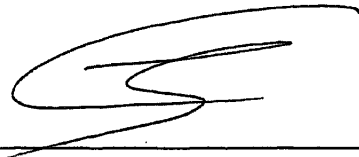
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 12 August 2011

At The Hague, The Netherlands