

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 October 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 Document

Decision on the Bar Table Motion of the Defence of Germain Katanga

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

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Mr Eric MacDonald

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Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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Defence**

REGISTRY

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Ms Silvana Arbia

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Detention Section

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to articles 64, 67 and 69 of the Rome Statute (“the Statute”) and rules 63, 64 and 68 of the Rules of Procedure and Evidence (“the Rules”), decides as follows:

I. PROCEDURAL HISTORY

1. On 29 August 2011, the Defence for Germain Katanga (the “Defence”) submitted a motion requesting the Chamber to admit into evidence 21 documents from the bar, without introducing them by or through a witness (the “First Bar Table Motion”).¹ The Defence relied on the principles as set out by the Chamber in the ‘Decision on the Prosecutor’s Bar Table Motion’ of 17 December 2010.² The Defence noted that all but two of the 21 documents were originated from the Prosecution and were disclosed to the Defence.³

2. On 29 August 2011, the Chamber orally ordered⁴ the Defence to re-submit the First Bar Table Motion in accordance with the procedural directions set down by the Chamber⁵ and to submit a request under regulation 35(2) of the Regulations of the Court in relation to two documents which were not yet on the Defence Evidence List.

¹ “Defence Bar Table Motion”, 29 August 2011, ICC-01/04-01/07-3133-Conf, paras. 1 and 3

² ICC-01/04-01/07-2635

³ ICC-01/04-01/07-3133-Conf, para. 3. Documents DRC-D02-0001-0199 and DRC-D02-0001-0469 are the two documents which were obtained by the Defence

⁴ ICC-01/04-01/07-T-300-ENG ET WT 29-08-2011

⁵ “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 1 December 2009, ICC-01/04-01/07-1665, paras. 101-102

3. On 15 September 2011, the Defence submitted a request to vary the time limit under Regulation 35⁶ in order to allow the addition of a CCGA Verification Report⁷ and a Prosecution Internal Memorandum⁸ to the Defence List of Evidence.

4. By e-mail dated 16 September 2011, the Defence for Mathieu Ngudjolo indicated it did not object to the Regulation 35(2) Request. By written submission dated 21 September 2011, the Prosecution argued that the requirements under regulation 35(2) were not fulfilled and that the Defence did not adequately explain why the documents were not initially included in the Defence List of Evidence.⁹ On 23 September 2011, the Victims' Legal Representatives jointly submitted that the Regulation 35(2) Request should be rejected.¹⁰

5. By oral decision on 27 September 2011¹¹, the Chamber rejected the request to add the CCGA Verification Report, but allowed the addition of the Prosecution Internal Memorandum to the Defence Evidence List. In this decision, the Chamber also granted another Defence request¹² to add the manuscript letter "Ujuli sho"¹³ and its translation¹⁴ to the Defence List of Evidence.

6. On 16 September 2011, the Defence amended the First Bar Table Motion and requested that 19 documents be admitted into evidence in accordance with

⁶ "Defence Request to Vary the Time Limit Under Regulation 35 of the Regulations of the Court", 15 September 2011, ICC-01/04-01/07-3157-Conf

⁷ DRC-OTP-0185-0816

⁸ DRC-OTP-0233-0525-R01

⁹ "Réponse de l'Accusation à la Requête de la Défense en application de la norme 35 du Règlement de la Cour en date du 16 septembre 2011", 21 September 2011, ICC-01/04-01/07-3165-Conf

¹⁰ "Observations sur la requête de la Défense de G. Katanga visant à l'ajout de deux pièces sur la liste des pièces qu'elle entend utiliser lors de son la présentation de sa preuve ", 23 September 2011, ICC-01/04-01/07-3170-Conf

¹¹ ICC-01/04-01/07-T-314-ENG ET WT 27-09-2011 1-69 NB T, p. 3, line 3 et seq

¹² "Defence Request to Vary the Time Limit Under Regulation 35 of the Regulations of the Court," 21 September 2011, ICC-01/04-01/07-3163-Corr

¹³ DRC-OTP-0029-0109

¹⁴ DRC-OTP-1024-0091

the directions of the Chamber.¹⁵ The amended First Bar Table Motion did not include the CCGA Verification Report and the Prosecution Internal Memorandum.¹⁶

7. The 19 documents the Defence wishes to introduce through the First Bar Table Motion are divided into three categories:

Category 1 consists of 14 United Nations reports:

DRC-OTP-0061-0381;	DRC-OTP-0204-0177
DRC-OTP-1029-0413;	DRC-OTP-0006-0347;
DRC-OTP-0004-0066;	DRC-OTP-0009-0499;
DRC-OTP-0004-0292;	DRC-OTP-1029-0634;
DRC-OTP-0004-0452	DRC-OTP-0152-0966;
DRC-OTP-0004-0491	DRC-OTP-1029-0585;
DRC-OTP-0195-1513	DRC-D02-0001-0199;

Category 2 consists of two Certificates:

DRC-D02-0001-0469;
DRC-OTP-1057-0087;

Category 3 consists of three Prosecution Investigators' Reports:

DRC-OTP-1023-0073;
DRC-OTP-1029-0678;
DRC-OTP-1060-0095;

¹⁵ ICC-01/04-01/07-3159-Conf

¹⁶ These documents were the subject of the Regulation 35(2) Request, ICC-01/04-01/07-3157-Conf

8. By e-mail dated 21 September 2011, the Defence for Mathieu Ngudjolo indicated it would not be submitting separate observations regarding the First Bar Table Motion.¹⁷ However, it did submit comments¹⁸ within the framework of the procedure set out in the Chamber's decision of 1 December 2009.¹⁹

9. On 29 September 2011, the Prosecution submitted its response to the First Bar Table Motion.²⁰ The Prosecution did not object to the addition of nine documents;²¹ however, it did formulate objections to the addition of the remaining ten documents.²²

10. On 7 October 2011, the Defence submitted an additional application to admit document, "Ujuli sho", and its translation²³ from the bar (the "Second Bar Table Motion").²⁴ The parties raised no objections against the admission of this document.²⁵

II. ANALYSIS

A. Preliminary remarks

11. First, the Chamber notes that the Prosecution did not object to the admission of nine documents. As noted, the Defence for Mathieu Ngudjolo did not submit any formal objections to the First Bar Table Motion. In relation to the objections raised by Mr. Ngudjolo's Defence in the context of the consultation

¹⁷ E-mail from the Defence for Mathieu Ngudjolo to the Chamber, 21 September 2011 at 18:34

¹⁸ ICC-01/04-01/07-3159-Conf-Anx2

¹⁹ ICC-01/04-01/07-1665, para. 102-3

²⁰ "Réponse de l'Accusation à la Requête de la Défense du 16 septembre 2011 aux fins d'admission de pièces qu'elle entend verser directement au débat", 29 September 2011, ICC-01/04-01/07-3177-Conf

²¹ The Prosecution did not object to the addition of the following documents: DRC-OTP-0061-0381, DRC-OTP-0004-0292, DRC-OTP-0195-1513, DRC-OTP-1029-0634, DRC-D02-0001-0199, DRC-D02-0001-0469, DRC-OTP-1057-0087, DRC-OTP-1029-0678, and DRC-OTP-1023-0073

²² ICC-01/04-01/07-3177-Conf, para 3

²³ DRC-OTP-0029-0109 and DRC-OTP-1024-0091 (translation)

²⁴ "Defence Bar Table Motion", 7 October 2011, ICC-01/04-01/07-3178-Conf

²⁵ ICC-01/04-01/07-3178-Conf-Anx 1

process,²⁶ the Chamber reiterates that in cases involving more than one accused, the fact that an item of evidence is only relevant to one of the accused and bears no relation to another co-accused, is not a ground for objection by the latter.²⁷ Objections based solely on this ground will therefore be dismissed. Consequently, the Chamber considers that there are no valid objections to the admission of the following eight items from the First Bar Table Motion:

1. The UN MONUC Daily Sitrep 667 of 14 May 2002 (DRC-OTP-0061-0381);
2. The UN MONUC Daily Sitcen Mission Report of 2 March 2004 (DRC-OTP-0004-0292);
3. Bunia SITREP 20 June 2003 (DRC-OTP-0195-1513);
4. Outgoing Code Cable of 18 August 2003 (DRC-OTP-1029-0634);
5. UNICEF in emergencies – Children and armed conflict (DRC-D02-0001-0199);
6. Diploma of radio operator Mike 4 (DRC-D02-0001-0469);
7. Marriage certificate of ODHARO OMBILI Nziri (DRC-OTP-1057-0087);
8. Investigator's Note on W-280 (DRC-OTP-1029-0678).

12. In relation to DRC-OTP-1023-0073, the Chamber rejects the objection by the Defence for Mr. Ngudjolo, because it is not based on the admissibility criteria, but rather on the content of the document. The Chamber therefore considers that there are no valid objections against this document either.

²⁶ ICC-01/04-01/07-3159-Conf-Anx2

²⁷ ICC-01/04-01/07-2635, para. 18

13. Further, the Chamber notes there are no objections to the document “Ujuli sho”²⁸ which is the subject of the Second Bar Table Motion.

14. Although the Chamber is not bound to accept exhibits to which there are no objections, it will only decline doing so if there are compelling reasons. The Chamber finds there to be no such reasons in relation to the ten abovementioned documents. They are therefore admitted into evidence.

15. In dealing with the remainder of the documents, the Chamber will apply the criteria developed in the ‘Decision on the Prosecutor’s Bar Table Motions’ of 17 December 2010.²⁹ As stated in that decision, the Chamber follows a three-step approach.³⁰ First, the Chamber must assess whether a proffered item of evidence is relevant to a live issue in the case. If so, the Chamber must then determine whether it has sufficient probative value. Probative value is evaluated on the basis of two factors, reliability and significance. Finally, once it has been established that an item of evidence has sufficient probative value, the Chamber must still examine whether its admission would cause undue prejudice to the opposing party. If the Chamber finds that the prejudice is disproportionate to the probative value of the evidence, it must be excluded.

B. Items rejected for lack of relevance

16. If the evidence tendered makes the existence of a fact at issue more or less probable, it is relevant. Whether or not this is the case depends on the purpose for which the evidence is adduced. Unless immediately apparent from the exhibit itself, it is the responsibility of the party tendering it to explain: (1) the relevance of a specific factual proposition to a material fact of the case; (2) how the item of evidence tendered makes this factual proposition more probable or less probable.

²⁸ DRC-OTP-0029-0109 and DRC-OTP-1024-0091 (translation)

²⁹ ICC-01/04-01/07-2635

³⁰ ICC-01/04-01/07-2635, para. 14

17. The Chamber observes, in this regard, that the main Defence argument for proffering a number of UN documents is that they are said to provide proof of a lack of control over the militia by the FNI/FRPI. The documents in question pertain to a period starting in October 2003 and continuing until the end of January 2004. The Defence invites the Chamber to draw the inference “that a later lack of authority is probative as to an earlier lack of authority within an emerging structure.”³¹ Although the Chamber does not exclude that in certain circumstances this type of inference can reasonably be made, it considers that in this case the vagueness of the information contained in the documents, as well as the relatively long time which separates the facts alleged in the documents from the period relevant to the charges, renders any such inference overly tenuous.

18. The Chamber similarly finds that DRC-OTP-1029-0585 cannot support any relevant inference regarding the position of Germain Katanga at the time of the Bogoro attack. The period to which this document relates is too short and too far removed from the relevant period

19. For these reasons, the Chamber finds that the following items of evidence must be rejected for lack of relevance:

DRC-OTP-0004-0066;
DRC-OTP-0004-0452;
DRC-OTP-0004-0491;
DRC-OTP-0204-0177;
DRC-OTP-0006-0347;
DRC-OTP-0009-0499;
DRC-OTP-0152-0966;
DRC-OTP-1029-0413;
DRC-OTP-1029-0585.

³¹ ICC-01/04-01/07-3159-Conf, para. 24

C. Items rejected for lack of probative value

20. With regard to DRC-OTP-1060-0095, the Chamber finds that the Investigator's Report cannot significantly assist the Chamber in reaching a conclusion about the existence or non-existence of a material fact. It equally considers that the information it contains about any pressure that may have been made to bear on witness DRC-D02-P-0146 to sign his statement is insufficient to allow the Chamber to draw any significant conclusions as to the credibility of witnesses DRC-OTP-P-280 or DRC-D02-P-0146. With regard to the alleged lies of Prosecution intermediary DRC-OTP-P-0143, the Report does not contain any new information. Moreover, the witness addressed this issue extensively during his testimony.³² This document therefore lacks sufficient probative value.

³² The Chamber notes that the document was also mentioned during his testimony, ICC-01/04-01/07-T-266, p. 2 and

FOR THESE REASONS,

THE CHAMBER,

GRANTS the Bar Table Motions in respect of the following items of evidence:

DRC-OTP-0061-0381;
DRC-OTP-0004-0292;
DRC-OTP-0195-1513;
DRC-OTP-1029-0634;
DRC-D02-0001-0199;
DRC-D02-0001-0469;

DRC-OTP-1057-0087;
DRC-OTP-1029-0678;
DRC-OTP-1023-0073;
DRC-OTP-0029-0109;
DRC-OTP-1024-0091

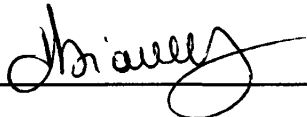
REJECTS the remainder of the First Bar Table Motion;

INSTRUCTS the Registry to assign EVD numbers to the admitted items.

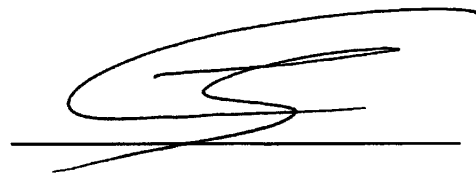
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 21 October 2011

At The Hague, The Netherlands