

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **11 May 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

Public Document

**with Annexes 1 and 2 – Confidential, ex parte, only available to the Prosecution and
Defence**

**Prosecution's Application to Amend Paragraph 14 of the Order concerning the
Presentation of Incriminating Evidence and the E-Court Protocol of the Rome
Statute (Article 64)**

Source: Office of the Prosecutor

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

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Other

Procedural Background

1. On 13 March 2009, Trial Chamber II (“Chamber”) ordered the Prosecution to submit, *inter alia*, an analytical table of all the evidence it intends to use for trial (“the Order”).¹
2. On 7 May 2009, a meeting was held between the Prosecution and Legal Officers of Trial Chamber II, regarding the Table of Incriminating Evidence (“Table”). The Prosecution suggested that paragraph 14 of the Order be modified in order to include different information than that originally requested by the Chamber in the presentation of the Table.
3. On 8 May 2009, the Prosecution received a response from the Chamber recommending, *inter alia*, that an official request be submitted in order to amend paragraph 14 of the Order.²

Submissions

4. The Prosecution hereby requests an amendment of paragraph 14 of the Order. Paragraph 14 of *the Order* reads as follows:

If a particular item of evidence is relied upon in relation to more than one factual allegation, the Prosecution shall indicate in each instance where the evidence is mentioned and to which other factual allegation it relates. This may be done by way of reference to the “Claim number” of the other factual

¹ Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, ICC-01/04-01/07-956, 13 March 2009.

² See Annex 1.

allegation(s), to which the item of evidence pertains, in the column entitled "Other References."³

5. Two requirements stem from paragraph 14 of *the Order*: (1) Indicate in each instance where the element of proof is mentioned and (2) Indicate to which other *factual allegation* it relates. The Chamber specifies that this could be done through reference to the *Claim number*.

6. The Prosecution's Table of Incriminating Evidence is constituted of 13 different sections. Firstly, there is a section concerning the Individual Criminal responsibility of the perpetrators. Two other sections relate to the *Chapeau elements* required for the specific charges: The crimes against humanity contextual elements section and the war crimes contextual elements section. Finally, there are ten (10) other sections which analyse the specific charges: three sections relate to the crimes against humanity of murder, rape and sexual slavery and seven (7) other sections describe the war crimes of wilful killing, rape, sexual slavery, pillaging, destroying or seizing the enemy's property, attacking civilians and using, conscripting or enlisting children. The Prosecution based itself on Annex A of the Order of the Chamber in creating its Table of Incriminating Evidence.⁴ Consequently, the 13 sections that make up the Prosecution's Table are identical in form and structure, to the template of Annex A.

7. The Prosecution's *Factual allegations* referred to in its Table of Incriminating Evidence are taken from the *Amended Document Containing the Charges pursuant to Article 61 (3) (a) of the Statute* ("DCC").⁵ Each of the *Factual allegations* can be found in a specific paragraph within the DCC. However, the

³ ICC-01/04-01/07-956, p. 8, par. 14.

⁴ ICC-01/04-01/07-956-AnxA.

⁵ ICC-01/04-01/07-649-Anx1A.

Factual allegations are not always reproduced in their entirety in the Prosecution's Table of Incriminating Evidence. In fact, very often, only part of a given *Factual allegation* is cited. A specific *Factual allegation* might find itself in different sections of the Table and in different forms. Against this background, the *Claim numbers* given to each of the *Factual allegations*, in their respective section, do not serve as a means of identifying the *Factual allegations* but rather as a means of numbering them. Consequently, *Factual allegations* do not have a unique *Claim number*.

8. The Prosecution therefore suggests providing the Chamber with a separate document which would include the information regarding the specific sections of the Table where the textual fact in the element of proof (the evidence) has also been mentioned. This document would be in the form of an excel sheet containing all items of evidence which the Prosecution intends to rely on at trial and it would be composed of fifteen columns (see Annex 2 to this Application). The first column would list the ERNs of the specific elements of proof, organized in numerical order of the ERN. The second column would indicate the document title/description and the thirteen other columns would relate to the 13 sections of the Table, as explained above. For each particular element of proof, the appropriate box, would be populated with the reference as to where the element appears within a section. In this manner, the utility of each element of proof can be readily ascertained in relation to each charge, contextual elements or modes of liability. The Chamber and parties will immediately see which element of proof is cited more frequently.
9. For the same reasons set out in paragraph 7, the Prosecution cannot comply with the request to provide "...a separate document in which the different claim numbers that pertain to the same factual allegation are listed".

Confidentiality

10. The Prosecution submits Annexes 1 and 2 to this Application as Confidential, *ex parte*, only available to the Prosecution and Defence as they relate to the Table which is currently confidential and to an email exchange with the Chamber.

Conclusion

11. The Prosecution respectfully submits that complying with paragraph 14 of *the Order* would result in the inclusion of information in the column entitled *Other References* that would not assist the Chamber and/or enable Defence Counsels to prepare the case in the manner initially foreseen by the Order. The Prosecution submits that for the Table of Incriminating Evidence to serve its purpose, paragraph 14 of *the Order* should be amended in the manner suggested above. The Prosecution would also provide an electronic version of the Table and List described in paragraph 8 of this Application to facilitate searches in the said documents.



Luis Moreno-Ocampo, Prosecutor

Dated this 11th day of May 2009

At The Hague, The Netherlands