



Original: **French**

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

Date: **18 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

**Decision on the Prosecutor's Urgent Application for Leave to Use a Video as
Incriminating Evidence (Regulation 35 of the Regulations of the Court)**

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, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

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

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Mbuyu Andjelani

Legal Representatives of the Applicants

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 64(2), 64(3)(c) and 67(1)(b) of the Rome Statute and regulations 35 and 54 of the Regulations of the Court, decides as follows:

1. On 20 June 2008, the Prosecutor disclosed a video recording, DRC-OTP-0155-0004, (“the Video”) to the two Defence teams as provided for by rule 77 of the Rules.¹ On 23 January 2009, the Chamber ordered the Prosecutor to disclose to the Defence all the incriminatory evidence on which he intends to rely at trial, and for this to be done by 30 January 2009,² and on 13 March 2009 the Chamber asked him to submit by 4 May 2009 a table analysing the evidence (“the Table”), together with a list of this evidence.³ It extended the time limit for the submission of the Table to 20 May 2009.⁴
2. On 6 May 2009, the Prosecutor informed the Chamber that he had re-disclosed the Video to the two Defence teams, but as incriminatory evidence.⁵
3. During an *ex parte* hearing held on 8 May 2009, the Chamber asked the Prosecutor to file a formal request for leave to reclassify the Video.⁶ The Prosecutor filed his application on 11 May 2009 pursuant to regulation 35 of the Regulations of

¹ Office of the Prosecutor, “Prosecution’s Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 20 June 2008”, 23 June 2008, ICC-01/04-01/07-624.

² *Order Fixing the Schedule for Pre-Trial Disclosure of Incriminatory and Exculpatory Evidence and the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence)*, 23 January 2009, ICC-01/04-01/07-846-tENG.

³ *Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol*, 13 March 2009, ICC-01/04-01/07-956.

⁴ *Decision on the “Prosecution’s Motion to File Partial Table of Incriminating Evidence and Related material, Confidential - Ex Parte, available to the Prosecution Only, on 4 May 2009 - Regulation 35”*, 4 May 2009, ICC-01/04-01/07-1095.

⁵ Office of the Prosecutor, “Prosecution’s Communication of Incriminatory Evidence Disclosed to the Defence on 5 May 2009”, 6 May 2009, ICC-01/04-01/07-1110; see also Office of the Prosecutor, “Prosecution’s Communication of Originals of Incriminatory Evidence Disclosed to the Defence on 5 May 2009”, 6 May 2009, ICC-01/04-01/07-1111.

⁶ ICC-01/04-01/07-T-64-CONF-EXP-ENG ET, p. 66-67.

the Court (“the Application”).⁷ Mr Ngudjolo’s Defence team informed the Chamber that it did not wish to submit observations on this Application. Mr Katanga’s Defence team indicated that it did not have any objections to raise concerning the reclassification of the Video, but that it reserved its position with regard to its admissibility.⁸

4. In support of his Application, the Prosecutor emphasizes that he has interpreted the orders issued by the Chamber on 23 January and 13 March 2009 in light of rule 77 of the Rules. He considers that this interpretation allows him to add further items to his list of incriminating evidence disclosed to the Defence on 30 January 2009,⁹ since the item in question had already been disclosed.

5. He maintains that it was only in preparing the Table requested by the Chamber that he realized that this videotape could prove useful at trial. Moreover, he considers that the Defence will be able to benefit from the analysis that he has carried out when the Table is disclosed to the Defence, four months before the start of the trial.¹⁰

6. The Chamber recalls that, under regulation 35(2) of the Regulations of the Court, a fixed time limit can only be extended after it has lapsed if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

7. It is the Chamber’s view that the matters relied on by the Prosecutor do not fall within the terms of regulation 35 as cited above. However, it considers that this Video is relevant for the Defence teams and could contribute to a better understanding of the issues and to the determination of the truth. It recalls that the

⁷ Office of the Prosecutor, “Prosecution’s Urgent Application to be Permitted to Present as Incriminating Evidence a Video Previously Disclosed to the Defence Pursuant Rule 77 [Regulation 35]”, filed on 11 May 2009, registered on 12 May 2009, ICC-01/04-01/07-1128.

⁸ Exchange of e-mails between the Legal Adviser to the Trial Division and the Defence Teams on 12 and 13 May 2009.

⁹ ICC-01/04-01/07-1128, para. 1.

¹⁰ *Ibid.*, paras. 2 and 4.

Defence teams for both of the accused already became aware of the Video when it was disclosed on 20 June 2008 under rule 77 of the Rules, and that they could in fact benefit from the analysis of this Video within the context of the Table. Furthermore, the Chamber considers that both of the accused have the necessary time to prepare their defence in an effective manner in advance of the commencement of the trial, and that, in the event, they will not suffer any prejudice. It accordingly considers that it can grant the Prosecutor's Application.

FOR THESE REASONS, THE CHAMBER

GRANTS the Prosecutor's Application and;

ORDERS the Prosecutor to incorporate the information relating to Video DRC-OTP-0155-0004 into the table of incriminating evidence to be submitted by 4 p.m. on 20 May 2009.

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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed] 18/5/09
Judge Hans-Peter Kaul

Dated this 18 May 2009,

At The Hague, The Netherlands