



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 Disclosure of Incriminating Photographs

Order 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

Defence Counsel for Germain Katanga

Mr David Hooper
 Mr Andreas O'Shea

**Defence 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 Ambuyu 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

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”), acting pursuant to articles 64(2), 64(3)(c) and 69(3) of the Statute and regulations 35(2) and 54 of the Regulations of the Court, orders the following:

1. In an application described as urgent, filed on 14 May 2009, the Prosecutor requests the Chamber’s authorization for 47 incriminating photographs to be disclosed to the Defence (“the Application”).¹ This Application has been submitted pursuant to regulation 35 of the Regulations of the Court, since, subject to pending protective measures, incriminating evidence should have been disclosed by 30 January 2009.

2. The Chamber intends to respond to the Application by examining, first, whether the criterion laid down in regulation 35(2) of the Regulations of the Court has been met. Secondly, the Chamber has to satisfy itself that the Defence does not suffer any form of prejudice. To this end, it will, *inter alia*, consider the volume of this evidence, whether the evidence raises any new questions, and whether the Defence will be in a position to familiarize itself with the material and make use of it sufficiently in advance of the commencement of the trial to enable adequate preparation for trial. Finally, the Chamber emphasizes that the two Defence teams have not sought to make any observations on this Application.

3. According to the Prosecutor, the evidence consists of photographs of locations taken in February and March 2007 during preparations for a specialist forensic mission due to be carried out in Bogoro, or, more precisely, at the Bogoro Institute (“the Institute”), where victims were allegedly assembled on 24 February 2003 before being executed and buried in the surrounding area.² He explains that these photographs, which contain incriminating material, had not initially been taken with a view to being submitted as incriminating evidence at the trial, because he intended to take new, better quality photographs later on, once the mission was

¹ Office of the Prosecutor, “*Requête urgente, en application de la norme 35 du Règlement de la Cour, aux fins de communication de photographies à charge*”, 14 May 2009, ICC-01/04-01/07-1133.

² ICC-01/04-01/07-1133, para. 6.

in progress.³ He states that the mission could ultimately only be carried out between 28 and 31 March 2009,⁴ and that he learnt shortly before it began that the Institute's premises, which feature in the photographs, had been altered following renovation works in January 2009.⁵

4. The Prosecutor stresses that new photographs taken in March 2009, subsequently to the restoration work, thus do not reflect the exact state that the Institute's premises were in (bullet holes and blood stains), unlike those taken in February and March 2007. He therefore wishes to use the photographs taken in 2007 in order to submit them to experts in ballistics and blood stain analysis.⁶

5. In support of his Application, the Prosecutor states:

[TRANSLATION] [...] the Prosecution was unaware of the alteration to the scene of the crime. It only discovered this shortly before the mission in March 2009 and was only able to assess the extent of the change as a whole during the mission itself. And it was only able to reach a proper conclusion after a preliminary examination of some of the evidence collected in Bogoro at the end of March 2009, which it did not receive until 29 April 2009, by diplomatic pouch.⁷

6. The Chamber considers that the situation as explained above legitimately allows the Prosecutor to invoke regulation 35(2) of the Regulations of the Court, inasmuch as the alteration to the premises that were the subject of the photographs taken in 2007, which took place in January 2009, and which the Prosecutor only found about in March 2009, was outside the Prosecutor's control.

7. The Prosecutor does indeed already have in his possession a video⁸ filmed in Bogoro in February 2007, but he considers that this video consists of images of a lesser quality than the photographs which are the subject of this Application.

³ *Idem.*

⁴ *Ibid.*, para. 7.

⁵ *Ibid.*, para. 8.

⁶ *Ibid.*, paras. 9 and 10.

⁷ *Ibid.*, para. 14.

⁸ This video is the subject of Applications no. 912 and 1052 for the purpose, respectively, of redaction and reclassification, dealt with by the Chamber in a separate decision.

Furthermore, he emphasizes that it is desirable for the experts to be able to have access to documents which are as varied as possible and of the best quality.⁹

8. The Chamber notes that the number of photographs is not excessive and that no redaction is required. It notes that the Defence already has a sample of the photographs taken in 2007, which were disclosed for the requirements of the confirmation of charges hearing, and which include some of the evidence that is visible in the rest of the photographs that the Prosecutor now seeks to disclose.¹⁰ This is therefore not a question of evidence completely new to the Defence. The Chamber notes finally that, since no redaction is envisaged, disclosure of the evidence to the Defence could take place quickly, and, moreover, it could be submitted together with the table of incriminating evidence, which must be filed by 20 May 2009, thus putting the Defence in a position to prepare itself in an effective manner sufficiently in advance of the commencement of the trial. The Chamber therefore considers that the photographs merit disclosure, as the Defence will suffer no prejudice.

FOR THESE REASONS, the Chamber

GRANTS the Application;

DIRECTS the Prosecutor to disclose the photographs to the Defence as soon as possible; and

ORDERS the Prosecutor to incorporate the information relating to the photographs into the table of incriminating evidence to be submitted by 4 p.m. on 20 May 2009.

⁹ *Ibid.*, para. 12.

¹⁰ *Ibid.*, para. 17.

Done in English and in 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