

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-01/04-01/07**
Date: **18 November 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**

Confidential with confidential annex

**Decision on a judicial site visit
to the Democratic Republic of the Congo**

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
Mr Éric MacDonald

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

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr Marc Dubuisson
Presidency

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to articles 64, 69 and 74 of the Rome Statute (“the Statute”) and rule 132 of the Rules of Procedure and Evidence (“the Rules”), decides as follows.

1. On 13 November 2008, the Chamber ordered the Office of the Prosecutor, counsel for the Defence and the Legal Representatives of the victims to provide it with their written observations regarding a possible judicial site visit to Bogoro and the surrounding area in the Democratic Republic of the Congo (hereinafter the “DRC”).¹
2. The parties and participants responded on 24 November 2008 stating unanimously that they were in favour of such a site visit, provided it be carried out at an appropriate stage of the proceedings.² Subsequently, at various status conferences, they stated the same position.³

¹ *Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute)*, 13 November 2008, ICC-01/04-01/07-747-tENG.

² Defence for Mathieu Ngudjolo, “*Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance en vue de la conférence de mise en état du 27 novembre 2008*”, 24 November 2008, ICC-01/04-01/07-758; Legal Representatives of the victims, “*Réponse de la Représentante Légale des Victimes a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0046/08, a/0050/08, a/0051708, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08 et a/0109/08 aux questions de la Chambre de Première Instance II en vue de la conférence de mise en état (article 64-3-a du Statut)*”, 24 November 2008, ICC-01/04-01/07-759; Legal Representatives of victims, “*Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a) du Statut*”, 24 November 2008, ICC-01/04-01/07-761; Defence for Germain Katanga, “*Defence Response to the Order dated 13 November 2008*”, 24 November 2008, ICC-01/04-01/07-763; Office of the Prosecutor, “*Réponse de l’Accusation à l’ « Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut) »*”, 13 November 2008, ICC-01/04-01/07-764.

³ ICC-01/-01/07-T-93-Red-ENG WT 29-01-2010 5/76 RM T ; ICC-01/04-01/07-T-168-ENG ET WT 09-07-2010 35-36/42 VR T ; ICC-01/04-01/07-T-224-ENG ET WT 29-11-2010 45/64 RM T.

3. On 26 August 2011, the Chamber invited the parties and participants to reconfirm their position and, if it remained unchanged, to submit proposals of locations to be visited, explaining why they considered the sites to be of interest and suggesting an itinerary. It also requested them to explain how a site visit might assist the Chamber in resolving any issue that is still contested, indicating which evidence had already been admitted in regard to the issue.⁴

4. On 12 September 2011, the parties and participants, with the exception of the Prosecutor, again stated that they were in favour of a judicial site visit and made suggestions regarding a possible itinerary, amongst others.

5. Contrary to his position thus far, the Prosecutor now takes the view that a site visit by the Chamber is not necessary at this stage of the proceedings. Indeed, he considers that the evidence relating to the locations, as admitted to the case record, is sufficiently clear and detailed and that it is not contested. He further states that the benefits of such a visit do not justify the time and the expense that it would require or the security measures that would need to be put in place.⁵

6. The Defence for Mathieu Ngudjolo, however, reaffirms the appropriateness of a visit to the DRC.⁶ It suggests that the Chamber visit Bunia, Dele, Zumbe, Kambutso and Likoni, then Lagura and, finally, Bogoro, and highlights the relevance of each of these locations to the contentious aspects of the case.⁷ It also suggests that the parties and participants receive “[TRANSLATION] recordings, reports or transcripts” of the

⁴ *Order inviting the Parties and Participants to Make Observations Regarding a Judicial Site Visit*, 26 August 2011, ICC-01/04-01/07-3131, para. 10.

⁵ Office of the Prosecutor, “Prosecution’s Observations Regarding a Judicial Site Visit”, 12 September 2011, ICC-01/04-01/07-3142, paras. 2, 6 and 8.

⁶ Defence for Mathieu Ngudjolo, “*Observations de la Défense de Mathieu Ngudjolo en réponse à ‘Order Inviting the Parties and Participants to Make Observations Regarding a Judicial Site Visit’* (ICC-01/04-01-3131)”, 12 September 2011, ICC-01/04-01/07-3141, paras. 2 and 3.

⁷ *Ibid.*, paras. 7-27.

judicial site visit for their future use, particularly in their written submissions.⁸

Lastly, it proposes that the sites be photographed or even filmed.⁹

7. The Defence for Germain Katanga considers that a judicial site visit to the DRC would assist the Chamber in its evaluation of the evidence, especially in appreciating the distances involved and the opportunities of sight afforded by various vantage points and considering the conditions under which certain sounds can be heard. It feels that this would aid the appraisal of the credibility of certain witnesses.¹⁰ It suggests that the Chamber visit Bunia, Dele, Bogoro, Diguna, Aveba and Zumbe. It feels, moreover, that travel should be by road rather than by helicopter, since the latter means of transport does not allow for a full appreciation of the distances and the nature of the terrain being traversed.¹¹ Lastly, it repeats its view that certain basic premises, founded on the threefold requirement of impartiality, equality of arms and transparency, need to be established and to be respected by all the participants.¹²

8. The Legal Representatives of the victims also confirm their desire for the Chamber to carry out a site visit and are of the opinion that such a visit is essential in order to gain a full and complete understanding of several testimonies.¹³ They propose that the Chamber visit Bogoro and possibly also Aveba and Zumbe, and they, too, request the establishment of rules of procedure to be respected by all the participants, suggesting some rules.¹⁴

9. The Chamber notes the observations submitted in the filings of the parties and participants. It acknowledges both the merit and the usefulness of a site visit in

⁸ *Ibid.*, para. 33.

⁹ *Ibid.*, para. 31.

¹⁰ Defence for Germain Katanga, "Defense Proposals for a judicial Site Visit", 12 September 2011, ICC-01/04-01/07-3143-Conf, paras. 7 and 8.

¹¹ *Ibid.*, paras. 33 and 34.

¹² *Ibid.*, para. 42.

¹³ Legal Representatives of the victims, "Observations conjointes relatives à la tenue d'une visite de la Chambre sur les lieux", 12 September 2011, ICC-01/04-01/07-3144-Conf, paras. 5, 6 and 7.

¹⁴ *Ibid.*, para. 52.

order for the Chamber to be able to appreciate the practical ramifications of certain aspects of the case before it.

10. To this end, following the request of certain parties and the participants, the Chamber has prepared a protocol for conducting the visit, which is annexed to this order.

11. A status conference is also convened, during which the Chamber shall hear the observations of the parties and participants on the protocol, after which it shall prepare a list of the locations which it intends to visit. If the parties and participants do not object, this status conference could be held before the presiding judge alone.

12. Nevertheless, the Chamber notes at this juncture that:

- The visit shall take place during the second half of January 2012;
- Owing to budgetary constraints, the composition of the delegation shall necessarily have to be limited: it shall be confined to two representatives of each of the parties and two Legal Representatives;
- Having been informed of the prospect of a visit to Bogoro by the Chamber, the services of the Registry have undertaken an initial site reconnaissance mission for the purposes of evaluating the practicability of the proposed itineraries, principally from a logistical and security perspective;
- It should be possible to visit the majority of the locations and sites suggested by the parties and participants, subject, obviously, to any security restrictions identified by the Court security services up to the time of departure. In this connection, the Prosecutor is invited to provide observations, should he wish the Chamber to visit a location that has not hitherto been suggested by the parties and participants; and

- In principle, all the approved locations will be visited on the same day, combining the use of both helicopters to travel from one site to another and, if necessary, vehicles at each site.

13. Lastly, the Chamber emphasises the absolute imperative of maintaining the confidentiality of this decision.

FOR THESE REASONS, THE CHAMBER

DECIDES that a judicial site visit to Bogoro and the surrounding area shall be carried out in the second half of January 2012, with the exact date of the visit to be confirmed;

INVITES the Prosecutor to share his observations by 4 p.m. on 21 November 2011, should he wish the Chamber to visit a location that has not hitherto been suggested by the parties and participants;

DECIDES that a status conference shall be held at 9 a.m. on 25 November 2011 in the presence of the authorised representatives of the Registry; and

REQUESTS the parties and participants to notify it by e-mail before 4 p.m. on 21 November 2011 of any objections to the holding of this status conference in the presence of the presiding judge alone.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 18 November 2011

At The Hague, The Netherlands

CONFIDENTIAL ANNEX

Protocol of conduct for the site visit

Procedure during the site visit

1. The Chamber shall retain control of the conduct of the visit.
2. Parties and participants may not tender evidence.
3. Parties and participants shall not be authorised to file oral or written submissions.
4. At the request of the Chamber, the parties and participants may be requested to identify locations, sites or buildings and, if necessary, to provide any further pertinent information on the events which took place there. In the event of disagreement over identification, any challenge shall be entered in the transcript of the visit.
5. Parties and participants shall refrain from any contact with the media.

Site visit report

6. During the site visit, a CMS representative shall be present in order to prepare a written report of the visit, ensure that this protocol is respected and prepare the transcript to be produced upon completion of the visit.
7. Upon completion of the visit, subject to the Chamber's approval, the transcript referred to in paragraph 6 shall be entered into the case file.