

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

No.: ICC-01/04-01/07  
Date: 1 December 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 annexes**

**Decision on the 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 the Defence of Germain**

**Katanga**  
Mr David Hooper  
Mr Andreas O'Shea

**Counsel for the Defence of 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 for  
Participation/Reparation**

**Office of Public Counsel for Victims**

**Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**  
Presidency  
Mr Marc Dubuisson

**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 Victims to submit written observations on a possible judicial site visit to Bogoro and its environs (Democratic Republic of the Congo, hereinafter “DRC”).<sup>1</sup>
2. On 24 November 2008, the parties and participants unanimously responded in favour of such a visit, on condition that it be held at an appropriate stage of the proceedings.<sup>2</sup> They subsequently restated this position on several occasions at various status conferences.<sup>3</sup>
3. On 26 August 2011, the Chamber invited the parties and participants to reaffirm their position and, where sustained, to propose to the Bench the locations to

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<sup>1</sup> *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.

<sup>2</sup> 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 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, 3/0051708, 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 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 to the Order dated 13rd 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.

<sup>3</sup> ICC-01/01/07-T-93-Red-FRA WT 29-01-2010 6/80 RM T; ICC-01/04-01/07-T-168-FRA ET WT 09-07-2010 36/41 VR T; ICC-01/04-01/07-T-224-FRA ET WT 29-11-2010 42/60 RM T.

be visited, specifying their interest therein and a possible itinerary. It further directed them to indicate to the Bench how a site visit could help it resolve any issues which remain contested and in relation to which evidence had already been admitted.<sup>4</sup>

4. On 12 September 2011, the parties and participants, save, however, for the Prosecutor, expressed anew their support for a judicial site visit, advancing suggestions, including for the possible itinerary.

5. Contrary to his hitherto adopted position, the Prosecutor took the view that a site visit by the Chamber was unnecessary at this stage in the proceedings. He contended that the evidence already on record concerning the site was sufficiently clear and detailed and was uncontested. He added that the benefits of such a visit did not warrant the requisite time and expenditure and that the same held true for the security measures which would need to be put in place.<sup>5</sup>

6. The Defence for Mathieu Ngudjolo, for its part, reaffirmed the appropriateness of a site visit to the DRC.<sup>6</sup> It suggested that the Chamber travel successively to Bunia, Dele, Zumbe, Kambutso, Likoni, Lagura and Bogoro, underscoring its interest in each of these locations vis-à-vis the contentious aspects of the case.<sup>7</sup> It further proposed that the parties and participants receive “[TRANSLATION] recordings, reports or detailed notes” concerning the Chamber’s

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<sup>4</sup> *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.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> *Ibid.*, paras. 7 to 27.

visit for their subsequent use, namely in written submissions.<sup>8</sup> Lastly, the Defence argued for the visit to be photographed and even filmed.<sup>9</sup>

7. The Defence for Germain Katanga stated that a judicial site visit to the DRC would assist the Chamber in evaluating the evidence, in particular to appreciate distances, survey the view from various observation-points and consider the conditions in which certain sounds can be heard. The Defence added that such an exercise would aid the appraisal of the credibility of certain witnesses,<sup>10</sup> suggesting that the Chamber travel to Bunia, Dele, Bogoro, Diguna, Aveba and Zumbe. Moreover, the Defence submitted that travel by road would be preferable to helicopter as that means of transport does not allow a full appreciation of the distances and nature of the terrain covered.<sup>11</sup> Lastly, it asserted that certain principles to be respected by all participants must be defined and grounded in the threefold requirement of impartiality, equality of arms and transparency.<sup>12</sup>

8. For their part, the Legal Representatives of the Victims also affirmed their desire for a judicial site visit, underscoring their view that it is essential to a full understanding of several in-court testimonies.<sup>13</sup> They suggested that the Chamber travel to Bogoro and possibly Aveba and Zumbe. They, too, requested that procedural rules to be respected by all participants be defined, setting forth some such rules.<sup>14</sup>

9. The Chamber has taken cognizance of the observations articulated in the submissions of parties and participants. It recognizes the merits and use of a site visit in determining, in a very practical sense, certain aspects of the case before it.

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<sup>8</sup> *Ibid.*, para. 33.

<sup>9</sup> *Ibid.*, para. 31.

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

<sup>11</sup> *Ibid.*, paras. 33 and 34.

<sup>12</sup> *Ibid.*, para. 42.

<sup>13</sup> Legal Representatives of 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.

<sup>14</sup> *Ibid.*, para. 52.

10. To this end the Chamber has prepared a draft itinerary which specifically affords priority to a certain number of locations, sites or establishments to be viewed and, as requested by certain parties and participants, a protocol on conduct *in situ* during the site visit. It also convened a status conference between the parties, participants, and representatives of the Registry who undertook a reconnaissance mission in October 2011 to assess, in logistical and security terms, the feasibility of the suggested itineraries outlined at paragraphs 6, 7 and 8 above.

11. The status conference of 25 November 2011<sup>15</sup> (hereinafter "SC") successively considered and discussed *inter partes* the draft itinerary prepared by the Chamber, the protocol defining the rules of conduct to be followed by the parties and participants and various legal, logistical, organisational and practical matters, specifically addressing in this respect:

- the issue of ascertaining who, upon the arrival of the Bench in a locality, would guide it to the various locations to be visited;<sup>16</sup>

- whether there is a need for English-French and French-English interpreters;<sup>17</sup>

- the modalities for note-taking by the Court Officer throughout the site visit and the content of the minutes to be prepared thereafter;<sup>18</sup>

- the likely role of representatives of the DRC judicial authorities, should they express the desire to be present during the site visit;<sup>19</sup>

- contact with the local community and representatives of media outlets, if any;<sup>20</sup>

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<sup>15</sup> ICC-01/04-01/07-T-334-CONF-FRA ET 25-11-2011.

<sup>16</sup> *Ibid.*, pp. 21-23.

<sup>17</sup> *Ibid.*, p. 51.

<sup>18</sup> *Ibid.*, pp. 47-50, 51.

<sup>19</sup> *Ibid.*, pp. 52-53 and 57-60.

- how to respond if approached by persons connected to the case such as witnesses, the defence teams' resource persons, members of the Accused's families, victims or victims' relatives who may be *in situ*;<sup>21</sup>

- whether counsel for both Accused can contact their clients by telephone during the site visit.<sup>22</sup>

12. Following the discussions on these various points, the Chamber is in a position to issue a final decision on the date and modalities of the visit to the DRC. As regards the list of approved locations, sites and buildings, the Chamber emphasises that this document takes account of the suggestions and observations propounded by the parties in their submissions and at the SC. The document further affords consideration to both the budgetary and time constraints by which the Chamber is bound. Finally, the Chamber points out that this list may be amended *in situ* according to, *inter alia*, meteorological conditions, the motorised transport available to the Registrar, and, ultimately, any changes in the security situation which will be continuously reviewed *in situ*.

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<sup>20</sup> *Ibid.*, p. 53.

<sup>21</sup> *Idem*, pp. 54-57.

<sup>22</sup> *Idem*, pp. 50 and 66.

**FOR THESE REASONS, THE CHAMBER**

**DECIDES THAT:**

- the visit shall be conducted in the week of 15 to 22 January 2012;
- the Chamber shall be accompanied by a legal assistant and an analyst;
- the Office of the Prosecutor and the defence teams shall be represented, respectively, by two persons, each team of legal representatives being represented by one person;

**DETERMINES:**

- the list of locations, sites and buildings to which its visit shall afford priority (confidential Annex A);

**DECIDES THAT:**

- a representative of the Registry, a neutral organ of the Court, in the person of the Director of Court Services, shall act as Guide, and, *in situ*, shall indicate the locations, sites and positions of the buildings referred to in the list determined by the Chamber;

**DETERMINES:**

- the terms of the protocol governing the conduct to be adopted by the parties and participants during the site visit (confidential Annex B);

**DECIDES THAT:**



- as agreed with the Defence for Germain Katanga, the assistance of English and French language interpreters is not required;
- the minutes prepared upon completion of the site visit shall be submitted for the approval of the Chamber, which shall ensure that they are faithful and shall impart them through the most appropriate means.

**REFERS**, as regards the other matters referred to at paragraph 11 above, to the discussions held at the SC of 25 November 2011 since no particular difficulty was raised by the parties and participants.

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

[signed]

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**Judge Bruno Cotte**  
**Presiding Judge**

[signed]

[signed]

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**Judge Fatoumata Dembele Diarra**

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**Judge Christine Van den Wyngaert**

Dated this 1 December 2011

At The Hague, the Netherlands

## CONFIDENTIAL ANNEX B

### Visit to the DRC

#### Protocol for conduct during the site visit

##### Procedure during the site visit

1. The Chamber shall retain control over the conduct of the visit.
2. The parties and participants may not seek the admission of evidence.
3. The parties and participants shall not be authorized to make written or oral submissions.
4. At the Chamber's request, the parties and participants may be required to identify locations, sites or buildings. In the event of disagreement regarding such identification, the objection raised shall be recorded in the report on the visit.
5. Where a representative of the Congolese judicial authorities is *in situ*, such person shall confine him or herself to assisting with the site visit.
6. No contact between the media and parties or participants shall be authorized.

##### Report on the site visit

7. During the site visit, a CMS representative shall be present for the purposes of preparing a written report on the visit, ensuring compliance with the present protocol and preparing the minutes upon completion of the visit.
8. Upon completion of the visit and subject to the approval of the Chamber, the minutes referred to at paragraph 6 shall be registered in the record.