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

Date: **31 August 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 postponing the date of commencement of the trial
(Rule 132(1) of the Rules of Procedure and Evidence)**

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

Office of the Prosecutor

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

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Ms Fiona McKay

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”), acting pursuant to article 64 of the Statute of the Court (“the Statute”), rule 132(1) of the Rules of Procedure and Evidence (“the Rules”) and regulation 54 of the Regulations of the Court, decides the following.

1. In its decision of 27 March 2009, the Chamber scheduled the commencement of the trial for 24 September 2009.¹ In light of a number of issues only recently raised which require a determination prior to the commencement of the trial, the Chamber considers that there are compelling reasons² to postpone the trial. The purpose of this decision is to set forth those reasons.

I. Issues concerning the submission of incriminating evidence

a. Classification of incriminating evidence

2. On 27 May 2009, at the Chamber’s order,³ the Prosecutor filed a table presenting all of his incriminating evidence (“the Table”) and the list of the witnesses he intended to call at trial.⁴ That document was intended to link the charges confirmed by Pre-Trial Chamber I and the modes of responsibility with the facts alleged and the evidence on which the Prosecutor intended to rely at trial. In making the order, the Chamber had considered that such a document would provide those concerned, particularly the Defence, with a structured presentation of all of that evidence in good time. In actual fact, the Table and its annexes amount to 1,165 pages.

3. On 17 July 2009, the Defence for Germain Katanga drew the Chamber’s attention to the difficulties in using the Table as submitted, stating:

¹ *Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve)*, 27 March 2009, ICC-01/04-01/07-999.

² *Ibid.*, para. 15.

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

⁴ Office of the Prosecutor, “*Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l’Accusation et de la liste des pièces à charge*”, 27 May 2009, ICC-01/04-01/07-1174, with 17 confidential annexes.

Having reviewed the 1165 page document produced by the Prosecution, the Defence has reached the conclusion that while useful in providing notice of the evidence which the Prosecution intends to rely upon, this lengthy and inter-dependent document does not fulfil the practical purpose of providing the Defence with a single, reliable and clear point of reference for the charges against the accused.⁵

In the Defence's view, the Table in its current format does not therefore enable it to determine the specific facts with which the Accused are charged. It repeated this complaint on 14 August 2009,⁶ at the request of the Chamber, which had invited the Defence to submit concrete proposals.⁷ It requested that the Chamber order the Prosecutor to file a new document setting out the charges and the legal and factual elements of the case, based on the *Decision on the Confirmation of Charges* issued by the Pre-Trial Chamber, and not on the document drafted pursuant to regulation 52 of the Regulations of the Court by the Prosecutor prior to the confirmation hearing. The Defence for Germain Katanga also requested that a table be filed in the record on the basis of this new document containing the charges.⁸

4. In the view of the Defence for Mathieu Ngudjolo, which also submitted its observations⁹ and from whom the Chamber sought additional proposals,¹⁰ the Table's main flaw is that the Prosecutor chose to refer solely to the document containing the charges, and not the Pre-Trial Chamber's *Decision on the Confirmation of Charges*.¹¹ Sharing the concerns of the other Defence team, it also requested that the Prosecutor submit a new table addressing only those facts included in the *Decision on*

⁵ Defence for Germain Katanga, "Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges", 17 July 2009, ICC-01/04-01/07-1310, para. 2.

⁶ Defence for Germain Katanga, "Defence Proposals to Remedy Deficiencies in the Notice to the Accused", 14 August 2009, ICC-01/04-01/07-1377, para. 7.

⁷ *Order on the submissions by the Defence on the Table of Incriminating Evidence and on the sequence of Prosecution witnesses*, 27 July 2009, ICC-01/04-01/07-1337.

⁸ ICC-01/04-01/07-1310, p. 11, ICC-01/04-01/07-1377, para. 8.

⁹ Defence for Mathieu Ngudjolo, "*Soumission de la Défense de Mathieu Ngudjolo suite à la « Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges » enregistrée le 17 juillet 2009*" (ICC-01/04-01/07-1310), 20 July 2009, ICC-01/04-01/07-1324.

¹⁰ ICC-01/04-01/07-1337.

¹¹ ICC-01/04-01/07-1324, para. 10, Defence for Mathieu Ngudjolo, "*Observations de la Défense de Mathieu Ngudjolo relatives au Tableau des éléments à charge élaboré par le Procureur* (ICC-01/04-01/07-1174)", 14 August 2009, ICC-01/04-01/07-1375, paras. 6-15 and 37.

the Confirmation of Charges, thereby necessarily excluding a number of evidentiary materials.¹²

5. The Prosecutor responded to the Defence complaints on 21 August 2009, stating that its criticisms were unfounded and that the Table as it stands is fit for purpose.¹³

6. These various submissions make it evident that the notification of the charges currently remains contentious, and this crucial issue must obviously be resolved prior to the commencement of trial.

7. Like the Defence, the Chamber itself required a relatively long time to study the Table and all of its constituent parts after it was filed on 27 May 2009. Without wishing to express an opinion at this stage as to the merits of the criticisms and proposals of the Defence teams, the Chamber would state that it had itself noted that the Office of the Prosecutor would need to make substantial amendments to the document. The amendments will be set out in a forthcoming decision. At this juncture, the remarks set out hereinafter are intended solely as guidance.

8. Firstly, the Table does indeed reflect the alleged facts set forth in the Document Containing the Charges of 26 June 2008¹⁴ and not the wording used by the Pre-Trial Chamber in its *Decision on the Confirmation of Charges* of 26 September 2008.¹⁵ Even regardless of the choice of document to be used as a reference at trial – an issue raised by the Defence teams which will be settled in due course – it is necessary to ensure now, before the commencement of the trial, that the facts the Prosecutor set out in the Table are consistent with the facts of the charges confirmed by the Pre-Trial Chamber.

¹² ICC-01/04-01/07-1324, p. 5, ICC-01/04-01/07-1375, p. 21.

¹³ Office of the Prosecutor, “*Réponse de l’Accusation aux observations et propositions de la Défense relatives au Tableau des éléments à charge*”, 21 August 2009, ICC-01/04-01/07-1416.

¹⁴ Office of the Prosecutor, “*Submission of Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648*”, 26 June 2008, ICC-01/04-01/07-649.

¹⁵ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/07-716-Conf. See the public redacted version dated 30 September 2008 (ICC-01/04-01/07-717).

9. Secondly, the correlation between the elements constituting a crime, the factual allegations used to characterise them and/or the evidence adduced to prove the alleged facts appears somewhat tenuous. Hence the Prosecutor must endeavour to establish more rigorous correlations.

10. Thirdly, the Prosecutor has sometimes used the same facts and evidence in support of two crimes even though the constitutive elements of the crimes are different. This causes some degree of confusion, lengthens the document and makes it less easy to turn to account. Here again, the Prosecutor should therefore make the necessary amendments.

11. Lastly, for a number of the constituent elements, frequently the Table merely refers to the alleged facts and the evidence used to support another element of the same offence or even a separate offence, without clearly showing which alleged facts correspond to which constituent element or elements. Here again, certain passages in the Table must be reconsidered.

12. Implementing the aforementioned amendments, which will take some time, will in all likelihood require the holding of additional status conferences so that, once the improvements deemed necessary have been made, the significant work undertaken thus far by the Office of the Prosecutor may facilitate participation in the trial for all concerned. The Chamber must recall that, although the Table is and remains first and foremost a tool to structure the presentation of incriminating evidence,¹⁶ it is also a valuable indicator as to whether the preparation of the case must be continued, and if so, in which direction.

13. In this respect, on the one hand, the Chamber has noted that certain parts of the Table contain a particularly large and most likely repetitive volume of evidence. On the other hand, the Chamber intends to give full effect to article 64(2) of the Statute, under which it must ensure that the trial is fair and expeditious, and rule

¹⁶ ICC-01/04-01/07-956, para. 12.

132(2) of the Rules and regulation 54 of the Regulations of the Court. To this end, it will also ensure that the presentation of the incriminating evidence will not be excessively long, which signifies that the Prosecutor must be more selective and strict in choosing the evidence he will call so as to afford the Chamber, when it has heard the evidence, a better understanding of the importance of the evidentiary materials the Prosecutor will have retained. Status conferences must therefore be held to enable the Prosecutor to provide the Chamber with further information about, *inter alia*, the expected duration of his various witnesses' testimony and the presentation of incriminating evidence, to provide any relevant information about the list of exhibits he intends to adduce, to explain to the Chamber the reasons for the order in which witnesses will be called,¹⁷ to provide it with a summary of facts to which each witness will testify and to inform it of the exact charges in relation to which each witness will be examined.

b. Agreements as to evidence

14. Having painstakingly analysed the Table in its current form, the Chamber deems it necessary to hold status conferences in order to enable it, pursuant to rule 69 of the Rules, to determine in consultation with the parties all evidentiary points on which they may agree. It should be feasible to draw up such agreements henceforth, in particular in relation to the contextual elements of the crimes against humanity and war crimes.

c. Issues concerning the admissibility and relevance of evidence

15. The Chamber today received an application from the Defence for Mathieu Ngudjolo requesting the removal from the Table of more than 290 items listed by the Prosecutor in support of the charges.¹⁸ The Prosecutor responded to the application

¹⁷ Office of the Prosecutor, "Prosecution's order of witnesses it intends to call at trial", 14 August 2009, ICC-01/04- 01/07-1378.

¹⁸ ICC-01/04-01/07-1375, paras. 42-44.

in general terms, without advancing an opinion on each of the impugned items.¹⁹ Accordingly, the Chamber must rule on this application in the coming weeks. Furthermore, in light of the challenges of the Defence for Mathieu Ngudjolo to the admissibility and relevance of the evidence contained in the Table, it is more imperative than ever that the Defence teams – to whom the Table now affords an overview of all of the evidence on which the Prosecutor intends to rely – be invited to provide any useful clarifications on the applications they consider appropriate to make as regards the admissibility or relevance of the evidence. The Chamber recalls that, under rule 64 of the Rules, any issue relating to relevance or admissibility of evidence must be raised at the time when the evidence is submitted to a Chamber. A decision on this issue will be issued in the near future.

d. Conclusion

16. In light of the foregoing, the Chamber recalls that, in its view, the trial cannot commence effectively without the prior examination and, to the extent possible, implementation of any solutions which would focus the trial solely on the matters that are genuinely in dispute in the case. That is the objective it must attain, as must all of the participants, at the end of this unavoidable extension of the preparatory phase.

17. However, there are other compelling reasons for a postponement.

II. Issues pertaining to the alleged unlawfulness of the arrest and detention of Germain Katanga in the Democratic Republic of the Congo (DRC)

18. On 30 June 2009, the Defence for Germain Katanga filed a motion for a declaration on unlawful detention and stay of proceedings wherein it alleged that the Accused was unlawfully arrested and detained by the Congolese authorities and that

¹⁹ ICC-01/04-01/07-1416, paras. 18 to 27.

the Prosecutor and the Registry bear some responsibility for the continuation of this unlawful detention.²⁰

19. On 15 July 2009, in response to an application by the Prosecutor,²¹ the Chamber reclassified a Registry report on the execution of the warrant of arrest for Germain Katanga which was the subject of the Defence motion.²² On 23 July 2009, two Legal Representatives of Victims submitted their observations,²³ and on 24 July 2009, the Prosecutor filed his response.²⁴

20. On 25 August 2009, the Chamber found it necessary to seek the observations of the Registry²⁵ and, in accordance with rule 103 of the Rules, invited the competent authorities of the Democratic Republic of the Congo to file their own observations within 15 days of the notification of the French version of Germain Katanga's motion and the Prosecutor's response.²⁶

21. The Chamber considers that, in light of the importance of the issue raised therein, the trial cannot commence without a prior ruling on the Prosecutor's application.

²⁰ Defence for Germain Katanga, "Defence motion for a declaration on unlawful detention and stay of proceedings", 30 June 2009, ICC-01/04-01/07-1258-Conf-Exp. See also the public redacted version, ICC-01/04-01/07-1263.

²¹ Office of the Prosecutor, Prosecution request for re-classification of Report of the Registrar, 7 July 2009, ICC-01/04-01/07-1276.

²² *Ordonnance autorisant la reclassification d'un rapport du Greffe (norme 23bis du Règlement de la Cour)*, 15 July 2009, ICC-01/04-01/07-1306.

²³ Legal representatives of the victims, "*Observations des représentants légaux des victimes représentées par me Jean-Louis Gillissen et Me Joseph Keta sur « The Defence motion for a declaration on unlawful detention and stay of proceedings (ICC-01/04-01/07-125-conf-Exp) »*", 23 July 2009, ICC-01/04-01/07-1331.

²⁴ Office of the Prosecutor, "Prosecution Response to Defence motion for a declaration of unlawful detention and stay of proceedings", 24 July 2009, ICC-01/04-01/07-1335-Conf-Exp. See the public redacted version, ICC-01/04-01/07-1381.

²⁵ *Decision Inviting Observations from the Registry on Germain Katanga's Application for a Declaration on Unlawful Detention or Stay of Proceedings*, 25 August 2009, ICC-01/04-01/07-1425-tENG.

²⁶ *Decision Inviting Observations from the Democratic Republic of the Congo on Germain Katanga's Application for a Declaration on Unlawful Detention or Stay of Proceedings*, 25 August 2009, ICC-01/04-01/07-1426-tENG.

III. Issues pertaining to protective measures for prosecution and defence witnesses

22. At an *ex parte* hearing on 8 July 2009,²⁷ the Chamber drew the Prosecutor's attention to the fact that several exculpatory witnesses regarding whom the Prosecutor sought a ruling from the Chamber were already protected by order of Trial Chamber I. It appeared that, for the majority, the protective measures granted initially in the *Lubanga* case were different from those which this Chamber was envisaging. The Chamber reminded the Prosecutor that, pursuant to regulation 42(1) of the Regulations of the Court, once ordered in any proceedings in respect of a victim or witness, protective measures continue to have full force and effect in relation to any other proceedings, unless said measures are reviewed pursuant to regulation 42(3), which states: "[a]ny application to vary a protective measure shall first be made to the Chamber which issued the order". The Chamber was constrained to state that it had hitherto received no information concerning the particular status of these witnesses who, as far as it was aware, were intervening only in the case before it.

23. Accordingly, the Chamber invited the Prosecutor to submit an urgent request to Trial Chamber I for a variation of the measures it had ordered for many of these witnesses. In a decision issued in this regard dated 22 July 2009,²⁸ the Chamber was also compelled to approach Trial Chamber I *proprio motu* concerning the situation of several other exculpatory witnesses which it considered also likely to change. On 27 July and 20 August 2009, Trial Chamber I issued two orders setting out the procedure to be followed to enable it to rule on the implementation of regulation 42

²⁷ ICC-01/04-01/07-T-68-CONF-EXP-FRA ET 08-07-2009.

²⁸ *Decision on the Protection of 21 Witnesses Under Article 67(2) of the Statute and/or Rule 77 of the Rules of Procedure and Evidence*, 22 July 2009, ICC-01/04-01/07-1329-Conf-Exp-tENG. See the public redacted version, ICC-01/04-01/07-1332-tENG.

of the Regulations of the Court.²⁹ To date, the situation of the witnesses concerned has not been resolved.

24. What is more, when considering the Prosecutor's August 2009 requests pursuant to regulation 35 of the Regulations of the Court for redactions and for disclosure of new incriminating and exculpatory evidence, the Chamber discovered that the situation of some of the witnesses concerned and of other protected persons on which it had already ruled had in fact been assessed previously by Trial Chamber I, again without the Prosecutor's having informed this Chamber. In the event that the Chamber should find that the conditions for the application of the aforementioned regulation 35 have been satisfied, it will once again be compelled urgently to approach Trial Chamber I, which will inevitably give rise to further delays.

25. The fact that the Chamber must wait for a ruling from Trial Chamber I, to which the matter was referred belatedly, is further reason for a postponement of the trial commencement date.

26. Lastly, the Chamber must mention the Prosecutor's recent late filing of applications under regulation 35 of the Regulations of the Court seeking the addition of new incriminating and exculpatory evidence, even though the Prosecutor's tardy filing does not in itself constitute a ground to postpone the commencement date of the trial. Regardless of how the Chamber decides to rule on such applications, the fact that the Defence must be able to process and turn them to account – especially if they are granted – required an additional effort from all concerned at this final stage in the preparatory phase.

²⁹ Trial Chamber I, *Order on the prosecution's applications to vary protective measures under Regulation 42*, 17 July 2009, ICC-01/04-01/06-2068 and *Order on the prosecution's applications for the variation of protective measures concerning Witness 44 and Witness 203*, 20 August 2009, ICC-01/04-01/06-2087-Conf.

FOR THESE REASONS,

DECIDES that the trial will commence on 24 November 2009; and

DECIDES to organise a status conference in open session, to be held at 9.30 a.m. on 30 September 2009.

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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Hans Peter Kaul

Dated this 31 August 2009
At The Hague, The Netherlands