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

Date: 27 March 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Decision setting the date 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

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

**Counsel for the Defence of Germain
Katanga**

Mr David Hooper
Mr Andreas O'Shea
Ms Caroline Buisman

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of 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 Applicants

Office of Public Counsel for Victims

Ms Paolina Massida

**Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

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

I. Background

1. On 26 September 2008, Pre-Trial Chamber I issued the “Decision on the confirmation of charges”¹ and, on 24 October 2008, the Presidency constituted Trial Chamber II, in accordance with article 61(11) of the Statute.² On 6 November 2008, Trial Chamber II convened an initial status conference³ with a view to setting the date of the trial, in accordance with rule 132(1) of the Rules. Although this provision stipulates that the Chamber must set the date promptly after its constitution, until now the Chamber has considered that it was unable to do so definitively and realistically, for the following reasons.

2. First, the Chamber considered it appropriate to obtain information from the participants in the proceedings and from the Registry on the status of the proceedings and any difficulties that they had encountered. Before its first hearing, the Chamber instructed the participants to respond to specific questions and, in return, to inform the Chamber of the issues which they deemed relevant and on which they wished the Chamber to rule.⁴ The Prosecution, Defence counsel, the Legal Representatives of victims and the Registry filed their observations on

¹ Pre-Trial Chamber I, “Decision on the confirmation of charges”, 26 September 2008, ICC-01/04-01/07-716-Conf. See also the public redacted version of the decision, issued on 30 September 2008, ICC-01/04-01/07-717.

² Presidency, “Decision constituting Trial Chamber II and referring to it the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*”, 24 October 2008, ICC-01/04-01/07-729.

³ “Order Fixing the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence)”, 6 November 2008, ICC-01/04-01/07-739-tENG.

⁴ “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.

24 November 2008⁵ and expounded on them orally at the first status conference, which took place on 27 and 28 November 2008.

3. Following this hearing, the Chamber wished to obtain from all of the participants additional written observations on, *inter alia*, the disclosure of incriminating and exculpatory evidence, the confidentiality agreements entered into on the basis of article 54(3)(e) of the Statute, the treatment of applications and the modalities for victim participation, the common legal representation of victims and various procedural issues raised by the Registry.⁶ A second status conference was held on 3 February 2009⁷ and it was only on 17 February 2009 that the Chamber had at its disposal all of the requests, responses and replies filed by the participants on the above-mentioned points. These documents provided the Chamber with an overview of all of the main outstanding issues following the pre-trial stage that require resolution before the commencement of the trial.

⁵ Defence Team for Mathieu Ngudjolo, “Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance II en vue de la conférence de mise en état du 27 Novembre 2008 (article 64-3-a du Statut)”, 24 November 2008, ICC-01/04-01/07-758; Defence Team 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)’ du 13 novembre 2008”, 24 November 2008, ICC-01/04-01/07-764; Legal Representative 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, a/0051/08, 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 Representative 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; Legal Representatives of Victims, “Réponses du Représentant Légal des Victimes a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0030/08, a/0031/08, a/0032/08, a/0033/08, a/0034/08, a/0035/08 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 l’article 64-3-a du Statut”, 24 November 2008, ICC-01/04-01/07-762; Legal Representatives of Victims, “Observations du Représentant légal des victimes a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08 sur les questions liées à la conférence de mise en état du 27 novembre 2008”, 24 November 2008, ICC-01/04-01/07-767; Registry, “Response to the questions raised by Trial Chamber II on 13 November 2008 and additional observations”, 24 November 2008, ICC-01/04-01/07-765.

⁶ “Order Instructing the Participants and the Registry to File Additional Documents”, 10 December 2008, ICC-01/04-01/07-788-tENG.

⁷ ICC-01/04-01/07-T-56-FRA ET WT 03-02-2009.

4. The second reason for a deferral of the date of the trial relates to the fact that it was necessary, in the Chamber's view, to ascertain when all the evidence, both incriminatory and exculpatory, could be disclosed by the Prosecution to the Defence. This information was in fact essential to setting a date for the commencement of the trial, also taking account of the time required by the Defence effectively to prepare its case. It was also crucial to obtain clarifications with regard to the status of the requests for redactions, the necessary measures to ensure the protection of the witnesses and the victims, and the agreements entered into under article 54(3)(e) of the Statute, since all of these outstanding issues were likely to hinder total and expeditious disclosure.

5. With this in mind and with the benefit of the experience in *Lubanga*, on 21 January 2009, the Chamber ordered the Prosecution to provide additional details of certain disclosure notes, inspection reports and information concerning documents obtained under article 54(3)(e) of the Statute.⁸ Furthermore, on 23 January 2009, the Chamber fixed the schedule for pre-trial disclosure of incriminatory and exculpatory evidence. The Chamber instructed the Prosecution to disclose to the Defence by 30 January 2009 the evidence that it intended to use at trial and to file any requests for its redaction. With regard to evidence falling under article 67(2) of the Statute and rule 77 of the Rules, the Chamber requested that the Prosecution file requests for its redaction by 16 February 2009, with a view to disclosing it to the Defence by 27 February 2009.⁹ The initial time limit of 16 February 2009 was extended by three weeks at an *ex parte* hearing held on 25 February 2009, during which the Prosecution set out the obstacles it had faced in completing on time the redaction procedures

⁸ "Order Instructing the Prosecutor to Provide Additional Details about Certain Disclosure Notes, Inspection Reports and the Report Dated 5 January 2009 (Regulation 28 of the Regulations of the Court)", 21 January 2009, ICC-01/04-01/07-839-tENG.

⁹ "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.

which it viewed as essential.¹⁰ On 23 March 2009, the time limit was extended, once again, for eight witness statements.¹¹

6. Furthermore, the Prosecution explained to the Chamber the challenges encountered in implementing the protective measures necessary for disclosure to the Defence of incriminatory and exculpatory witness statements, including the disclosure of the witnesses' identities.¹² On 9 February 2009, the Chamber received the Prosecution's submission concerning the incriminating witness statements¹³ and, on 11 February 2009, its submissions on the statements containing exculpatory information.¹⁴ The Chamber received responses from most participants on 20¹⁵ and 23 February 2009.¹⁶ At the hearing held on 25 February 2009, the Chamber sought

¹⁰ ICC-01/04-01/07-T-60-CONF-EXP-FRA ET 25-02-2009.

¹¹ "Order on the Prosecutor's Application for an Extension of Time (Regulation 35 of the Regulations of the Court)", 23 March 2009, ICC-01/04-01/07-978-tENG; ICC-01/04-01/07-T-63-FRA ET WT 23-03-2009, p. 3, lines 7-10.

¹² ICC-01/04-01/07-T-54-CONF-EXP-FRA ET 28-02-2009.

¹³ Office of the Prosecutor, "Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses", 9 February 2009, ICC-01/04-01/07-882.

¹⁴ Office of the Prosecutor, "Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Witnesses Providing Exculpatory Evidence or Evidence of a Nature Material to the Preparation of the Defence", 11 February 2009, ICC-01/04-01/07-893. See also, Office of the Prosecutor, "*Requête de l'Accusation aux fins d'expurgations d'informations dans certains éléments de preuve relevant de l'Article 67(2) ou de la Règle 77, conformément à l'Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès*", 16 February 2009, ICC-01/04-01/07-902; Office of the Prosecutor, "Prosecution's Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 – also known as Witness 253, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 280 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules", 24 March 2009, ICC-01/04-01/07-986; Office of the Prosecutor, "*Requête aux fins d'admission de faits et de non communication de l'identité de neuf témoins (W-023, W-033, W-037, W-044, W-047, W-052, W-068, W-101, W-113) ayant fourni des éléments de preuve relevant de la Règle 77*", 24 March 2009, ICC-01/04-01/07-986-Conf-Exp.

¹⁵ Defence Team for Germain Katanga, "Defence Response to the Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses", 20 February 2009, ICC-01/04-01/07-909; Defence Team for Mathieu Ngudjolo, "*Réponse de la Défense aux 'Mesures proposées par l'Accusation quant aux modalités de communication propres à assurer la protection des témoins à charge'*", 20 February 2009, ICC-01/04-01/07-907; Legal Representatives of Victims, "*Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 aux 'Prosecution's Submissions on the Modalities of Disclosure required for the Protection of Incriminating Witness'*", 20 February 2009, ICC-01/04-01/07-908; Legal Representatives of Victims, "*Observations des représentants légaux de victimes sur les mesures proposées par l'Accusation quant aux modalités de communications propres à assurer la protection des témoins à charge*", 20 February 2009, ICC-01/04-01/07-910.

¹⁶ Defence Team for Mathieu Ngudjolo, "*Réponse unique de la Défense aux soumissions numéros 893 et 902 de l'Accusation*", 23 February 2009, ICC-01/04-01/07-911.

additional information from the Prosecution on the protection of some of the witnesses concerned.¹⁷ This hearing continued on 16 March 2009.¹⁸

7. Thirdly, before setting the date of the trial, the Chamber considered it necessary to await the challenge to admissibility that the Defence for Germain Katanga had envisaged filing since the first status conference held on 27 and 28 November 2008.¹⁹ At the second status conference, on 3 February 2009,²⁰ the Defence confirmed its intention, and it ultimately filed its challenge on 10 February 2009, as “confidential, *ex parte*, available only to the Defence for Germain Katanga”.²¹ On 5 March 2009, the Chamber set the procedure to be followed under article 19 of the Statute, as required by rules 58 and 59 of the Rules.²² Furthermore, the Chamber considered it expedient to await the Prosecution’s response in order to make an informed assessment as to the time needed to dispose of the legal issues raised by the challenge to admissibility. This response was filed on 19 March 2009.²³

¹⁷ ICC-01/04-01/07-T-60-CONF-EXP-FRA ET 25-02-2009.

¹⁸ ICC-01/04-01/07-T-62-CONF-EXP-FRA ET 16-03-2009.

¹⁹ ICC-01/04-01/07-T-53-FRA ET WT 28-11-2008, p. 54, line 21-p. 55, line 6.

²⁰ ICC-01/04-01/07-T-56-FRA ET WT 03-02-2009, p. 45, line 25 and p. 46, lines 1-25.

²¹ Defence Team for Germain Katanga, “Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute”, 10 February 2009, ICC-01/04-01/07-891-Conf-Exp.

²² “Decision Prescribing the Procedure to be Followed Under Article 19 of the Statute (Rule 58 of the Rules of Procedure and Evidence)”, 5 March 2009, ICC-01/04-01/07-943-tENG.

²³ Office of the Prosecutor, “Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)”, 19 March 2009, ICC-01/04-01/07-968. No. **ICC-01/04-01/07**

II. Considerations in favour of scheduling the trial for September 2009

8. In the light of all of the information received, the Chamber is now able to set the trial date. Firstly, most requests for redaction of evidence have been filed according to a process determined by the Chamber for the Office of the Prosecutor.²⁴ Furthermore, the Chamber now has at its disposal the information to allow it to take the appropriate measures to ensure the protection of witnesses, in respect of whom the Prosecution formulated various submissions currently under consideration.²⁵ The Chamber now knows when, and in what form, the disclosure of evidence by the Prosecution to the Defence will be completed,²⁶ and the timeframe the Defence considers necessary for it to complete its investigations. In addition, by its decision of 26 February 2009, the Chamber established for the Registry the modalities for the treatment of applications for victim participation,²⁷ thereby now allowing the Chamber to rule on the modalities of their participation and on the question of common legal representation, in respect of which the Chamber now has the necessary information.²⁸ Lastly, the Chamber is able to determine the time it will need to dispose of all of the pending requests and, in particular, the admissibility challenge mentioned at paragraph 7 above.

9. The Chamber recalls that, in the written submissions filed before the first status conference, the parties proposed that the trial commence on 8 June 2009.²⁹

²⁴ "Decision on the Redaction Process", 12 January 2009, ICC-01/04-01/07-819-tENG.

²⁵ See paragraph 6 of this decision.

²⁶ "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", 13 March 2009, ICC-01/04-01/07-956.

²⁷ "Decision on the treatment of applications for participation", 26 February 2009, ICC-01/04-01/07-933-tENG.

²⁸ Legal Representatives of Victims, "*Soumission relative à la représentation légale commune*", 6 February 2009, ICC-01/04-01/07-876; Legal Representatives of Victims, "*Corrigendum à la soumission relative à la représentation légale commune*", 6 February 2009, ICC-01/04-01/07-876-Corr. See also, Registry, "*Observations sur la représentation légale commune des victimes*", 18 February 2009, ICC-01/04-01/07-905-Conf-Exp.

²⁹ Defence Team for Mathieu Ngudjolo, "*Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance II en vue de la conférence de mise en état du 27 novembre 2008 (article 64-3-a du Statut)*", 24 November 2008, ICC-01/04-01/07-758, para. 12; Defence Team for Germain Katanga, "Defence Response to the Order dated 13 November 2008", 24 November 2008, ICC-01/04-01/07-763, p. 5; Office of the Prosecutor, "*Réponse de l'Accusation à l'Ordonnance enjoignant aux participants et* No. **ICC-01/04-01/07**

Subsequently, the Defence for Germain Katanga informed the Chamber that it would require more time to complete its investigations, as a result of difficulties encountered in the field.³⁰ When invited to make oral submissions on the possible commencement of the trial in early July 2009, the Defence teams³¹ and the Prosecution³² expressed their preference for the trial to commence in September 2009 to allow optimal preparation of their cases.

10. Such considerations aside, and in the light of the findings which follow, it is the Chamber's view that neither 8 June nor early July 2009 would be reasonable dates for the commencement of the trial.

11. The Chamber will first need to dispose of the above-mentioned admissibility challenge, subsequent to any observations from the authorities of the Democratic Republic of the Congo and the victims or their legal representatives on 16 April 2009 and a hearing on the matter, if appropriate. The determination of this challenge – which is crucial to the situation of one of the Accused and which, article 19(4) of the Statute ordains, may be raised only once – may, furthermore, be appealed as of right under article 82(1)(a) of the Statute; adjudication of any such appeal must precede commencement of trial.

12. Desirous of conducting fair and expeditious proceedings, the Chamber further instructed the Prosecution to tabulate its incriminating evidence properly.³³ The Office of the Prosecutor requested an extension of time to 3 May 2009 to complete this.³⁴ Furthermore, to date, the disclosure of exculpatory evidence and

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)' du 13 novembre 2008", 24 November 2008, ICC-01/04-01/07-764, p. 13; ICC-01/04-01/07-T-53-FRA ET WT 28-11-2008, p. 59, lines 1-5 and p. 77, lines 6 and 7.

³⁰ Defence Team for Germain Katanga, "Defence Observations regarding the investigations", 9 February 2009, ICC-01/04-01/07-883-Conf-Exp.

³¹ ICC-01/04-01/07-T-59-CONF-EXP-FRA ET 25-02-2009, p. 22, lines 16-18; ICC-01/04-01/07-T-61-FRA ET WT 03-03-2009, p. 29, lines 1-11.

³² ICC-01/04-01/07-T-60-CONF-EXP-FRA ET 25-02-2009, p. 26, lines 1-7.

³³ ICC-01/04-01/07-956.

³⁴ Office of the Prosecutor, "Prosecution's Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with No. **ICC-01/04-01/07**

evidence falling under rule 77 of the Rules is incomplete. The Defence teams have estimated at least three months as a reasonable time frame for completion of their investigations, as of disclosure of all of the evidence.³⁵ In addition, although the position of the parties, whom the Chamber duly consulted, is not yet known on this point,³⁶ the Chamber has not ruled out that it will have to determine, before the trial, the admissibility of several exhibits which has already been challenged during the confirmation hearing and, where necessary, adjudicate new challenges. Further, the Chamber authorised the Prosecution to request, no later than 45 days before the date of the commencement of the trial, that all of the redactions be maintained which the Chamber has at the current stage of the proceedings in principle allowed until the thirtieth day before that date.

13. Lastly, almost 150 applications for victim participation are pending and require adjudication by the Chamber once the Victims Participation and Reparations Section has redacted them, the redacted versions have been reviewed by the Chamber and then transmitted to the parties for observations. The Chamber recalls that it set 4 May 2009 as the date as of which it would no longer be possible to file new applications for participation. It is, therefore, important to allow the legal representatives of newly admitted victims sufficient time to familiarise themselves with the material and to determine which issues entail the defence of the personal interests of the victims, within the meaning of article 68(3) of the Statute.³⁷

Trial Chamber II ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’’, 19 March 2009, ICC-01/04-01/07-969. See also the Defence Team for Mathieu Ngudjolo, “Réponse de la Défense de Mr Ngudjolo à la demande d’extension de temps soumise par le Bureau du Procureur en date du 19 mars 2009 en vertu de la Norme 35 du Règlement de la Cour’’, 23 March 2009, ICC-01/04-01/07-976; Defence Team for Germain Katanga, “Defence Response to Prosecution’s Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material’’, 23 March 2009, ICC-01/04-01/07-980.

³⁵ See, for the Defence for Germain Katanga, ICC-01/04-01/07-T-59-CONF-EXP-FRA ET 25-02-2009, p. 7, lines 10-14, p. 22, lines 16-18 and p. 23, lines 21-24, and, for the Defence for Mathieu Ngudjolo, ICC-01/04-01/07-T-61-FRA ET WT 03-03-2009, p. 29, lines 1-11.

³⁶ ICC-01/04-01/07-956, paras. 36 and 37.

³⁷ ICC-01/04-01/07-T-61-FRA ET WT 03-03-2009, p. 29, lines 22-25 and p. 30, lines 1-14.

14. For all of these reasons, the date of the trial is scheduled for 24 September 2009; the Prosecution may, if it considers it necessary, request that the redacted versions of the evidence be maintained until 10 August 2009, when the work of the Court will resume.

15. Given that all of the participants have agreed to this date, the Chamber wishes to emphasise that, save for compelling reasons, no deferral shall be authorised.

FOR THESE REASONS,

DECIDES that the trial will commence at 9.30 a.m. on 24 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 Fumiko Saiga

Done this 27 March 2009,

At The Hague, the Netherlands