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No.**: ICC-01/04-01/07**
Date: **28 October 2009**

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

Public Document

URGENT

Document Containing the Charges as Confirmed by the Pre-Trial Chamber in accordance with the « Décision relative au dépôt d'un résumé des charges par le Procureur »

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor

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 (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
Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. In accordance with Trial Chamber II ("Chamber") Decision requesting a summary of the confirmation decision[1], the Prosecution herewith submits as Annex 1 its Document Containing the Charges Confirmed by the Pre-Trial Chamber (Document).[2]

2. The Prosecution agrees with the Chamber that the Defence must have adequate and reasonably timely notice of the charges against them, including the particular details that the Prosecution will rely upon to prove its case. For the purposes of notice of the charges, it is sufficient if the Document Containing the Charges provides, and the confirmation decision confirms, the allegations regarding the elements of the crime, the time and place of the attack, the number and (where possible) identity of victims, and the means used to commit the crimes. Beyond that, the Prosecution supplements the details or particulars to be proven through disclosure, pre-trial briefing, or other means sufficient to protect the Accused's rights.

3. The Prosecution also fully supports the Chamber's decision to start the trial on 24 November 2009 without further delay. Accordingly, it files the Document to comply with the Chamber's order.

4. The Prosecution disagrees, in principle, with the Decision that the Pre-Trial Chamber must find sufficient proof as to particular details of the case as a

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[1] ICC-01/04-01/07-1547.

[2] The Prosecution terms this document a Document Containing the Charges Confirmed by the Pre-Trial Chamber to meet the Chamber's objectives in a way that harmonizes the document with the process adopted by Trial Chamber I and provided in the Rome Statute.

On the latter point, the Statute makes clear that the document containing the charges (DCC) is *the* document by which a person is brought to trial. The confirmation decision confirms the charges but does not thereafter substitute for the DCC, nor does the Pre-trial Chamber assume the Prosecution's powers to define the charges. For example, Article 61(3)(a) provides that prior to the confirmation hearing the person shall "be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial". The Pre-trial Chamber may "confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed", decline to confirm, or ask the Prosecutor to consider providing further information or amending the charge (Article 61(7)). Article 61(7) thus makes clear that the Prosecution formulates the charges on which it intends to try the Accused, and the Pre-trial Chamber decides whether to confirm, or not, "those charges" – *i.e.*, the charges that the Prosecution brought. Additionally, Article 61(9) explains that after trial begins the Prosecutor (with the permission of the Pre-trial or Trial Chamber) as appropriate, may amend, add, substitute, or withdraw charges. Except for the authority of the Trial Chamber under Regulation 55 to change the legal characterisation of the facts, it lies with the Prosecutor at the first instance to make the decision to alter charges.

prerequisite to their proof at trial; indeed, in this instance, the Pre-Trial Chamber directed the Prosecution to present only its "core" witnesses and evidence at the confirmation hearing.[3] It would be manifestly unfair to change the procedures retrospectively and exclude from the upcoming trial any relevant facts and details that are not reflected in the confirmation decision. Similarly, if the confirmation decision inaccurately reflects the facts or the evidence presented, the Prosecution cannot be bound by the Pre-Trial Chamber's mistake. Accordingly, the Prosecution preserves its right to appeal a final judgment if the Chamber were to acquit one or both the Accused because it declines to consider evidence omitted at the confirmation hearing, relevant facts not found in the confirmation decision, or because there is a discrepancy between the confirmation decision and the original charges and/or evidence submitted at that hearing.[4]

5. The Document reflects (1) the confirmed charges against the Accused and (2) the facts and circumstances upon which each charge is based, with reference to the specific findings in the confirmation decision.

6. This Chamber defines facts and circumstances as the elements of the crime, the time and place of the attack, the number and (where possible) identity of victims, and the means used to commit the crimes.[5] The Prosecution relies upon that definition in the Document[6].

7. The Prosecution notes that the confirmation decision concluded that the Accused's criminal responsibility fell within the parameters of Article 25(3)(a) and therefore did not address the alternative mode of liability under Article 25(3)(b). To provide maximum guarantees to the Accused, the Prosecution

[3] ICC-01/04-01/07-428, paras 78-79.
[4] In Annex 1 the Prosecution has identified discrepancies between the allegations pleaded in the Amended Document Containing the Charges dated 26 June 2008 and the determinations made by the Pre-Trial Chamber in its Decision on the confirmation of charges.
[5] ICC-01/04-01/07-1547, paras 10, 31.
[6] The Document does not restate throughout the Article 61(7) standard repeated by the Pre-Trial Chamber with respect to its findings -- that the facts establish substantial grounds to believe that the Accused committed the charged crime. It also includes facts that were found to be proven by the Pre-Trial Chamber for crimes that were not confirmed

stresses that, under Regulation 55, the Chamber may change the legal characterisation of the facts to accord with the form of participation under Article 25 (3)(b). The confirmation decision also does not identify the proof of the Accused's intent and knowledge.

8. Finally, the Document does not repeat all the evidence that the Prosecution intends to introduce at trial. The Prosecution adds, however, that the Chamber and the Accused have already received all the incriminatory evidence that constitutes the Prosecution's case.

Luis Moreno-Ocampo, Prosecutor

Dated this 28th day of October 2009

At The Hague, The Netherlands