



Original: **French**

No.: **ICC-01/04-01/07**
Date: **5 November 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge 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**

**Decision on the Application by the Defence for Mathieu Ngudjolo for
Postponement of the Commencement Date for the Hearings on the Merits (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:

The 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

**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

**The Office of Public Counsel for
Victims**

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

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

**Victims Participation and Reparations
Section**

Ms Fiona McKay

TRIAL CHAMBER II of the International Criminal Court (respectively, “the Chamber” and “the Court”), acting pursuant to article 64(2) and (6)(d) of the Statute of the Court (“the Statute”), rule 132(1) of the Rules of Procedure and Evidence (“the Rules”) and regulations 54 and 77 of the Regulations of the Court, decides as follows.

I. Background

1. By Decision of 27 March 2009, the Chamber set 24 September 2009 as the date for the commencement of the hearings on the merits.¹ On 31 August 2009, faced with a series of issues which had arisen late in the day and on which it needed to rule before commencing the hearings, the Chamber decided that there were compelling reasons² for postponing the date originally set. The date for the opening of the hearings was therefore finally set at 24 November 2009.³

2. At the status conference held on 2 November 2009, the Defence for Mathieu Ngudjolo found itself obliged to inform the Chamber of the near-simultaneous departure of two of its legal assistants. The serious problems arising from this double departure impelled it to ask for the trial to be postponed to early February 2010.⁴

3. At the request of the Chamber, this request was confirmed by a written application filed on 2 November 2009⁵ (“the Application”), and the participants expressed their views on the request at the status conference held on 3 November 2009.

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 *Décision reportant la date d'ouverture des débats au fond (règle 132-1 du Règlement de procédure et de preuve)*, 31 August 2009, ICC-01/04-01/07-1442.

⁴ ICC-01/04-01/07-T-74-CONF-ENG ET 02-11-2009, p. 30, lines 23-24.

⁵ Defence for Mathieu Ngudjolo, “*Requête de la Défense de Mathieu Ngudjolu en vue de solliciter le report de la date du procès actuellement fixée par la Chambre de première instance II au 24 novembre 2009*”, 2 November 2009, ICC-01/04-01/07-1587-Conf.

4. The Defence for Mathieu Ngudjolo set out a number of considerations from which, in its view, it followed that the Application should be granted. Inter alia, it submitted that a number of issues have yet to be decided by the Chamber, that witnesses had recently been added to the Prosecution list, that the possibility of applications for leave to appeal could not be precluded, that it needed to conduct a further mission to the Democratic Republic of the Congo, and that, in general, it appreciated the difficulties faced by the other Defence team.⁶

5. The Prosecutor pointed out that responsibility for the departure of one of the two legal assistants lay with the accused, and that he must therefore bear the consequences. Moreover, according to the Prosecutor, the ad hoc international criminal tribunals had so decided when faced with similar situations. He was also concerned to emphasise the consequences that a further postponement would entail for certain Prosecution witnesses. He concluded that it would therefore be possible for the trial to commence on the scheduled date, when a number of witnesses would be heard, and that the proceedings could then be rescheduled by extending the end of year adjournment.⁷

6. Mr Luvengika, the first Legal Representative of the Victims to express himself on the matter, was concerned to stress the impatience felt by the victims authorised to participate, who were wondering why the proceedings were taking so long. However, he made it clear that he had no objection to the hearings being postponed, or simply rescheduled.⁸ For his part, Mr Gilissen also pointed out how long the victims had been waiting, while declaring himself in favour of a simple rescheduling arrangement, consisting of maintaining the commencement date of 24 November 2009, with the hearings being resumed at a date later than 12 January as originally scheduled.⁹

⁶ ICC-01/04-01/07-T-76-CONF-ENG CT2 03-11-2009, p. 32, line 2, to p. 42, line 2.

⁷ Ibid., p. 43, line 6, to p. 44, line 15.

⁸ Ibid., p. 44, line 22, to p. 46, line 19.

⁹ Ibid., p. 56, line 25, to p. 48, line 4.

7. In response to an invitation from the Chamber to give its views on the suggestions from the other participants, the Defence for Mathieu Ngudjolo finally indicated that it did not object to the hearings commencing on 24 November 2009, provided that they were confined to opening statements. Thus it explained that it would not be in a position to cross-examine any of the witnesses called to testify between 24 November and 11 December 2009, the last day of hearings prior to the judicial recess.¹⁰

II. The Chamber's analysis

8. The Chamber would begin by pointing out that the pending decisions in this case do not necessarily all have to be rendered before the opening of the hearings on the merits. It would also emphasise that any new applications for leave to appeal can have suspensive effect only if the Appeals Chamber expressly so orders pursuant to article 82 of the Statute and rule 156(5) of the Rules.

9. First, the Chamber notes that, at the close of argument on the Application, all of the participants ultimately opted, for various reasons, for commencement of the hearings on the scheduled date. They have all agreed that they can present their opening statements on 24 November 2009.

10. Secondly, the Chamber notes that the participants disagree only on whether the Chamber should proceed with the hearing of Prosecution witnesses following the said opening statements and before 11 December 2009.

11. On this point, the Chamber recalls that the first four witnesses whom the Prosecutor intends to call are Witnesses 233, 28, 419 and 250.¹¹ It notes that, with the exception of Witness 419, on whom the Office of the Prosecutor will basically be relying for the presentation of photographic material and for testimony

¹⁰ Ibid., p. 50, line 24 – p. 51, line 2, and p. 52, lines 16-19.

¹¹ Office of the Prosecutor, “*Dépôt d’une liste révisée des témoins de l’Accusation et de leur ordre de déposition*”, 5 November 2009, ICC-01/04-01/07-1599.

“[TRANSLATION] also bearing on the geography and topography at Bogoro proper and in the surrounding area”,¹² the three other witnesses were already known to the Defence teams at the time of the confirmation hearings, their statements and transcripts having been disclosed between December 2007 and June 2008. The Chamber accordingly takes the view that Defence Counsel cannot reasonably argue that they have not had enough time to prepare their cross-examination of these witnesses.

12. True, the Chamber is aware that Witnesses 28 and 250 made new statements on 3 and 4 July 2009, and that these were made known to the Defence only on 21 August 2009.¹³ The Chamber recalls, however, that the transcripts of their statements amount to 14 pages for Witness 28 and to 24 pages for Witness 250, and that their purpose is essentially to ensure that these witnesses were not in any way influenced by an intermediary of the Office of the Prosecutor.

13. These witnesses’ statements thus do not raise any particular difficulty. The issue now before us is therefore to decide whether Mr Kilenda effectively finds himself deprived of the possibility of cross-examining them solely by reason of the problems of judicial assistance with which he is currently faced.

14. The Chamber notes that the accused may still avail himself of the informed assistance of his Lead Counsel, Mr Jean-Pierre Kilenda Kakengi Basila, as well as of his Co-Counsel, Mr Jean-Pierre Fofé Djofia Malewa, both of whom are at the present time thoroughly familiar with the case.

15. Without underestimating the constraints with which Mathieu Ngudjolo’s Defence is currently having to cope, the Chamber considers that the assistance, at legal level, provided to the team by the two colleagues who have just left it could be

¹² Office of the Prosecutor, “*Thèmes principaux sur lesquels les témoins de l’Accusation déposeront*”, 7 October 2009, ICC-01/04-01/07-1514-Conf-Anx2.

¹³ *Decision on the Prosecution’s Applications to Redact, Disclose and to Add the Interview Transcripts of Witnesses P-15, P-28, P-159, P-161, P-166, P-249, P-250 and P-268*, 3 November 2009, ICC-01/04-01/07-1591-Conf-Exp.

effectively supplied by the Office of Public Counsel for the Defence (“the Office”), pending the recruitment of new colleagues. In this regard, regulation 77(5) of the Regulations of the Court states that the Office shall *inter alia* provide support and assistance to defence counsel by conducting legal research and giving legal advice. The assistance that the Office can provide to counsel already appointed in a case was explained in a memorandum filed by it in the *Lubanga* case on 12 February 2007.¹⁴ The Chamber concurs with the conclusions of the author of this memorandum, inasmuch as the assistance provided can consist of the drafting of submissions and briefs on precise points of law designed to assist the lawyers dealing with a case. In the Chamber’s view, it was in order in particular to provide assistance of this kind to a defence team finding itself in temporary difficulties that the Office was created. The Chamber likewise considers that “[TRANSLATION] addressing specific issues as and when the need arises does not amount to assuming full and entire responsibility for the defence”, and that “it is not the function [of the Office] to [...] form a defence team to replace a lawyer already chosen by an individual against whom a prosecution is being conducted”. The Chamber accordingly invites Mr Kilenda to consider this possibility and, if he takes the view that it would be appropriate to have recourse to regulation 77 of the Regulations of the Court, urgently to make the necessary approaches to the Registrar in that regard.

16. For all of these reasons, the Chamber confirms that the hearings on the merits will commence on 24 November 2009 with opening statements, followed by the hearing of the Prosecutor’s first witnesses. The Chamber considers it necessary, however, in order to take account of the genuine difficulties faced by Mathieu Ngudjolo’s Defence team, to provide for the hearings to be adjourned for a period longer than that originally envisaged, and to have them recommence only on 26 January 2010.

¹⁴ Office of Public Counsel for the Defence, “*Observations du Bureau du Conseil Public pour la Défense sur la décision de la Chambre préliminaire I «Decision on the defence request for extension of time »*”, 12 February 2007, ICC-01/04-01/06-823.

17. The Chamber further considers it necessary to order the appearance of the person in the Office of the Prosecutor in charge of investigations in this case (“the Lead Investigator”), in addition to the Prosecution witnesses already due to testify. The Chamber believes that it would be helpful, now that the hearings on the merits are about to commence, to give the Lead Investigator the opportunity to explain:

- how the investigation into the events of 24 February 2003 at Bogoro was conducted, and to describe any difficulties encountered by the investigators;
- how statements were taken from the various Prosecution witnesses;
- the methods used to investigate exonerating circumstances as provided in article 54(1)(a) of the Statute, as well as the procedure for reviewing the evidence gathered in the course of the investigation in order to identify potentially exculpatory material. On this point, the Chamber would refer participants to their filings of 19 January and 9 February 2009 as regards the Prosecutor,¹⁵ and of 2 February 2009 for the two Defence teams;¹⁶ and
- any other item of information that he considers might be helpful with a view to the Chamber’s being properly informed before hearing the first witnesses.

18. The Chamber will therefore take the Lead Investigator’s testimony on 25 November 2009. His evidence, which should not exceed one hour, will begin with a statement addressing the points set out above. It will be followed by questions from the Bench lasting some 20 minutes. The Prosecutor will then have 30 minutes to put

¹⁵ Office of the Prosecutor, “*Réponse de l’Accusation au paragraphe 8 de l’«Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires» du 10 décembre 2008*”, 19 January 2009, ICC-01/04-01/07-834; Office of the Prosecutor, “*Réplique du Bureau du Procureur aux Réponses de la Défense sur la « Réponse de l’Accusation au Paragraphe 8 de l’Ordonnance [du 10 décembre 2008] enjoignant aux participants et au Greffe de déposer des documents complémentaires »*”, 9 February 2009, ICC-01/04-01/07-884.

¹⁶ Defence for Mathieu Ngudjolo, “*Point de vue de la Défense sur la «Réponse de l’Accusation au paragraphe 8 de l’«Ordonnance du 10 décembre 2008 enjoignant aux participants et au Greffe de déposer des documents complémentaires»*”, 2 February 2009, ICC-01/04-01/07-863; Defence for Germain Katanga, “*Defence Response to the Prosecution’s Submissions regarding paragraph 8 of the order of 10 December 2008*”, 2 February 2009, ICC-01/04-01/07-864.

his own questions, and, finally, the two Defence teams will have 30 minutes each for their questions.

19. The Chamber would stress that, in the course of this question-and-answer session, there can be no question of addressing the situation of a particular witness, still less of challenging decisions ordering redactions pursuant to article 54(3)(e) of the Statute or to rule 81 of the Rules. The Chamber recalls that the information sought by it in hearing the Lead Investigator is basically intended to provide it with general information on the conduct of the investigations into the facts to be presented to it in the course of the trial. It goes without saying, however, that the Chamber is not thereby precluded, if it should prove necessary following the testimony of a particular witness, from subsequently recalling the Lead Investigator in order to obtain such further information as he may be able to provide.

FOR THESE REASONS,

DISMISSES the Application;

DECIDES to order the Lead Investigator to appear in order to be heard by the Chamber on 25 November 2009;

DECIDES that the hearings on the merits will commence on 24 November 2009 at 9.30 a.m. with the reading of the charges in accordance with article 64(8)(a) of the Statute and opening statements. They will continue on 25 November 2009 with the testimony of the Lead Investigator and, on the following days, with the testimony of Witnesses 233, 28 and 419;

CONFIRMS that the hearings will be adjourned from 12 December to 25 January 2009; and

INVITES Defence Counsel for Mathieu Ngudjolo to consider the possibility of having recourse to regulation 77 of the Regulations of the Court, and urgently to make the necessary approaches in this regard to the Court Registrar.

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 5 November 2009

At The Hague, The Netherlands