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

Date: **23 July 2009**

TRIAL CHAMBER I

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

Observations of the Legal Representatives of the Victims Represented by Mr Jean-Louis Gillisen and Mr Joseph Keta on “The Defence motion for a declaration on unlawful detention and stay of proceedings (ICC-01/04-01/07-125-Conf-Exp)”

Source: The Legal Representatives of the Victims

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

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Unrepresented Victims

**Unrepresented Applicants
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I. Background

1. On 3 March 2004, President Joseph Kabila sent to the International Criminal Court a request for an investigation into the situation in the Democratic Republic of the Congo. President Kabila also referred to the fact that the competent authorities were unable to carry out and pursue investigations into the said crimes.
2. On 26 February 2005, Mr Germain Katanga was arrested by the Congolese authorities with other individuals in connection with his alleged involvement in the murder of nine peacekeepers in the Ituri region. Pre-trial detention was extended on several occasions for the requirements of the investigation.
3. On 2 July 2007, an international arrest warrant was issued by the International Criminal Court for the acts, described as a war crime, committed by the accused in the Bogoro locality in March 2003. This arrest warrant was executed on 6 July 2007.
4. On 17 October 2007, Mr Katanga gave evidence to the military prosecuting authority in connection with the acts which he was accused of committing in the Court's arrest warrant. That hearing was conducted in accordance with Congolese legal procedure. That same day, the accused was transferred to The Hague and presented his defence there.
5. On 2 July 2009, the Defence submitted a document entitled "Defence motion for a declaration on unlawful detention and stay of proceedings (ICC-01/07-01/04-1258-Conf-Exp)",¹ in which it requested a stay of the proceedings against Mr Katanga on account of the unlawful detention to which he was subjected.

¹ ICC-01/04-01/07-1263.

6. The legal representatives of the victims respectfully submit to the Chamber the following observations:

II. The motion for a declaration on the unlawful detention of Mr Katanga

A. Inadmissibility of the motion

7. The Defence claims that Mr Katanga was initially arrested with other individuals for the murder of nine peacekeepers in the Ituri region, and that no serious investigations, or even proceedings, were conducted. The legal representatives of the victims recall that the State prosecution service (the Public Prosecutor) alone has the power to decide whether or not it is expedient to conduct proceedings in the Democratic Republic of the Congo; the same applies at the International Criminal Court – this is a discretionary power.²

8. It is important to recall that, at the hearing of 1 June 2009 on the challenge to admissibility, the Congolese authorities, in their submission,³ responded to the question by clarifying that issue. Thus, to the question of whether the DRC had conducted proceedings against Germain Katanga in the DRC, the answer was no, since no investigation had been carried out against the accused into the facts concerning Bogoro, and accordingly there had been no proceedings to that effect. The reason for Mr Katanga's pre-trial detention, as well as of other individuals detained together with him, was his alleged involvement in the murder of the peacekeepers.

B. Violation of fundamental rights under international law

9. The Defence also claims that there was a violation of Congolese law during Mr Katanga's detention, as well as violations of fundamental rights under international law. The Defence stresses in this regard that the organs of the Court

² See article 53(1) of the Rome Statute.

³ ICC-01/04-01/07-1189.

participated in the violations committed in the DRC. The legal representatives of the victims reserve their opinion on this issue as they have not yet received all the evidence in the case, certain elements of which were disclosed *ex parte*.

10. The legal representatives of the victims consider, however, that if the organs of the Court were involved, this would raise the issue of complementarity. The Rome Statute, ratified by the DRC on 30 March 2002, subjects the DRC to the legal regime of the International Criminal Court under the principle of complementarity and the obligation to cooperate; this presupposes that jurisdiction lies primarily with national courts, the ICC replacing them only where the State is unwilling or unable to carry out investigations within the meaning of article 17(1) of the Statute.

11. The DRC did not take any significant procedural measure capable of supporting the Defence case concerning the acts committed in Bogoro in March 2003. The Defence argument is based on allegations contained in a report of dubious liability by a non-governmental organisation.

III. Discontinuance of the proceedings

12. The legal representatives note that, in the unlikely event that the Chamber were to consider that the Court was indeed involved in the violations committed in the DRC, the necessary sanction could not be discontinuance of the proceedings, given the gravity of the crimes for which the accused is being prosecuted.

13. Lastly, the legal representatives of the victims submit that a decision not to prosecute Mr Katanga would infringe the victims' rights to truth and justice. The Rome Statute provides for the participation of victims in the various stages of

proceedings before the ICC;⁴ the victims of the atrocities in the DRC are entitled to truth and justice,⁵ which implies three consequences:

- That the perpetrators of the crimes are prosecuted;
- That the perpetrators of those crimes are tried and convicted;
- That the victims are entitled to reparations.

FOR THESE REASONS,

MAY IT PLEASE TRIAL CHAMBER I

- To find that the motion for a declaration on unlawful detention submitted by the Defence for Germain Katanga is inadmissible.

Dated this 23 July 2009 at Tours.

[signed]

For the legal representatives,

Mr Joseph Keta

⁴ Article 68 of the Rome Statute.

⁵ Decision of 15 May 2008, Pre-Trial Chamber I, ICC-01/04-01/07-474.