

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/07
Date: 14 February 2008

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Navanethem Pillay
Judge Sang-Hyun Song

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

Public

**Prosecution's Response to Defence Document in Support of Appeal Against
"Decision on the Defence Request Concerning Languages"**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Eric Macdonald, Trial Lawyer
Ms Florence Darques-Lane, Legal Adviser

Counsel for the Defence

Mr David Hooper Counsel
Mr Göran Sluiter, Assistant Counsel
Ms Caroline Buisman, Assistant Counsel

Introduction

1. This appeal concerns two issues: (i) the scope of Articles 67(1)(a) and (f), and in particular whether these provisions require that an accused person be informed of the charges and follow proceedings in a language that he or she speaks and understands “perfectly” or “fully;”¹ and (ii) the degree of competency in French of Germain KATANGA (“Appellant”), and whether it meets the standards of Articles 67(1)(a) and (f), as determined by the Single Judge. The Appeals Chamber is thus requested to determine the degree of language competency required under Articles 67(1)(a) and (f), both from a legal point of view and in the context of the facts of the proceedings against the Appellant.
2. As to the first issue, the Prosecution submits that, in interpreting Articles 67(1)(a) and (f), the central question is not whether an accused meets a rigid and absolute threshold of language ability to the level of perfection, but whether, in the circumstances of the case, the accused’s language capabilities are sufficient to secure his or her right to a fair trial. As to the second issue, the Prosecution contends that, having considered the totality of the evidence before her, the Single Judge reasonably concluded that Mr KATANGA’s competency in French meets the standards of Articles 67(1)(a) and (f).²

Procedural History

3. On 9 November 2007, the Registrar filed its “*Rapport du Greffe relatif aux renseignements supplémentaires concernant les langues parlées, écrites et comprises par Germain Katanga*” (“Registrar’s Report”),³
4. On 23 November 2007, the duty Counsel for Mr KATANGA filed the “*Observations de la Défense de Germain Katanga sur le ‘Rapport du Greffe relatif aux renseignements*

¹ See also Prosecution’s Observations, para. 1.

² The Appellant appears to have partially abandoned his previous request (ICC-01/04-01/07-149, p. 6.), and is no longer requesting that all documents provided to him in French be translated in Lingala. The Appellant, however, reserves the right to request, on a case-by-case determination upon showing good cause, the translation of some significant documents, such as the document containing the charges or the defence closing brief (Appellant’s Brief, note 74.). In addition, Appellant would be satisfied if the interpreting facility is in place at the beginning of the trial (Appellant’s Brief, para. 63.).

³ ICC-01/04-01/07-62.

supplémentaires concernant tes langues parlées, écrites et comprises par Germain Katanga” (“Defence Observations”).⁴

5. On 23 November 2007, the Prosecution filed the “Prosecution's Observations on the ‘*Rapport du Greffe relatif aux renseignements supplémentaires concernant les langues parlées, écrites et comprises par Germain Katanga*’” (“Prosecution’s Observations”).⁵
6. During a Status Conference held on 14 December 2007, the Defence, the Prosecution and the Registry made further submissions on the language issue.⁶
7. On 21 December 2007, the Single Judge rendered the “Decision on the Defence Request Concerning Languages” (“impugned Decision”),⁷ in which she found that Mr KATANGA's competency in French meets the standards of Articles 67(1)(a) and (f) of the Statute.⁸ With this decision, the Single Judge effectively denied Mr KATANGA's request that the documents provided to him in French be translated in Lingala, and that he be assisted by a Lingala interpreter and a translator during the proceedings.⁹
8. On 27 December 2007, the Defence, pursuant to Article 82(1)(d), filed the “Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages” (“Defence Application for Leave to Appeal”).¹⁰ On 8 January 2008, the Prosecution filed the “Prosecution's Response to the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages”.¹¹
9. On 18 January 2008, the Single Judge rendered the “Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages”,¹² granting the Defence Application for Leave to Appeal in relation to the issue of whether the impugned Decision “incorrectly found that Mr. Katanga's competency in French meets the standards of articles 67(1)(a) and (f) of the Statute”.¹³

⁴ ICC-01/04-01/07-78.

⁵ ICC-01/04-01/07-81.

⁶ ICC-01/04-01/07-T-11.

⁷ ICC-01/04-01/07-127.

⁸ ICC-01/04-01/07-127, paras. 32 and 37.

⁹ Defence Observations, p. 12.

¹⁰ ICC-01/04-01/07-130.

¹¹ ICC-01/04-01/07-137.

¹² ICC-01/04-01/07-149.

¹³ ICC-01/04-01/07-149, p. 7.

10. On 31 January 2008, the Defence filed the “Defence Document in Support of Appeal Against ‘Decision on the Defence Request Concerning Languages’” (“Appellant’s Brief”).¹⁴
11. Pursuant to Regulation 65(5), the Prosecution hereby responds to the Appellant’s Brief.

Argument

12. The Appellant raises two grounds of appeal. First, the Appellant submits that the Single Judge erred in applying a legal standard that is not consistent with the wording and spirit of Articles 67(1)(a) and (f), particularly of the French version of the Rome Statute.¹⁵ This ground of appeal is framed as an error of law. The applicable standard of review requires the Appellant to identify the alleged error, to present arguments in support of its claim, and to explain how the error invalidates the decision.¹⁶
13. Second, the Appellant contends that the Single Judge erred in finding that Mr KATANGA’s level of French meets the requirements of Articles 67(1)(a) and (f).¹⁷ The second ground of appeal is framed as an error of fact. The applicable standard of review requires the Appellant to show that, on the basis of the evidence before the Single Judge, no reasonable trier of fact could have found that Mr KATANGA’s competency in French meets the standards of Articles 67(1)(a) and (f).¹⁸
14. The Appellant raises two general arguments in relation to both grounds of appeal. Neither has merit.
15. First, the Appellant contends that in a borderline case, such as the present one, the principle of *in dubio pro reo* must be applied.¹⁹ The Prosecution submits that even if, *arguendo*, the

¹⁴ ICC-01/04-01/07-175. Although the Appellant’s Brief was filed with the Registry on 31 January 2008 at 16:26 hours, it was not notified to the Prosecution until 1 February 2008.

¹⁵ Appellant’s Brief, paras. 11-24. See in particular para. 12.

¹⁶ The Appellant raising an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision (*Prosecutor v. Brdjanin*, IT-99-36-A, Appeal Judgement, 3 April 2007, para. 9).

¹⁷ Appellant’s Brief, paras. 25-55. See in particular para. 31.

¹⁸ See *Prosecutor v. Brdjanin*, IT-99-36-A, Appeal Judgement, 3 April 2007, para. 13. The Appellant’s Brief does not set out the applicable standard of review. The Appellant’s Brief states that in order to make a determination that Mr KATANGA’s level of French meets the standards set by articles 67(1)(a) and (f), “the Single Judge must have been satisfied that this was the only inference to be possibly drawn from the evidence” (para. 41). In light of this statement and in the absence of any specific reference to the applicable standard of review, it may be doubted whether the Appellant applied the correct standard of review with respect to its second ground of appeal.

¹⁹ Appellant’s Brief, paras. 57-59.

principle *in dubio pro reo* would extend to the interpretation of procedural law, it would not apply to the instant case. As demonstrated below, the Appellant has failed to establish that the Single Judge committed any error of law or error of fact. On the contrary, the Single Judge's Decision has solid legal and factual foundations. Thus, the current case is not a borderline one, and there is no justification for reference to the principle of *in dubio pro reo*.

16. Second, the Appellant submits that Mr KATANGA's right to a fair trial should not be compromised for reasons pertaining to costs or inconvenience.²⁰ However, nothing in the impugned Decision suggests that costs or inconvenience were a factor, let alone a determining one. Although the Registrar observed that granting Mr KATANGA's request would result in a delay of the proceedings of at least six months and additional costs between 650.000 and 800.000 Euros, the impugned Decision gives no indication that this had any bearing on the Single Judge's findings.²¹

(a) The First Ground of Appeal - Erroneous legal standard

17. The Appellant submits that the Single Judge erred as a matter of law in applying a legal standard that is not consistent with the wording and spirit of Articles 67(1)(a) and (f), particularly of the French version of the Rome Statute.²² According to the Appellant, Articles 67(1)(a) and (f) require an absolute threshold of language competency, namely that an accused be in perfect command of the language in which he or she is informed and in which the proceedings are conducted.²³
18. Article 67(1)(a) provides for the right of an accused "[t]o be informed promptly and in detail of the nature, cause and content of the charge, *in a language which the accused fully understands and speaks*" (emphasis added). Article 67(1)(f) provides that an accused has a right to have "free of any costs, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not *in a language which the accused fully understands and speaks*" (emphasis added). As the Appellant concedes,²⁴ the impugned Decision correctly applied this

²⁰ Appellant's Brief, paras. 60-65.

²¹ ICC-01/04-01/07-T-11, p. 16, lines 15-20 and p. 29, lines 17-21.

²² Appellant's Brief, paras. 11-24. See in particular para. 12.

²³ Appellant's Brief, paras 15, 19 and 24. See also paras. 26, 37, 43-45, 47-48 and 50, in which the Appellant seeks to apply the standard set out previously to the facts of the case.

²⁴ Appellant's Brief, para. 12.

legal standard in assessing whether Mr KATANGA fully understands and speaks French. The Single Judge referred to this standard on several occasions throughout the Decision.²⁵

19. However, the Appellant argues that there is a discrepancy between the level of language competency required in the French text of Articles 67(1)(a) and (f) (*'parfaitement'*) and the level required in the English text of these articles (*'fully'*).²⁶ According to the Appellant, the former requires a level of perfection, while the latter requires a lower level of mere fluency.²⁷ The Appellant further argues that "if the Appeals Chamber finds that there is no discrepancy between the English and the French versions of article 67(1)(a) and (f), then the English term *'fully'* must be interpreted in light of the French term *'parfaitement'* in order to avoid any ambiguity".²⁸
20. The Prosecution submits that the English and French versions of Articles 67(1)(a) and (f) do not articulate different required language capabilities. As standard English- and French-language dictionaries confirm,²⁹ the plain meaning of these terms is essentially the same. Appellant's arguments to the contrary are unsupported³⁰ and in part irrelevant.³¹
21. Other considerations further suggest that Articles 67(1)(a) and (f) do not entail an absolute standard of language ability to a level of perfection. First, the primary concern of Articles 67(1)(a) and (f) is not whether an accused meets certain objectively identifiable language competencies, but whether, in the circumstances of the case, the language capabilities of an accused are fully sufficient to secure his right to a fair trial.

²⁵ Impugned Decision, paras. 2, 7, 30 and 40.

²⁶ Appellant's Brief, paras. 12-18.

²⁷ Appellant's Brief, para. 15. See also Defence Application for Leave to Appeal, para. 15.

²⁸ Appellant's Brief, para. 19. By suggesting that the English term *'fully'* must be interpreted in light of the French term *'parfaitement'*, the Appellant is seeking to adjust the meaning of the term *'fully'* in light of the alleged meaning of the term *'parfaitement'*. As stated above, for the purposes of this particular argument, the Appellant has accepted that there is no discrepancy between the English and the French version of Article 67(1)(a) and (f). Hence, the meaning the English term *'fully'* cannot be adjusted in light of the meaning of the term *'parfaitement'*, as the meaning of the two terms is one and the same. The approach suggested by the Appellant lacks any logical foundation and must be rejected for that reason alone.

²⁹ *Le nouveau Petit Robert*, dictionnaire alphabétique et analogique de la langue française, 2003, on "parfaitement": absolument, complètement, entièrement => pleinement. Thus, the term "*parfaitement*" includes both a quantitative and a qualitative concept and there is no measurable distinction of gradation between the two. *The Oxford English Dictionary*, Oxford University Press (<http://dictionary.oed.com>) on "fully": in a full manner or degree; to the full, without deficiency; completely, entirely; thoroughly, exactly, quite. Thus, the term "fully" includes both a quantitative and a qualitative concept.

³⁰ See in particular Appellant's Brief, para. 15, which is not supported by any reference other than a similar submission included in the Defence Application for Leave to Appeal (para. 15), which is equally unsupported.

³¹ See in particular Appellant's Brief, paras. 17 and 18, arguing that the fact that French is the language being used by Mr KATANGA should be a factor to be considered in determining which version of Articles 67(1)(a) and (f) is more consonant with the spirit of the Statute and the Rules.

22. This is consistent with the jurisprudence of international and regional human rights bodies,³² which consider, for instance, whether the nature of the offence charged and any communications by the authorities are sufficiently complex to require a detailed knowledge of the language used in court.³³ It is submitted that a similar approach ought to be taken in the context of the Rome Statute.³⁴ Hence, the principal issue is whether, in light of the accused's language skills, the language in which the accused is informed and the language of the proceedings ensures a fair trial.³⁵
23. The absence of a requirement of language ability to a level of perfection under Articles 67(1)(a) and (f) is further justified by the fact that many native speakers do not have perfect knowledge of their mother tongue. It might also imply – contrary to the reality of his or her representation by competent counsel³⁶ – that an accused must understand the legal terminology and technical proceedings of the Court.³⁷ This cannot be the purpose and the meaning of Articles 67(1)(a) and (f).
24. As the Single Judge recognized,³⁸ Articles 67(1)(a) and (f) do not grant an accused the right to choose the language of the proceedings. To the contrary, a proposal to this effect was defeated during the negotiations which led to the adoption of the Statute.³⁹ This implies that the accused does not have a 'right' under the Statute to be informed in his native language. In order to comply with the standard of Articles 67(1)(a) and (f), an accused may also be

³² See e.g. *Kamasinski v. Austria*, judgment, A Series N° 168, 19 December 1989, para. 74.

³³ *Hermi v. Italy*, European Court of Human Rights, Judgment, Appl. no. 18114/02, 18 October 2006, para. 71; see also *Güngör v. Germany*, European Court of Human Rights, Decision on Admissibility, Appl. no. 31540/96, 17 May 2001, para. 1.

³⁴ In this context, see *Situation in the Democratic Republic of the Congo*, Judgement on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 33.

³⁵ The Appellant refers to an extract from a paper issued by the European Commission that states: "the Rome Statute goes somewhat further than the ECHR [European Convention on Human Rights]" (Appellant's Brief, para. 21). However, this extract does not explain how the Rome Statute relates to the ECHR. Nor does it refer to the language requirements under Articles 67(1)(a) and (f), but to Articles 55 and 67 as a whole. Moreover, the Appellant fails to mention that the Commission expressly indicated that it "is not aware of any mechanisms for determining whether a suspect or defendant 'cannot understand or speak the language used in court'" and that "[t]his seems to be decided on an *ad hoc* basis by the people the suspect or defendant comes into contact with (police officers, lawyers, court staff etc.)" See 52003DC0075, Green Paper from the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, available at http://europa.eu/documents/comm/green_papers/index_en.htm#2003, p. 28.

³⁶ Prosecution's Observations, p. 7. See also transcript of hearing of 14 December 2007 (ICC-01/04-01/07-T-11, p. 33, lines 10-15).

³⁷ Appellant's Brief, para. 27. See also paras. 35-36 and 49.

³⁸ Impugned Decision, para. 30. This conclusion appears to have been accepted by the Defence (see Defence Application for Leave to Appeal, para. 13). Nevertheless, the Appellant's Brief states that Mr KATANGA's "preferred language is Lingala" (para. 27).

³⁹ Impugned Decision, para. 30 and note 60.

informed in a language other than his native language, provided that he or she fully understands and speaks it, which enables him or her to a fair trial.⁴⁰

25. For the above reasons, the Prosecution submits that the first ground of appeal should be dismissed.

The Second Ground of Appeal – Erroneous Factual Assessment

26. In this ground of appeal the Appellant submits that the Single Judge committed an error of fact in finding that Mr KATANGA's level of French meets the requirements of Articles 67(1)(a) and (f).⁴¹

General considerations

27. The Single Judge drew the conclusion with respect to Mr KATANGA's level of French on the basis of the totality of the evidence before her. The Prosecution contends that the Appeals Chamber's consideration with respect to the second ground of appeal should equally be limited to the evidence that was before the Single Judge. The additional evidence presented before the Appeals Chamber by way of an annex to the Appellant's Brief,⁴² should not be considered. The Appellant has neither provided any justification for failing to tender this evidence before the Single Judge,⁴³ nor filed an application for additional evidence pursuant to Regulation 62(1).⁴⁴
28. Even if the two affidavits annexed to the Appellant's Brief were admissible as additional evidence in this appeal, they lack evidentiary value. An affidavit of a member of the defence team stating that they experienced difficulties in their communication in French with Mr KATANGA is hardly conclusive to establish that Mr KATANGA's level of French does not meet the requirements of Articles 67(1)(a) and (f).

⁴⁰ Although the Appellant appears to have accepted that Articles 67(1)(a) and (f) do not grant an accused the right to choose a language of his preference (Defence Application for Leave to Appeal, para. 13), the Appellant's Brief refers on several occasions to Mr KATANGA's "preferred language" being Lingala (Appellant's Brief, paras. 27, 50 and 52, as well as note 66). See also Prosecution's Observations, para. 1.

⁴¹ Appellant's Brief, paras. 25-55. See in particular para. 31.

⁴² ICC-01/04-01/07-175-AnxA OA3.

⁴³ See for instance *Prosecutor v. Duško Tadić*, Case No. IT-94-I-A, Decision on Appellant's Motion for the Extension of the Time -Limit and Admission of Additional Evidence, 15 October 1998.

⁴⁴ See also the Prosecution's prior submission in ICC-01/04-01/06-736, 29 November 2006, para. 20.

The decision of the Single Judge is reasonable

29. The Prosecution submits that the Single Judge's factual findings are not unreasonable. The evidence and arguments put before the Single Judge by the Registry and the Prosecution, as well as the submissions made by the Defence were discussed during the hearing of 14 December 2007.⁴⁵ The Single Judge summarized these arguments and the evidence in the impugned Decision.⁴⁶ In addition, as the Prosecution pointed out during that hearing, Mr KATANGA listened to Counsel's submissions made in French without his headset. In addition, when, following an English-language instruction by the Court, the Registry official started addressing the Court in French, Mr KATANGA removed his headset.⁴⁷
30. The Single Judge, having considered the totality of the evidence before her and having had an opportunity to observe the Appellant in a courtroom setting, found that Mr KATANGA's competency in French meets the standards of Articles 67(1)(a) and (f).⁴⁸
31. Absent a showing of unreasonableness, this finding of the Single Judge should remain undisturbed.

(i) The Appellant's general arguments

32. The Appellant submits that the "Single Judge's factual analysis was erroneous because it attached too much weight to the evidence allegedly suggesting that Mr. Katanga's level of French meets the requirements of articles 67(1)(a) and (f), and too little weight to the submissions made on behalf of Mr. Katanga suggesting that his level of French is nothing higher than reasonable".⁴⁹ The Appellant contends that the Single Judge drew inferences from indirect evidence, pointing out that no witnesses had been called to testify.⁵⁰ This submission mischaracterises the evidence. A substantial part of the evidence before the Single Judge is direct evidence. It stems directly from Mr KATANGA, such as the documents filed by Mr KATANGA before a court in the DRC,⁵¹ or from persons who had first-hand

⁴⁵ ICC-01/04-01/07-T-11. See also *impugned Decision*, para. 32.

⁴⁶ See *impugned Decision*, summarizing the arguments and evidence presented by the Registry (paras. 7-5), the arguments and evidence presented by the Prosecution (paras. 16-21) and the observations by the Defence (paras. 22-29).

⁴⁷ ICC-01/04-01/07-T-11, p. 33, lines 7-9.

⁴⁸ *Impugned Decision*, para. 32.

⁴⁹ Appellant's Brief, para. 31.

⁵⁰ Appellant's Brief, paras. 26 and 40.

⁵¹ See *impugned Decision*, paras. 34 and 35.

communication with Mr KATANGA, such as the evidence pertaining to his communication in French with ICC officers.⁵² In any event, the Statute and the Rules do not impose any limitations that would prevent indirect evidence from being admitted into the proceedings and given full probative value. The Single Judge has the authority to freely assess the evidence submitted to her and to rule on its relevance and admissibility.⁵³ Moreover, the Single Judge may not apply national laws governing evidence.⁵⁴

(ii) The Appellant's arguments relating to specific categories of evidence

33. The Appellant further presents a number of specific arguments relating to the different categories of evidence analysed by the Single Judge.⁵⁵ For the reasons below, these arguments should be rejected. However, even if the Appeals Chamber finds that the probative value of a particular piece of evidence ought to be limited, this does not render the conclusion of the Single Judge unreasonable, especially since the Single Judge came to her conclusion having assessed the cumulative effect of the totality of the evidence before her.⁵⁶

Education in French

34. The Appellant submits that the Single Judge attached undue significance to Mr KATANGA's secondary school diploma.⁵⁷ The Prosecution contends that the Single Judge correctly took into consideration that "not only did Mr Katanga obtain his secondary school diploma (*Section Pédagogie*) in French, he passed the State examination in French."⁵⁸ The arguments advanced by the Appellant to the effect that Mr KATANGA "did not do extremely well at school," that he interrupted his education and obtained his degree only at the age of 26, that the conflict impacted the standard of teaching in the DRC and that outside school he spoke another language,⁵⁹ are of no relevance. After all, Mr KATANGA completed his secondary education in French and passed the State examination, as the Single Judge correctly found.⁶⁰

35. A person with secondary education may not necessarily be able to follow complex and technical criminal proceedings in the language in which he or she obtained his or her

⁵² See impugned Decision, para. 35.

⁵³ See Article 69(4) and Rule 63(2).

⁵⁴ Rule 63(5). See submission by the Appellant in Appellant's Brief, para. 40 making reference to the "best-evidence" rule in common-law systems.

⁵⁵ See Appellant's Brief, paras. 32-56, referring to impugned Decision, paras. 33-36.

⁵⁶ Impugned Decision, para. 32.

⁵⁷ Appellant's Brief, paras. 32-37.

⁵⁸ Impugned Decision, para. 33.

⁵⁹ Appellant's Brief, paras. 32-33.

⁶⁰ Impugned Decision, para. 33.

education.⁶¹ However, as noted above, the level of language competency referred to in Articles 67(1)(a) and (f) does not require an accused to understand all of the legal terms and the procedural technicalities of the proceedings against him or her. For these purposes, an accused has a right to be assisted by counsel.⁶²

Documentary evidence

36. The Appellant objects to the “heavy reliance” on documents relating to a hearing that Mr KATANGA attended in the DRC and to the procedures that preceded his transfer to the Court.⁶³ While the Appellant does not dispute the authenticity of these documents, it questions their nature and context.⁶⁴
37. The Single Judge correctly assessed the content of these documents when taken at face-value. If the Appellant was of the view that their nature and context are of particular relevance,⁶⁵ he should have produced evidence to that effect before the Single Judge. He chose not to do so. It was thus appropriate for the Single Judge to assess the relevance and the probative value exclusively from the documents themselves.
38. The Prosecution also opposes the Appellant’s submission that the Defence was not in the possession of the confidential annexes attached to the Registrar’s and Prosecution’s filings and that the Defence saw these documents for the first time at the hearing of 14 December 2007.⁶⁶ Although these materials were initially classified as confidential, the Defence team did have access to them through the duty Counsel who represented Mr KATANGA during his initial appearance, through duty Counsel who was appointed to prepare previous filings on language issues, or through Mr KATANGA himself, as the relevant materials were notified to them.⁶⁷ During the hearing of 14 December 2007, the

⁶¹ Appellant’s Brief, paras. 35-36.

⁶² See above, para. 23. See also ICC-01/04-01/07-T-11, p. 33, lines 10-15. The Appellant’s analogy to the cases against Kosovo Albanians before the ICTY where the proceedings were translated into Albanian although the accused allegedly speak Bosniac, Croat, Serbian (“BCS”) must be dismissed (Appellant’s Brief, para. 34). Firstly, the Appellant did not demonstrate that the translation into Albanian was put in place to respect the rights of the accused to a fair trial. The translation into Albanian of the proceedings could have been put in place for other reasons, such as for outreach purposes. Secondly, the Appellant did not support his allegation that the Kosovo Albanian accused spoke and understood BCS.

⁶³ Appellant’s Brief, para. 38.

⁶⁴ Appellant’s Brief, para. 39.

⁶⁵ See Appellant’s Brief, paras. 39, 45 and 46.

⁶⁶ Appellant’s Brief, para. 42.

⁶⁷ ICC-01/04-01/07-40-Conf-Exp-Anx 1, 4, 7, notified on 22 October 2007 to OPCD/Keita; ICC-01/04-01/07-40-Conf-Exp-Anx 2, 3, 5, 6, 8, 9, notified on 22 October 2007 to OPCD/Keita; ICC-01/04-01/07-44; ICC-01/04-01/07-44-Conf-Exp-Anx, notified on 26 October 2007 to OPCD/Keita; ICC-01/04-01/07-45, notified on 26 October 2007 to OPCD/Keita; ICC-01/04-01/07-46, notified on 1 November 2007 to KATANGA; ICC-01/04-01/07-48, notified on 1 November 2007 to KATANGA; ICC-01/04-01/07-49-Conf, notified on 9 November 2007 to KATANGA; ICC-01/04-01/07-62, notified on 9 November 2007 to KATANGA; ICC-01/04-01/07-62-

Appellant did not raise the fact that he had no prior access to these materials. To the contrary, Lead Counsel for Mr KATANGA stated that he “had the opportunity of seeing the Registry’s submissions and indeed the excellent submissions provided [...] by Duty Counsel [...]”.⁶⁸ The Appellant’s allegation that other parties had received fuller advanced notice than the Defence of the nature of the issues to be discussed during that hearing is groundless and speculative.⁶⁹

39. Disputing the inferences drawn by the Single Judge from the documentary evidence, the Appellant suggests that contrary to what appears in the relevant document, French was not the language of Mr KATANGA’s choice during the hearing before the High Military Court. Rather it was imposed on him, as he was not provided with the option of an interpreter.⁷⁰ This submission by the Appellant is unsupported by any evidence and it is therefore not unreasonable that the Single Judge took the content of the document at face-value.

Communication in French with ICC officers

40. The Single Judge took into consideration that in his written and oral communication with the Congolese authorities and ICC officials, Mr KATANGA used the French language without raising any concerns. Moreover, the Single Judge noted that Mr KATANGA confirmed to the Duty Officer at the detention centre that he could read and understand all of the documents he had received in French.⁷¹ The Appellant contends that it would be unfair to Mr KATANGA to use his utmost efforts to fully cooperate with the ICC to draw an inference against him. Moreover, he contends that this initial conversation was basic and that no inference can be drawn from that conversation as to whether or not Mr KATANGA’s French language competencies meet the requirements of Articles 67(1)(a) and (f).⁷²
41. The Prosecution submits that, with a view to providing for fair and expeditious proceedings, the Single Judge was at liberty to draw inferences from the cooperation of Mr KATANGA with officials of the Court. Moreover, the documents that Mr KATANGA received in French and the conversation that he had with Court officials were not limited to basic information. The documents in question include the warrant of arrest and information relevant to legal aid

Conf-Anx1, notified on 9 November 2007 to KATANGA; ICC-01/04-01/07-62-Conf-Anx2, notified on 9 November 2007 to KATANGA; ICC-01/04-01/07-76, notified on 13 November to Duty Counsel Fofé; ICC-01/04-01/07-78, notified on 23 November to Duty Counsel Fofé; ICC-01/04-01/07-78, notified on 23 November to Duty Counsel Fofé; ICC-01/04-01/07-78, notified on 23 November to Duty Counsel Fofé.

⁶⁸ ICC-01/04-01/07-T-11, p. 17, line 25 – p. 18, line 2.

⁶⁹ Appellant’s Brief, note 46.

⁷⁰ Appellant’s Brief, para. 43. See also Defence Observations, para. 29.

⁷¹ Impugned Decision, para. 35.

⁷² Appellant’s Brief, para. 48.

and the appointment of counsel.⁷³ Moreover, during the oral conversation with Court officials issues relating to counsel were discussed.⁷⁴

Client-Counsel communication

42. The Single Judge also took into consideration that Mr KATANGA chose a Defence Counsel with whom he communicates in French, despite the fact that that he was given ample opportunity to chose a Lingala speaking counsel.⁷⁵ The Appellant disputes the drawing of any inference from his choice of counsel and contends that a defendant may choose his counsel on the basis of a variety of factors, including but not limited to his ability to communicate with counsel in his language of preference.⁷⁶
43. The Prosecution submits that the Single Judge did not err by taking into account the issue of client-counsel communication as an additional factor when concluding that Mr KATANGA's level of French meets the requirements of Articles 67(1)(a) and (f). Even if, to a limited extent, a handicap of communication may be compensated for by other qualities of the defence team, it was not unreasonable for the Single Judge to take into consideration that Mr KATANGA communicates with Defence Counsel in French.⁷⁷
44. In addition, the Prosecution points out that Counsel for the Defence did not request interpretation into Lingala for the purposes of communicating with Mr KATANGA in Lingala in the detention unit. As submitted by the Prosecution Counsel during the hearing of 14 December 2007, under these circumstances, Mr KATANGA should also not need interpretation into Lingala with a view to follow the courtroom proceedings to a standard required by Articles 67(1)(a) and (f).⁷⁸
45. For the above reasons, the Prosecution submits that the second ground of appeal should be dismissed.

⁷³ For the full list of documents submitted to Mr KATANGA on 20 October 2007, see ICC-01/04-01/07-44 Anx, 26 October 2007.

⁷⁴ ICC-01/04-01/07-T-11, p. 45. See also Registrar's Report, item 9.

⁷⁵ Impugned Decision, para. 36.

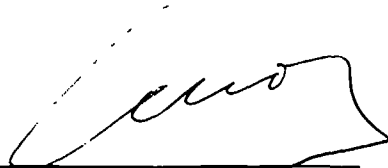
⁷⁶ Appellant's Brief, para. 50.

⁷⁷ Appellant's Brief, para. 52.

⁷⁸ ICC-01/04-01/07-T-11, 32, lines 17-24.

Relief sought

46. For the foregoing reasons, the Prosecution respectfully requests that the Appeals Chamber deny the appeal in its totality.
47. If the Appeals Chamber grants the first ground of appeal, i.e. if the Appeals Chamber finds that the Single Judge applied the incorrect legal standard, then the Prosecution submits that the Appeals Chamber refer the issue back to the Single Judge for a new determination as to whether Mr KATANGA's competency in French meets the standards of Articles 67(1)(a) and (f) as defined by the Appeals Chamber. In that case, it is submitted that the Appeal Chamber must not enter any findings with respect to the second ground of appeal.
48. If the Appeals Chamber dismisses the first ground of appeal, but grants the second ground of appeal, i.e. if the Appeals Chamber finds that the Single Judge - although applying the correct legal standard - erred in fact in finding that Mr KATANGA's level of French met the requirements of Articles 67(1)(a) and (f), then the Prosecution requests that the Appeals Chamber remand the issue back to the Single Judge for a new factual determination pertaining to the remaining possible languages, including a determination on whether Mr KATANGA's competency in Congolese-Swahili meets the standards of Articles 67(1)(a) and (f).⁷⁹



Luis Moreno-Ocampo
 Prosecutor

Dated this 14th day of February 2008
 At The Hague, The Netherlands

⁷⁹ According to the Appellant, Mr KATANGA's mother tongue is a local dialect of Congolese-Swahili, called Kingwana (ICC-01/04-01/07-T-11, p. 18, lines 11-15. See also impugned Decision, para. 29). The Court is already fully equipped to provide translation and interpretation in Congolese-Swahili.