

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/07
Date: 14 February 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

Registrar: Mr. Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR vs. Mathieu NGUDJOLO CHUI***

Public

**Prosecution's Observations on the Joinder of the Cases against Germain
KATANGA and Mathieu NGUDJOLO CHUI**

The Office of the Prosecutor

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The Office of the Prosecutor ("Prosecution") respectfully submits its observations on the intention of the Pre-Trial Chamber ("PTC I") to join the cases of *The Prosecutor vs. Germain KATANGA*¹ and *The Prosecutor vs. Mathieu NGUDJOLO CHUI*.² The Prosecution contends that its intent since the submission of a joint arrest warrant application against Germain KATANGA ("KATANGA") and Mathieu NGUDJOLO CHUI ("NGUDJOLO") was to have their cases joined so that they would be prosecuted together because of their joint participation in the same attack. The same issues arise in both cases and almost all of the witnesses and evidence to be relied upon by the Prosecution will be the same for the case against each of them.

Background

1. On 22 June and 25 June 2007, the Prosecution filed a joint application for the issuance of arrest warrants against KATANGA and NGUDJOLO ("Arrest Warrant Application").³
2. On 2 July 2007, a warrant of arrest was issued against KATANGA⁴ and on 6 July 2007, in a separate court record, a warrant of arrest was issued against NGUDJOLO (together referred to as "Arrest Warrants").⁵
3. The first appearance of KATANGA, took place on 22 October 2007.⁶ The first appearance of NGUDJOLO took place on 11 February 2008, and the

¹ ICC-01/04-01/07.

² ICC-01/04-02/07.

³ ICC-01/04-348-US-Exp, 22 June 2007, reclassified as ICC-01/04-01/07-31-US-Exp; ICC-01/04-350-US-Exp, 25 June 2007, reclassified as ICC-01/04-01/07-33-US-Exp.

⁴ ICC-01/04-01/07-1-US, reclassified as public see ICC-01/04-01/07-24.

⁵ ICC-01/04-02/07-1-US, reclassified as public see ICC-01/04-02/07-10.

⁶ ICC-01-04-01/07-T-5.

PTC I set his confirmation hearing on 21 May 2008.⁷ The confirmation hearing for KATANGA has been postponed to a date to be determined.⁸

4. In a hearing held on 12 February 2008, PTC I submitted *proprio motu* to the parties, the question of a possible joinder of the cases of KATANGA and NGUDJOLO, and requested written observations from the Prosecution and counsel for each of the detainees as regards the proposed joinder of their cases.⁹

The Issuance of Warrants of Arrest in Separate Court Records

5. On 19 June 2007, prior to the submission of the Arrest Warrant Application against both KATANGA and NGUDJOLO, a closed session, *ex parte* hearing was held before Judge Sylvia Steiner acting as Single Judge. During this hearing, the possible issuance of Arrest Warrants against KATANGA and NGUDJOLO in separate court records was discussed.¹⁰
6. The Prosecution submitted one Arrest Warrant Application. However, for administrative purposes, PTC I issued, in separate court records, Arrest Warrants against the persons charged. The decision to create two files from the same Arrest Warrant Application stemmed primarily from the need to facilitate notification of the Arrest Warrants to the authorities of the Democratic Republic of the Congo and to maintain confidentiality of information, as one of the persons charged was likely to be surrendered before the other.

⁷ ICC-01/04-02/07-T-3-Eng RT 11-02-2008, p. 24, lines 10 to 12.

⁸ ICC-01/04-01/07-172.

⁹ ICC-01/04-01/07-T-17-Eng RT 12-02-2008, p. 7, lines 9 to 11, p. 13, lines 10 to 16.

¹⁰ ICC-01/04-01/07-T-4-Conf-Exp.

Presumption in favour of Joinder of Proceedings

7. Rule 136 of the Rules, provides that persons accused jointly “shall be tried together”.¹¹ This presumption of joining cases against persons who have been charged in relation to the same alleged crimes, should already apply when both persons sought are in the Court’s custody and the proceedings against them are at this early stage. Whilst Rule 136 is primarily applicable at the trial stage, all organs of the Court should ensure Rule 136 is operational as soon as practicable. Its intent is clearly not to limit its application to trial stage, but to join cases, if the reasons which militate in favour of a joinder are verified, at any time prior to trial. To restrict the interpretation of this provision to allow joinder exclusively at the trial stage would contravene the reasons for which a joinder may be decided, as discussed hereinafter.
8. The Prosecution’s decision to submit a joint Arrest Warrant Application for the same conduct in relation to the same attack evidences OTP’s clear intent that KATANGA and NGUDJOLO be charged jointly at the same confirmation hearing. Because NGUDJOLO’s arrest occurred after the surrender of KATANGA for practical reasons, does not detract from the fact that the case against KATANGA and NGUDJOLO are one and the same and that it has been the Prosecution’s continuous intent to have the charges levelled against each of the suspects heard at the same proceedings.
9. Accordingly, the Prosecution sought in its Arrest Warrant Application the arrest of KATANGA and NGUDJOLO for jointly taking part in, and

¹¹ Rule 136 of the Rules contains a presumption in favour of joinder of persons accused jointly, in contrast to the similar Rule 48 of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), International Criminal Tribunal for Rwanda (“ICTR”) and Special Court for Sierra Leone (“SCSL”), which provide instead that: “[p]ersons accused of the same or different crimes committed in the course of the same transaction *may be* jointly charged and tried.” [Emphasis added]. Nevertheless, the *ad hoc* tribunals have in practice favoured joinder. See e.g. *Prosecutor v Delalić et al.*, Decision on the Motion by Defendant *Delalić* Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998, para. 35: “[T]he principles of administration of justice have always accepted the practice of trying joint offenders jointly irrespective of the attendant inevitable minimum prejudices.”

ordering the attack of, Bogoro pursuant to a common plan.¹² Therefore, their cases should be joined as soon as practicable and before the confirmation hearing so that their case can be heard together.

10. Abundant international and domestic jurisprudence establishes that courts have an inherent power to join cases.¹³ The rationale is clear, as explained by Lord Morris, in *Director of Public Prosecutions v. Merriman*:¹⁴

[...] questions of joinder, whether of offences or of offenders, are very considerably matters of practice on which this court unless restrained by statute has inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Here is essentially a field in which rules of fairness and of convenience should be evolved and where there should be no fetter to the fashioning of such rules [...]

11. In the present instance, practical considerations strongly argue for joinder. Moreover, if the Trial Chamber has the power to join or sever cases, the Pre-Trial Chamber, by extension, possesses such authority. The reasons justifying a presumption in favour of joinder at trial equally exist at the pre-

¹² The Prosecution submits that the Arrest Warrants and Arrest Warrant Application provide sufficient indication of the manner in which the facts of the case against KATANGA and NGUDJOLO are so intertwined as to require their joinder. All of the 14 witnesses relied upon in the Arrest Warrant Application provided evidence relevant to the case against KATANGA and NGUDJOLO of the common plan to carry out the attack on Bogoro.

¹³ Pursuant to Article 21 of the Statute, relevant observations of the *ad hoc* tribunals support this argument such as, for instance: *Prosecutor v. Bagosora, Ntabakuze, Nsengiyumva*, ICTR-96-12, para. 103-104. In this case, the Trial Chamber observed that: “[i]n common law jurisdictions, questions of joinder lie entirely within the discretion of the Court, which has inherent power to formulate its own rules”; citing the cases of *R. v. Assim*, [1966] 2 ALL ER 881 and *Public Prosecutions v. Doot & Others*, (1973) AC 807 (House of Lords). The Trial Chamber also referred to civil law jurisdictions, where joinder can be initiated by the Court. The Trial Chamber concluded that it is in the public interest that joint offences may be tried together and that in “appropriate circumstances the Trial Chamber may so order quite apart from the provision of the Rules allowing for joinder....” [Emphasis added]. See also *Prosecutor v. Norman, Fofana, & Kondewa*, SCSL-2003-12-PT, 27 January 2004, para. 15 in which the Chamber considered that: “the cumulative effect of these statutory provisions is the vesting of a discretionary jurisdiction in the Court to grant the joinder of indictments, weighing the overall interests of justice and the rights of the accused person. In fact, the founding instruments of both the ICTY and ICTR are to the same effect.”

¹⁴ (1972) 56 Cr. App. R. 766 HL. Lord Morris cites the case of *Reg. v. Assim* [1966] 2 Q.B. 249. See *Prosecutor v. Bagosora, Ntabakuze, Nsengiyumva*, ICTR-96-12, Decision on the Prosecutor’s Motion for Joinder, 29 June 2000, para. 104. *Prosecutor v. Norman, Fofana & Kondewa*, SCSL-2003-12-PT, 27 January 2004, para. 20.

trial stage. In the present situation, there are a number of reasons justifying a joinder at this early stage of the proceedings.

12. First, a joinder of proceedings will minimise the potential impact on witnesses, including witness protection, for witnesses whose evidence is necessary for both cases. Secondly, a joinder ensures that the same issues arising in both cases are dealt with consistently. Finally, a joinder avoids the unnecessary expense and time that the Court would face if it held two separate confirmation hearings.¹⁵

13. The Prosecution contends that there is no reason to wait until trial to join the cases. Deciding upon the joinder prior to trial would contribute to judicial economy and consistency.¹⁶ The joining of the cases avoids KATANGA and

¹⁵ See *Prosecutor v Delalić et al.*, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998, para. 35: Reasons of public interest for joinder cited include: savings in expense and time; interests of transparent justice that the same verdict and the same treatment should be returned against all persons jointly tried with respect to the offences committed in the same transaction; to avoid discrepancies and inconsistencies inevitable from the separate trial of joint offenders. *Prosecutor v Kayishema*, Case No. ICTR-95-I-T, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996. p. 3. Reasons cited for joinder include: to obviate risks of contradiction in the decision rendered when related and indivisible facts are examined; allowing a more consistent and detailed perception of evidence presented by the Prosecutor; a better protection of victims' and witnesses' physical and mental safety, including by eliminating the need for them to make several journeys to repeat their testimony. *Prosecutor v Norman, Fofana & Kondewa*, Decision and Order on Prosecution Motions for Joinder, SCSL-2003-12-PT, 27 January 2004, para. 18. Repeats the same factors as outlined in *Delalić* and *Kayishema*, as being relevant; adding: interests of the Prosecution; interests of the international community in trial of persons charged with serious violations of international humanitarian law; rights of the accused to a fair and expeditious trial. *Prosecutor v Radoslav Brdanin & Momir Talić*, Decisions on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 30: It is in the interests of justice for co-accused to be able to refute attempts by the other to blame them. Articles 68(1) and 57(3)(c) of the Statute also provide PTC I with the power to take appropriate measures for the protection of victims and witnesses, which it is submitted includes joinder of proceedings to avoid witnesses being required to testify twice in two separate cases thereby sparing them additional trauma and reducing impact on their physical and mental safety (including by avoiding the need to make several journeys to repeat their testimony, which can increase chances of their detection as ICC witnesses).

¹⁶ See e.g. *Prosecutor v Delalić et al.*, Case No. IT-96-21-T-, T. Ch. 1 July 1998, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of Charges against Him, para. 35. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-2003-12-PT, 27 January 2004, Para. 18. Citing *Prosecutor v Kanyabashi*, ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of the Trial Chamber, 3 June 1999, para. 31. *Prosecutor v Bagosora* (Case No. ICTR-96-7), *Kabiligi and*

NGUDJOLO waiting for the same witnesses to give evidence in their separate respective cases. Furthermore, having witnesses testify only once avoids inconsistency, a duplication of evidence, and affords an equal treatment to both suspects: there will be no risk of having different evidence presented in the event that witnesses, after testifying in one case, became unavailable to testify in the other. Any delays as a result of the joinder are off-set by the benefits of having a joint trial when weighing the overall interests of justice. PTC I, by its management of the court proceedings, can ensure that there is no undue delay. In any event, the desire for a speedy trial does not justify severance of the proceedings against KATANGA and NGUDJOLO.¹⁷ *Inter alia* the ICTY's Trial Chamber in *The Prosecutor v. Delalić et al.* stressed this principle when it held that: "...the principles of administration of justice have always accepted the practice of trying joint offenders jointly irrespective of the attendant inevitable minimum prejudices."¹⁸ Finally, the Prosecution further stresses that, as reflected by Rule 136(2), the joinder affords each of the persons charged with the same rights as if they were tried separately.

14. The Prosecution asserts that joining the cases against KATANGA and NGUDJOLO will not result in a serious prejudice to KATANGA. So far, KATANGA has been in pre-trial detention for less than four months which,

Ntabazuke (Cases No., ICTR-97-34 and ICTR-97-30) and *Nsengiyumva* (Case No. ICTR.-96-12), T. Ch. III, 29 June 2000, para. 143.

¹⁷ *Prosecutor v Ndayambaje*, Decision on Defence Motion for Separate Trial, 25 April 2001, paras. 16-20; cited in Archbold: International Criminal Courts, Practice, Procedure & Evidence, Sweet & Maxwell, 2003, Chapter 8, p. 207. At para. 19, the Chamber noted: "[T]he European Court of Human Rights held that the fact that an accused might be tried faster, should severance be granted, does not per se render unreasonable the length of the proceedings. Indeed, the Court held in the *Neumeister v Austria* case, which involved 11 co-accused, that: 'the course of the investigation would probably have been accelerated had the applicant's case been severed from those of his co-accused, but nothing suggests that such a severance would have been compatible with the good administration of justice.'"

Prosecutor v Bagosora (ICTR-96-7), *Ntabakuze, Nsengiyumva*, (Cases ICTR-97-30 and ICTR-96-12), 29 June 2000, para. 148: "It is necessary to look at the totality of the situation and the legal reasons for joinder in spite of some amount of delay."

¹⁸ See *Prosecutor v Delalić et al.*, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998, para. 35.

pursuant to the jurisprudence from this Court and from the *ad hoc* tribunals, is not an unreasonable period of time.¹⁹ Furthermore, the date of KATANGA'S confirmation hearing was recently postponed by the Single Judge before NGUDJOLO's surrender,²⁰ and which was not objected to by KATANGA's defence.²¹ The date set for the confirmation hearing for NGUDJOLO of 21 May 2008 would not constitute an undue delay in the proceedings against KATANGA if the cases were to be joined. Indeed, it is in the interests of KATANGA and NGUDJOLO that their cases be joined as early as possible prior to any final date for the confirmation hearing and any ultimate trial, to avoid any undue delays to their respective proceedings.

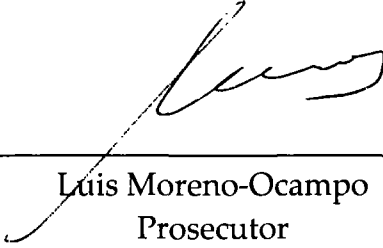
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15. For the foregoing reasons, the Prosecution respectfully submits that PTC I join the cases of KATANGA and NGUDJOLO, as soon as practicable.

¹⁹ See ICC-01/04-01/06-586, p. 7; ICC-01/04-01/06-824, para. 122. Both PTC I and Appeals Chamber said whether a period of pre-trial detention is unreasonable must be based on the particular features of the case. ICC-01/04-01/06-586, p. 7; ICC-01/04-01/06-824, para. 123. Other factors considered relevant, also pertinent to the case against KATANGA and NGUDJOLO, include complexity of the case and the amount and location of evidence. In *Neumeister v. Austria*, ECHR Application no. 1936/63, 27 June 1968, factors considered relevant include the actual length of detention. ICC-01/04-01/06-824, para. 122: At the time of appeal, Lubanga had been held for seven months and three days at the seat of the Court, and the Appeals Chamber did not consider it to be an unreasonable period per se. *Prosecutor v. Milutinović et al.*, Case Nos. IT-99-37 and IT-03-70, T. Ch. I, 08 July 2005, Decision on Prosecution Motion for Joinder: Two months after Vladimir Lazarević surrender to the Tribunal and shortly before Pavković and Lukić did the same, the Prosecution moved to join the trial of four accused with the trial of three other accused, who had been separately indicted and whose trial was foreseen to start five to six months later. Upon granting the joinder motion, the joint trial of all six accused started in July 2006, about seven to eight months later than originally scheduled for three of the accused.

²⁰ ICC-01/04-01/07-172.

²¹ Defence Counsel originally requested a one-month postponement to the confirmation hearing. See ICC-01/04-01/07-T-12-Eng ET WT 14-12-2007 1-24 NB PT, 14 December 2007, p. 13, lines 18-24.



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Dated this 14th day of February 2008

At The Hague, The Netherlands