

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : **English**

No.: ICC-01/04-01/07
Date: **25 March 2008**

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr. Bruno Cathala

**SITUATION IN DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

**Prosecution's Response to NGUDJOLO's Application for Leave to Appeal the
Decision on the Decision Concerning the Issue of Joinder**

The Office of the Prosecutor

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Procedural background

1. On 2 July 2007, Pre-Trial Chamber I (“the Pre-Trial Chamber”) issued a warrant of arrest against Germain KATANGA.¹ On 6 July 2007, the Pre-Trial Chamber issued a warrant of arrest against Mathieu NGUDJOLO CHUI.²
2. On 22 October 2007, the initial appearance of Germain KATANGA before the Pre-Trial Chamber was held, during which the confirmation hearing in the case of *The Prosecutor v Germain Katanga* was scheduled to commence on 28 February 2008.³
3. On 30 January 2008, the Pre-Trial Chamber issued the “Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing”, by which the confirmation hearing was postponed until a date to be determined by the Pre-Trial Chamber.⁴
4. On 11 February 2008, the initial appearance of Mathieu NGUDJOLO CHUI before the Pre-Trial Chamber was held, during which the confirmation hearing in the case of *The Prosecutor v Mathieu Njudjolo Chui* was scheduled to commence on 21 May 2008.⁵
5. During the status conference of 12 February 2008, the possibility of a joinder of the cases *The Prosecutor v Germain Katanga* and *The Prosecutor v Mathieu Njudjolo Chui* was discussed before the Pre-Trial Chamber.⁶ The Prosecution,⁷ the Defence of Germain KATANGA (“the Defence”),⁸ and the Defence of Mathieu NGUDJOLO CHUI⁹ filed additional written observations on the joinder of the cases.
6. On 10 March 2008, the Pre-Trial Chamber issued the “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI” (“Joinder Decision”), in which it decided to join the cases.¹⁰ In the Joinder Decision the Pre-Trial Chamber also ruled that the confirmation hearing of the joint cases shall commence on 21 May 2008.

¹ ICC-01/04-01/07-1.

² ICC-01/04-02/07-1.

³ ICC-01/04-01/07-T-5-ENG ET.

⁴ ICC-01/04-01/07-172.

⁵ ICC-01/04-02/07-T-3-ENG ET.

⁶ ICC-01/04-01/07-T-17-ENG ET; and ICC-01/04-02/07-T-4-ENG ET.

⁷ ICC-01/04-01/07-195, and ICC-01/04-01/07-195-Anx, 14 February 2008; ICC-01/04-02/07-22, and ICC-01/04-02/07-22-Anx1, 14 February 2008.

⁸ ICC-01/04-01/07-203, 18 February 2008.

⁹ ICC-01/04-02/07-29, 18 February 2008.

¹⁰ ICC-01/04-01/07-257.

7. On 17 March 2008, the Defence filed the “*Demande d’Autorisation d’Interjeter Appel de la Décision de Jonction Intervenue en Date du 10 Mars 2008 dans les Affaires Germain KATANGA et Mathieu NGUDJOLO*” (“Application”),¹¹ in which the Defence seeks leave to appeal the Joinder Decision on the following two issues:

- *La Conformité au Principe de Légalité de l’Interprétation faite par la Chambre Préliminaire de l’article 64(5) du Statut et de la Règle 136 du RPP?* (“first issue”);¹² and
- *La Jonction d’Instance Préjudicie Sérieusement les Droits de la Défense et la Protection des Intérêts de la Justice?* (“second issue”).¹³

8. Pursuant to Regulation 65(3), the Prosecution hereby responds to the Application.

Submissions

9. The Prosecution submits that the Application does not meet the requirements for leave to appeal to be granted under Article 82(1)(d) in relation to either of the above issues. Consequently, the Prosecution opposes the Application.¹⁴

10. Under Article 82(1)(d), leave to appeal may be granted if the decision “involves an issue which affects the fair and expeditious conduct of the proceedings ... and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” The Appeals Chamber has stated that “[a]n issue is constituted by a subject the resolution of which

¹¹ ICC-01/04-01/07-328.

¹² Application, paras. 20-27 and 41-44.

¹³ Application, paras. 28-44.

¹⁴ The Prosecution’s submissions are confined to the arguments advanced in the Application. The Prosecution notes that before the UN ICTY, issues pertaining to the joinder of cases have been considered to be subject to interlocutory appeal (See for instance *Prosecutor v Milosevic*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 1 February 2002; *Prosecutor v Gotovina et al.*, IT-01-45-AR73.1 IT-03-73-AR73.1 IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006; *Prosecutor v Tolimir et al.*, IT-04-80-AR73.1, Decision on Radivoje Miletic’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006. See also *Prosecutor v Popovic et al.*, IT-02-57-PT, IT-02-58-PT, IT-02-63-PT, IT-02-64-PT, IT-04-80-PT, IT-05-86-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 6 October 2005.)

The Prosecution also notes that according to the Appeals Chamber, “a Pre-Trial Chamber or Trial Chamber may certify [the existence of an appealable issue] on its own accord” (*Situation in the DRC*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 20).

is essential for the determination of matters arising in the judicial cause under examination.”¹⁵

The first issue: La Conformité au Principe de Légalité de l’Interprétation faite par la Chambre Préliminaire de l’article 64(5) du Statut et de la Règle 136 du RPP?

11. The Prosecution contends that the issue of whether joinder of cases by the Pre-Trial Chamber complies with the principle of legality arises from the Joinder Decision.¹⁶ However, the Prosecution submits that the Application does not set out the criteria under Article 82(1)(d) for leave to appeal to be granted, but primarily appears to advance an argument on the merits of an appeal.¹⁷

12. The Prosecution does not dispute the general importance of the principle of legality; however, it submits (i) that the Defence’s arguments do not go beyond a mere invocation of the principle of legality, without developing in any proper way in which manner the Decision infringes the principle; and, more importantly, (ii) that the Defence has not provided any specific arguments to support its general submission that the first issue affects the fair and expeditious conduct of the proceedings.¹⁸ The Defence seeks support in a decision by Trial Chamber I purportedly acknowledging that an issue affecting the principle of legality meets the criteria of Article 82(2)(d).¹⁹ The Prosecution submits that such reliance is misplaced:²⁰ the decision does not support the submissions made by the Defence, since the Trial Chamber did not make any reference to the principle of legality.²¹

¹⁵ *Situation in the DRC*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, para. 9 (emphasis added).

¹⁶ See in particular the finding of the Pre-Trial Chamber that “article 64(5) of the Statute and rule 136 of the Rules are included in Chapter VI of the Statute and of the Rules which deals with the ‘Trial Procedure’” (Joinder Decision, p. 8).

¹⁷ As both Pre-Trial Chamber I and Pre-Trial Chamber II have stated, the existence of the requirements set forth in Article 82(1)(d) is the sole factor of relevance in determining whether leave should be granted or not. Submissions of arguments on the merits or the substance at an early stage must be considered “irrelevant and premature” (see *Situation in the DRC*, ICC-01/04-135-tEN, 20 April 2006, para. 25; see also *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 22 – unsealed pursuant to decision ICC-02/04-01/05052, 13 October 2005).

¹⁸ See Application, para. 26-27.

¹⁹ Application, para. 27. See also footnote 21.

²⁰ *Prosecutor v Lubanga*, ICC-01/04-01/06-1191, 26 February 2008, paras. 30 and 32.

²¹ While para. 30 of this decision refers to a submission of the defence, in para. 32 of that decision, the Trial Chamber found that “the participation of victims of crimes other than those included in the charges, could lead to the Chamber considering additional material in the trial against the accused. As a result, the Chamber is

13. The Defence further argues that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings as new proceedings will be required in the event that the Joinder Decision is erroneous.²² The alleged error in this context concerns the principle of legality and the improper application of Article 21 of the Statute and the Vienna Convention on the Law of Treaties.²³ The Prosecution submits that the Appeals Chamber has already ruled with sufficient clarity on the application of Article 21 of the Statute and the Vienna Convention on the Law of Treaties; consequently it is submitted that there is no need for immediate resolution of the issue by the Appeals Chamber.²⁴

14. The Prosecution, therefore, opposes the Application in relation to the first issue.

The second issue: La Jonction d'Instance Préjudicie Sérieusement les Droits de la Défense et la Protection des Intérêts de la Justice?

15. The Prosecution contends that the second issue proposed by the Defence is not “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”,²⁵ and therefore it is not an “issue” within the meaning of Article 82(1)(d). Rather, the Defence raises a theme, namely the alleged prejudicial impact of the Joinder Decision on the rights of the Defence and the protection of the interest of justice, and proposes a number of arguments in support of this theme.²⁶ The Prosecution submits that the Application in relation to the second issue ought to be rejected for that reason alone.

persuaded that this issue could significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial.”

²² Application, para. 42.

²³ Application, paras. 22-25.

²⁴ *Situation in the Democratic Republic of the Congo*, Judgement on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, paras. 22-24, 33-42; *Prosecutor v. Lubanga*, Judgement on Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, paras. 34-36. See also *Prosecutor v. Lubanga*, Separate Opinion of Judge Pikis in the Decision on Participation of Victims in the Appeal against the Confirmation Decision under Article 82(1)(b), ICC-01/04-01/06-925 OA8, 13 June 2007, para. 12, Sep. Op.

²⁵ *Situation in the DRC*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, para. 9 (emphasis added).

²⁶ Application, paras. 28-44. The Prosecution submits that the authority adduced in footnote 23 of the Application does not relate to the proposed theme, but to a different issue examined by a Chamber of the ICTY.

16. In addition, the Prosecution contends that the arguments proposed by the Defence in support of the above theme are without any merits and do not meet the criteria under Article 82(1)(d) for leave to appeal to be granted.
17. Contrary to the submission of the Defence, the Joinder Decision does not affect the right of Mathieu NGUDJOLO CHUI to have adequate time and facilities for the preparation of the defence.²⁷ Nothing in the Joinder Decision prevents the Defence from requesting additional time for the purposes of the preparation of the defence, for dealing with possible admissibility challenges or for solving alleged difficulties related to the translation of some documents.²⁸ In fact, the Defence appears to acknowledge that it has an opportunity to ask for additional time.²⁹
18. Moreover, the Defence cannot invoke prejudice that the Joinder Decision allegedly causes to the rights of Germain KATANGA in order to show that the issue in question affects the fairness of the proceedings.³⁰ It is not up to the Defence to speculate on possible unfairness that the Joinder Decision may cause to Germain KATANGA, especially as the Defence of Germain KATANGA has not objected to the joinder of the cases.³¹
19. Also, contrary to the submission of the Defence, the Pre-Trial Chamber does not prejudice any factual issue relevant to the proceedings on the confirmation of charges by joining the cases of Germain KATANGA and Mathieu NGUDJOLO CHUI.³² The Joinder Decision does not refer to any facts relevant to the proceedings against Germain KATANGA and Mathieu NGUDJOLO CHUI other than the reference to the Prosecution's joint initial application for warrant of arrests against them for crimes allegedly committed during, and in the aftermath, of the joint attack on the village of Bogoro by the FNI and FRPI on 24 February 2003.³³
20. Finally, the Joinder Decision does not have any impact on the redactions of documents that will be disclosed by the Prosecution to Mathieu NGUDJOLO CHUI.³⁴ In this context, the Prosecution notes the Single Judge already ruled that "in relation to those decisions issued by the Chamber in the case of The Prosecutor v. Germain Katanga

²⁷ Application, para. 31.

²⁸ See Application, paras. 32, and 37-40.

²⁹ Application, para. 32.

³⁰ Application, paras. 31-32.

³¹ ICC-01/04-01/07-203, 18 February 2008.

³² Application, para. 33.

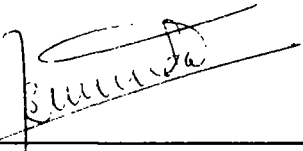
³³ Joinder Decision, p. 6.

that may have an impact on the Defence of Mathieu Ngudjolo Chui, in particular the First, Second and Third Decisions on Redactions, the Defence of Mathieu Ngudjolo Chui will have until 28 March 2008 at 16h00 to file any requests for reconsideration or, alternatively, for leave to appeal”.³⁵

21. The Prosecution, therefore, opposes the Application in relation to the second issue.

Conclusion

22. For the reasons referred to above, the Prosecution requests that the Pre-Trial Chamber reject the Application.



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Prosecutor

Dated this 25th day of March 2008
At The Hague, The Netherlands

³⁴ Application, para. 36.

³⁵ ICC-01/04-01/07-259, 10 March 2008, pp. 9-10.