

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 April 2008

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

***IN THE CASE OF
THE PROSECUTOR v. Germain Katanga and Mathieu Ngudjolo Chui***

**Public Document
URGENT**

Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo
Chui against the Decision on Joinder

Decision/Order/Judgment 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
Mr Eric MacDonald, Senior Trial Lawyer

**Counsel for the Defence
of Germain Katanga**

Mr David Hooper
Ms Caroline Bruisman

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr J.L. Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court”, respectively);

NOTING the “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹ (“the Decision”), issued on 10 March 2008, in which the Chamber decided, *inter alia*, (i) to join the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*; and (ii) that the hearing on the confirmation of charges in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* shall start on 21 May 2008;

NOTING 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*”² (“the Application”) filed by the Defence for Mathieu Ngudjolo Chui on 17 March 2008, in which the Defence sought leave to appeal the Decision;

NOTING the “Prosecution’s Response to NGUDJOLO’s Application for Leave to Appeal the Decision on the Decision Concerning the Issue of Joinder”³, filed on 25 March 2008, in which the Prosecution submitted that it opposes the Application and argued that “the Application does not meet the requirements for leave to appeal to be granted under Article 82(1)(d);”⁴

NOTING articles 64 (5) and 82(1)(d) of the *Rome Statute* (“the Statute”), rules 136, 155 and 156 of the *Rules of Procedure and Evidence* (“the Rules”) and regulation 65 of the *Regulations of the Court* (“the Regulations”);

¹ ICC-01/04-01/07-257 and ICC-01/04-02/07-48.

² ICC-01/04-01/07-328

³ ICC-01/04-01/07-339.

⁴ ICC-01/04-01/07-339, p. 3.

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁵ for the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING that, according to the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal",⁶ issued by the Appeals Chamber on 13 July 2006 ("the Appeals Chamber Judgment"):

- (i) "[o]nly an issue may form the subject-matter of an appealable decision";⁷
- (ii) "[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination";⁸

⁵ See, *inter alia*, "Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal", issued by Pre-Trial Chamber I on 23 June 2006 (ICC-01/04-01/06-165-Conf-Exp); "Decision on Defence Motion for Leave to Appeal", issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338); "Decision on Second Defence Motion for Leave to Appeal", issued by Pre-Trial Chamber I on 28 September 2006 (ICC-01/04-01/06-489); "Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions", issued by Pre-Trial Chamber I on 14 December 2007 (ICC-01/04-01/07-108); and "Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58", issued by Pre-Trial Chamber II on 19 August 2005 (ICC-02/04-01/05-20-US-Exp; unsealed pursuant to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular para. 20.

⁶ ICC-01/04-168.

⁷ Appeals Chamber Judgment, para. 9.

- (iii) “[n]ot every issue may constitute the subject of an appeal”,⁹ but “it must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”;¹⁰ and
- (iv) “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “the issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings’”;¹¹

CONSIDERING that the Defence of Mathieu Ngudjolo Chui is seeking leave to appeal in relation to the following two issues: (i) whether the Chamber erred in its interpretation of article 64(5) of the Statute and rule 136 of the Rules in violation of the principle of legality (“the First Issue”); and (ii) whether the joinder of the cases seriously prejudices the rights of the Defence and the protection of the interests of justice (“the Second Issue”);

CONSIDERING that in relation to the First Issue, the Defence alleges that the Chamber has erred in the interpretation of article 64 (5) of the Statute and rule 136 of the Rules because:

- (i) in application of the principle of legality, the Chamber, acting pursuant to paragraph 1(a) of article 21 of the Statute, should have first undertaken a strict literal interpretation of the provisions; and

⁸ Appeals Chamber Judgment, para. 9.

⁹ Appeals Chamber Judgment, para. 9.

¹⁰ Appeals Chamber Judgment, para. 10.

¹¹ Appeals Chamber Judgment, para. 14.

- (ii) only had this interpretative criterion failed to provide a clear meaning to the said provisions, could the Chamber have resorted, pursuant to paragraph 1(b) of article 21 of the Statute, to the interpretative criteria provided for in the *Vienna Convention on the Law of Treaties* ("the Vienna Convention");

CONSIDERING that in the Decision the Chamber interpreted, pursuant to paragraph 1(a) of article 21 of the Statute, the relevant provisions of the Statute and the Rules according to the interpretative criteria provided for in the Vienna Convention; and, that as a result, the conclusion reached by the Chamber concerning its power to join the cases of *The Prosecution v. Germain Katanga* and *The Prosecution v. Mathieu Ngudjolo Chui* at the present stage of the proceedings, differed from the conclusion that the Chamber would have reached had it carried out a strict literal interpretation of article 64 (5) of the Statute and rule 136 of the Rules;

CONSIDERING therefore that, in the view of the Chamber, the First Issue raised by the Defence of Mathieu Ngudjolo Chui is an issue arising out of the Decision insofar as:

- (i) the legal nature of the Statute is that of a treaty, and the interpretative criteria provided for in the Vienna Convention are also applicable to the interpretation of the Statute and the Rules pursuant to paragraph 1(a) of article 21 of the Statute;¹²
- (ii) the relevant provisions – article 64 (5) of the Statute and rule 136 of the Rules – are of a procedural nature, as opposed to a substantive penal nature;
- (iii) no provision expressly regulating the issue of joint or separate pre-trial proceedings of a case appears in the Statute or in the Rules; and

¹² ICC-01/04-168 at para. 33.

- (iv) under these specific circumstances - the existence of a *legislative lacuna* in the regulation of a procedural matter - the strict literal interpretation of the relevant provisions required by the principle of legality is not possible and the Chamber, acting under paragraph 1(a) of article 21 of the Statute, must apply the interpretative criteria provided for in the Vienna Convention;

CONSIDERING that, in the view of the Chamber, the Second Issue raised by the Defence of Mathieu Ngudjolo Chui does not fall within the above-mentioned definition of the term “issue” provided by the Appeals Chamber insofar as it simply highlights the reasons why the First Issue would significantly affect the fair conduct of the proceedings; and that, therefore, the Application of the Defence of Mathieu Ngudjolo Chui in relation to the Second Issue must be rejected;

CONSIDERING the implications of the Decision on Joinder in the conduct of the proceedings in the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*, as shown by the “Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI” issued by the Single Judge on 10 March 2008;¹³ and that therefore, in the view of the Chamber, the First Issue raised by the Defence of Mathieu Ngudjolo Chui meets the first criterion provided for in article 82 (1) (d) of the Statute;

CONSIDERING further, that an immediate resolution of the First Issue raised by the Defence of Mathieu Ngudjolo Chui would provide legal certainty for jointly conducting the pre trial proceedings in the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*; that this would allow the proceedings to “move forward; by ensuring that the proceedings follow the right course” because

¹³ ICC-01/04-01/07-259.

“removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the proceedings;”¹⁴ and that, therefore, the First Issue raised by the Defence of Mathieu Ngudjolo Chui meets the second criterion provided for in article 82 (1) (d) of the Statute;

CONSIDERING that, as Germain Katanga has already been in pre-trial detention at the seat of the Court since 18 October 2007, and as the confirmation hearing in the joint case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* is currently scheduled to start on 21 May 2008, there is a need for an urgent ruling by the Appeals Chamber on the issue for which leave to appeal is granted in the present decision;

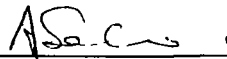
FOR THESE REASONS,

GRANTS the Application for leave to appeal by the Defence of Mathieu Ngudjolo Chui in relation to “whether the Chamber erred in violation of the principle of legality in its interpretation of article 64(5) of the Statute and rule 136 of the Rules”;

¹⁴ ICC-01/04-168, para 15.

REJECTS the Application for leave to appeal in relation to the Second Issue raised by the Defence of Mathieu Ngudjolo Chui;

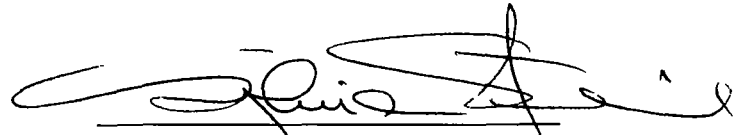
Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka



Judge Sylvia Steiner

Dated this Wednesday 9 April 2008

At The Hague, The Netherlands