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Date: **17 March 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 v. GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI***

Public Document

**Application for Leave to Appeal against the Decision on Joinder rendered on
10 March 2008 in the Germain KATANGA and Mathieu NGUDJOLO Cases**

The Office of the Prosecutor

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I. PROCEDURAL BACKGROUND

1. On 6 July 2007, a warrant of arrest for MATHIEU NGUDJOLO was issued by Pre-Trial Chamber I of the International Criminal Court.¹

2. On 7 February 2008, Pre-Trial Chamber I rendered a decision to unseal the warrant of arrest issued for Mr Mathieu Ngudjolo.²

3. On 7 February 2008, the Pre-Trial Chamber scheduled the first appearance of Mathieu Ngudjolo for 11 February 2008.³

4. On 11 February 2008, before Pre-Trial Chamber I, Mr Jean-Pierre Kilenda Kakengi Basila, in his capacity as Duty Counsel for Mathieu Ngudjolo, challenged the admissibility of the proceedings instituted against his client and signified his intention to file submissions to this end on 12 February 2008.⁴

5. At the hearing of 12 February 2008, presided over by Single Judge Sylvia Steiner, where Germain Katanga appeared, assisted by his usual counsel, together with Mathieu Ngudjolo, assisted by Mr Jean-Pierre Kilenda Kakengi Basila, the parties made submissions on the Prosecution's application for joinder of the cases against the two suspects. At that hearing, the parties' respective counsel argued that the issue was wholly premature, further contending that the materials submitted by the Prosecution were not sufficient to enable them to reply appropriately to the latter's representations.⁵

¹ Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July 2007, Pre-Trial Chamber I, ICC-01/04-02/07.

² *Decision to unseal the warrant of arrest against Mathieu Ngudjolo Chui*, 7 February 2008, ICC-01/04-02/07-10.

³ *Decision Scheduling the First Appearance of Mathieu Ngudjolo Chui and Authorising Photographs at the Hearing of 11 February 2008*, 7 February 2008, ICC-01/04-02/07-14.

⁴ Transcript of the hearing of 11 February 2008, pages 17-24, ICC-01/04-02/07-T-3.

⁵ Transcript of the status conference of 12 February 2008, (in particular, pages 1-3), ICC-01/04-02/07-T-4.

6. On 14 February 2008, the Prosecutor submitted his observations to the Pre-Trial Chamber, emphasizing the urgency of joining the Katanga and Ngudjolo cases on account of the suspects' joint participation in the events referred to in their respective warrants of arrest.⁶

7. On 18 February 2008, the Defence for Mr Katanga responded to these observations, stating that, while it found the argument for joinder persuasive, such joinder could be prejudicial to its client.⁷

8. On that same date, responding in his turn to the observations of the Prosecutor, Defence Counsel for Mr Ngudjolo argued that the Pre-Trial Chamber was not competent to rule on joinder at this stage in the proceedings and that, since he was only acting as duty counsel, he considered that this issue should be addressed by permanent counsel.⁸

9. On 20 February 2008, Single Judge Sylvia Steiner decided that, if appointed within 25 days, permanent counsel for Mr Ngudjolo should be notified by the Registry of all documents relating to the joinder of the Ngudjolo and Katanga cases, and should have 7 days in which to respond to the Prosecutor's observations.⁹

10. On 25 February 2008, the appointment of Mr Kilenda as permanent counsel was registered in the record.¹⁰

⁶ Prosecution's Observations on the Joinder of the Cases against Germain Katanga and Mathieu NGUDJOLO CHUI, Pre-Trial Chamber I, 14 February 2008, ICC-01/04-02/07-22.

⁷Defence observations on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 18 February 2008, ICC-01/04-01/07-203.

⁸ Defence observations on the joinder of the cases against Mathieu NGUDJOLO and Germain KATANGA pursuant to the oral request of Pre-Trial Chamber I at the hearing of 12 February 2008, pp. 8-9, Pre-Trial Chamber, 18 February 2008, ICC-01/04-02/07-29.

⁹ *Decision to unseal and reclassify certain documents in the record of the Case against Germain Katanga*, pp. 8-9, Pre-Trial Chamber I, 20 February 2008, ICC-01/04-02/07-32.

¹⁰ *Enregistrement de la désignation de maître Jean Pierre Kilenda Kakengi Basila par M. Mathieu Ngudjolo Chui comme conseil et de la déclaration d'acceptation du mandat par le conseil*, Pre-Trial Chamber I, 25 February 2008, ICC-01/04-02/07-42.

11. It is true that Mr Kilenda made no substantive observations within the time limit fixed by the Court in respect of the joinder, taking the view that his previous submissions were sufficient, and hoping that the Pre-Trial Chamber would make its ruling taking into account the entire previous procedural history in order to reach a properly informed decision and deny the joinder.

12. Against all expectations, on 10 March 2008 the Pre-Trial Chamber did not view the matter in this light, rendering a decision joining the Katanga and Ngudjolo cases on the ground of the suspects' alleged joint criminal participation in the events set forth in their respective warrants of arrest.¹¹

II. AS TO THE LAW

13. Pursuant to article 82(1) of the *Rome Statute* ("the Statute"), "[e]ither party may appeal any of the following decisions in accordance with the *Rules of Procedure and Evidence*... (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, 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." It is clear that these three elements are cumulative. Granting an application for leave to appeal is dependent on their being shown to be present.

14. Under rule 155(1) of the *Rules of Procedure and Evidence* ("RPE"), when a party wishes to appeal a decision under article 82(1)(d), that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

15. It is thus for the Defence to identify the issues in the impugned decision (without addressing the substance) whose immediate resolution is likely materially

¹¹ *Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI*, Pre-Trial Chamber I, 10 March 2008, ICC-01/04-01/07-257.

to advance the proceedings in that they are capable of significantly affecting the fair and expeditious conduct of such proceedings.

16. According to established precedent, only an issue raised in a decision may be appealed.¹²

17. An issue is understood to mean a problem whose resolution is essential to the determination of matters in dispute in a given case.¹³ It must be an issue that may “significantly affect” – that is to say, concretely – either a) “the fair and expeditious conduct of the proceedings or b) “the outcome of the trial” or c) “for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

18. With regard to the fairness and expeditiousness of the proceedings, in its judgment of 13 July 2006, the Appeals Chamber noted that “[t]he term “fair” in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3); making its interpretation and application subject to internationally recognized human rights. The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.¹⁴ The principles of a fair trial extend to pre-trial proceedings as well as the

¹² See, for example, the *Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor*, Pre-Trial Chamber I, 23 January 2008, ICC-01/04-438, as well as the references to case law to this effect in footnote 6.

¹³ The Appeals Chamber has stated that an issue is understood to be “an identifiable subject or topic”, “a subject the resolution of which is essential for the determination of matters arising in the judicial cause...” *Judgment on the Prosecutor’s Application for extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, para. 9, Appeals Chamber, 13 July 2006, ICC-01/04-168.

¹⁴ Article 14 of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966), which entered into force 23 March 1976, United Nations Treaty Series 171), reads: “1. [...] In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...] 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (c) To be tried without undue delay;” Article 6(1) of the

investigation of crime.” This fact is borne out by the provisions of articles 55 and 54(1) of the Statute. Breach of or deviation from the rules of a fair trial may have implications on the proceedings and may affect the outcome of the trial. It is not difficult to understand that purging the pre-trial process of errors consequential in the above sense is designed as a safeguard for the integrity of the proceedings. This is the core of article 82(1)(d) of the Statute.¹⁵

19. With regard to the term “proceedings”, it also encompasses all prior and subsequent proceedings.¹⁶ The outcome of the trial is a separate question. It requires that an issue be submitted to the Appeals Chamber where the possibility of an error on this point in an interlocutory or intermediary decision might have a bearing on the outcome of the trial. The Pre-Trial Chamber and Trial Chamber must ponder this seriously in order to avoid any repercussions that might be prejudicial to the outcome of the trial and its fair conduct.¹⁷

III. IDENTIFICATION OF THE APPEALABLE ISSUES RAISED BY THE CHAMBER’S DECISION

First issue raised by the impugned decision: whether the Pre-Trial Chamber’s interpretation of article 64(5) of the Statute and of rule 136 of the RPE is consistency with the principle of legality

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, European Treaty Series No. 5), reads: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Article 7 (1) (d) of the *African Charter on Human and Peoples’ Rights*, signed on 27 June 1981, entered into force on 21 October 1986, reads: “1. Every individual shall have the right to have his cause heard. This comprises: “d. The right to be tried within a reasonable time by an impartial court or tribunal.” The *American Convention on Human Rights*, (“Pact of San José, Costa Rica”, signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955), provides under the heading “Article 8. Right to a Fair Trial” in paragraph 1: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal [...]”

¹⁵ *Judgment on the Prosecutor’s Application for extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, para. 9, Appeals Chamber, 13 July 2006, ICC-01/04-168.

¹⁶ *Ibid.*, para.12.

¹⁷ *Ibid.*, para.13.

20. The question is whether the Pre-Trial Chamber's interpretation of article 64(5) of the Statute and of rule 136 of the RPE is consistent with the principle of legality.

21. This issue is raised in the Chamber's 4th, 5th, 6th and 7th recitals. The Chamber interpreted article 64(5) of the Statute and rule 136 of the RPE in light of article 31(1) of the *Vienna Convention on the Law of Treaties* (4th recital of the decision). It inferred that there was a presumption for joint proceedings for persons prosecuted jointly: in light of the "ordinary meaning to be given to the terms of the treaty", the above-mentioned provisions establish a presumption for joint proceedings for persons prosecuted jointly (5th recital); that the joinder of cases is consistent with the "object and purpose" of the Statute and the Rules (6th recital); that the contextual interpretation of the foregoing provisions, notwithstanding that they are included in Chapter VI of the Statute and among the Rules governing trial, does not preclude their application at the Pre-Trial stage (7th recital), and supports the Chamber's conclusion as to the existence of a presumption in favour of joinder.

22. It should be noted that, in the present case, the presumption for joinder established by the Chamber is not based on the applicable norms, in that it disregards the hierarchy set out in article 21(1) of the Statute, the foundation on which the principle of legality rests. Simply ignoring the Statute, the Elements of Crimes and the RPP, the Chamber inferred a presumption for joinder on the basis of the international convention on the law of treaties, notwithstanding that it is under an obligation to give full effect to the clear provisions of the Statute and the Rules. In so doing, the Pre-Trial Chamber flouted the principle of legality recognized by the Court.

23. The hierarchy of applicable norms established by article 21 of the Statute is as follows: in the first place, the Statute, the Elements of Crimes and the RPE; in the second place, where appropriate, the Court shall apply applicable treaties and the principles and rules of international law and, failing that, general principles of law

derived by the Court. The Defence submits that the expression “where appropriate” calls for recourse to such sources where the Statute, the Elements of Crimes and the RPE are unclear, ambiguous or lead to a result which is manifestly absurd or unreasonable.¹⁸

24. In the present case, the Chamber, through its method of interpretation, arbitrarily applied the *Vienna Convention on the Law of Treaties*. The provisions in question are found in Part VI of the Statute and in the Rules governing trial, and do not have their equivalent in the provisions governing the pre-trial phase or in those applicable to the various stages of the proceedings; the terms used clearly refer to the trial phase. These provisions meet the goal expressed in the Statute, that is, “to make internationally punishable the heinous crimes specified therein in accordance with the principles and procedure institutionalised thereby”.¹⁹

25. Nor is the reference in the 9th recital of the Chamber’s decision to the jurisprudence of the ICTY and ICTR of any relevance. It should be clearly understood that the *Rome Statute* is an international treaty born of protracted negotiations between willing parties. It is therefore exhaustive by nature. In this respect, it is significantly different from the ICTY and ICTR Statutes, which allow considerable latitude for the interpretation of their provisions. For the drafters of the *Rome Statute*, who approached the matter differently, the Statute was conceived as a set of complete and detailed criminal codes. They also negotiated a separate agreement on the *Rules of Procedure and Evidence*.²⁰ It is thus apparent that the judges are under a binding obligation to give full effect to the clear provisions of the Statute and the Rules.

¹⁸ In this regard, see article 32 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, in http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹⁹ *Judgment on the Prosecutor’s Application for extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, para. 37, Appeals Chamber, 13 July 2006, ICC-01/04-168.

²⁰ Arsanjani and Reisman, *The Law-in-Action of the International Criminal Court*, 2005, Am. J. Int’l L. 385, at 389, ft 18.

The fair and expeditious conduct of the proceedings is significantly affected

26. The Chamber's disregard of the principle of legality as enshrined in the Statute affects the fairness of the proceedings instituted against Mr Ngudjolo.

27. The issue raised significantly affects the fairness and expeditiousness of the proceedings. The Trial Chamber has recognized that an appealable issue which infringes the principle of legality fulfils the conditions set forth in article 82(1)(d), in that it significantly affects the fairness and expeditiousness of the proceedings and requires an immediate resolution.²¹ The fact is that the principle of legality is a fundamental procedural safeguard: it prevents the arbitrary application of the law, it contributes to protecting the principle of legal certainty, the proper application of the law and the expeditiousness of the proceedings. Given that the law has been set forth clearly and correctly in the available statutory framework, the violation of the principle of legality in this decision requires an immediate resolution that would advance the proceedings by making it materially possible for the parties to respond effectively and in detail to the documents in the case.

Second issue raised by the impugned decision: whether the joinder of the cases is seriously prejudicial to the rights of the Defence and the protection of the interests of justice

28. The second question raised by the impugned decision is whether the joinder of the cases is seriously prejudicial to the rights of the Defence and the protection of the interests of justice.

29. The Chamber decided that, absent any declaration of guilt by Germain Katanga or Mathieu Ngudjolo, persons prosecuted jointly must be tried together, unless separate trials are necessary to avoid serious prejudice to Mr Katanga or to Mr Ngudjolo, or to protect the interests of justice (10th recital).

²¹ *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the defence and Prosecution Requests for Leave to Appeal the Decision on Victims' participation of 18 January 2008*, paras. 30 and 32, Trial Chamber, 26 February 2008, ICC-01/04-01/06-1191.

30. In the Chamber's view, Mr Ngudjolo's Defence had based its objections to joinder on the inapplicability of article 64(5) of the Statute and rule 136 of the Rules (11th recital), but the Chamber failed to have regard to the alternative submissions concerning the prejudicial consequences of a joinder on the suspect's defence.²²

31. It is appropriate at this point to emphasise that the joinder of the two cases as decided by the Chamber is prejudicial to the fundamental rights of both suspects. Attention is drawn to rule 136(2) of the RPE, pursuant to which in case of joinder each of the persons concerned shall be accorded the same rights as if they were being tried separately. However, the joinder prejudices Mr Ngudjolo's right to have sufficient time to prepare his defence. Since every accused has the right not to have his period of detention unduly extended, Mr Katanga's rights may in practice be in conflict with those of Mr Ngudjolo.

32. It should in particular be recalled that Mr Ngudjolo's Defence challenged the admissibility of the case at the pre-trial hearing. Determination of admissibility is a lengthy process that will be bound to affect adversely the expeditiousness of the joint proceedings. Mr Ngudjolo's Defence will need to prepare its case on this point. It may even request further extensions of time. In the meantime, Mr Katanga's period of detention pending a final decision will be extended.

33. Co-perpetration and membership in an armed group cannot be presumed prior to confirmation of the charges. However, in ordering the joinder of these cases, the Chamber has pre-judged such confirmation, thereby violating the principle of impartiality that should govern the activities of the judges of the Chamber. It was to safeguard the fair trial principle that joinder was provided for only at the trial phase. The possibility of severance at a later stage of the trial will not necessarily suffice to make good the adverse effects of final decisions taken in the interim.

²² Point 2.2 of the "Defence observations on the joinder of the cases against Mathieu NGUDJOLO and Germain KATANGA pursuant to the oral request of Pre-Trial Chamber I at the hearing of 12 February 2008", 18 February 2008, ICC-01/04-02/07-29.

The fairness and expeditiousness of the proceedings are significantly affected

34. The issue raised significantly affects the fairness and expeditiousness of the proceedings.

35. This decision places the fundamental rights of the two suspects in conflict. However, a suspect's right to enjoy the same rights in joint proceedings as a suspect in separate proceedings necessarily affects the fairness and expeditiousness of the proceedings.²³

36. Redactions must be dealt with separately in order to take into account the particular circumstances of each person prosecuted; if the proceedings are not fair, the rights of the Defence will be infringed. The Chamber has moreover recognised that redaction issues would have an impact on Mr Ngudjolo's defence.²⁴

37. At no time should it be forgotten that Mr Ngudjolo's Defence has challenged the admissibility of this case before the Court. This issue must be considered within the context of a fair trial, that is, with due regard for the rights of the Defence to have adequate time and facilities for the preparation of its case.

38. It is worth noting at this point that, responding favourably to Defence Counsel's letter of 22 February 2008 requesting disclosure of all proceedings conducted in the Democratic Republic of the Congo against Mr Ngudjolo, the Prosecution, in its reply of 13 March 2008, promised to provide Counsel with the material in its possession, acknowledging that this request was justified in terms of Counsel's defence of his client's interests, while at the same time making it clear that

²³ See, for example, ICTY jurisprudence: "The first requirement of Rule 73(B) is met because the Decision involves an issue – the right of an accused to be accorded the same rights in a joint trial as he would have if tried separately – which significantly affects the fair and expeditious conduct of the proceedings." *Prosecutor v. Tolimir, et al.* (Case No. IT-04-80-PT). *Decision on Motion for Certification of Joinder Decision for Intellocutory Appeal*, Trial Chamber III, 6 October 2005, para. 11. The decision is available at: <http://www.un.org/icty/popovic88/trialc/decision-e/051006.htm>.

²⁴ *Decision Establishing a calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI*, Pre-Trial Chamber, 10 March 2008, ICC-01/04-01/07-259.

it was not disclosing such of these materials as might be subject to a rule 77 disclosure in support of any challenge to admissibility that the Defence intended to make before the Chamber.

39. Lastly, it should be noted that the Mr Ngudjolo's Defence has major practical difficulties relating to the translation of certain documents, in particular those in the Katanga case record. Although the Chamber has ordered that Mr Ngudjolo be provided with a permanently available interpreter,²⁵ in practice Mr Ngudjolo's rights and the fairness and expeditiousness of the proceedings are at risk.

40. In its decision of 27 February 2007,²⁶ the Chamber refers to an interpreter for the suspect. However, what the Defence in fact needs is a translator to translate certain documents that are crucial to the understanding of the record, in particular filings in English in the Katanga case. Such assistance to the suspect would be meaningless if his counsel does not also benefit from it. Mr Katanga's Defence team works in English. This, however, is not the case for Mr Ngudjolo's Defence team. This practical difficulty has an adverse impact on the fairness and expeditiousness of the proceedings and infringes the rights of the Defence under article 67(1)(b) of the Statute. Translation by the members of the Defence team consumes valuable time at this confirmation phase and prevents the Defence from responding promptly to filings in English. The Defence submits that the approach adopted by Single Judge Steiner in the case against Mr Lubanga illustrates the need for a translator to prepare for the confirmation of the charges. Judge Steiner recognized that the documents relevant to the preparation of the defence could be translated by the Registry even though the decision referred to an interpreter.²⁷

²⁵ *Decision on the Defence Request concerning time limits*, 27 February 2008, ICC-01/04-02/07-45.

²⁶ *Ibid.*

²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Status Conference, 5 September 2006, in particular pages 51-52, and pages 45-53, ICC-01/04-01/06-T-17-CONF. See also, in the same case, the decision of 14 December 2007 by the Trial Chamber, ICC-01/04-01/06-1091.

IV. AN IMMEDIATE RESOLUTION OF THE ISSUES RAISED BY THE IMPUGNED DECISION MAY MATERIALLY ADVANCE THE PROCEEDINGS

41. The immediate resolution of the issue raised may materially advance the proceedings.

42. The issues raised above require an immediate resolution in order to advance the proceedings, because, if the decision is incorrect, new, separate proceedings will become necessary. This would inevitably be prejudicial to the accused, to witnesses, and to any alleged victims authorised to participate. It would also be bound to prejudice the proper administration of justice and judicial economy.²⁸

43. Such prejudice is all the more likely since, in deciding to join the Katanga and Ngudjolo cases, the Chamber hastened to establish an agenda, fixing 14 March 2008 as the date for the disclosure of materials in the joined records, and scheduling the confirmation hearing for 21 May 2008.

44. Accordingly, the Defence intends to challenge the decision on joinder rendered on 10 March 2008, because that decision is legally unsound and would be liable to cause serious and irremediable prejudice to Mr Ngudjolo if he were to be tried jointly with Mr Germain Katanga.

FOR THESE REASONS,

45. The Defence, having regard to the foregoing facts and grounds, most respectfully requests Pre-Trial Chamber I for leave to appeal against the decision on the joinder of the Katanga and Ngudjolo cases rendered on 10 March 2008.

²⁸ “The second requirement of Rule 73(B) is also met because if the Appeals Chamber were to find the Decision flawed, it may be necessary to conduct new trials in which one or more accused are severed from the rest, an outcome which would be prejudicial to the accused, to witnesses and the interests of justice and judicial economy. Therefore an immediate resolution of this issue by way of interlocutory appeal may, in the Trial Chamber’s view, materially advance the proceedings”, para.12 of the Decision in *The Prosecutor v. Tomilir et al.* previously cited in footnote 22. <http://www.un.org/icty/popovic88/trialc/decision-e/051006.htm>.

/signed/

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Permanent Counsel for the Defence for Mr Mathieu Ngudjolo Chui

Done on 17 March 2008

At Brussels, Belgium