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**International
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THE APPEALS CHAMBER

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

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

Public Document

**Prosecution Response to Defence Document in Support of Appeal against
Decision on the Joinder of Cases**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. This appeal concerns the power of the Pre-Trial Chamber to authorise the joinder of the charges and cases against two suspects, who in this instance are charged with the same crimes arising out of the same coordinated attack and based on substantially the same evidence, for the purpose of the confirmation hearing. The Prosecution originally sought the issuance of arrest warrants in a joint application; however given that one of the suspects was likely to be surrendered before the other, the warrants were issued in separate court records to maintain confidentiality of information.
2. It is beyond dispute that persons may be tried jointly under the Statute, and that persons may also be “jointly accused” (Rule 136). The Prosecution thus submits that the only reasonable interpretation of the Statute, in context, is that the Pre-Trial Chamber does have the power to authorise the joinder of cases prior to, and for the purposes of, the confirmation hearing. There is no need for an express provision in the Statute to this effect - as prior to the confirmation hearing the charges and the case may be amended and reframed freely, so long as this does not prejudice the rights of the suspect(s) - just as there was no need for an express power for the Pre-Trial Chamber to sever the joint case originally proposed by the Prosecution.

Procedural Background

3. On 22 June and 25 June 2007, the Prosecution filed a joint application for the issuance of arrest warrants against Germain KATANGA (“KATANGA”) and Mathieu NGUDJOLO CHUI (“NGUDJOLO”).¹ This joint application alleged that KATANGA and NGUDJOLO were criminally responsible for the same crimes, arising out of a single attack in which they were the two primary actors.

¹ 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 (“Arrest Warrant Application”). The Prosecution has submitted redacted versions of these applications – see ICC-01/04-01/07-196 and ICC-01/04-02/07-24.

4. The Pre-Trial Chamber issued a warrant of arrest against KATANGA on 2 July 2007,² and issued a warrant of arrest against NGUDJOLO on 6 July 2007.³ Despite the Prosecution having submitted a single Arrest Warrant Application, Pre-Trial Chamber I (“the Pre-Trial Chamber”) issued the two arrest warrants in separate court records.⁴ The Prosecution submits that this was based primarily on 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.⁵
5. The first appearance of NGUDJOLO took place on 11 February 2008, and the Pre-Trial Chamber set his confirmation hearing on 21 May 2008.⁶
6. In a hearing held on 12 February 2008, the Pre-Trial Chamber raised 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.⁷
7. On 14 February 2008, the Prosecution submitted that the cases should be joined as soon as practicable.⁸ The Prosecution recalled that it had jointly requested the issuance of arrest warrants against the two suspects, and intended that their cases be joined so that they could be prosecuted together: the charges are based on their joint participation in the same attack, the same issues arise in relation to both suspects, and almost all of the witnesses and evidence to be relied upon will be the same against each suspect.
8. KATANGA did not oppose the joinder of the cases, noting that there was “a persuasive argument for joinder of the two cases” and that “it can raise no

² ICC-01/04-01/07-1-US, reclassified as public see ICC-01/04-01/07-24.

³ ICC-01/04-02/07-1-US, reclassified as public see ICC-01/04-02/07-10.

⁴ 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. See ICC-01/04-01/07-T-4-Conf-Exp.

⁵ See ICC-01/04-01/07-195, 14 February 2008, paras. 5-6.

⁶ ICC-01/04-02/07-T-3-Eng RT 11-02-2008, p. 24, lines 10 to 12. The first appearance of KATANGA had previously taken place on 22 October 2007 - ICC-01/04-01/07-T-5.

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

⁸ ICC-01/04-01/07-195.

effective argument against such joinder in principle.”⁹ NGUDJOLO, on the other hand, did oppose the joinder of the cases, including on the basis that the Pre-Trial Chamber did not have the competence to rule on the joinder of cases.¹⁰

9. On 10 March 2008, the Pre-Trial Chamber decided to join the cases.¹¹ The Chamber considered that “the Prosecution sought initially to prosecute jointly Germain Katanga and Mathieu Ngudjolo Chui”; that both warrants relate to the suspects’ “alleged co-responsibility for the crimes allegedly committed during and in the aftermath of the said attack on the village of Bogoro; that all supporting materials and evidence in the Prosecution’s joint application relate to both alleged co-perpetrators”; and that the Prosecution had requested joinder of the cases.¹²
10. On 17 March, NGUDJOLO (“the Appellant”) sought leave to appeal the Decision in respect of two issues.¹³ The Prosecution opposed the application for leave to appeal.¹⁴ The Pre-Trial Chamber granted leave to appeal one of the two issues on 9 April 2008.¹⁵
11. On 21 April 2008, the Appellant filed his document in support of appeal.¹⁶
12. The Prosecution hereby files its response pursuant to Regulation 65(5).

The Issue in this Appeal

13. The issue certified for this appeal by the Single Judge is “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”.¹⁷ The issue is thus one of the manner in

⁹ ICC-01/04-01/07-203, 18 February 2008, para. 2.

¹⁰ ICC-01/04-02/07-29, 18 February 2008.

¹¹ ICC-01/04-01/07-257 (the “Decision”). The Pre-Trial Chamber also issued a further decision the same day (ICC-01/04-01/07-259), regarding consequential matters to implement the joinder of the cases (the renaming and number of the joined case; transfer of documents) and safeguard the rights of NGUDJOLO (cross-disclosure of evidence; cross-notification of decisions; provision for leave to appeal prior decisions from the other case).

¹² Decision, p. 6.

¹³ ICC-01/04-01/07-328-tENG (“Application for Leave to Appeal”).

¹⁴ ICC-01/04-01/07-339.

¹⁵ ICC-01/04-01/07-384.

¹⁶ ICC-01/04-01/07-421-tENG OA6 (“Appeal Brief”).

¹⁷ Decision Granting Leave to Appeal, p. 8.

which the Pre-Trial Chamber interpreted the relevant provisions of the Statute and the Rules, and its authority to approve the joining of the cases against the Appellant and KATANGA prior to the confirmation hearing. This appeal thus does not concern the permissibility or desirability of joint trials in general;¹⁸ nor does it concern the appropriateness of the Pre-Trial Chamber exercising its discretion to authorise the joinder of the cases in these circumstances.¹⁹

14. The Appellant raises five grounds of appeal:²⁰

- 1) The Pre-Trial Chamber erred by not following the hierarchy of applicable law set out in Article 21 of the Statute, and consequently did not apply the clear provisions of the Statute and the Rules of Procedure and Evidence;
- 2) In the event that the Vienna Convention is applicable, it would support a limitation of joinder to the trial phase, without extending it to the pre-trial phase;
- 3) Joinder at the pre-trial phase is neither logical nor effective in the context of the proceedings before the International Criminal Court;
- 4) The Pre-Trial Chamber erred in extending by analogy the provisions of Article 64 and Rule 136 to the pre-trial phase, departing from specifically established provision of Article 51(3) which would have been consistent with the principle of legality; and
- 5) The question of joinder is, because of its potentially adverse implications for the Appellant, a substantive rule which is subordinate to the principle of legality.

15. The Prosecution submits that the Pre-Trial Chamber committed no error in terms of the principle of legality when interpreting its power to authorise joinder. The Pre-Trial Chamber correctly interpreted the Statute and the Rules based on the principles set out in the *Vienna Convention on the Law of Treaties* ("Vienna

¹⁸ See in particular Appeal Brief, paras. 46-47. As this issue is not within the scope of the appeal, the Prosecution submits that these arguments should be disregarded by the Appeals Chamber.

¹⁹ See e.g. Appeal Brief, paras. 38, 41, 47.

²⁰ Appeal Brief, para. 23.

Convention”), in accordance with the established jurisprudence of the Appeals Chamber.²¹ The Prosecution thus opposes the appeal in its entirety.²²

16. The Appellant further requests that the Appeals Chamber grant suspensive effect to this appeal.²³ The Prosecution also opposes this request.

The First Ground of Appeal – the Single Judge correctly interpreted the Statute and the Rules, and the Decision does not violate the principle of legality

17. The Prosecution submits that the assertion underpinning the Appellant’s first ground of appeal, that the Decision “ignor[ed] the Statute, the Elements of Crimes and the RPP, [and that] the Chamber inferred a presumption for joinder on the basis of the international convention on the law of treaties”,²⁴ misunderstands or misrepresents the Decision.
18. The Decision held that “there shall be joint trials for persons accused jointly” and that this “establishes a presumption for joint proceedings for persons prosecuted jointly”. This finding is explicitly based on the Chamber’s interpretation of “the ordinary meaning of article 64(5) of the Statute and rule 136 of the Rules”.²⁵ The Vienna Convention was thus not used as an extraneous source for the Chamber’s finding. Rather, it was used as the tool by which to interpret the primary documents. This is in line with the jurisprudence of the Appeals Chamber, which has ruled that the interpretation of the Rome Statute is governed by the Vienna Convention, and that “the principal rule of interpretation is set out in article 31 (1) that reads: A treaty shall be interpreted in good faith in accordance with the

²¹ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 33.

²² While the Prosecution opposes this appeal, the Prosecution is strongly committed to the principle of legality, and recognises it as a fundamental principle underpinning the Statute, the Rules of Procedure and Evidence, and other constitutional documents of the Court (Appeal Brief, para. 18). These documents must be interpreted and applied by the Chambers in accordance with Article 21 and the rules of treaty interpretation.

²³ Appeal Brief, paras. 49-51.

²⁴ Application for Leave to Appeal, para. 22; quoted in Appeal Brief, para. 24.

²⁵ Decision, p. 7.

ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”²⁶

19. The Prosecution submits that a good faith interpretation of the relevant provisions fully supports the interpretation adopted in the Decision. Where the proposed charges against two persons have been jointly formulated,²⁷ then the plain language of Rule 136 demonstrates that there is a presumption that they will be tried together.²⁸
20. As the Appellant notes, the Statute and the Rules are silent on the power of the Pre-Trial Chamber to join cases.²⁹ The Decision thus properly looked to the context, and the object and purpose, of the provisions in determining whether this was intended to exclude the Pre-Trial Chamber from authorising the joinder of cases prior to the confirmation hearing.
21. The definition and use of the term “accused” in the Statute and the Rules supports the propriety of the Chamber’s interpretation. The power of the Pre-Trial Chamber to authorise the joinder of charges against two persons is the necessary implication of Rule 136. As the Appellant notes, a person becomes an “accused” upon the confirmation of charges.³⁰ However Rule 136 refers to persons “accused jointly”. Thus Rule 136 requires that charges against persons can be joined prior to, and for the purposes of, the confirmation hearing,³¹ otherwise persons could never be “accused jointly”.

²⁶ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 33. The Prosecution also notes that the Appellant relies on the Vienna Convention to support his interpretations (see e.g. Appeal Brief, para. 28; Application for Leave to Appeal, para. 23).

²⁷ Article 58(2)(b) requires that the Prosecution detail the specific crimes under the Statute for which the persons’ arrest is sought. The manner in which the Prosecution has complied with the requirement to date, especially when combined with the concise statement of the facts which are alleged to constitute these crimes, forms an initial indication by the Prosecution of the charges which it proposes bring against the suspect(s).

²⁸ As the Decision notes, Rule 136 states that persons jointly accused shall (rather than may) be tried together – Decision, p. 7, footnote 19.

In this case, the Prosecution initially proposed the counts jointly against both the Appellant and Germain KATANGA in its Application for Arrest Warrant, and subsequently confirmed its ongoing intent to bring the charges jointly - ICC-01/04-01/07-195, 14 February 2008, introduction and paras. 9-10.

²⁹ Appeal Brief, para. 26.

³⁰ Appeal Brief, para. 29-30.

³¹ This should apply not only in the case that charges have been brought together, but also must include the power of a Chamber to join prior to the confirmation hearing, where charges were initially proposed separately or where charges that were brought jointly have been separated prior to the confirmation hearing.

22. The structural context of the Court thus requires that the Pre-Trial Chamber has the power to authorise the Prosecution to bring joint charges, and to confirm charges jointly. This interpretation is also supported by the object and purpose of the provisions, as without such a power Rule 136 would be deprived of any meaningful effect, in contravention of the principles of treaty interpretation.³²
23. The Decision therefore did not improperly arrogate a power of the Trial Chamber to the Pre-Trial Chamber, as advanced by the Appellant.³³ Rather, the Decision interpreted the Statute and Rules in the manner required to facilitate the meaningful and effective exercise of the relevant powers of the Trial Chamber.
24. The Prosecution submits that, in this context, the lack of an express rule empowering the Pre-Trial Chamber to authorise the joinder of charges does not demonstrate that the Pre-Trial Chamber is precluded from exercising such a power. Rather, this exercise is a function of the more fluid nature of the charges prior to the confirmation hearing. At this stage in the proceedings, the Prosecution may freely formulate, present and amend the charges,³⁴ subject to the rule of speciality,³⁵ while the Pre-Trial Chamber retains the authority to ensure that such amendments do not compromise the rights of the accused.³⁶ This authority to formulate and present charges against suspects must extend to the bringing of joint charges.³⁷ The Prosecution thus submits that no express authority was required for the Pre-Trial Chamber at this stage to ensure that this

³² As terms of a treaty are the expression of the intention of the parties, and as the parties must have intended that each provision has a certain effect, the “principle of effectiveness” or “*effet utile*” requires that a provision ought not be given an interpretation that leaves it meaningless or without effect – see *The Corfu Channel Case (merits)* ICJ Reports (1949) at p. 24 (and cases cited therein); Jennings and Watts (ed), *Oppenheim’s International Law (9th ed)* (1992), Vol I at para 633(9). This principle is based on or related to interpretation in light of the treaty’s object and purpose.

³³ Appeal Brief, para. 33.

³⁴ Article 61(4).

³⁵ Article 101.

³⁶ See Article 57(3)(c) and Rule 121(1) and the requirement of reasonable notice under Article 61(4).

³⁷ The present circumstances provide a clear example of a situation where such a power is necessary: where two suspects are charged as co-perpetrators with regard to the same counts arising out of a single coordinated attack; the warrants of arrest were sought together in a single application; however the two warrants were issued with separate case-codes for pragmatic reasons, in order to facilitate the prompt arrest of and disclosure of documents to one accused while maintaining the fact of the second warrant under seal.

re-formulation (or reversion to the original formulation) of the case did not prejudice the rights of the suspects, and authorise such a re-formulation.³⁸

25. In contrast, once the charges have been confirmed and persons have been formally accused, the ability to amend or otherwise alter those charges is severely restricted.³⁹ The joining of cases at that stage would represent an amendment to the charges against a person which had been crystallised by a decision confirming the charges. The Prosecution thus submits that it is consistent for the Statute and Rules to (a) include an express power to alter the charges by joinder or severance after they have been confirmed, while (b) not requiring an express power to authorise joint charging prior to confirmation.
26. The interpretation of the Statute and Rules in the Decision thus does not violate the principles of legality or of treaty interpretation. For the above reasons, the Prosecution opposes the First Ground of Appeal.

The Second Ground of Appeal – the Decision properly applied the Vienna Convention

27. As explained above, the reference by the Pre-Trial Chamber to the principles set out in the Vienna Convention to interpret the relevant provisions of the Statute and Rules was not arbitrary,⁴⁰ but was appropriate. Contrary to the Appellant's argument, the Pre-Trial Chamber's finding with regards to the presumption of joint proceedings for persons accused jointly was not simply based on considerations of public interest;⁴¹ rather, it was based on the interpretation by the

³⁸ For example, the orders made by the Pre-Trial Chamber in decision ICC-01/04-01/07-259), including the renaming and number of the joined case, the transfer of documents between the previous case records, disclosure of evidence from the other prior case, cross-notification of decisions and determinations on the ability of one suspect to seek leave to appeal prior decisions from the other prior case. Such orders are necessary either in the exercise of the Pre-Trial Chamber's inherent power to control the proceedings before it (and to make necessary orders to that effect) and to safeguard the rights of the defence.

³⁹ See e.g. Article 61(9).

⁴⁰ Appeal Brief, para. 35, citing Application for Leave to Appeal, para. 32.

⁴¹ Contrast Appeal Brief, para. 35. The fact that considerations which the Appellant appears to characterise as public interest, but which are consistent with the object and purpose of the Statute (Decision, p. 8), further support the interpretation of the Pre-Trial Chamber's authority does not demonstrate any error.

Pre-Trial Chamber of the relevant provisions of the Statute and Rules, in context and in order to give them meaningful effect.⁴²

28. As stated above, the Appeals Chamber has confirmed that the interpretation of the Rome Statute is governed by the Vienna Convention.⁴³ The jurisprudence of the International Court of Justice cited by the Appellant, referring to additional methods of interpretation where the ordinary meaning is ambiguous or leads to an unreasonable result,⁴⁴ does not demonstrate any error. The Pre-Trial Chamber did not resort to additional means of interpretation in this case, but rather applied the principal rule set out in Article 31(1) of the Vienna Convention. There was no need to resort to additional means of interpretation in this instance; and in any event the only such means identified by the Appellant (the *travaux préparatoires*) confirms, consistent with the Vienna Convention,⁴⁵ the propriety of the Pre-Trial Chamber's approach.

29. The reading of the provisions out of context, as proposed by the Appellant (i.e. that the express authority of the Trial Chamber at a later stage necessarily denies any power of a Pre-Trial Chamber to approve joinder prior to the confirmation hearing) would lead to unreasonable results. The powers to join and sever cases are presented together in the Statute.⁴⁶ Thus, if the Pre-Trial Chamber has no power to authorise the joinder of the cases, then arguably it had no power to

⁴² See paras. 17ff, above.

⁴³ See e.g. *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 33.

⁴⁴ Appeal Brief, para. 37. The ICJ case referred to by the Appellant predates the Vienna Convention, and sets out a similar approach to the interpretation of treaties to that codified in articles 31 and 32 of the Vienna Convention. The reference to the natural and ordinary meaning does not signify a rigidly literalist interpretation, as the Appellant appears to imply; rather, this is the interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty" codified in Article 31(1), which goes on to clarify that such good faith interpretation of the words of the treaty shall be conducted "in their context and in light of its object and purpose." The reference to the use of other methods of interpretation in the case of ambiguity or unreasonable results parallels Article 32 of the Vienna Convention (see footnote 45, below), and does not dictate the conditions for the application of Article 31(1). The ICJ has repeatedly confirmed that the Vienna Convention codifies the law for the interpretation of treaties and has consistently applied it – see e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Reports 136, at para. 94; *LaGrand Case (Germany v. USA)*, 2001 ICJ Reports 466, at para. 99; *Oil Platforms (Islamic Republic of Iran v. U.S.)* 1996 ICJ Reports 803, at para. 23.

⁴⁵ As the Appellant recognises, Article 32 of the Vienna Convention permits recourse to supplementary means of interpretation in order to confirm the meaning resulting from the application of the general principles (as set out in article 31), as well as where the interpretation under those principles is ambiguous, obscure, or leads to a result which is manifestly absurd or unreasonable – Appeal Brief, footnote 34.

⁴⁶ Article 64(5).

order the severance of the case against two suspects which the Prosecution presented jointly for the purposes of issuing warrants of arrest.⁴⁷ Furthermore, it would be unreasonable if the Trial Chamber had the power to sever cases⁴⁸ and to try persons jointly accused,⁴⁹ but the Pre-Trial Chamber had no power to authorise joining of related cases against two suspects for the purpose of confirming the charges.⁵⁰

30. The drafting history referred to by the Appellant also does not support his contention that joining cases at the pre-trial stage is precluded.⁵¹ The relevant provisions do not refer to the joinder of cases. Rather, they pertain to the publicising of the indictment (or document containing the charges). The removal of this entire provision, which made reference to “the case of joint accused”, does not indicate that the drafters of the Statute intended to remove the possibility of joint confirmation hearings or joinder of cases during the pre-trial phase. To the contrary – these drafts, which expressly contemplated joint cases at the pre-trial stage, did not contain any express power for the Pre-Trial Chamber (or Presidency) to authorise the joinder of cases. Such a power must therefore have been considered implicit or inherent. Given that the drafters saw no need to provide an express power in the earlier drafts, such an absence of an express power in the Statute cannot be reasonably interpreted as precluding the Pre-Trial Chamber from authorising joinder. This further confirms the interpretation in the Decision.

31. For the above reasons, the Prosecution opposes the Second Ground of Appeal.

⁴⁷ Not only would this result in the Pre-Trial Chamber’s original separation of the joint case proposed by the Prosecution being ineffective. If the Pre-Trial Chamber lacked the power to order that a case against multiple suspects be severed, this could have severe repercussions on the rights of suspects (in particular the right to trial without undue delay and the obligation under Article 61(1) to hold the confirmation hearing within a reasonable time) in a situation where one suspect who has been jointly accused is surrendered to the Court substantially before the other(s).

⁴⁸ Article 64(5).

⁴⁹ Rule 136(1).

⁵⁰ See paras. 18-20, above.

⁵¹ Appeal Brief, para. 37 and footnote 39.

**The Third Ground of Appeal – the joinder of the cases at this stage is
both logical and efficient**

32. The Prosecution submits that none of the factors presented by the Appellant in relation to the Third Ground of Appeal demonstrate that the Pre-Trial Chamber violated the principle of legality, or otherwise erred in its interpretation of the Statute and Rules.
33. The fact that the Prosecution at the confirmation hearing may chose to present evidence in written or summary form, and may apply to withhold the identity of witnesses, does not demonstrate that a Pre-Trial Chamber has no power to authorise the joinder of cases for the purposes of confirmation, nor that it is virtually impossible to find that joinder is appropriate.⁵²
34. The additional arguments presented by the Appellant are irrelevant to the present appeal. The possibility that one suspect might make an admission of guilt at a later stage does not demonstrate any error in establishing a power to join the cases at this stage of the proceedings.⁵³ The Appellant further refers to the impact of a challenge to admissibility on the possibility of joinder prior to confirmation.⁵⁴ However, to the best of the Prosecution's knowledge, after indicating an intent to challenge the admissibility of the case at the initial appearance,⁵⁵ the Appellant has not taken any formal steps before this Court to pursue this. Finally, authorising the joinder of cases prior to the confirmation hearing does not imply any pre-judgement or lack of impartiality on the part of the Pre-Trial Chamber.⁵⁶
35. As a result, the Prosecution also opposes the Third Ground of Appeal.

⁵² Appeal Brief, paras. 38-39. The joinder of charges which are based on the same factual allegations, and where the suspects are alleged to have been part of an agreed plan to launch a given attack, is consistent with the proper administration of justice; best reflects the allegations brought by the Prosecution; avoids duplication or potential inconsistencies in the presentation of evidence; and aids in the efficient consideration of that evidence.

Further, to the extent that the Appellant bases his arguments on the evidence which the Prosecution has chosen to rely upon in this particular case (see e.g. para. 38), the arguments are completely irrelevant to this appeal.

⁵³ Appeal Brief, para. 40. The Statute gives the Trial Chamber the power to sever a joint case, and the Rules mandate such severance if some, but not all, accused in a joint case plead guilty. The Prosecution submits that the argument of the Appellant regarding a hypothetical lack of notice of the admission of guilt of a co-accused is spurious – notice of an admission of guilt would clearly have to be notified to all parties at an appropriate time.

⁵⁴ Appeal Brief, para. 41.

⁵⁵ ICC-01/04-02/07-T-3-ENG ET, 11 February 2008, pp. 12-13, 17-18, 21-24.

⁵⁶ Appeal Brief, para. 41.

The Fourth Ground of Appeal – the Decision does not violate Article 51(3)

36. The Pre-Trial Chamber's findings on the presumption of joint proceedings and the related power of the Pre-Trial Chamber to join proceedings do not violate Article 51(3). Contrary to the submissions of the Appellant, the Pre-Trial Chamber did not create a new procedural device.⁵⁷ Rather, in the absence of express provisions in the Statute and the Rules,⁵⁸ the Pre-Trial Chamber interpreted "the ordinary meaning of article 64(5) of the Statute and rule 136 of the Rules" in light of the Vienna Convention.⁵⁹ In so doing, the Pre-Trial Chamber considered and interpreted the existing provisions of the Statute and the Rules, in their proper context, and identified certain existing powers of the Pre-Trial Chamber and their procedural bases.⁶⁰ The Prosecution submits that the Pre-Trial Chamber adhered to the guidelines of interpretation of the Statute and the Rules as provided by the Appeals Chamber.⁶¹ Furthermore, the Pre-Trial Chamber's conclusions with respect to its power to join proceedings are correct.⁶²
37. The Pre-Trial Chamber thus did not need to resort to a "provisional Rule" within the meaning of Article 51(3). For that reason, the Pre-Trial Chamber did not violate the principle of legality when it chose not to proceed under Article 51(3). The higher degree of detail included in the Statute and the Rules of the ICC compared to the constitutive instruments of the UN *ad hoc* Tribunals favours a

⁵⁷ Appeal Brief, para. 44.

⁵⁸ See Decision Granting Leave, p. 7.

⁵⁹ Decision, p. 7.

⁶⁰ Decision, p. 6.

⁶¹ See in particular *Situation in the DRC*, Judgement on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, paras. 22-24 and 33-42.

⁶² The Prosecution submits that the question of whether or not the Pre-Trial Chamber filled a legal void when concluding that it has power to order the joinder of cases is not relevant to this appeal (see Appeal Brief, para. 44). The questions to be answered in this context are whether the Pre-Trial Chamber followed the correct procedure when interpreting the Statute and the Rules, or whether the Pre-Trial Chamber created a new procedural device which would require resort to the procedure prescribed by Article 51(3) and therefore exceeded its powers as contended by the Appellant.

contextual interpretation, rather than prohibiting it, as suggested by the Appellant.⁶³

38. For the reasons set out above, the Prosecution opposes the Fourth Ground of Appeal.

The Fifth Ground of Appeal – general considerations regarding joinder *per se* are not relevant to this appeal

39. The Prosecution submits that the arguments raised in support of this ground do not relate to the issue on appeal. There can be no dispute that the Statute provides for the joinder of cases and joint trials.⁶⁴ A general reference to potential concerns posed by joining criminal cases, in a domestic criminal system of jury trials,⁶⁵ is irrelevant when considering whether the Pre-Trial Chamber can authorise a joinder prior to the confirmation hearing. Similarly, arguments on the impact of the Decision to join the cases in this instance⁶⁶ have not bearing on the issue of the Pre-Trial Chamber's competence and its interpretation of the Statute and Rules.⁶⁷ The Prosecution submits that such arguments are irrelevant to, and outside the scope of, the present appeal and should thus be disregarded by the Appeals Chamber.

40. As a result, the Prosecution also opposes this Fifth Ground of Appeal.

⁶³ Appeal Brief, para. 42. In this context, the Prosecution notes that while the ICC Statute and Rules are more detailed than the analogous documents in the ICTY and ICTR, they are not as exhaustive or comprehensive as the Appellant portrays (e.g. Appeal Brief, paras. 19, 42). The Statute and the Rules contain instances where matters were left to be determined through the Court's practice and judicial interpretation – see e.g. Kress, "The Procedural Law of the International Criminal Court in Outline" 1 *Journal of International Criminal Justice* (2003) 603; Piragoff, "Evidence" in Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 389-390; see e.g. Regulation 54 indicating the range of matters to be determined regarding trial procedure; Regulations 28(3) and 29(2) also refer to the "inherent powers of the Chamber."

⁶⁴ This is expressly provided for in Article 64(5) and Rule 136.

⁶⁵ Appeal Brief, para. 46.

⁶⁶ Appeal Brief, para. 47.

⁶⁷ The Pre-Trial Chamber denied the Appellant leave to appeal a second issue, relating to whether the joinder of the cases (in this instance) seriously prejudices the rights of the defence and the protection of the interests of justice.

The Appellant's Request for Suspensive Effect

41. The Appellant has also requested that the Appeals Chamber grant suspensive effect to this appeal, pursuant to Article 82(3).⁶⁸ The Prosecution, in the particular circumstances of this case, opposes the request for suspensive effect. The Prosecution submits that, in general, the Appellant's rights as a suspect⁶⁹ are not prejudiced by the continued effect of the Decision pending resolution of this appeal and do not warrant the Appeals Chamber granting suspensive effect.
42. The core of the request for suspensive effect appears to be the alleged impact that the resolution of this appeal may have on the conduct of the confirmation hearing. While at the time of the Appellant's request for suspensive effect the confirmation hearing was scheduled to commence on 21 May 2008, the Prosecution notes that the Pre-Trial Chamber has recently postponed the commencement of the confirmation hearing until 27 June 2008.⁷⁰
43. The Prosecution notes that the Pre-Trial Chamber issued the Decision Granting Leave to Appeal on an urgent basis, referring to "the need for an urgent ruling by the Appeals Chamber on this issue".⁷¹
44. The Prosecution thus submits that any suspension of the proceedings based on this appeal is not required at this stage. In any event, and at a minimum, the present appeal should not suspend the *preparation for* the confirmation hearing at this point.

⁶⁸ Appeal Brief, paras. 49-51.

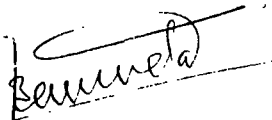
⁶⁹ Appeal Brief, para. 50: "la protection des droits de Monsieur Ngudjolo en tant que suspect".

⁷⁰ ICC-01/04-01/07-446, 25 April 2008. The Pre-Trial Chamber noted that "there are five interlocutory appeals ... which are currently pending before the Appeals Chamber; that in relation to some of them, the Appeals Chamber has to decide on the suspensive effects requested by the appellants" and therefore decided that "the confirmation hearing will commence on 27 June 2008 unless the Appeals Chamber otherwise decides" (p. 7).

⁷¹ ICC-01/04-01/07-384, 9 April 2008, p. 8. The Prosecution has also submitted this Response to the Appeal Brief as expeditiously as possible, and well within the time limit prescribed in the Regulations, in order to facilitate such urgent consideration.

Relief Sought

45. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber deny this appeal in its entirety.



Fatou Bensouda, Deputy Prosecutor
on behalf of

Luis Moreno-Ocampo, Prosecutor

Dated this 28th day of April, 2008

At The Hague, The Netherlands