



Original: English

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

Date: 21 July 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

**Notification of Defence Request for Leave to Appeal the Pre-Trial Chamber's Oral
Decision of 11 July 2008 on Redactions of the Transcript**

Source: Defence for Mr Germain Katanga

Document 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 for Germain Katanga

Mr David Hooper
Ms Caroline Buisman

Counsel for the Defence for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Jean-Chrisostome Mulamba
Nsokoloni

Legal Representatives of Applicants
[1 name per team maximum]

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

[2 names maximum]

States Representatives

The Office of Public Counsel for the Defence

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. On 24 June 2006, the Defence for Mr Katanga (“Defence”) filed its confidential *Defence Written Submissions on Fact and Law pursuant to Rule 121(9)*,¹ *inter alia* objecting to the admissibility of document DRC-OTP-0155-0318 or DRC-OTP-1016-0150 disclosed on 29 January 2008 as incriminating evidence, which is a *procès-verbal d’audition* of Mr Katanga taken in Kinshasa on 20 January 2006 (“procès-verbal”). Pre-Trial Chamber I have reserved all their decisions on admissibility of evidence to their final judgement on the confirmation of charges.
2. On 2 July 2007, the Prosecution have said that they will not rely on the *procès-verbal* for the purpose of the confirmation hearing.² In effect this defers the admissibility argument to the Trial Chamber - if the charges are confirmed.
3. The Defence were concerned that the document not be further referred to - in particular it was concerned that it should not come within the public domain. It should not be made public unless and until there is a ruling that it is admissible. It is prejudicial to the accused.³ Publicity will only cause prejudice in the minds of those who come to know its contents, including those who are to be his final judges, but also including potential witnesses for both sides and the public at large.
4. The *procès-verbal* was then introduced by one of the victims’ legal representatives, Mr Diakiese, during the hearing of 7 July 2008.⁴ Given the confidential nature of the *procès-verbal*, that the Prosecution have said that they will not rely on this document for the purpose of the confirmation hearing and that the Pre-Trial Chamber have

¹ ICC-01/04-01/07-641-Conf.

² ICC-01/04-01/07-T-41-ENG Ct WT 02-07-2008 1-54 SZ PT, p. 15 :

10 In any event, let me address the first point, the question of the
 11 proces-verbal d’audition. In order to accelerate the proceedings and not
 12 be cut up in legal details at this stage, meaning this stage of the
 13 confirmation hearing, at this stage of the proceedings against
 14 Mr. Katanga and Mr. Ngudjolo, the Prosecution will not rely on these two
 15 copies of the proces-verbal which can be found at the following ERN
 16 numbers DRC-OTP-0155-0318, and the second one can be found at
 17 DRC-OTP-1016-0150.

18 In taking this position, the Prosecution does not concede that
 19 these documents are not admissible for the reasons advanced by
 20 Mr. Katanga’s lawyer, Mr. Hooper, but for the purpose of the confirmation
 21 hearing the Prosecution does not intend to rely on these two
 22 proces-verbal.

³ The Prosecution have quoted the *procès-verbal* in the Prosecution *Additional List of Evidence* (ICC-01/04-01/07-584-Conf-Anx1b) in support of the allegation, contained in the *Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute* of 12 June 2008 (ICC-01/04-01/07-584-Anx1A, para. 90) that “Katanga has admitted his responsibility in the attack on the village of Bogoro”.

⁴ ICC-01/04-01/07-T-44-ENG RT 07-07-2008, p. 16 and 19.

determined that the legal representatives of victims cannot introduce evidence,⁵ Mr Diakiese should not have introduced this document, particularly not in a public session.

5. On 7 July 2008, the Defence filed the confidential *Defence Request for Redactions*, requesting the redactions of the two excerpts of the public transcript of the hearing of 7 July 2008 referring to the procès-verbal.⁶
6. During the hearing of 11 July 2008, Pre-Trial Chamber I made an oral ruling that, as the excerpts of the transcript were not prejudicial to the victims or witnesses, they could remain public; therefore they rejected the *Defence Request for Redactions* and ordered that it be reclassified as public⁷ ("Oral Decision of 11 July 2008").
7. In accordance with the procedure for leave to appeal as set out in the *Decision on the Procedure for Leave to Appeal pursuant to article 82 (l)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations and on the Pending Requests for Leave to Appeal Concerning Witnesses 132 and 287* ("Decision on the Procedure for Leave

⁵ ICC-01/04-01/07-T-43-ENG 04-07-2008, p. 70 :

PRESIDING JUDGE KUENYEHIA: Mr. Keta, victims cannot produce evidence of any kind in this -- in the process in this court. They can, if they are non-anonymous, discuss evidence presented by the Prosecution, but they cannot produce evidence. They can also discuss legal facts. And so I'm afraid the Chamber cannot accept the document that you refer to, because we have only one Prosecution -- Prosecutor, and that is the Office of the Prosecutor. We cannot allow a second prosecute near this process.

⁶ ICC-01/04-01/07-663-Conf.

⁷ ICC-01/04-01/07-T-46-ENG ET WT 11-07-2008 1-46 NB PT, p. 24-25.

14 On the 7th of July, the Defence of Mr. Germain Katanga filed a
 15 confidential request for the redaction of pages 16, lines 4 to 7, and
 16 page 19, lines 4 to 10 of the public transcript of the hearing of 7th
 17 July 2008, ICC-01/04-01/07-T.44-ENG RT. The request was made on the
 18 basis that one of the Legal Representatives of Victims, and I quote:
 19 "Quoted substance matters from a confidential document during the hearing
 20 and that the requested redactions would give appropriate respect to
 21 confidential status of this document."

22 The Chamber notes that the relevant excerpts of the transcript do
 23 not identify any person other than Mr. Germain Katanga. No victim or
 24 witness shall be put at risk as a result of the disclosure to the public
 25 of the excerpts of the confidential document in question, and therefore
 1 the requested redactions will serve no purpose. The Chamber is of the
 2 view that although the information comes from a confidential document,
 3 the excerpts can remain on the public record. The Chamber therefore
 4 decides to reject the request of the Defence for Germain Katanga for
 5 redactions to transcript as numbered above.

6 Furthermore, the Chamber finds no reason why the request should
 7 remain confidential and hereby reclassifies document

8 ICC-01/04-01/07-663-Confidential as public.

to Appeal”),⁸ the Defence hereby notifies Pre-Trial Chamber I of its intention to request leave to appeal the Oral Decision of 11 July 2007 on the following grounds:

- The Pre-Trial Chamber took no account of the prejudice to the Defence of making such material public;
- The decision to make it a public document undermines any future submission on admissibility (deferred following the decision not to rely on the material by the Prosecution);
- The decision precedes any decision in respect of the admissibility of the document;
- In the event that the document is rendered inadmissible, disclosure of it to the public despite it being confidential is improper and defeats in part the purpose of rendering it inadmissible.

8. Accordingly, the Defence submits that the Pre-Trial Chamber made a reversible error affecting the fairness and expeditiousness of the proceedings and in respect of which an immediate resolution of the Appeals Chamber may materially advance the proceedings, thereby squarely falling within the ambit of Article 82(1)(d) of the Rome Statute.
9. In accordance with the Decision on the Procedure for Leave to Appeal, the Defence will file, five days after the receipt of the notification of the Chamber's decision confirming or not the charges, an additional document in support of the current application in which the reasons presently enumerated will be elaborated upon.⁹

Respectfully submitted,

⁸ ICC-01/04-01/07-601:

13. [...] the relevant party files, within the five day time limit provided for in rule 155 of the Rules, a short (one or two pages) written application for leave to appeal in which:

(i) the issues for which leave to appeal is requested are identified; and
(ii) the legal and/or factual reasons supporting the request for each of the issues for which leave to appeal is requested are specified via their enumeration.

14. [...] once an application has been filed, the party filing it shall have until five days after the receipt of the notification of the Chamber's decision confirming or not the charges to file an additional document in support of the application in which the reasons enumerated in the original application may be elaborated upon.

⁹ ICC-01/04-01/07-601, para. 14.



David HOOPER

Dated this 21 July 2008

At London/ The Hague