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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

**Defence Application for Leave to Appeal the Decision on the Confirmation of
Charges**

Source: Defence for Mr Germain Katanga

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

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Introduction

1. The Defence for Mr Germain Katanga (“Defence”) requests leave to appeal the Pre-Trial Chamber’s *Decision on the Confirmation of Charges* (“Confirmation Decision”).¹ The Defence submits that this Decision contains two errors warranting the Appeals Chamber’s consideration: (1) the majority of the Pre-Trial Chamber –with Judge Anita Ušacka dissenting- wrongfully confirmed the sexual violence charges under counts 6, 7, 8, and 9 despite lack of sufficient evidence of the requisite intent of *dolus directus*; (2) the majority of the Pre-Trial Chamber –with Judge Anita Ušacka dissenting- applied an incorrect doctrine of intent, that is, *dolus eventualis* instead of *dolus directus*, in respect of the sexual violence charges under counts 6, 7, 8, and 9.

Threshold Criteria for Leave to Appeal

2. The Defence files this *Defence Application for Leave to Appeal the Decision on the Confirmation of Charges* (“Defence Application”) pursuant to article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.
3. Pre-Trial Chambers I and II have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets 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.²

Issue of Appeal

4. On 11 July 2008, the Defence made oral submissions, *inter alia*, arguing that Article 30 of the Rome Statute does not include *dolus eventualis* and, accordingly, a suspect cannot be

¹ ICC-01/04-01/07-716-Conf. A public redacted version was issued on 1 October 2008 : ICC-01/04-01/07-717.

² ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

charged to have committed a crime under the jurisdiction of the Court with *dolus eventualis*.³

5. In the Confirmation Decision, the Pre-Trial Chamber held that that “there is no need for the present Decision to discuss whether the concept of *dolus eventualis* has a place within the framework of article 30 of the Statute because the Chamber will not rely on this concept for the mental element in relation to the crimes charged. Therefore, the Defence for Germain Katanga's contention that the Statute does not include the notion of *dolus eventualis* is rendered moot.”⁴
6. Instead, the Pre-Trial Chamber maintains that it has only relied on the doctrine of *dolus directus* of the first and second degree in their determination as to whether the counts should be confirmed. With reference to Article 30 of the Rome Statute, the Pre-Trial Chamber has defined *dolus directus* of the first degree as requiring that the suspect:⁵
 - (i) knows that his or her actions or omissions will bring about the objective elements of the crime;
 - (ii) undertakes such actions or omissions with the express intent to bring about the objective elements of the crime.
7. The Pre-Trial Chamber has defined *dolus directus* of the second degree as not requiring direct intent to bring about the objective elements of the crime, but an awareness “that it (the consequence) will occur in the ordinary course of events”.⁶
8. Whilst the Defence is appreciative of these findings, it submits that the Pre-Trial Chamber has not followed through its own reasoning in respect of the sexual violence crimes charged under counts 6, 7, 8 and 9. The majority of the Pre-Trial Chamber has held that, based on the evidence produced by the Prosecution, there are substantial grounds to believe that the suspects committed these sexual violence crimes with *dolus directus* of the second degree.⁷
9. The Defence respectfully submits that, contrary to the views of the majority of Pre-Trial Chamber I, those counts cannot be confirmed under the doctrine of *dolus directus* of the second degree and fully endorses Judge Ušacka's arguments set out in her Partly Dissenting Opinion, paragraphs 3-29.
10. There is no evidence of any direct involvement of Mr. Katanga in any of the sexual crimes allegedly committed; neither is there any evidence that Mr. Katanga ordered or provoked

³ ICC-01/04-01/07-T-46-ENG ET, page 31, lines 8-12 and pages 39 line 15 – 42 line 13. See also Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, filed on 28 July 2008, ICC-01/04-01/07-698, paras. 18, 31- 32.

⁴ Confirmation Decision, para. 531.

⁵ Confirmation Decision, para. 529.

⁶ Confirmation Decision, para. 530 (Art. 30(2)(b) Rome Statute).

⁷ Confirmation Decision, paras. 567 and 569.

the commission of those crimes.⁸ There is also no evidence that Mr. Katanga knew that sexual crimes were being committed, or would be committed in the ordinary course of events.⁹ At most, it could be argued that the alleged commission of sexual crimes was the foreseeable consequence of putting in action the alleged common plan ‘to wipe out Bogoro’. That, however, may amount to *dolus eventualis*, but certainly not to *dolus directus*.

11. The Defence fully adopts Judge Ušacka’s view that “the evidence highlights the fundamental difference between the perpetrator’s cognitive awareness that the action will result with certainty and an awareness that undertaking a course of conduct carries with it an unjustifiable risk of producing harmful consequences”.¹⁰

12. The majority of the bench relied on the following provisional findings to conclude that there were substantial grounds to believe that the suspects committed the sexual violence crimes described in counts 6, 7, 8, and 9 with *dolus directus* of the second degree:¹¹

- (i) rape and sexual slavery against of women and girls constituted a common practice in the region of Ituri throughout the protracted armed conflict;
- (ii) such common practice was widely acknowledged amongst the soldiers and the commanders;
- (iii) in previous and subsequent attacks against the civilian population, the militias led and used by the suspects to perpetrate attacks repeatedly committed rape and sexual slavery against women and girls living in Ituri;
- (iv) the soldiers and child soldiers were trained (and grew up) in camps in which women and girls were constantly raped and kept in conditions to ease sexual slavery;
- (v) Germain Katanga, Mathieu Ngudjolo Chui and their commanders visited the camps under their control, frequently received reports of the activities of the camps by the camps commanders under their command, and were in permanent contact with the combatants during the attacks, including the attack on Bogoro;
- (vi) the fate reserved to captured women and girls was widely known amongst combatants; and
- (vii) the suspects and the combatants were aware, for example, which camps and which commanders more frequently engaged in this practice.

13. It is respectfully submitted that, whilst these provisional findings may support the conclusion that there are substantial grounds to believe that the suspects were aware of the likelihood that sexual crimes would be committed in the execution of the common plan ‘to wipe out Bogoro’ and, hence, acted with *dolus eventualis*, they do not support the conclusion of the majority of the Pre-Trial Chamber that there are substantial grounds to believe that they were aware that such crimes would be committed in ‘the ordinary course of events’.¹² Accordingly, since the suspects are not charged with *dolus eventualis*, these charges should not have been confirmed.

⁸ See also Judge Ušacka’s Partly Dissenting Opinion, paras. 19 and 21.

⁹ See also Judge Ušacka’s Partly Dissenting Opinion, paras. 20, 23-25.

¹⁰ Judge Ušacka’s Partly Dissenting Opinion, para. 22.

¹¹ Confirmation Decision, para. 568.

¹² See also Judge Ušacka’s Partly Dissenting Opinion, para. 14.

14. The contest arises not only from a disagreement on the amount of evidence available to demonstrate *dolus directus*, but also on the amount of evidence required to find that there are substantial grounds to believe that the alleged crimes were committed with the requisite intent of *dolus directus*. Thus, the matter in dispute constitutes the following factual and legal error:

- (1) The majority of Pre-Trial Chamber I erred in fact in accepting that the Prosecution has produced sufficient evidence to find that Mr. Katanga had *dolus directus* for the commission of the sexual crimes charged as counts 6, 7, 8, and 9;
- (2) The majority of Pre-Trial Chamber I erred in law in applying an incorrect doctrine of *dolus directus*.

15. Both errors amount to issues arising from the Confirmation Decision, significantly affecting both the fairness and expeditiousness of the proceedings; and the outcome of the trial. The issues also warrant an immediate resolution of the Appeals Chamber.

Impact on the Fairness of the Proceedings

16. The majority of the Pre-Trial Chamber I has confirmed four counts that it should not have confirmed. As a consequence, Mr. Katanga faces ten counts instead of six. He must prepare a defence in respect of counts that were wrongfully confirmed because they fail to meet the threshold for confirmation. The fairness of the proceedings is, therefore, affected.
17. Moreover, notwithstanding that the Confirmation Decision firmly states that the suspects are not charged with *dolus eventualis*, it applies a standard of evidence that falls short of the standard of evidence that must be met to confirm the charges pursuant to a *dolus directus* doctrine. The application of this lower standard effectively lets in *dolus eventualis* through the backdoor, thereby circumventing the parameters set by Article 30 of the Rome Statute. The fairness of the proceedings is also clearly affected on this basis.

Impact on the Expeditiousness of the Proceedings

18. The Defence submits that the two issues affect the expeditiousness of the proceedings in that four counts have been confirmed that should not have been confirmed. Consequently, all parties have to prepare for a more voluminous trial resulting in delays that can be avoided if the errors are corrected by the Appeals Chamber.
19. A denial of this Application to grant leave to appeal would further impact on the expeditiousness of the proceedings because the issue of the correct interpretation of the

doctrines of intent would become a prime issue to be litigated before the Trial Chamber if the Confirmation Decision stands. Endless litigation may flow from it, which would render the pre-trial and/or trial phases unnecessarily lengthy.

Impact on the Outcome of Trial

20. These errors impact on the outcome of the trial because, if not corrected, they entail the risk that Mr. Katanga be ultimately convicted for charges that did not meet the threshold for confirmation. Affirming the majority view rather than the minority view makes a difference of four counts, thus clearly impacting on the outcome of trial.

An Immediate Resolution may materially advance the Proceedings

21. The errors whose leave to appeal is sought are made by two out of three judges. Judge Ušacka's strong dissenting view on these issues demonstrates that they are not straight forward, clear cut matters. An Appeals Chamber's decision is, therefore, clearly warranted to set the matters straight and confirm which view is the correct one: the view of the majority of two judges, or that of the dissenting judge. As held by the Appeals Chamber, "removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings".¹³

22. Moreover, the introduction of *dolus eventualis* through the backdoor may also have an impact on the ultimate issue of guilt, not only in respect of the crimes involving sexual violence, but also the other crimes charged. The ultimate standard of proof may be lowered as a result. The Defence fully accords with Judge Ušacka's view that "it is not the duty of the Chamber to lessen the Prosecution's burden, but rather to assess the evidence presented and to decide whether such evidence is sufficient to establish substantial grounds to believe that each element of each of the crimes has been committed."¹⁴ The Defence would take this view one step further and say that the Chamber is not authorised to lessen the Prosecution's burden.

23. It is further essential for future proceedings before the ICC that the doctrine of *dolus directus* of the second degree be given a correct interpretation. Absent any other case law

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

¹⁴ Judge Ušacka's Partly Dissenting Opinion, para. 28.

on this matter, the Confirmation Decision will serve as a guideline for future cases. It is therefore of crucial importance that this guideline be legally correct.

24. It is important that the Appeals Chamber be given an opportunity to express its view on those matters immediately because that would avoid the situation where the proceedings continue in respect of four counts which should be dropped at this stage. That would be a waste of time and resources and defeat the purpose of the confirmation hearing. It would also avoid that the standard be set incorrectly.

25. All these arguments demonstrate that an immediate resolution of the matter by the Appeals Chamber would materially advance not only the pending proceedings but also any future proceedings. Accordingly, it is submitted that an immediate resolution of the appellate issues is not only in the interests of the Defence, but also in the interests of the Court.

Conclusion

26. On the grounds adumbrated above, the Defence requests the Pre-Trial Chamber to grant leave to appeal the Pre-Trial Chamber's *Decision on the Confirmation of Charges* pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.

Respectfully submitted,



David HOOPER
Lead Counsel for Germain Katanga

Dated this 6th October 2008

At London