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PRE-TRIAL CHAMBER I

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

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

Public Document

**Prosecution's Response to Application by the Defence of Katanga for Leave to
Appeal the Decision on the Confirmation of Charges**

Source: The 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

This Application for Leave to Appeal by the Defence of Germain KATANGA ("the Defence") concerns two issues that allegedly arise out of the Pre-Trial Chamber's confirmation of counts charging rape and sexual slavery. Each issue, however, centers on a common question: whether the evidence presented by the Prosecution was sufficient to satisfy the standard of *dolus directus* in respect of the relevant charges.

The Prosecution submits that this question does not constitute an "issue" that properly can be subject to interlocutory appeal. Instead, the question merely reflects the Defence's disagreement with the finding of the majority of the Chamber on the basis of the evidence before it.

The Defence will have a full opportunity to raise all questions regarding the evidence needed to meet the applicable standard of intent for Germain KATANGA before the Trial Chamber. To allow an appeal against the confirmation of a charge based on a disagreement whether the evidence at the confirmation proceeding established substantial grounds to hold the accused for trial would render every confirmation of a charge a fit matter for interlocutory appeal – an option that the Statute consciously excluded.¹

Even if the Chamber considers that either of the "issues" identified in the Application properly arise out of the Decision, the Prosecution submits that they do not meet the standard for leave to appeal. In particular,

- The Defence has failed to demonstrate that these issues affect the fair and expeditious conduct of the proceedings. If interlocutory appeal is not authorized, the Defendant will have a full opportunity to make arguments regarding the sufficiency of the evidence and the appropriate legal standards before the Trial Chamber and in any subsequent appeal against the Trial Chamber's decision.

¹ See ICC-01/04-01/06-915, 24 May 2007, para. 19 and authorities cited therein.

- Given that the Trial Chamber must assess the evidence for itself and is not bound by the factual and legal findings at the confirmation stage (including regarding the *mens rea*), any flaw in those findings also will not affect the outcome of the trial.

For the same reasons, the immediate resolution of these issues will not materially advance, and in fact will delay, the trial.

Procedural Background

1. On 2 July and 6 July 2007, the Pre-Trial Chamber issued arrest warrants for Germain KATANGA and Mathieu NGUDJOLO CHUI. They made their initial appearances before the Court on 22 October 2007 and 11 February 2008, respectively, and the cases were joined on 10 March 2008.²
2. The Prosecution filed its Amended Document Containing the Charges on 26 June 2008.³
3. Subject to the procedure set out by the Pre-Trial Chamber on 17 June 2008,⁴ on 21 July 2008 the Defence of Germain KATANGA ("the Defence") filed a notice of intent to appeal regarding the redaction of references to a *procès-verbal* from a transcript.⁵ The Defence has since stated that it is not pursuing leave to appeal this issue.⁶
4. The Pre-Trial Chamber held a Confirmation Hearing from 27 June to 16 July 2008. Written observations by the parties and participants were filed on 22 and 28 July 2008.

² ICC-01/04-01/07-257.

³ ICC-01/04-01/07-649.

⁴ ICC-01/04-01/07-601.

⁵ ICC-01/04-01/07-688.

⁶ ICC-01/04-01/07-720.

5. On 26 September 2008, the Pre-Trial Chamber issued the Decision on the Confirmation of Charges ("Decision").⁷ The Decision confirmed 10 of the 13 counts against each of the accused.
6. On 6 October 2008, the Defence filed an Application for Leave to Appeal against the Confirmation Decision.⁸ The Defence sought leave to appeal two issues:
 - "(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 ["the First Issue"];
 - (2) The majority of Pre-Trial Chamber I erred in law in applying an incorrect doctrine of *dolus directus* ["the Second Issue"]."⁹
7. The Prosecution's response to the Application for Leave to Appeal is made pursuant to Regulation 65(3).

**The First Issue does not arise from the Decision or
meet the criteria for leave to appeal**

8. The Prosecution submits that leave should not be granted as the Statute does not foresee interlocutory appeals against findings of fact underlying a confirmation of charges. The confirmation of a charge is not a final resolution of any factual issue. It simply authorizes the trial, which is the next step in the criminal process. At that stage, an accused will have a full opportunity to present all factual and legal arguments before the Trial Chamber. If an accused is convicted, he or she will further have the right to appeal from the final decision and to raise any alleged error regarding the conviction on appeal.¹⁰

⁷ ICC-01/04-01/07-716-Conf; ICC-01/04-01/07-717.

⁸ ICC-01/04-01/07-721 ("Application for Leave to Appeal").

⁹ Application for Leave to Appeal, para. 14; and arguing that "Both errors amount to issues arising from the Confirmation Decision" (para. 15).

¹⁰ In contrast, the non-confirmation of a charge may terminate proceedings in whole or with respect to one or more counts. For the Prosecution, appeal may be the only remedy available. The principles governing an application by the Prosecution for leave to appeal a decision on the confirmation of charges may therefore be different, as the Prosecution will not have another opportunity to present its submissions on the disputed charge before the Trial Chamber or as part of any final appeal. Accordingly, a number of national systems disallow defence appeals from decisions equivalent to the confirmation of the charges, while allowing the Prosecution to appeal a decision equivalent to a declination to confirm the charges. See for instance § 210(1) of the German Rules of Criminal Procedure (StPO), which provides that the accused cannot appeal the decision in which the

9. Any authorization of appeals from orders confirming charges is absent from the Statute, and commentators note that “[a]ppeal is not allowed, in principle, with respect to [the] decision” to confirm charges under Article 61(7)(a).¹¹ The Prosecution thus submits that the Chamber should not accept that the Defence’s claim constitutes an issue, for the purposes of Article 82(1)(d), arising out of the Decision.

(a) *The First Issue does not arise from the Decision*

10. The First Issue raised by the Defence is that the Chamber “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”. An issue, for the purposes of leave to appeal, requires more than mere factual disagreement over whether the evidence is sufficient to allow the accused to be tried. Rather, the Defence must demonstrate that there is some “subject or topic requiring a decision for its resolution”.¹² As presented by the Defence, the First Issue is “merely a question over which there is disagreement or conflicting opinion.”¹³ It therefore does not meet that standard.
11. In its Application for Leave to Appeal, the Defence sets out the factual findings¹⁴ from which the Pre-Trial Chamber found substantial grounds to believe the accused were aware that the sexual crimes would be committed in the ordinary

proceedings are opened. Section 210(1) states that the prosecution, on the other hand, has an opportunity to appeal the decision by which the opening of the proceedings has been declined. This approach has been confirmed by the Supreme Court of Germany (BGH, *Beschluß* vom 17. 3. 1999 - 2 BJs 122-98-1 - 3 ARs 2-99 (NJW 1999, 1876)). Similarly, the Italian Code of Criminal Procedure (*codice di procedura penale*) provides that a decision that declines to open the trial proceedings can be appealed (Art. 428). On the other hand, a decision to open the trial proceedings is not subject to appeal (M. Pisani, et al., *Manuale di Procedura Penale*, Seconda Edizione, Monduzzi Editore, 1996, p. 400). In the United States, federal appellate courts will not entertain an accused’s appeal from the refusal to dismiss an indictment in an analogous circumstance. “If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed.” *Costello v. United States*, 350 U.S. 359, 363 (1956). A federal statute, however, authorizes appeals by prosecutors from orders dismissing charges before trial. Title 18, United States Code, Section 3731, provides: “In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information ... as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.”

¹¹ Shibahara and Shabas, “Article 61”, in Triffterer (ed) *Commentary on the Rome Statute of the ICC* (2nd ed) (2008, Verlag CH Beck, Munich), p. 1179.

¹² *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 9.

¹³ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 10.

¹⁴ Application for Leave to Appeal, para. 12.

course of events. The Defence disagrees with the Pre-Trial Chamber's interpretation of those facts. The Application itself recognises that the purported issues are "disagreement[s]".¹⁵ But it provides no basis for supporting that this disagreement is an issue, other than referring to the dissenting opinion of Judge Ušacka, and thus fails to properly identify an issue.¹⁶

12. Not every factual disagreement could be appealed, as this Chamber has previously held, and the Statute rejects precisely that scenario.¹⁷
13. The Prosecution thus submits that the First Issue as identified by the Defence does not constitute an "issue" for the purposes of Article 82(1)(d).
14. However, even if the Chamber considers that it may constitute an issue, the Prosecution further submits that the Defence has failed to demonstrate that it satisfies the additional criteria for leave to appeal.

(b) The First Issue does not affect the fair and expeditious conduct of the proceedings

15. The Defence does not demonstrate that the First Issue will affect the fair conduct of the proceedings. The accused has been informed in detail of the nature of the case against him, and the Defence is in a position to fully prepare its case. An

¹⁵ "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" (Application for Leave to Appeal, para. 14, emphasis added). Thus while the Application identifies a disagreement and alleges errors, nowhere does it properly present an issue.

¹⁶ As the Prosecution has previously submitted, while arguments pertaining to the merits are not required in an application for leave to appeal, mere disagreement with an aspect of a judicial decision cannot serve as the basis for leave to be granted. An applicant should thus provide some arguments establishing that the objection to a particular aspect of a decision has some arguable basis (see ICC-01/04-01/06-843, paras. 34-35). The Pre-Trial Chamber in that instance found "the matter raised by the Defence to be nothing more than a disagreement on the interpretation of a rule of law which does not constitute an issue within the meaning of article 82(1)(d) of the Statute." (ICC-01/04-01/06-915, para. 70).

¹⁷ See ICC-01/04-01/06-915, 24 May 2007, para. 19 and authorities cited therein. As the Pre-Trial Chamber explained, the drafters of the Statute considered initially, but ultimately rejected, blanket authorization of interlocutory appeals against rulings on evidence and concerning the confirmation or denial of an indictment. Specifically, "[t]he right to appeal against a decision to confirm an indictment was deleted from the article." Brady, H., & Jennings, M., "Appeal and Revision" in Lee, R.S., *International Criminal Court: the Making of the Rome Statute* 294 (Kluwer Law International, 1999). As another commentator explained: "Similarly, the negotiators decided not to include express permission for the defence to appeal against an *indictment*. They decided that ... to give the defence a right to appeal against such decisions would encourage the entering of appeals purely to gain time." Roth, P., & Henzelin, M., "The Appeal Procedure of the ICC", in Cassese, A., & Jones, W.D. (Editors), *The Rome Statute of the International Criminal Court: A Commentary, Volume II* (Oxford University Press, 2002).

accused has a right to a confirmation hearing, but he does not have a right to avoid trial on offences that were confirmed by the Pre-Trial Chamber. So, the fact that the accused will be tried on those charges, even though the Defence disagrees with the case, will not render the trial unfair.

16. Challenges to the sufficiency of the evidence at the confirmation hearing stage do not need to be resolved by the Appeals Chamber in order to move the trial proceedings forward. An appeal at this stage will only delay the proceedings.
17. The matter is ripe for consideration by the Trial Chamber, which will hear all of the evidence presented by the Prosecution and Defence. After hearing the evidence, that Chamber will determine whether the Prosecution proved all the confirmed charges, including the four disputed counts.
18. Interjecting an appeal to consider issues that can be fully addressed at trial will only delay, not expedite, the process. Even if the Appeals Chamber were to uphold the Defence's position, that would not necessarily remove the four disputed counts from the case. Instead, the case would be remanded to the Pre-Trial Chamber, which could request that the Prosecution provide further evidence under Article 61(7)(c)(i), as recognized by Judge Ušacka.¹⁸ And even if an appeal were to result in a declination to confirm the charges,¹⁹ the Prosecution would have the right to seek confirmation of those charges at a later time, supported by additional evidence.²⁰ Under these varying scenarios, an interlocutory appeal would only interrupt and delay the case, not serve the expeditious conduct of the proceedings.²¹
19. The Defence's argument that appeal will narrow the evidence that must be presented at trial is also invalid.²² The witnesses presented at the confirmation hearing in support of these charges, Witnesses 132 and 249, are also witnesses in

¹⁸ Decision, Partly Dissenting Opinion of Judge Anita Ušacka, para. 29. This provision also provides for the Prosecution to conduct further investigations with respect to a given charge.

¹⁹ Article 61(7)(b).

²⁰ Article 61(8).

²¹ See ICC-01/04-01/06-915, para. 29.

²² Application for Leave to Appeal, para. 18.

respect of confirmed charges that are not disputed.²³ Their evidence may be presented at trial in any event.

(c) The First Issue will not affect the outcome of the trial

20. The outcome of the trial will depend upon whether the evidence presented by the Prosecution meets the standard set out in Article 66(3). If, as the Defence argues, the evidence in support of the four rape and sexual slavery charges “did not meet the threshold for confirmation”,²⁴ then the person charged is not likely to be convicted and if he is, the Defence can renew those arguments on a post-conviction appeal.

(d) Immediate resolution of the First Issue will not materially advance the proceedings

21. Finally, the Prosecution submits that the immediate resolution of this issue by the Appeals Chamber will not materially advance the proceedings. The Trial Chamber is obliged to consider and assess independently all evidence before it²⁵ and is not bound by any of the factual or evidentiary findings of the Pre-Trial Chamber.²⁶
22. The Defence raises two additional arguments in support of this requirement that immediate resolution may materially advance the proceedings. The Defence first argues that the existence of a dissenting opinion warrants the intervention of the Appeals Chamber.²⁷ The Prosecution submits that the existence of a partly dissenting opinion does not require interlocutory consideration of the issue by the Appeals Chamber.²⁸ The Partly Dissenting Opinion expresses a different assessment of the evidence against the agreed legal standard. The Appeals Chamber has confirmed that the “[a]ppraisal of

²³ In particular Count 11: Intentional Attack against the Civilian Population.

²⁴ Application for Leave to Appeal, para. 20.

²⁵ Article 64(9); Rule 63(2).

²⁶ ICC-01/04-01/06-1084, paras. 4-5, 43. See also Decision, paras. 71 and 193; ICC-01/04-01/06-803-tEN, paras. 55 and 90. The Pre-Trial Chamber has previously considered this in refusing leave to appeal issues regarding evidence in a confirmation decision: see ICC-01/04-01/06-915, paras. 36, 39-40, 54, 68.

²⁷ Application for Leave to Appeal, para. 21.

²⁸ The existence of a dissenting opinion does not create a divergence or inconsistency in the jurisprudence of the court. In contrast, when two or more Chambers have taken different positions, then the Prosecution recognises that this can be a factor in favour of granting leave to appeal (see e.g. ICC-02/05-114, para. 34 and authorities cited therein).

evidence [...] lies, in the first place, with the Pre-Trial Chamber”;²⁹ and contrary to the submission of the Defence, it is thus not a question on which the Appeals Chamber must “confirm which view is the correct one” between the majority and the dissent.³⁰

23. The Defence also argues that “the Appeals Chamber [must] be given an opportunity to express its view on those matters immediately [to] 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.”³¹ As previously noted, the system of appellate review established by the Statute does not provide for interlocutory appeals from preliminary decisions to confirm charges.³²

**The Second Issue also does not arise from the Decision or
meet the criteria for leave to appeal**

(a) The Second Issue does not arise from the Decision

24. The Second Issue presented by the Defence also does not constitute an appellable issue arising out of the Decision. In large part, this Second Issue restates the First Issue: though worded differently, ultimately it constitutes a disagreement over the “standard of evidence”³³ applied by the Chamber in finding that the evidence was sufficient to confirm the charges in question.

²⁹ ICC-01/04-01/07-572 OA4, para. 25. The Appeals Chamber went on to state that it “may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues.”

³⁰ Application for Leave to Appeal, para. 21. Indeed, even if the Dissenting Opinion of Judge Ušacka was found to be correct, this would not result in the charges being rejected under Article 61(7)(b). Rather, Judge Ušacka would have requested that the Prosecutor provide further evidence under Article 61(7)(c)(i). Furthermore, granting leave to appeal at this stage is not the only way in which the majority and minority views may be considered. The Defence may make submissions based on Judge Ušacka’s views regarding the sufficiency of the evidence before the Trial Chamber, and as part of any final appeal if necessary.

³¹ Application for Leave to Appeal, para. 25.

³² See para. 12, above.

³³ Application for Leave to Appeal, para. 17.

25. The Defence argues that the Pre-Trial Chamber must have used the test of *dolus eventualis* to determine the criminal liability of the accused, since an application of *dolus directus* in the second degree could not have led to the confirmation of these charges. However, the Defence does not demonstrate that this alleged incorrect legal standard (or “incorrect doctrine”³⁴) actually arises out of the Decision.³⁵ In fact, the Defence acknowledges that the Decision explicitly states that it does not rely upon *dolus eventualis*.³⁶ The Defence merely disagrees that the Pre-Trial Chamber could have reached the factual conclusion it reached in accordance with the legal standard it enunciated.³⁷
26. The Defence does not explain how the allegedly erroneous introduction of *dolus eventualis* arises out of a Decision that specifically denies it is invoking that standard.
27. The Defence thus does not identify any issue arising out of the reasoning of the Decision or the standard it set out. Furthermore, as with the First Issue, even if the Chamber considers that this may constitute an issue, the Prosecution further submits that the Defence has also failed to demonstrate that it satisfies the additional criteria for leave to appeal.
- (b) *The Second Issue does not affect the fair and expeditious conduct of the proceedings*
28. The Second Issue identified by the Defence does not affect the fair conduct of the proceedings. The legal standard for the *mens rea* of the accused applied by the Chamber in confirming the charges does not bind the Trial Chamber. This issue therefore does not impact on the fairness of the ongoing proceedings.

³⁴ Application for Leave to Appeal, para. 14(2).

³⁵ The Defence merely asserts that the evidence presented could only have amounted to *dolus eventualis*, and not to *dolus directus* – see Application for Leave to Appeal, paras. 10, 13. The Defence also refers to para. 22 of Judge Ušacka’s dissent (Application for Leave to Appeal, para. 11). However, Judge Ušacka does not disagree with the doctrine of intent applied in the Decision, but only “whether there is sufficient evidence to establish substantial grounds to believe that in respect of counts 6, 7, 8 and 9, the suspects acted with *dolus directus* in the first or second degree” (Decision, Partly Dissenting Opinion of Judge Anita Ušacka, para. 12).

³⁶ Application for Leave to Appeal, paras. 5-6, 8. See also Decision, paras. 529, 531.

³⁷ The Pre-Trial Chamber previously considered an allegation that the standard which was applied for the confirmation of charges was “far too low” was “nothing more than a disagreement on the interpretation of a rule of law which does not constitute an issue within the meaning of article 82(1)(d) of the Statute” - ICC-01/04-01/06-915, paras. 70-71.

29. The Second Issue also does not affect the expeditious conduct of the proceedings. The Defence argues that “the issue of the correct interpretation of the doctrines of intent would become a prime issue to be litigated before the Trial Chamber”.³⁸ The Prosecution agrees that the *mens rea* required for criminal liability under the Statute is indeed an issue appropriately to be considered by the Trial Chamber and subsequently by the Appeals Chamber.³⁹

30. An interlocutory appeal should not be used to obtain an Appeals Chamber ruling on such an issue before it is fully considered by the Trial Chamber.

(c) The Second Issue will not affect the outcome of the trial

31. The Second Issue also does not affect the outcome of the trial. As stated previously, regardless of the propriety of the Pre-Trial Chamber’s application of the doctrine of *dolus directus*, the Trial Chamber is not bound by any legal, factual or evidentiary findings in the Confirmation Decision.⁴⁰

(d) Immediate resolution of the Second Issue will not materially advance the proceedings

32. The immediate resolution of the Second Issue also is not required to advance the proceedings. Like the factual findings in the First Issue, the Pre-Trial Chamber’s legal findings regarding the interpretation or application of *dolus directus* in the second degree do not bind the Trial Chamber and thus do not need to be considered, confirmed or corrected by the Appeals Chamber in order for the case to properly proceed.

33. As with the First Issue, the Prosecution submits that the proper manner for the case to proceed is for the trial to be held.

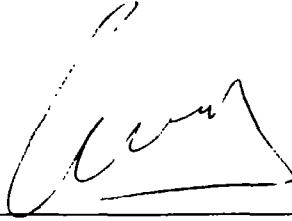
³⁸ Application for Leave to Appeal, para. 19.

³⁹ While the confirmation (or not) of the charges binds the Trial Chamber and defines the parameters of its factual inquiry, the issues discussed in the Decision and the specific findings and legal reasoning of the Pre-Trial Chamber in arriving at its conclusions do not bind the Trial Chamber or the parties (see further ICC-01/04-01/06-953, para. 10). Indeed, such legal findings or reasoning of the Pre-Trial Chamber could not bind the Trial Chamber, which has the authority under Regulation 55 to modify the legal characterisation of the facts.

⁴⁰ See paras. 21 and 30, and footnotes 26 and 39, above.

Relief Sought

34. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber reject the Application for Leave to Appeal.



Luis Moreno-Ocampo
Prosecutor

Dated this 10th day of October 2008

At The Hague, The Netherlands