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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***

Public Document

**Observations of the Defence of Germain Katanga on the “Report of the Registry
on the Additional Information Concerning the Languages Spoken, Written and
Understood by Germain Katanga”**

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I- INTRODUCTION: PROCEDURAL BACKGROUND

1. On 2 July 2007, Pre-Trial Chamber I issued a *Warrant of Arrest for Germain Katanga*.¹
2. In its decision of 18 October 2007, the Chamber set the date of the first appearance of Mr Germain Katanga for 22 October 2007.²
3. On 22 October 2007, the Director of the Division of Court Services filed a document entitled “Information to the Chamber on the execution of the request for the arrest and surrender of Germain Katanga.”³
4. On 26 October 2006, Pre-Trial Chamber I made an order requesting the Registrar to provide further information regarding the languages spoken, written and understood by Mr Germain Katanga: “Order for a Report of Additional Information on the Detention and Surrender of the Detainee Germain Katanga.”⁴
5. On 1 November 2007, the Registry filed the *Requête aux fins de prorogation de délai pour le dépôt du rapport concernant des renseignements supplémentaires sur la détention et le transfert de Germain Katanga*.⁵
6. Pre-Trial Chamber I granted this extension of time limit to the Registrar in its *Decision on the Request for an Extension of Time*,⁶ rendered on 2 November 2007.

¹ ICC-01/04-01/07-1.

² ICC-01/04-01/07-26, 22 October 2007.

³ ICC-01/04-01/07-40-Conf-Exp.

⁴ ICC-01/04-01/07-45.

⁵ ICC-01/04-01/07-46.

⁶ ICC-01/04-01/07-48.

7. In compliance with the Chamber's order, on 9 November 2007, the Registrar filed the "Report of the Registry on the Additional Information Concerning the Languages Spoken, Written and Understood by Germain Katanga".⁷
8. On 13 November 2007, Pre-Trial Chamber I set the deadline of 16:00, 23 November 2007 for the Prosecutor and the Defence to file their observations on the report in its *Decision on Time Limit for the Submission of Observations on the "Rapport du Greffe relatif aux renseignements supplémentaires concernant les langues parlées, écrites et comprises par Germain Katanga."*⁸
9. The following submissions of the Defence are respectfully and specifically made further to the above-mentioned Decision.

II- APPLICABLE LAW IN THIS INSTANCE

10. The Defence requests that the Chamber consider the need to respect the relevant provisions of the Statute of the Court, in particular articles 50(3) and 67(1)(a) and (f).
11. Article 50(3) of the Statute provides that "[a]t the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified."
12. Furthermore, article 67(1) provides that "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality (a) [t]o be informed promptly and in detail of the nature, cause

⁷ ICC-01/04-01-07/62-tENG.

⁸ ICC-01/04-01-07/76.

*and content of the charge, in a language which the accused **fully understands and speaks**;... (f) [t]o have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the **accused fully understands and speaks**” .⁹*

13. These statutory provisions are clear and need only be applied. They are based on the need to enable all parties in the trial, in this instance the accused, to closely follow the proceedings and participate effectively therein using the language in which he is fully proficient.
14. It can be seen from the preparatory session for the *Rome Statute* of the ICC that the delegations of Syria, Oman and the Syrian Arab Republic submitted a proposal in which article 67(1)(a) read as follows: (a) *to be informed immediately and in detail, in his or her own language or in a language of his or her choice, of the nature [...]*¹⁰ It is clear that the *ratio legis* of this provision is to enable the accused to be informed of the nature, cause and content of the charges in a language he fully understands and speaks, and to ensure his full participation in the trial.
15. It is satisfying to note that in its decision of 15 May 2006, Pre-Trial Chamber I confirmed first that article 67 applies to an accused during the confirmation of charges phase, and second that the rights enshrined in article 67 are the required minimum which the Chamber may extend with a view to preserving the right to a fair trial.¹¹

⁹ Emphasis added.

¹⁰ UN Doc A/CONF.183/C.1/WGPM/L.36, p. 1. available in the United Nations documentation system at <http://documents-dds-ny.un.org/doc/UNDOC/LTD/G98/706/67/pdf/G9870667.pdf?OpenElement>

¹¹ *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-102: *Decision on the final system of disclosure and the establishment of a timetable*, 15 May 2005, para. 97.

16. A study of the case law of the international criminal tribunals demonstrates that these tribunals have always recognised the right of the accused to make use of a language he understands, reads and speaks fully. Hence, for example, notwithstanding the fact that accused originating from Kosovo could be presumed to understand the Serbian language, the International Criminal Tribunal for the Former Yugoslavia granted them the right to receive the translation of the documents and to follow the proceedings in the language of their preference, that is, Albanian.
17. Likewise, in the case of *The Prosecutor v. Milosevic*, the Prosecutor applied to the Chamber for leave to disclose documents to Milosevic in English because in the course of diplomatic negotiations and media interviews the accused had demonstrated that he spoke, read and understood the English language well. In denying this motion, the Chamber established the following as law:

“The native language of the accused in this case is not English [...]. The reasons put forward to support the Motion are based largely on matters of judicial economy [...] Article 21, paragraph 4, of the Statute of the International Tribunal guarantees to the accused certain minimum rights, one of which is to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him[...]; that the disclosure of witness statements pursuant to Rule 66 (A)(ii) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) is one of the means intended to ensure that the accused is so informed of the charge against him and to ensure a fair trial [...]; that, in the opinion of the Trial Chamber and in the circumstances of this particular case, these guarantees are so fundamental as to outweigh considerations of judicial economy.”¹²

¹² *Prosecutor v. Milosevic, Decision On Prosecution Motion For Permission To Disclose Witness Statements In English*, <http://www.un.org/icty/milosevic/trialc/decision-e/10919DE516312.htm>.

18. Reference may also be made to the case of Vojislav Seselj who was granted leave to use the language of his choosing, namely B/C/S,¹³ despite the fact that he had taught law at the University of Michigan in the United States of America.¹⁴
19. The Chamber may also rely on the current practice of the ICTR which has granted some accused persons leave to express themselves in Kinyarwanda with the assistance of interpreters.
20. Some domestic legislation, in accordance with fair trial guarantees, also recognises an accused person's right to use the language of his or her preference in which he or she is fully proficient. The case of the Supreme Court of Canada which rendered the following decision may be cited:

*"The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. Second, the right is one which is intimately related to our basic notions of justice, including the appearance of fairness. As such, the right to interpreter assistance touches on the very integrity of the administration of criminal justice in this country. Third, the right is one which is intimately related to our society's claim to be multicultural, expressed in part through s. 27 of the Charter. The magnitude of these interests which are protected by the right to interpreter assistance favours a purposive and liberal interpretation of the right under s. 14 of the Charter, and a principled application of the right."*¹⁵

¹³ Bosnian/Croatian/Serbian.

¹⁴ See the Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, 9 May 2003, <http://www.un.org/icty/seselj/trialc/decision-e/030509.htm>

¹⁵ *R. v. Tran*, Supreme Court of Canada, 1994 CarswellNS 24 32 C.R. (4th) 34, 170 N.R. 81, [1994] 2 S.C.R. 951, 133 N.S.R. (2d) 81, 380 A.P.R. 81, 92 C.C.C. (3d) 218, 117 D.L.R. (4th) 7.23 C.R.R. (2d) 32. 133 N.S.R. (2d) 81 at para. 41 and 50.

See also the High Court of Transvaal in the Republic of South Africa which, in deciding on the translation problems in a criminal case, expressly decided that "the interpretation will be in a language which the accused fully understands and not into a language he understands partially." *S. v. Ngubane* 1995 (I) SACR

21. Likewise, in the Belgian system, pursuant to the *Loi du 15 juin 1935 sur l'emploi des langues en matière judiciaire* [Act of 15 June 1935 on the Use of Languages in Judicial Matters], the right of a person charged or of another party to freely choose the language of the hearings is construed very broadly: it is not confined to the three national languages (French, Flemish and German) and may be invoked by any person of Belgian or foreign nationality. Accordingly, for example, an investigating judge can under no circumstances refuse to put questions to the person charged in the language of that person's choosing on the pretext that the person has an adequate knowledge of the language of the proceedings.¹⁶

III- THE REGISTRAR'S REPORT VIS-À-VIS THE LAW

22. Mr Germain Katanga and his Duty Counsel carefully examined the "Report of the Registry on the Additional Information Concerning the Languages Spoken, Written and Understood by Germain Katanga".

23. The Report states that Mr Germain Katanga knows, reads, speaks and understands French well. To this end, it relies on the "languages in which the domestic legal proceedings were conducted", the "languages used to issue orders and instructions within the Congolese army", the "languages in which Mr

384 (T). In *RSA*, the judges interpreted the rights relating to a language during proceedings as the right of the accused to be able to participate in the proceedings in an official language of his or her choosing. See *Mthetwa v. de Bruin NO et al.*, 1998 (3) BCLR 336 (N), p. 338. Similarly, in *S. v. Pienaar* 2000 (2) SACR 143 (NC). See comments in D. Cote, *The Right to Language Use in South African Criminal Courts* (2005).

See also New Zealand, *R v. DC Whangarei T63/96, 3/6/97* [1997]: The Court decided that the accused, whose mother tongue was Maori, had the right to a Maori-English interpreter, even though he used English at the previous proceedings and had not yet made known his choice to speak Maori. The judges made the following observations: "It is not sufficient that an accused has some understanding and ability to speak the language used in court: they must be able to understand and speak it sufficiently well to be able to obtain..., and enjoy and exercise all their rights in the proceedings to the best of their abilities. Unless they have that level of understanding, and speaking ability, to deny them the services of an interpreter would be to deny or unreasonably derogate from the pivotal right to a fair hearing (s 25 (a)) and would be a failure to observe the principles of natural justice (s 26 (1))."

¹⁶ E. Boutmans, *De voorlopige hechtenis*, Antwerpen, Kluwer, 1985, p.48.

Katanga undertook his schooling”, and “any other relevant information to enable the determination of the languages spoken, read and understood by Mr Katanga”, in this case Mr Katanga’s participation in discussions with the Defence Support Section.

24. Before addressing the Registry’s submissions, Mr Germain Katanga wishes to emphasise that he is being prosecuted for extremely grave crimes and that he must be put in a position to follow closely, to properly understand the trial, to properly understand the charges brought against him and to defend himself with full knowledge of the facts.

a) The languages in which the domestic proceedings were conducted (Section 1 of the Report)

25. The stakes at issue for Germain Katanga before the International Criminal Court are such that he cannot take the risk of trying to use French, a language in which he is not proficient.

26. These stakes are unrelated to his statement to the *Avocat Général* of the High Military Court. The fact that the record of his interview before that domestic judicial authority, in the absence of Germain Katanga’s lawyer, was drafted in French does not establish that Germain Katanga is proficient in French, a language whose many subtleties are a source of anxiety to everyone.

27. An analysis of the two-page handwritten record of the interview, prepared on 17 October 2007, reveals that the summary nature of the interview during which the *Avocat Général* of the High Military Court asked Mr Germain Katanga some simple questions, in particular to find out about the state of his health, whether he had had breakfast that morning, and his views on the ICC’s request seeking his

transfer to The Hague. That judicial authority's questions were very short, as were Germain Katanga's answers: "No", "Gladly", "Yes" ...

28. This interview can in no way be compared to the lengthy questioning which will certainly be conducted before the ICC on complex issues of Germain Katanga's alleged involvement in the commission of the crimes ascribed to him.
29. The Defence emphasises that nowhere in the record of the interview is it stated that the *Avocat Général* of the High Military Court had previously informed Germain Katanga that he was entitled to request that the proceedings be conducted in a language other than French and to request the services of an interpreter. It was the responsibility of that judicial authority: (1) to inform Germain Katanga that he had the right to use the language which he fully understands; (2) to ensure that Germain Katanga had fully understood the scope of this right; (3) to ensure that Germain Katanga had the means with which to exercise this right.¹⁷
30. Neither the record of the interview nor any other procedural document prepared by the domestic judicial authority can establish that Germain Katanga fully understands and speaks French.

**b) Languages used to issue orders and instructions within the Congolese army
(Section 2 of the report)**

¹⁷ In particular, see Harris O'Boyle and Warwick: "It is arguable that the state's obligation should extend at the outset to informing an accused who appears in need of assistance to his right to an interpreter", *Law of the European Convention on Human Rights*, (Butterworths 1995), page 271; - See also. *R v Lee Kun*, Court of Criminal Appeal, December 1915, [1916] 1 KB 337, at 341: "It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law."

31. It cannot be assumed that Germain Katanga is proficient in French by relying on the fact that orders are issued to officers of the *Forces Armées Congolaises* (FARDC) in French or the fact that officers take their oaths in French. If the ICC carries out a careful investigation into the FARDC officers, it will realise very quickly that many of them, who have not had advanced training or university education, have a low level of proficiency in understanding, speaking and reading French.

c) The languages in which Mr Katanga undertook his schooling (Section 3 of the report)

32. The Registrar's Report also attempts to make an assumption about Mr Germain Katanga's knowledge of French from the fact that education in the Democratic Republic of the Congo is in French and that Germain Katanga studied there up to the first year of secondary school. This submission is untenable. Without denigrating the education currently provided there, Mr Germain Katanga and his Defence, would draw the Chamber's attention to the fact that, due to the multifaceted and multidimensional crisis plaguing the DRC for decades, the standard of teaching has deteriorated to such an extent that it cannot be said with any certainty that a child who has completed secondary school can fully understand and speak French. In this respect too, the Court may conduct an investigation to establish this deterioration in standards, which is particularly critical in modest families whose children use French only for short periods of time in class and revert to their mother tongue during break time in the actual school grounds and at home in the natural, social and family environment in which they live. This occurs to such an extent that the language which the children use the most is indeed their mother tongue. Germain Katanga was one of these children of modest families who studied in difficult circumstances. His level is such that he can read a simple letter written in French but not understand it correctly.

**d) Mr Katanga's participation in discussions with the Defence Support Section
(Section 4 of the Report)**

33. Admittedly, during his initial contacts with Defence Support Section staff, Germain Katanga endeavoured to express himself in French. However, in so doing, he became aware of his limited ability to understand and express himself, both orally and in writing in French, and of the enormous efforts required for him to compensate for his deficiency.

34. In this respect, the Defence invokes *R v. Petrovic*, in which the Canadian Court decided:

“A person may be able to communicate in a language for general purposes while not possessing sufficient comprehension or fluency to face a trial with its ominous consequences without the assistance of a qualified interpreter. Even if that person speaks broken English or French and understands simple communications, the right constitutionally protected by s.14 [right to interpreter] of the Charter is not removed.”¹⁸

35. From the time of his initial meeting with OPCD staff on 20 October 2007, Germain Katanga told Mr Xavier-Jean Keïta that he is more comfortable in Lingala,¹⁹ to such an extent that, during a subsequent meeting held on 23 October 2007, an OPCD staff member acted as a Lingala translator.²⁰ Likewise, at the meeting of 29 October 2007, Germain Katanga had to request the assistance of this OPCD staff member to translate and explain the indigence form in Lingala for him.²¹

¹⁸ (1984), 13 C.C.C. (3d) 416 (Ont. C.A.), at 423.

¹⁹ See minutes of the meeting of 20 October 2007, Ref. OPCD/002/XJK/GD.

²⁰ See minutes of the meeting of 23 October 2007, Ref. OPCD/002/XJK/CB.

²¹ See minutes of the meeting of 29 October 2007, Ref. OPCD/003/XJK/CB.

36. Consequently, as of his first appearance before the Chamber on 22 October 2007, Germain Katanga provided the same information in relation to the language issue during this exchange with the Presiding Judge:

Presiding Judge Kuenyehia: [...] May I confirm whether you speak French or any other language, Mr. Katanga?

Mr Katanga (interpretation): I speak Lingala best.

Presiding Judge Kuenyehia: But do I understand, Mr. Katanga, that you speak French also?

Mr Katanga (interpretation): Not really.

[...]

Presiding Judge Kuenyehia: Mr. Katanga, the -- could you please stand. The Court is obliged, under Article 67, to have you speak the language which you fully understand. Does the Chamber understand that you do not speak and understand French?

Mr Katanga (interpretation): I hope -- I do not speak French fluently, and sometimes it is difficult for me to understand and how -- difficult for me to express myself.²²

37. It was therefore proper for Germain Katanga to inform the staff of the International Criminal Court and Pre-Trial Chamber I in a timely manner of his limited ability to understand French and his preference for Lingala, the language he understands and speaks better.

e) The cost of translation and interpretation into Lingala

38. In its conclusion, the Report of the Registry refers to, *inter alia*, the potential financial and technical implications and impact on the time limits of the Decision

²² See transcript ICC-01-04-01-07-T-5-ENG, Hearing of 23 October 2007, p. 3 lines 2 to 21.

of the Chamber ordering measures needed for the provision of translation and interpretation from the Court's working languages into Lingala. The Defence argues that a right as fundamental to the accused as the use of a language he fully understands and speaks, and upon which his effective participation in the trial depends, cannot be sacrificed out of concern for financial or judicial economy.

39. This position is shared by the ICTY which rightly emphasised that judicial economy cannot justify depriving an accused of his right to effective participation in the proceedings. Likewise, in the European Union, despite the difficulties in obtaining translation and interpretation of specific languages, States have the obligation to make arrangements which take them into consideration.²³ In this respect, a competent interpreter must be provided even if the accused's counsel speaks the language of the Court and of the accused.²⁴ In such circumstances, the language spoken by the legal representative is irrelevant to the accused's right to an interpreter.

CONCLUSIONS AND RELIEF SOUGHT

40. To conclude, Mr Germain Katanga emphasises that he is not being frivolous in raising the language issue. He is doing so because he is aware of his limits in understanding and expressing himself in French orally and in writing, and out of major concern to be in a position to properly follow developments in his trial, to fully defend himself in accordance with the relevant provisions of the ICC Statute and to allow the Court to ensure the proper administration of justice which everyone expects.

²³ Green Paper from the Commission, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, Brussels, 19 February 2003, COM (2003) 75 Final, Section 5.2.2 (c).

²⁴ See *Mackessack v. Assistant Magistrate*, Empangeni 1963(1) SA 892 at 893.

41. It was out of such concern that he stated before the Court, as soon as he made his first appearance on 22 October 2007, that he speaks and understands Lingala better and that it is sometimes difficult for him to understand, write and express himself in French.

42. The arguments put forward by the Registry in its Report of 9 November 2007 do not establish that Mr Germain Katanga *fully understands and speaks French*.

43. For all these reasons and pursuant to articles 50(3) and 67(1)(a) and (f) of the Statute of the Court, Mr Germain Katanga requests Pre-Trial Chamber I:

- a) to take into consideration his limited ability to understand and speak French;
- b) to order that documents in French transmitted to him as part of the proceedings be accompanied by a translation in Lingala;
- c) to grant him the right to be assisted by a Lingala interpreter and translator during the proceedings;
- d) to order that judicial documents be transmitted to him in hard copy until he receives basic computer training and is provided with a computer and a printer;
- e) to order all other necessary measures to allow him to follow and participate in his trial in Lingala, which is the language he understands, writes and speaks best.

AND MAY JUSTICE BE DONE

[signed]

Pr Jean-Pierre FOFÉ

Duty Counsel

Dated this 19 November 2007

At Paris