



Original: **English**

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

Date: 12 March 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

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

Public Document

Defence Application for an Amended Document Containing the Charges

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 Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Ambuyu Andjelani

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. This is an application for an order to the Prosecution to file a new, amended document containing the charges pursuant to Article 61(3)(a) of the Statute. The purpose of this application is to ensure that the accused is provided with the charges, as amended by the Decision on the Confirmation of Charges¹ (“Confirmation Decision”), in a clear, concise and comprehensive manner.

A. Procedural background

2. Germain Katanga was arrested in the Democratic Republic of Congo on 26th February 2005. A warrant of arrest was issued under seal by the Prosecutor’s Office of the International Criminal Court on 2nd July 2007 and unsealed on 18 October 2007.² He was surrendered and transferred to The Hague on 17 October 2007. His first appearance before Pre-Trial Chamber I was on 22 October 2007.³ The Prosecution filed a first document containing the charges against Mr Katanga on 29 January 2008.⁴ On 10 March 2008 the Pre-trial Chamber I decided to join the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*.⁵ On 21 April 2008, the Prosecution submitted a document containing the charges against Mr Katanga and Mr Ngudjolo.⁶ On 12 June 2008 the Prosecution filed an amended document containing the charges.⁷ A last amended charging document was filed on 26 June 2008⁸ (“the Charging Document”). A confirmation of charges hearing then took place from 27th June to the 18th July 2008, and the Decision on the Confirmation of Charges was delivered on the 26th September 2008. A trial date has not as yet been set.

B. The right to be informed of the charges

3. Article 67(1)(a) affords the accused the right ‘to be informed promptly and in detail of the nature, cause and content of the charge’. This is one of the fundamental rights of

¹ ICC-01/04-01/07-716-Conf, 26 September 2008. See also the public redacted version ICC-01/04-01/07-717, 1st October 2008.

² ICC-01/04-01/07-1-tENG.

³ ICC-01/04-01/07-T-5-ENG.

⁴ ICC-01/04-01/07-170, Submission of the Document Containing the Charges and of the List of Evidence.

⁵ ICC-01/04-01/07-257, Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI.

⁶ ICC-01/04-01/07-422, Prosecution's Submission of the Document Containing the Charges and List of Evidence.

⁷ ICC-01/04-01/07-584, Prosecution's Submission of Amended Document Containing the Charges and Additional List of Evidence.

⁸ ICC-01/04-01/07-649, Submission of Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648.

the accused and as such is reflected in customary international law, the provisions of major human rights instruments and all constitutive documents of international criminal courts and tribunals. The right constitutes an integral part of the right to a fair trial. The fairness of the trial depends on the accused being able to investigate in advance of the trial, and confront during the trial, the charges against him in a manner which does not leave scope for surprise or the moulding of the case by the prosecution as the evidence unfolds. The importance of a charging document is recognised and given effect in all domestic, criminal jurisdictions.

4. It is submitted that this right requires that the nature of the charge is communicated to the Accused in a manner which is clear and unambiguous, as well as complete. It is also necessary and in the interests of justice that charges be communicated so far as possible in a simple and direct manner.
5. For these purposes, it is submitted that it is inadequate and undesirable for the accused to be left to analyse and decipher the effect of the Decision on the Confirmation of Charges on the Charging Document to which it refers. The fundamental right of the accused to be informed of the charges against him is the same at the *ad hoc* tribunals. In the case of *Simic*, the Appeals Chamber of the ICTY aptly noted that:

An accused cannot be expected to engage in guesswork in order to ascertain what the case against him is, nor can he be expected to prepare alternative or entirely new lines of defence because the Prosecution has failed to make its case clear.⁹

6. It is submitted that in order to avoid any form of ambiguity or latitude in the precise effect of the Confirmation Decision on the Charging Document it is appropriate for the Prosecution to be required to produce a single, detailed but straight forward document which accurately reflects the decision of the Pre-Trial Chamber confirming charges while not confirming other charges.
7. The Defence respectfully agrees with the observations of the Trial Chamber that the Confirmation Decision has a superior value to the Charging Document that it confirmed in part. Where there are inconsistencies between the two then plainly the Confirmation Decision prevails. However, the issue raised in this motion is not one of

⁹ *Prosecutor v Blagoje Simic*, No. IT-95-9-A, Appeals Judgment, 28 November 2006, para 71.

hierarchy. It is the Prosecutor that has the conduct of the prosecution, not the Chamber. The Prosecution exercises a prosecutorial discretion under judicial control. The Charging Document manifests the intention of the Prosecution. The accused is entitled to a clear charging document, amended in the light of the Confirmation Decision, and free of the ambiguities that may otherwise arise.

C. The right to facilities for the preparation of the Defence

8. Justice requires that an accused person be given the best possible opportunity to present his defence so that convictions are based on a sound premise and innocent men are not wrongly convicted. Article 67(1)(b) provides that the accused has the right to adequate facilities for the preparation of this defence.
9. It is submitted that ‘facilities’ in Article 67(1)(b) includes the necessary tools for ensuring that an accused can understand his case clearly and precisely and direct his case accordingly. The Defence invites the Trial Chamber to adopt the practice and wisdom of other tribunals which have acknowledged the importance of an authoritative, plainly worded and comprehensive statement of the facts underlying the charges. For instance, the Trial Chamber in the *Media* case held that the statement of facts must be concise and comprehensive.¹⁰

D. Facilitating the procedural requirements

10. As part of the process to ensure that the accused properly understands the charges against him, procedural requirements have been enshrined in the Statute. Article 64(8)(a) provides that:

At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber.

11. In order to facilitate this task it is a practical step for the prosecution to produce a finalised version of the Charging Document which takes into account the decision of the Pre-trial Chamber confirming particular charges. It is further submitted that the

¹⁰ *Prosecutor v Nahimana*, Decision on Preliminary Motion filed by the Defence based on defects in the form of the indictment, 24 November 1997.

words of this provision pre-suppose that the charges are contained in a single document without need to refer to any other document.

12. Article 64(8)(a) further stipulates that:

The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with the provisions of this Statute.

The Defence submits that it is easier to be satisfied that the accused understands the nature of the charges if the accused is not expected to have regard to two documents, an original charging document and a decision on the confirmation of charges, in order to understand the charges against him. It is also more difficult to make an admission of guilt unless the nature of the charges is unambiguously and comprehensively contained in a single document.

13. In the *Lubanga* case, the Trial Chamber held that in order to give effect to the Chamber's obligation under article 64(8)(a) to ensure, before proceeding to trial, that the accused understands the nature of the charges, it would be necessary for the Prosecution to file an amended charging document, and for this document to be an operative document which would be read to the accused at the opening of the trial.¹¹

14. While one Trial Chamber is not bound by the decision of another, it is submitted that the Lubanga decision is based on sound reasoning. It is also in the interests of justice that accused before different Trial Chambers benefit from similar procedural protections when they relate to central matters to the trial affecting the fundamental rights of the accused, such as in this case the presentation of the charges against the accused.

15. It is submitted that the document containing the charges is intended to disclose in terms as precise and as clear as possible the Prosecution's case against the accused. It is one of the central pillars of the trial. Regulation 52 of the Regulations of the Court states:

¹¹ *Prosecution v. Lubanga*, ICC-01/04-01/06-1548, Order for the Prosecution to File an Amended Document Containing the Charges, 9 December 2008.

The document containing the charges referred to in article 61 shall include:

- (a) The full name of the person and any other relevant identifying information;
- (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
- (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

16. The fact that Regulation 52 requires that a document containing the charges includes a detailed exposition of the facts and legal characterisation upon which the charges are based, lends support to the proposition that a single document should contain all the charges, and without reference to extraneous matters which will not form part of the trial. It further emphasises the importance of a single authoritative document setting out all the details and only the details upon which the Prosecution will pursue the trial.

17. The Trial Chamber requested the Prosecution to produce a table linking the evidence to the charges and mode of liability;

“This table shall refer to the relevant passages in each piece of evidence and will link this piece of evidence to the specific alleged facts that the Prosecution wants to prove in order to establish elements of crime that the accused have been charged with, and this would include the contextual elements of the crime as well as the elements that constitute the mode of responsibility that the accused have been charged with. [...]”

“[...] the Chamber is requesting that the Prosecution present its evidence in the table, evidence that refers to the mode of responsibility as set out in the decision on the confirmation of charges, and the factual elements should also be clearly stated, the factual elements that prove this form of mode of responsibility, of liability.”¹²

The Defence submits that such an exercise will greatly benefit from reference being made to one rather than to two documents.

E. Preserving an authoritative document as a source of the charges.

18. The importance of the existence of a single authoritative document containing the charges may manifest itself at different stages of the trial. Firstly, in the event that the Prosecution or Defence successfully apply for the amendment of the charges in the

¹² ICC-01/04-01/07-T-56-ENG RT 03-02-2009, p. 29, l. 5-11, 21-25.

light of additional evidence or in order to preserve the fairness of the trial, then it simplifies arguments and procedural steps if there is one comprehensive and authoritative document forming the basis of discussion and amendment.

19. Secondly, all participants in the proceedings, whether the Trial Chamber, the Prosecution, the Defence or any other participant, including victims, States and Amicus Curiae plan and conduct proceedings with the charges in the forefront of their minds. The existence of a single, short and authoritative document facilitates the work of all participants in the proceedings. This is particularly so for temporary participants such as States and Amicus Curiae, who may not be entirely familiar with the history of the proceedings.
20. It has been held by the Appeals Chamber that victims may only be granted the right to participate in the case if they are able to establish that they have suffered harm resulting from the charges as confirmed.¹³ The determination of this question is facilitated, not only for the parties and the Trial Chamber, but also for victims and potentially classified victims, if there is an authoritative text of the charges upon which the Prosecution is seeking a conviction.
21. Thirdly, the Accused has a right to a public hearing in terms of Article 67(1) of the Statute. An open and public hearing, transparently conducted, allows for the fairness of the trial to be the subject of public scrutiny. The trials before the International Criminal Court are also of great public interest. Having a single, accessible and authoritative document containing the charges as the basis of the trial assists in the transparency process and the ability of the public to follow the proceedings.
22. Fourthly, decisions of the Trial Chamber and Appeals Chamber throughout the trial and respective final judgments will inevitably involve analysis of and reference to the document or documents containing the charges. Article 74(2) of the Statute provides that the decision of the Trial Chamber ‘shall not exceed the facts and circumstances described in the charges and any amendments to the charges’. This implies the existence of an authoritative version of the charges which contains not only offences

¹³ See *Prosecution v. Lubanga*, ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008.

as such but also the facts and circumstances surrounding those charges expressed in a clear and unambiguous manner and, further, not containing extraneous material.

23. The Appeals Chamber has held that:

[It] agrees with the Prosecutor's contention that the parameters set forth in the charges define the issues to be determined at trial and limit the Trial Chamber's authority to the determination of those issues.¹⁴

This underscores the importance of having an authoritative and complete version of the charges upon which the Prosecution seeks to rely.

F. Inadequacy of the current position

24. It is submitted that the current position is inadequate to satisfy the above exigencies. As things stand, there is a Charging Document containing valid and invalid aspects, and a Decision confirming charges, containing reference to the charges in the Charging Document, but also to argument, explanation, judicial opinion and preliminary findings. The Charging Document was 35 pages. The Confirmation Decision, omitting the dissenting opinion, is a complex document of 214 pages. Neither document can, it is respectfully submitted, individually provide clear and consistent notice to the accused of the charges against him, as well as facilitate the simple and transparent performance of the procedural steps in the trial as required by, *inter alia*, Articles 67(1), 68(8)(a), and 74(2) of the Statute, and Regulation 52 of the Regulations of the Court.

25. The Charging Document contains extraneous material held to be invalid. The Decision on the Confirmation of Charges is a 227 pages document which contains opinion and qualifications, as well as extraneous material. The accused cannot have a clear picture of the charges he faces without consolidation into one authoritative document expressing the intentions of the Prosecution. The documents individually and collectively may leave the accused in a position where he does not fully understand and is left to guess and calculate the extent of the charges against him. He is left in a position where the impact of the phrases and analyses of the Pre-trial Chamber on the

¹⁴ *Ibid.*, at para 63.

charges is open to interpretation as with the charges themselves. He has to prepare alternative lines of defence in case his interpretation of the impact of the decision is not shared by the Prosecution or the Chamber.

26. The current situation might further permit the Prosecution to mould its case according to how the evidence unfolds, and to attempt to justify the permissibility of new categories of evidence by exploiting possible ambiguities in the reasoning of the confirming judges. The Prosecution is expected to know its case before it comes to trial, and the accused is entitled to unambiguous and straightforward notice of the case against him which includes the details of the offences as well as the factual foundation of those charges. Here it is worth noting the words of the ICTY Appeals Chamber in the case of *Kupreskic*:

The prosecution is expected to know its case before it goes to trial. It is not acceptable for the prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.¹⁵

27. The Defence submits that this is a useful observation and presupposes that the accused, the Chamber and the parties, are furnished with an accessible, authoritative and comprehensive document containing the charges and which forms the basis for the subsequent leading of evidence. It is submitted that in order to ensure proper compliance with the substantive and procedural requirements set out in this application it is implied, in the provisions of the Statute, Rules and Regulations, that the trial should proceed on the basis of a single authoritative version of the charges, premised upon and consolidating the findings of the Pre-Trial Chamber with respect to the Charging Document which it reviewed.

G. Residual discretion of the Trial Chamber

28. In the alternative, in the event that this procedural step is not expressly or impliedly required by the Statute, Rules or Regulations of the Court, it is submitted that it is a step which ought to be ordered by the Trial Chamber in the exercise of its residual

¹⁵ *Prosecutor v Kupreskic et al.*, No. IT-95-16-A, Appeal Judgment, 23 October 2001, para 92.

discretion to make such orders as are appropriate for ensuring the fairness and order of the trial.

29. This residual discretion is express and implied within the founding documents of the Court. Article 64(2) directs the Trial Chamber to ensure the fairness and expeditiousness of the Trial. It is implied within this provision that it can make such orders as are appropriate to facilitate the fair and expeditious conduct of the proceedings. Article 64(3)(a) then expressly provides that the Trial Chamber shall confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. Under Article 64(6)(f), the Trial Chamber is empowered to rule on any other relevant matters. Under Article 64(9)(b), the Trial Chamber can take all necessary steps to maintain order in the course of a hearing

RELIEF SOUGHT

It is accordingly requested that the Trial Chamber orders the Prosecution to file an amended document containing the charges that reflects the position following the Decision on the Confirmation of Charges, does not go beyond the provisions of the Charging Document of 26 June 2008, and which, in light of the said decision, removes impermissible references.

Respectfully submitted,



David HOOPER

Dated this 12 March 2009

At The Hague