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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 Redacted Version

**Defence Reply to Prosecution Response to Motion Challenging the Admissibility of the
Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)**

Source: Defence for Mr Germain Katanga

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

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Other

The Defence for Mr Germain Katanga (“Defence”) hereby replies to the Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) (“Response”).¹

The Prosecution argument

1. The Prosecution’s principle argument in its Response is that the case is admissible in terms of Article 17 of the Statute because the DRC has never carried out investigations which ‘focused substantively’ on Bogoro village and therefore, applying the ‘same conduct’ test as applied by the Pre-Trial Chamber, the ‘case’ could not be said to be a subject of investigation in the DRC. In support the Prosecution has disclosed to the Defence and the Chamber a number of documents hitherto undisclosed.
2. The Defence submits that the Prosecution has mischaracterised the facts before this Chamber as well as applied an incorrect legal analysis of Article 17 of the Statute.
3. It further appears that the Pre Trial Chamber may not have been provided with full disclosure of, or may not have taken into account the extent of the investigations conducted by the DRC authorities. In the Defence submission this would require the Trial Chamber to re-evaluate the position as at the time of the application for an arrest warrant and to consider the appropriate consequences of such lack of disclosure.

The Prosecution’s mischaracterization of the facts.

4. The Defence submits that the documents disclosed demonstrate that it is incorrect to assert that the authorities of the DRC ‘never focused substantively on Bogoro’. Rather, it is plain that Katanga’s case with respect to his involvement is criminal activity including Bogoro was ‘investigated’ by any normal use of that word. It is also clear that offences committed in the period 2002 -2005, including specifically Crimes Against Humanity, [REDACTED] also fell within the ambit of the DRC’s investigation. [REDACTED] It follows that it is a mischaracterisation of the facts to assert that the DRC ‘did not investigate Katanga for the crimes with which he is charged in this Court’. So far as the Defence is aware the Pre Trial Chamber was not told of the extent of the investigation and was unaware of its extent at the time it made its determination on admissibility.

¹ ICC-01/04-01/07-968-Conf-Exp. On 30 March 2009 the Prosecution filed a Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) (ICC-01/04-01/07-1007).

5. It is submitted that the investigations in the DRC must be considered in the light of the nature and object of those investigations. The DRC had arrested [REDACTED] individuals considered to be leaders within the conflict in Ituri, and its investigations were, like those of the ICC, directed at identifying the existence of and evidence in relation to crimes committed in the Province of Ituri in the armed conflict in the DRC. [REDACTED]² [REDACTED] the investigations relating to the conflict as it pertained to *Ituri* was continuing, was of a general nature and subject to expansion on specific aspects where new allegations and evidence were identified and corroborated. The fact that an investigation begins as a general focus on the crimes committed by certain individuals in *Ituri* does not imply that Bogoro did not form part of the investigation, but rather implies that all attacks falling within the scope of the general definition of the investigations fall within those investigations. Bogoro was not excluded. The fact that the attack on Bogoro did not fall within a list of attacks 'so far' identified during the course of those investigations does not imply that it did not fall within the scope of the investigation or that it may not be subsequently included.
6. Indeed, as demonstrated by other documents and in particular *Requete aux fins de Prorogation de la detention Provisoire*, 2nd March 2007 (Annex H1 to the Defence Motion), Bogoro clearly did become part of the investigation against Germain Katanga. This document was produced subsequent to the 'renewed investigative effort'. This document also refers to the other crimes investigated for the period 2002 -2005, including Crimes Against Humanity [REDACTED].
7. The Defence is not aware when it was that the Prosecution came into possession of the Prorogation document of 2nd March 2007 but it is likely that the Prosecution was in possession of it at the time the request for the arrest warrant was made. [REDACTED] The Defence do not know if the document or reference to it was produced to the Pre Trial Chamber but assume it was not - which would constitute a fundamental misleading of the court if the Prosecution knew of its existence.
8. [REDACTED] It cannot seriously be suggested to the Trial Chamber that if there is evidence implicating Katanga, absent a trial at the ICC, the DRC could or would try those others but omit Katanga!

² Annex G to Prosecution Response.

The application of Article 17(1)(b) in the light of disclosed documents

9. In terms of Article 17 (1) (b) of the Statute, a case is inadmissible if it has been investigated by a State and that State has decided not to prosecute the person concerned. It is plain that the case against Germain Katanga with respect to crimes against humanity committed in Ituri was under investigation. Although not essential to the argument, this did include the attack on Bogoro. The DRC then decided not to prosecute that case on the basis that it should be handed over to the International Criminal Court.
10. It is submitted that the information available demonstrates that the decision not to prosecute Katanga was not due to inability or unwillingness genuinely to prosecute, but rather simply due to a wish to give deference to the International Criminal Court. [REDACTED].

The application of Article 17(1)(a) in the light of disclosed documents

11. While Article 17(1)(a) is expressed in the present tense, the Defence has submitted in its motion that the question of whether the case was being investigated must be determined at the time of the warrant of arrest and statements of the government of the DRC made subsequently could not have retrospective effect. This, it is submitted, is an appropriate approach giving a teleological interpretation to Article 17(1)(a) in line with Article 31 of the Vienna Convention on the Law of Treaties.
12. It now seems clear from the available documents that the Pre-Trial Chamber failed to have regard to all the available documentation at the time when the question of admissibility was first considered. It is inevitable that the State will not continue with its investigations against a person once a determination of admissibility has been made by the ICC. Accordingly, if the Chamber made a false determination based on an incomplete factual presentation it is submitted that this provides an additional ground for applying Article 17(1)(a) as at the time of the hearing for an arrest warrant. The Defence submits that the Prosecution's failure to provide full disclosure, together with its unqualified assertion that the accused was not being investigated on matters before the court, constituted the creation of a defect in the initiation of the cause, which tainted the validity of all subsequent proceedings in the case. Therefore, for the court

to be properly seized of the case a determination of admissibility must be considered as at the date of the application to the Pre-Trial Chamber.

[REDACTED]

13. [REDACTED]

14. [REDACTED]. This interpretation is simply not consistent with documentary evidence establishing that Katanga was being detained on the basis of allegations with respect to Bogoro [REDACTED]. It is also inconsistent with the fact that the DRC was investigating his responsibility for crimes against humanity in the context of the conflict in the DRC as it pertained to *Ituri*. There is no indication or rationale for the DRC excluding particular villages from its investigations relating to the responsibility of the accused.

15. [REDACTED].

16. In the absence of an admission to this effect by the DRC, and supporting evidence, it must also be presumed that the authorities in the DRC would not request the continued detention of an accused for more than 12 months without having recovered any incriminating evidence. [REDACTED].³ Obviously, this demonstrates an ability to gather, and some success in gathering, evidence concerning the crimes committed in the conflict in *Ituri*, as opposed to a complete dead end in investigations due to the need for demobilization. A small village, particularly one relatively easily accessible from Bunia, cannot be singled out as impenetrable in this respect and no document pre-dating the warrant of arrest suggests such a distinction in the difficulties experienced.

Complementarity

17. In the submission of the Defence the Prosecution has misunderstood the Defence argument on complementarity. With respect to paragraph 20 of the Defence motion, not intended as an allegation as described by the Prosecution. Likewise, paragraph 63

³ Annex I to the Defence Motion, par 4 of document.

is in no way meant to allege any wrongdoing. Paragraph 20 merely suggests that fair burden sharing is one of the values underlying the principle of complementarity and that the interest which the Prosecutor might naturally and understandably have in moving the work of the court forward could understandably lead to the examination of cases which are already the subject of investigation in another forum. In a court which was overburdened with cases and where the jurisprudence on complementarity was well established the contest the parties now find themselves in would in all likelihood not arise at all because the state would be encouraged to pursue what it had already started. [REDACTED].

18. On the basis that the Prosecutor intervened in the investigation being conducted against Germain Katanga it has sought to compete with an able, willing and functioning national justice system. The DRC, on the material available, was prepared to investigate and was investigating the accused for a broad range of conduct qualified as international crimes. The accused was in custody and commissions of inquiry were active. The DRC possessed judicial and investigatory capacity. This was expressly referred to in the course of the Lubanga Pre Trial Chamber's observations where the circumstances of inability underpinning the DRC's initial letter of referral of 3rd March 2004 did 'not wholly correspond to the reality any longer' and 'the DRC national judicial system has undergone certain changes'⁴. The Defence note, for example, that the DRC successfully concluded a major trial in Katanga province just some weeks ago. The DRC is capable of conducting and concluding a complex war crime case.

19. The OTP, by intervening in the way that it has in the present case, breaches the essential basis for *complementarity*, which is to let national systems get on with investigations and trials when they can and thereby, as a consequence, preserve the ICC's limited sources for alternative, worthy causes. The Defence submit that the 'fight against impunity' is not best assisted by the kind of intervention displayed in the present case.

20. The Defence maintains its submission that the 'same conduct' test is incorrect. The argument presented by the Prosecutor in his response fails, in the Defence submission,

⁴ ICC-01/04-01/06-8 on its review of admissibility paragraphs 30 -36.

to present a constructive interpretation of the word 'case' in Article 17 in accordance with the thrust of the Statute's underlying object and purpose - the global fight against impunity. Resort to the dictionary is too rigid and narrow an approach. The approach proffered by the Prosecutor does not address convincingly the problem arising from the example of the 'nine villages out of ten' scenario provided by the Defence. The 'same conduct' case is the subject of argued concern by a number of commentators, see in particular the authoritative commentary in Triffterer (2008) at page 616, referring to this 'approach' as 'excessively exacting'. The Defence notes that literature on which the OTP relies in support of its interpretation of the word case is very abstract and does not address the damaging consequences of the same conduct test.

21. The Defence submit that the comparison at paragraph 70 -74 of the Response between art. 17 and art. 20 of the Statute is inapposite, in the sense that the provisions protect very different values. Art. 20 is essentially concerned with protecting an individual's right not to be subjected twice to a trial for the same conduct, whereas art. 17 is aimed at finding a fair and effective division of labour between national courts and the ICC.

22. The Defence submits that the OTP's contextual interpretation of provisions relating to cooperation is flawed. The provisions 89 (2), 89 (4), 94 and 95 offer a State a ground to refuse cooperation and admissibility-issues and ongoing national prosecutions may play a role there. However, admissibility and cooperation are two very different matters and stages within the functioning of the Court. It is in everyone's interest that States do not come in a position of having to invoke 89(2), 89 (4), 94 or 95. Furthermore, admissibility should not only be a matter of consensual burden sharing - in other words, also if a State wishes not to make use of any of the grounds set out in Part 9 to refuse cooperation, this does not make a case admissible and is in and of itself not necessarily conducive to an effective global fight against impunity.

23. The Prosecutor's reference to notions like 'sequencing the prosecution of different cases' and 'comprehensive accountability' may seem very attractive, but are they realistic? Criminal justice generally, and international criminal justice in particular, is about the intelligent use of scarce resources. Clearly, it can be expected that both the ICC and the national criminal justice system are selective in their prosecutorial focus and both should, and in practice will be, satisfied when the other side has, on the basis of available evidence, done a fairly reasonable job. By definition, certain conduct will

always remain unpunished (para. 92). The idea proposed by the OTP that in practice there will be 'comprehensive accountability' or 'sequencing of prosecutions' is, in the Defence submission, misplaced. There is also no precedent for it in the practice of the ad hoc Tribunals. In practical terms there is an interest in finality, from both the international and national prosecutorial side, but certainly also from the perspective of the accused. This implies, in the Defence submission, that ab initio the side with the most ambition should have priority in prosecuting, because we should not speculate as to what *might* happen after one side has finished its trial. Furthermore, in that equation the national prosecution should enjoy the benefit of the doubt in the sense that they are generally in a better job to effectively finalise prosecutions, have better access to evidence and witnesses and the public function of trials is best served close to the locus delicti and community affected. An approach to complementarity allowing the OTP to put an end to legitimate national efforts -especially when States out of convenience or for other reasons do not challenge the OTP- on the sole basis that a tiny part of the case would not be investigated by national authorities would, in our view, be clearly inconsistent with the object and purpose underlying article 17 and would be equally inconsistent with an effective fight against global impunity.

24. The Prosecutor has sought to dismiss the infringement of accused's right as speculative (para. 87 of its response). Furthermore, the Prosecutor has repeatedly stated that the DRC has not (yet) challenged the admissibility of the case, seemingly regarding this as an important factor.
25. The Defence submits that the Prosecutor has an insufficient eye for the autonomous right of the accused in challenging the admissibility and the adverse consequences produced by the transfer of his case to the ICC.
26. The accused has an important position in challenging admissibility, and as is confirmed in para. 64 of the Expert Paper (Annex A) he cannot become the victim of some sort of burden sharing between the DRC and the Prosecutor. In any event, as proposed by the Expert Paper such burden sharing cannot be binding upon the Court. Any other approach would make the accused's right to challenge admissibility theoretical and illusory. If, for example, the current result of burden sharing between the Prosecutor and the DRC is accepted as a *fait accompli* how could an accused ever properly challenge the admissibility of the case, which can only be done when he is available at the seat of the Court? Clearly the fact that Mr. Katanga is currently

detained at the ICC is proof that there are no strong objections to that on the part of the DRC. But if that would be a decisive or important factor, what can meaningfully be the accused's position in this process? With a view to retain a real and effective right to challenge admissibility of the case any possible agreement of burden sharing can therefore not bind the Court, especially, since we submitted, there is object proof that the DRC was conducting an investigation, and willing and able to effectively finalise that investigation.

27. Finally, it is submitted in reply to the Prosecutor that adverse effects of the application of Article 17 in this case by the Prosecutor for Mr. Katanga are by no means 'speculative and hypothetical, unsupported and largely extraneous to the case at hand' (para 87).

Conclusion

28. The documents provided by the prosecution itself therefore support the contention that there was a continuing investigation with respect to Ituri, including Bogoro, that the authorities did not give up on this investigation at least until the question of transfer to the ICC arose, if then, and that the Pre-Trial Chamber made a decision based upon an incomplete and inaccurate picture of the factual background. This confirms the existence of a past situation in terms of Article 17(1)(b) of the Statute. Given the flawed foundation of the Pre-Trial Chamber's decision, a defect in the proceedings arises which obliges the renewed application of Article 17(1)(a) to the situation at hand. The question of admissibility cannot in the Defence submission be evaded by an artificial analysis of the principle of *complementarity* and the conflict in Ituri.

ACCORDINGLY, the Defence reiterates and renews its request that the case be held to be inadmissible in terms of Article 17(1) of the Statute of the International Criminal Court.

Respectfully submitted,



David HOOPER

Dated this 1st April 2009

At London