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

Date: **20 May 2009**

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte , Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Hans-Peter Kaul

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

**Public Document**

**Defence Request to review or, in the alternative, for leave to appeal, the Decision  
on a number of procedural issues raised by the Registry**

**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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**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. In its ‘Decision on a number of procedural issues raised by the Registry’<sup>1</sup> of 14<sup>th</sup> May 2009 (the “Decision”), the Trial Chamber dealt with the issue of interpretation into Lingala. The Defence hereby seeks clarification of some parts of that decision, respectfully requests the Trial Chamber to revisit and change the Decision in the light of matters further set out below, or alternatively to grant the Defence leave to appeal the Decision.
2. The Trial Chamber ordered the appointment of an expert ‘who can independently assess Mr Katanga’s level of French’ and, in order to prevent Mr Katanga feigning an imperfect command of French, ‘to examine the record and to propose an appropriate test’. The Chamber further ordered the appointment of an expert to report on ‘the accuracy of the interpretation of court proceedings into Lingala’ and ‘to devise a test in order to assess Mr Katanga’s level of understanding in Lingala’.
3. The Chamber ordered that ‘the Defence of Mr Katanga and the Registry must provide full cooperation to the expert and provide him or her with all information he or she requests’ - subject to bringing to the Chamber’s attention any disputes. The Defence have not been given an opportunity to deal with any proposed language test. The Defence team will of course comply with that order and provide its full cooperation, subject to its duty of confidentiality to the accused. The Defence submit that any test can be done only with Mr Katanga’s express consent. Further, that should Mr Katanga decline to be tested by the expert no adverse inference should be drawn from such refusal. To do otherwise would be a reversal of the burden of proof.
4. The Defence would be grateful for the following to be clarified. It is unclear to the Defence whether these orders are to the effect that Mr Katanga subjects himself to such tests as the expert devises, or whether the Court is, at this stage, merely seeking tests to be devised in order for the Chamber then to consider any proposed test before determining whether Mr Katanga be requested or ordered to undergo such tests.
5. In any event the Trial Chamber seeks to have an expert devise a test, such test plainly being devised with a view that at some point in the future Mr Katanga be requested to take a test or tests.
6. The Defence submit, for reasons that are set out below, that it is wrong and inappropriate at this stage to request Mr Katanga to submit to a test as to his ability in

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<sup>1</sup> ICC-01/04-01/07-1134, Decision on a number of procedural issues raised by the Registry, 14 May 2009.

French or Lingala and seek leave to appeal the Trial Chamber's Decision in that respect.

7. The Appeal Chamber, by its Judgement of 27 May 2008<sup>2</sup> set out clear criteria to be followed in the event of an accused requesting interpretation and the circumstances when the requested language should be provided. The Appeal Chamber determined that;

Para. 61: '[...] the language requested should be granted unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under article 67 of the Statute' and 'If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated.'

8. The Defence recognises and accepts that the Appeal Chamber further stated that 'If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess, on the facts on a case by case basis, whether this is so.'<sup>3</sup> However, in the present case the Trial Chamber expresses no such belief. On the contrary, the Trial Chamber states at paragraph 44 of the Decision that 'neither the Registry nor the Prosecution have been able to demonstrate 'beyond any doubt' that Mr Katanga does understand and speak French fully' and that 'Consequently, they have not been able to establish that Mr Katanga is abusing his right under article 67 of the Statute.'
9. While the Trial Chamber states in paragraph 45 'that there are a number of elements in the record that tend to indicate that Mr Katanga's command of the French language is of an elevated level' this does not, in the Defence's submission, amount to a 'belief' on the part of the Trial Chamber that Mr Katanga does 'understand and speak French fully' in the sense of being 'completely fluent' as defined by the Appeal Chamber.
10. In those circumstances, the Defence submits that if, at very least, it is not 'absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his right under article 67', then the appropriate order for the Trial Chamber to make is an order that the accused receive interpretation of the court proceedings into his chosen language. If the issue is unclear to the Trial

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<sup>2</sup> ICC-01/04-01/07-522, (AC) Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2009.

<sup>3</sup> ICC-01/04-01/07-522, para. 2.

Chamber then the Appeal Chamber has clearly directed that where a doubt exists it should be resolved in favour of the accused.

11. The issue is a significant one for the accused. Mr Katanga has had the benefit of interpretation into Lingala for eighteen months and the case is due to start in just a few months time. Such tests, presently undefined and unknown, require continued delay and uncertainty. It is probable that in the event the Defence will require time to appoint and consult with their own linguistic expert. All this will take time and constitutes a significant distraction at a time when the limited resources of the Defence should be focused on trial preparation. Mr Katanga considers it demeaning to have to subject himself to such tests and is particularly upset at the suggestion by the Chamber that he may feign his responses.
12. The Defence respectfully agrees with the Trial Chamber that ‘neither the Registry nor the Prosecution have been able to demonstrate ‘beyond any doubt’ that Mr Katanga does understand and speak French fully’. The Trial Chamber is, the Defence submits, correct in rejecting the examples proffered by the Registry and the Prosecutor as satisfactory proof that Mr Katanga is, in the words of the Appeal Chamber, ‘completely fluent in the language in ordinary, non-technical conversation’.
13. In respect to the examples quoted in the ‘Requête de l’Accusation au sujet du « Report of the Registrar on the Provision of Lingala Interpretation for Germain Katanga at the Trial Stage »’,<sup>4</sup> the Defence has previously made its submissions in respect of the Procès-Verbal and the hand written document. The Procès-Verbal document was not written by the accused, nor, the Defence maintains, is it a complete record of the hearing to which it relates and at which the accused was unrepresented and where his request, that the hearing be in Lingala, went unheeded. The document referred to as Annex B is a short handwritten document in his hand that was dictated to Mr Katanga by members of his Defence team as a note to reflect his instructions concerning his absence from the Confirmation hearing.
14. The ‘suggestion’ by the Prosecution that Mr Katanga followed the confirmation proceedings from the Detention Unit by watching the French ‘footage’ is wholly incorrect and without foundation. Mr Katanga did not follow the proceedings visually. The Defence did not raise an issue of unfairness as it was aware that Mr Katanga had left his interests in the hands of the Defence attending the hearings - as is evidenced by the document referred to as ‘Annex B’.

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<sup>4</sup> ICC-01/04-01/07-870, dated 4 February 2009, and its Annexes A and B.

15. As for the further 'suggestion' by the Prosecution that Mr Katanga did not make use of the interpretation provided during the hearings and 'apparently' seemed to be following the proceedings in French, the Defence submits that there can be no proper or reliable basis for the 'suggestion'. The Prosecution was plainly not in a position to know what Mr Katanga was doing. Mr Katanga has consistently used the Lingala translation throughout the hearings of the case.
16. None of these suggested examples provide a basis for a reasonable belief that Mr Katanga is 'completely fluent'. In any event the accused himself has stated clearly that he is not completely fluent in French and has requested Lingala - the language in which he was brought up and the language that the Registry is currently capable of providing.
17. The Trial Chamber in its decision stated that 'before authorising a request for interpretation into a non working language, the Chamber must consider whether the proposed interpretation will indeed remedy the problem of imperfect command of one of the working languages of the Court. If the Chamber concludes that interpretation will not significantly enhance the accused's understanding of the proceedings, there seems very little advantage in providing it'.<sup>5</sup> The Trial Chamber stated that it is concerned that either Mr Katanga may be insufficiently fluent in Lingala or that the Lingala interpretation may be inadequate as it may lack, for example, a 'developed legal vocabulary'. The Defence submits that there is no present basis for suggesting that Lingala is a deficient language. It is the official language in the DRC and spoken by many millions as their primary language.
18. In respect to the issue of Mr Katanga's fluency in Lingala, and which the Trial Chamber refers to in its decision, the Defence submits that the Trial Chamber has plainly been misled by the mis-information provided by the Registry to the effect that Mr Katanga's language is to be referenced by a combination of Swahili, Kingwana and Lingala. The Registrar makes this assertion on her mistaken assumption that the accused was brought up in the Bunia area. This is wrong. Mr Katanga was brought up in Isiro, an area far from Bunia and a Lingala-speaking community. It is demeaning for Mr Katanga to be doubted as to whether he speaks his native language and to be subjected to some test. This was plainly only considered necessary because of the mis-information provided to the Chamber.

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<sup>5</sup> Decision, para. 46.

19. In respect to the issue raised by the Trial Chamber concerning the adequacy of the Lingala interpretation provided by the Registry the Defence accepts that there have been difficulties in the standard of that service. From an early stage Mr Katanga expressed his concern at the difficulties but he has found the service improved with time. There is still room for improvement but that is only to be expected in a new and complex service. It is no fault of Mr Katanga that the Registry addressed the issue of Lingala interpretation at such a very late stage. The Registry was plainly unprepared for providing the service, despite the fact that all but one of the ICC detainees are Lingala speaking and that many of the proposed witnesses speak the language. It is to be hoped that the service will be fully up to speed by the time of trial, including if needs be an agreed legal vocabulary. The Defence submits that a technical vocabulary has almost always to be rehearsed and developed by a translation service and the present is no exception.
20. The Defence notes that the main object and concern of the Registry hitherto has been the extra cost of translating into Lingala. It is for that reason that the Registry have been moved to object to providing this basic facility. The Defence suspect that the Registry's efforts to withdraw the service on the basis that the accused speaks French is just another means of achieving that cost-cutting objective which places insufficient weight on fair trial issues and on the need for the ICC to be seen to be providing a fair trial. It will surely be amiss and viewed as such by many in the DRC for a Lingala-speaking accused not to be provided interpretation.
21. The Trial Chamber states that 'the Chamber must consider whether the proposed interpretation will indeed remedy the problem of imperfect command of one of the working languages of the Court. If the Chamber concludes that the interpretation will not significantly enhance the accused's understanding of the proceedings, there seems limited advantage in providing it<sup>6</sup>'. It is to that end that the Chamber has requested an expert to examine the transcripts hitherto in order to assess the quality of translation and has requested that a Lingala test be devised for Mr Katanga.
22. Whether the interpretation will 'significantly enhance the accused's understanding of the proceedings' the Defence respectfully submit the following.
23. Firstly, as to Lingala not having a developed legal vocabulary, the Defence notes that fluency of language is expressly not to be measured by 'technical ' conversation. In any event this suggestion of under-development may appear somewhat inappropriate

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<sup>6</sup> Decision, para. 46.

in some quarters as Lingala is the national language of the Democratic Republic of Congo and the first language of the accused.

24. Secondly, but more importantly, the Trial Chamber has thereby introduced an additional criteria to that established by the Appeal Chamber. No mention of such a mandatory and relativist approach was made in its extensive review of the language position. The Defence submit that this relativist approach is an unjustified departure from the decision of the Appeal Chamber. The Defence submits that the only proper order for the Trial Chamber to have made in the circumstances presented to it was to order continued interpretation of court proceedings into Lingala.
25. It is unclear whether, should the accused decline to be tested, any refusal would be held against him or be the subject of an adverse inference. If the Trial Chamber were then to decide not to grant interpreting rights to the accused then that would or may significantly effect the fair and expeditious conduct of the proceedings and may, in the Defence submission, be a fundamental breach of fair trial rights by effecting his ability to follow the trial and thereby give instructions on those proceedings.
26. The Defence seeks leave, subject to the matters set out in its final prayer, to appeal the Trial Chamber's decision to devise and order tests in French and Lingala rather than make an immediate order for interpretation of the trial proceedings into Lingala.
27. The issue is one that, the Defence submits, falls within the criteria of article 82(1)(d) of the Statute. It touches on a significant fair trial issue that would or may significantly effect the fair and expeditious conduct of the proceedings. The right to interpretation, one of the basic rights of the accused, is an essential component of, or sine qua non of, a fair trial.<sup>[1]</sup> The decision of the Trial Chamber, the subject of this application, is a significant deviation from the Appeal Chamber's decision and, the Defence submits, makes an unnecessary and unlawful demand of the accused. It also introduces a further, relative criterion absent from the clear directions of the Appeal Chamber. If the Appeal Chamber upholds the submissions of the Defence then significant time and effort will be saved. The devising of tests, the scrutiny of those tests, the possible submissions and hearings relating to the issue of tests in the future, the possible instructing of a defence expert on the issue of linguistics - all potentially lies ahead if the tests go ahead.
28. An immediate resolution by the Appeals Chamber may materially advance the proceedings given the significant nature of the issue. The words of the section were

reviewed definitively in 'Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal'<sup>7</sup>,

29. The issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial<sup>8</sup>.

'The meaning conveyed by "advance" in the latter part of sub-paragraph (d) is "move forward"<sup>14</sup>; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings'<sup>9</sup>.

A wrong decision on an issue in the context of article 82 (1) (d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back.<sup>10</sup>,

The Defence submit that the matters raised by the Defence in this application meet the requirements of this authority.

30. The Defence respectfully request the Trial Chamber;
- a. To clarify the matters raised in paragraphs above.
  - b. To review its decision, in the light of the information contained in paragraphs Y and Z above, that the accused submit to tests for French and Lingala and instead to order, without further ado, that Mr Katanga receives interpretation in Lingala. The Defence have not had the opportunity to address the issue of a test in either language prior to this filing.
  - c. Alternatively, to grant leave to appeal the decision to devise and order tests in French and Lingala rather than make an immediate order for interpretation of the trial proceedings into Lingala.

<sup>7</sup> Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal 13 July 2006, Situation of DRC, ICC-01/04-168

<sup>8</sup> *ibid*

<sup>9</sup> *ibid*

<sup>10</sup> *ibid*

Respectfully submitted,



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David HOOPER

Dated this 20 May 2009

At The Hague