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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

**Renewed Application by the Defence for Germain Katanga for a New 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:

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A. Introduction

1. This is a renewed application by the Defence for Germain Katanga (hereinafter the Defence) for an order that the Prosecution file a new amended document containing the charges pursuant to Article 61(3)(a) of the Statute. The Defence's first application of 12th March 2009¹ was superseded and rendered potentially moot by the Chamber's Order of 13th March requiring the Prosecution to file a comprehensive table of incriminating evidence.² The Chamber noted at paragraph 7 of that order:

...unless the Defence can demonstrate the contrary, it seems to the Chamber that a well-structured table can fulfil the function of an amended document containing the charges. Indeed, if the table is filled in appropriately, it will provide the same information as a narrative document containing the charges, with the added benefit of additional detailed information and more precision.

2. The Defence notes that in some respects the implementation of the order has proved the Chamber's observation to be correct. The legal aspects of the charges have been clearly identified, especially with respect to understanding the interface between the charges and the evidence. Given the Chamber's observation the Defence reserved its position as to whether the implementation of the order of the Chamber would meet the concerns of the Defence. Having reviewed the 1165 page document produced by the Prosecution, the Defence has reached the conclusion that while useful in providing notice of the evidence which the Prosecution intends to rely upon, this lengthy and inter-dependent document does not fulfil the practical purpose of providing the Defence with a single, reliable and clear point of reference for the charges against the accused.
3. This application is made to ensure that the accused is provided with an authoritative, clear, concise and comprehensive representation of the charges in a manner which both gives effect to the Confirmation Decision of 26 September 2008,³ and at the same time is capable of being used during the course of the trial as a simple reference point as to the nature and extent of the charges against the accused. Since the concerns of the Defence remain essentially unchanged and the earlier proposal of the Defence was

¹ ICC-01/04-01/07-954, Defence Application for an Amended Document Containing the Charges.

² ICC-01/04-01/07-956, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol.

³ ICC-01/04-01/07-716-Conf, Decision on the confirmation of charges. *Cf.* its public redacted version, ICC-01/04-01/07-717, notified on 1 October 2009.

to some extent superseded by the Order of the Chamber, the Defence repeats below many of the legal arguments contained in its first motion on this issue.

B. Procedural background

4. 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 2007.⁴ He was surrendered and transferred to The Hague on 17 October 2007. His first appearance before Pre-Trial Chamber I was on 22 October 2007.⁵ The Amended Charging Document was filed on 26 June 2008.⁶ A confirmation of charges hearing then took place from 27th June to the 18th July 2008, and the Decision on Confirmation of Charges was delivered on the 26th September 2008.
5. On the 12th March 2009, the Defence filed an application for an order to 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 26th June 2008, and which, in the light of the said decision, removes impermissible references.'⁷ The following day on the 13th March 2009, the Trial Chamber issued its Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol.⁸ This decision required the Prosecution to produce a 'Table of Incriminating Evidence'. On 27th May 2009, the Prosecution finally filed its *Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l'Accusation et de la liste des pièces à charges*.⁹ In the mean time a trial date has been set for the 24th September 2009.¹⁰

⁴ ICC-01/04-01/07-1-tENG.

⁵ ICC-01/04-01/07-T-5-ENG.

⁶ ICC-01/04-01/07-649, Submission of Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648.

⁷ ICC-01/04-01/07-954, p. 11.

⁸ ICC-01/04-01/07-956.

⁹ ICC-01/04-01/07-1174.

¹⁰ ICC-01/04-01/07-999, Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve), 27 March 2009.

C. Utility of the Table of Incriminating Evidence

6. The Prosecution's Table of Incriminating Evidence consists of 1166 pages of Annexes to a motion. It is part in French and part in English. The Prosecution are not providing a translation of either language. Each annexe addresses a separate crime charged and is divided, inter alia, into a column for the factual basis of the charge, and a column for the evidence supporting the charge. The Table provides a comprehensive picture of the evidence upon which the Prosecution intends to rely in support of each charge. To this extent it is a useful tool.
7. However, having studied this extensive document, the Defence is not satisfied that it does serve the function of a concise and unambiguous exposition of the charges against the accused, which can serve as a single and authoritative point of reference as to the intention of the Prosecution in this respect. The Table of Incriminating Evidence produced by the Prosecution is large and unwieldy and yet incomplete as it requires reference to other documents for the factual premise of charges to be understood. Neither, the *Amended Document Containing the Charges* to which the Table refers, nor the *Decision on Confirmation of Charges* enable a clear and precise exposition of the charges including their factual underpinning. The former is superseded by the latter which only accepts certain legal charges. The latter is a 227 page document containing reasoning, opinion and explanation, as well as a separate opinion.
8. It is submitted that while the Table of Incriminating Evidence serves a useful function, in its present form it does not respect the rights of the accused and in particular the right to be informed of the charges, and the right to adequate facilities for the preparation of the defence. Further, the said table does not adequately serve the function of a document which can be used with ease during the course of the trial to satisfy procedural requirements under the rules and facilitate a common understanding of the basic premise of the Prosecution case in the conduct of examination of witnesses and the presentation of argument. This common understanding should be in place before the commencement of the trial and the Prosecution should not be permitted to define its case as the case proceeds exploiting ambiguities in the documents. In 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.¹¹

D. The right to be informed of the charges

9. 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 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 moulding of the case by the prosecution as the evidence unfolds.

10. It is therefore submitted that this right requires that the nature of the charge against him is communicated to him in a manner which is clear and unambiguous, as well as complete. It also demands in the defendant’s submission that charges should be communicated in so far as possible in a way which is simple, direct and all-embracing.

11. 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 Confirmation of Charges on the charging document which it refers to. The fundamental right of the accused to be informed of the charges against him is the same in 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.¹²

12. The Table of Incriminating Evidence filed by the Prosecution contains the factual underpinning of the charges in the first column of each annexe to its filing motion.

¹¹ *Prosecutor v Kupreskic*, Appeals Judgment of 23 October 2001, para 92

¹² *Prosecutor v Blagoje Simic*, Appeals Judgment, 28 November 2006, para 71

Instead of formulating the factual assertion underpinning the charge it refers back to paragraph numbers in the Amended Document Containing the Charges of 26 June 2008. It then in a number of cases quotes a sentence or sentences from that paragraph. In many cases the quote is preceded by and/or followed by a series of dots in brackets, suggesting that there is text to precede and text to follow. It is therefore not clear whether the Prosecution is relying on only the quoted text, or also the text preceding and following the quoted text but not appearing in the document, and to what extent. The result is that the Defence does not know the exact extent of the factual foundation of the charge in the case of each element of a crime. It also means that the Defence must cross-reference to the Amended Charging Document of 26th June 2008 each time to make sense of the Table of Incriminating Evidence.

13. It is submitted that this does not communicate to the Defence in an unambiguous manner the exact extent of the charges in so far as their factual premise is concerned. In order to avoid any form of ambiguity or latitude in the precise effect of the Decision on the charging document or the case against the accused, it is suggested that it would be appropriate for the Prosecution to be required to reformulate a single, simple and short document which accurately reflects the decision of the Chamber confirming the charges and, as the case may be, not confirming others. This document should then be referred to in a more precise manner in the Table of Incriminating Evidence such that there can be no room for doubt as to the exact nature and extent of the factual premise of an element of a crime charged.

E. The right to facilities for the preparation of the defence

14. Article 67(1)(b) provides that the accused has the right to adequate facilities for the preparation of his defence.
15. It is submitted that facilities includes the necessary tools for ensuring that the accused can understand and direct his case in a light of clarity and precision as to the case against him. The Defence thus invites that Trial Chamber to adopt the 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.¹³

16. While useful in setting out the extent of the evidence relied upon, the Table of Incriminating Evidence causes uncertainty and difficulty as a basic document for reference on the charges since it requires cross-reference to an outdated document and does not even make plain the exact extent to which that document is being relied upon.

F. Facilitating the procedural requirements

17. Apart from ensuring that the accused is in a position to predict clearly the case that will be presented against him, procedural requirements have been enshrined in the Statute. So 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.

18. In order to facilitate this task it makes sense in the Defence submission for the Prosecution to produce a finalised version of the charging document which takes into account the decision of the Pre-trial Chamber confirming charges. It is further submitted that the words of this provision pre-suppose that the charges are contained in a single document without need for reference to any other.

19. Article 68(8)(a) then 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 three documents at the commencement of the trial, an original charging document, a decision on confirmation of charges in order to understand the charges against him and a table of incriminating evidence. It is also difficult to make an admission of guilt unless the

¹³ *Prosecutor v Nahimana*, Decision on Preliminary Motion filed by the Defence based on defects in the form of the indictment, 24 November 1997

nature of the charges is absolutely, unambiguously and comprehensively contained in a single document. The document should be in a language he understands and the Defence, for the convenience of the Registry, has never insisted documents be translated into Lingala and French suffices in the case of documents.

20. In the case of *Lubanga*, the Trial Chamber held that in order to give effect to its obligation under article 64(8)(a), that is in order to ensure before proceeding to trial that the accused understands the nature of the charges, it was 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.¹⁴
21. While one Trial Chamber is not bound by the decision of another Trial Chamber, it is submitted that this is 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.

G. Preserving a document as a reliable source of the charges, as confirmed

22. It is submitted that the document containing the charges must inevitably be intended to disclose, in terms which are as clear and definite as possible, the prosecution's case against the accused. It is therefore one of the central pillars of the trial. The fact that Regulation 52 of the Regulations of the Court 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.
23. 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

¹⁴ Order for the Prosecution to File an Amended Document Containing the Charges, 9th December 2008 ICC-01/04-01/06

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 up to date, comprehensive and authoritative document forming the basis of discussion and amendment.

24. Second, all participants in the proceedings, the Trial Chamber, the prosecution, the defence and any other participant, including victims, States and *amicus curiae*, all plan, strategise 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 obviously particularly so for temporary participants such as States and *amicus curiae*, who may not be entirely familiar with the history of the proceedings.
25. 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.¹⁵ 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.
26. Third, 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 a subject of public scrutiny. The trials before the International Criminal Court are also the subject of great public interest. Having a single authoritative document containing the charges as the basis for the progress of the trial assists in the transparency the process and the ability for the public to follow.
27. Fourth, decisions of the Trial Chamber and Appeals Chamber throughout the trial but also their respective final judgments will inevitably involve analysis and connection with 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 as such but also the facts and circumstances surrounding those charges

¹⁵ See 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, ICC-01/04-001/06-1432

expressed in a clear and unambiguous manner, and further not containing extraneous material.

28. The Appeals Chamber has held that it:

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.¹⁶

This underscores the importance of having a concise and complete version of the charges upon which the prosecution seeks to rely, reformulated in the light of the Decision on Confirmation of Charges.

RELIEF SOUGHT

(1) It is accordingly requested that the Trial Chamber order the Prosecutor to file an amended document containing the charges including both legal and factual elements. This should reflect the position following the Decision on the Confirmation of Charges and not go beyond the provisions of the original amended charging document of 26 June 2008.

(2) It is further requested that the Prosecutor be ordered to re-file its Table of Incriminating Evidence with the charges referred to reflecting the charges as set out in the said new document, and being precise as to which specific aspects are being relied upon.

Respectfully submitted,



David HOOPER

Dated this 17 July 2009

At The Hague

¹⁶ See note 15 supra, at para 63