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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 THE CONGO
IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI**

Public Document

**Observations of the Victims on the Objection to Jurisdiction raised by the
Defence for Germain Katanga in its Motion of 10 February 2009**

Source : Legal Representatives of Victims

Ms Carine Bapita Buyangandu

Mr Hervé Diakiese

Mr Jean Chrysostome Mulamba Nsokoloni

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 of Germain

Katanga
Mr David Hooper
Ms Caroline Buisman

Counsel for the Defence of Mathieu

Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr. Fidel Nsita Luvengika
Mr. Vincent Lurquin
Ms Flora Mbuyu Angelina

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(participation/reparations)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

**Observations of the victims on the objection to jurisdiction raised by the Defence
for Germain Katanga in its Motion of 10 February 2009**

1. Trial Chamber II has invited the victims to submit their observations on the objection to the Court's jurisdiction submitted on 11 March 2009 by the Defence for Germain Katanga under article 19(2)(a) of the Statute, in particular on the following points:

(a) The Defence contends first that the Court's interpretation of the principle of complementarity is flawed.

(b) The Defence for Germain Katanga contends secondly that the Court applied an incorrect test for admissibility, and it accordingly proposes that new tests be applied (after applying both systems, the Defence concludes that the case is inadmissible).

(c) The Defence asserts finally that, having regard to the terms of article 17 of the Rome Statute, it cannot be said that the authorities of the DRC were unable or unwilling to prosecute Germain Katanga.

2. Prior to any examination of the arguments put forward by Mr. Katanga's Defence, the victims wish respectfully to submit to the Chamber certain considerations relating to their lack of access to the material on file which has enabled the Defence to develop its argument on lack of jurisdiction.

3. It is thus apparent from reading the various submissions of the parties and interveners that Mr. Katanga's Defence relied in particular on evidentiary material disclosed to it by the Prosecutor in order to support its objection to the ICC's jurisdiction.

4. The victims note that they have only had access to redacted versions of the said material, which has placed them in a situation of real difficulty in terms of assessing

the material in its entirety, making it substantially harder for them to submit detailed, specific observations to the Chamber regarding the objection.

5. In regard to the documents concerning the proceedings instituted against Mr. Katanga in the DRC, the victims observe that they were particularly entitled to have access to those documents in full, in that, under Congolese law, all of the procedural acts relating to Mr. Katanga must in law be accessible to the various parties to the proceedings, since they are concerned by the facts under investigation.

6. In effect, disclosure of the documents in criminal proceedings and the outcome of a prosecution are based in law on a combined reading of articles 157 and 158 of the Decree on the Organisation of the Courts (*arrêté d'organisation judiciaire*) 299/79 of 20 August 1979, which lays down the internal rules and regulations governing the courts, tribunals and public prosecutors' offices.

7. That text, which constitutes the general law governing criminal procedure, is also applicable to the Military Prosecutor's Office [*Ministère public militaire*].¹

8. In the case of the proceedings against Mr. Katanga by the Public Prosecutor of the Military High Court, the legal authority responsible for ensuring application of these provisions in relation to the parties is the Advocate General for the Armed Forces [*Auditeur général des Forces armées*], who by law enjoys full and exclusive power of prosecution before all military courts and tribunals.²

9. Thus the victims respectfully submit to the Chamber that, at this stage of the proceedings, the restrictions which have excluded them from full access to all of the material on file are not supported by any specific basis in law, particularly since the

¹ Article 40 of the Military Judicial Code of the DRC: [TRANSLATION] "subject to any provision to the contrary in the present Code, the provisions of general law of the Code on the Organisation and Jurisdiction of the Courts shall apply to the Military Prosecutor" (Law No. 023/2002 of 18 November 2002 on the Military Judicial Code).

² Articles 42 and 43 of the above Law.

body from which the redacted documents originated was bound by Congolese law to allow the parties to have access to them and to take copies.

10. The victims most respectfully submit the following observations to the Chamber:

A. The flawed treatment of the complementarity principle

11. In his submissions of 10 February 2009, Defence Counsel for Germain Katanga contends that the Congolese authorities have charged his client with several counts, including murder, illegal detention and torture, genocide, war crimes and crimes against humanity.

12. The Defence observes that Mr. Katanga is being prosecuted together with others on account of offences committed during the period from July 2002 to December 2005 in the course of general or systematic attacks on the civilian population, in particular at Bogoro.

13. After comparing the documents from the DRC with the decision of Pre-Trial Chamber II, the Defence argues in its objection that there is a substantial, if not total, overlap between these documents. It contends that the DRC intended to prosecute Germain Katanga for crimes against humanity, and for the offences allegedly committed against the population of Bogoro.

14. The Defence fails to show clearly in what way it is apparent from a comparison of the DRC documents that the treatment of the principle of complementarity is flawed.

15. In effect, the Defence fails clearly to explain how the content of the documents emanating from the Pre-Trial Chamber can be flawed simply because they contain virtually the same offences and charges, in respect of the same defendant, as those from the DRC.

16. To date, the only procedural act capable of enabling a determination to be made of the charges brought by the Military Prosecutor in the DRC against Mr. Katanga would be a decision referring the case for trial before the Military High Court under article 200 of the Military Judicial Code, issued by the Military Prosecutor and setting out exhaustively and specifically the acts and charges of which the defendant is accused, to the exclusion of any other charge not contained therein.³ That decision would constitute the sole document confirming and determining, following investigation of the evidence, the charges brought against the defendant and the offences of which he is accused.

17. To date, the Military Prosecutor has not yet referred the case to the judges of the Military High Court. He has confined himself to requesting the extension of detention from month to month in accordance with article 209(4) of the Military Judicial Code. In effect, it has not been possible for the charges against Mr. Katanga to be determined before a military court, for the simple reason that the Military High Court, Brigadier Germain Katanga's natural judge, was unable to constitute a bench in accordance with military law in order to try him and, as a result, has decided to suspend all proceedings against Mr. Katanga until a bench can be properly composed.⁴

18. The Defence seeks to establish an error on the basis of documents which have not yet been confirmed by a decision of the Military Prosecutor to refer the case for trial.

19. The Defence for Germain Katanga bases itself on conjecture, at a time when this case is still pending before a domestic body, namely the Military Prosecutor's Office, and when there has never been any decision referring the case for trial and confirming the final charges against him.

³ Article 200, Military Judicial Code of the DRC.

⁴ Interlocutory judgment of the Military High Court of the DRC of 12 May 2006/PD N 001/06.

20. It is clearly a matter of speculation to assume what charges might be brought by the Military Prosecutor's Office against Mr. Katanga and, above all, to assert that the acts related to the attacks on Bogoro currently being considered by the International Criminal Court would be included in any subsequent decision to refer the case for trial, and to rely on such an assumption to found an objection to jurisdiction.

21. The only established legal fact remains that, to date, apart from the International Criminal Court, no court or prosecutor has tried or examined Mr. Katanga in regard to the acts of which he is accused in connection with the attacks on the village of Bogoro.

B. – Incorrect tests for admissibility

22. The Defence for Germain Katanga contends that the Court has applied an incorrect test of admissibility, in that it has to date interpreted article 17 of the Rome Statute as covering the case where the same defendant is charged with the same offences both before the International Criminal Court and before a domestic military court. The Defence argues that the emphasis should rather be on the comparative gravity and greater number of the offences with which the defendant is charged.

23. The victims consider that the interpretation of article 19(2)(a) given in Decision ICC-01/04-01/07949 is the proper one in the present case.

24. That decision, as a source of case law, accords better with the practical implementation of the requirements of article 17 of the Rome Statute.

25. The basic test for determining whether a case is admissible before the Court in light of article 17 lies above all in an analysis of the State's willingness to prosecute the accused or suspect, irrespective of the charges against him.

26. The gravity threshold, or the number of charges, is irrelevant to this determination of the willingness to prosecute demonstrated by the State concerned.

27. To interpret article 17 by reference to tests based on the gravity threshold and the number of charges represents an attempt to amend this provision of the Statute which is unacceptable *rebus sic stantibus*.

C. – The inability or unwillingness of the DRC authorities to prosecute Germain Katanga

28. Finally, the Defence for Germain Katanga asserts that, in relation to article 17 of the Rome Statute, it cannot be said that the authorities in the DRC were unable or unwilling to prosecute Germain Katanga.

29. Pre-Trial Chamber II had correctly found that, in referring the situation in the DRC to the Court, the national authorities in the DRC were unfortunately unable to conduct investigations [...] or to encourage the necessary prosecutions without the assistance of the ICC.⁵

30. Moreover, a further factor in favour of this case being considered by the International Criminal Court is the interlocutory judgment of the Military High Court of 12 May 2006 P.D 001/06 already cited.

31. Thus it was decided that, where two of the individuals concerned by the Prosecutor's interlocutory application had the seniority and rank of brigadier-general, the law required that the bench of the High Court be composed of five judges, all of them of general officer rank and including two career members of the judiciary.

32. Likewise, the judicial officer representing the Public Prosecutor's Office at the hearing had to be of a rank higher than or equal to that of the defendant. In addition, there was the issue of the seniority of the officers of a rank equal to that of the

⁵ Letter of 3 March 2004 from President Joseph Kabila to the Prosecutor of the International Criminal Court, ICC-01-04-01-07-11, Annex 2.1 of 25 February 2008, reclassified as a public document pursuant to the Decision of 25 February 2008.

defendant, which could not be less than his, a matter addressed at the hearings of 5 and 9 May 2006.

33. Finding itself unable to satisfy these legal requirements, the Military High Court suspended the proceedings before it and, applying article 209(4) of the Military Judicial Code, confined itself to extending from month to month the period of detention of the defendants, namely Germain Katanga and his fellow-detainees.

34. To date, since the publication of that interlocutory judgment the Congolese authorities have yet to designate the two career judiciary members, and the proceedings thus remain blocked.

35. Having regard to all of the foregoing and to the action taken by the Congolese State in approaching the ICC in regard to Mr. Germain Katanga, it may reasonably be concluded, both from the letter from the President of the Democratic Republic of the Congo to the Prosecutor of the International Criminal Court and from the suspension of the proceedings before the military courts in the the DRC, as well as the transfer of Mr. Katanga to the ICC, that the manifest will of the Congolese authorities is still to cede jurisdiction to the ICC to try the offences ascribed to Mr. Katanga in accordance with the latter's rules.

D. – CONCLUSION

36. The victims consider that the International Criminal Court has jurisdiction to try the accused and that the objection to jurisdiction should be dismissed.

37. The victims claim the right of access to unredacted versions of all of the documents made available to the Defence for Mr. Katanga.

For these reasons,

May it please the Trial Chamber:

- To dismiss the objection to jurisdiction raised by the Defence for Germain Katanga;
- To order that the victims be provided with unredacted versions of all of the documents disclosed to the Defence for Mr. Katanga.

[signed]

[signed]

Ms Carine BAPITA BUYANGANDU Mr. Hervé DIAKIESE

[signed]

Mr. Jean Chrysostome MULAMBA Nsokoloni

Legal Representatives of Victims

Done at Kinshasa, 16 April 2009.