

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04-01/07 OA8**

Date: **07 September 2009**

THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko, Presiding Judge
 Judge Sang-Hyun Song
 Judge Erkki Kourula
 Judge Ekaterina Trendafilova
 Judge Joyce Aluoch

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR**

v. Germain KATANGA and Mathieu NGUDJOLO CHUI

Public

**Prosecution's Consolidated Response to the Observations of the Legal
Representatives, OPCV and DRC on the Document in Support of Appeal of the
Defence for Germain Katanga against the Decision of the Trial Chamber "*Motifs
de la décision orale relative à l'exception d'irrecevabilité de l'affaire*"**

Source: Office of the Prosecutor

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Introduction

1. On 16 June 2009, Trial Chamber II issued a written decision finding the case against Germain Katanga (“the Appellant”) admissible, which was appealed by the Appellant. Three victims’ legal representatives, the Office of Public Counsel for Victims (“OPCV”), also acting as legal representative of victims, and the authorities of the Democratic Republic of Congo (“DRC”) have filed observations to the Defence Appeal Brief (“the Observations”).¹
2. The DRC authorities reiterate that they never investigated the Appellant in relation to the crimes committed in Bogoro. This position is shared by the Legal Representatives. Hence, the Observations support the Prosecution’s submissions and the Trial Chamber’s findings that the DRC authorities did not investigate nor prosecute the case against the Appellant, and consequently confirm that the Trial Chamber did not err in finding the case admissible before this Court.

Procedural Background

3. On 12 June 2009, Trial Chamber II orally dismissed the Defence Admissibility Challenge.² On 16 June 2009, it issued the written reasons for that decision (the “Decision”).³
4. The Appellant filed a notice of appeal on 22 June 2009⁴ and the document in support of the appeal on 8 July 2009 (“Defence Appeal Brief”).⁵ The Prosecution responded to the Defence Appeal Brief on 30 July 2009 (“Prosecution’s Response”).⁶

¹ When necessary the Prosecution will distinguish between the observations of the four legal representatives, including the OPCV (the “Legal Representatives’ Observations”) and the observations submitted by DRC (“the DRC’s Observations”).

² ICC-01/04-01/07-T-67-ENG ET.

³ *Prosecutor v. Katanga and Ngudjolo*, Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire (article 19 du Statut), ICC-01/04-01/07-1213, 16 June 2009 (hereinafter, the “Decision”).

⁴ ICC-01/04-01/07-1234.

⁵ Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘*Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire*’, ICC-01/04-01/07-1279. The Appellant raised five grounds in support of his appeal: (a) the Trial Chamber erred in finding that the challenge to admissibility was filed out of time; (b) the Trial Chamber erred in finding that the Prosecutor was under no obligation to bring to the attention of the Pre-Trial Chamber the Bogoro and related documents; (c) the Trial Chamber erred in defining “unwilling”, in light of Article 17(2) and the principle of complementarity; (d) the Trial Chamber erred in confusing the concepts of unwillingness and inability; and (e) the Trial Chamber’s erroneous definition of “unwilling” deprived the accused of a real and effective right to challenge admissibility.

⁶ ICC-01/04-01/07-1346-Conf OA8 (a public redacted version was filed on 31 July 2009, ICC-01/04-01/07-1349). The Prosecution submitted that, as the Appellant conceded, the First Ground of Appeal had no impact on the Decision. The Second Ground of Appeal was without merit: the Trial Chamber was correct in finding that the Prosecution was not obliged to place the relevant documents before the Pre-Trial Chamber as part of its Arrest Warrant Application; and in any event any error here also had no impact on the Decision as the Trial

5. Three victims' Legal Representatives and the OPCV, also acting as legal representative of victims,⁷ filed their Observations on the Defence Appeal Brief on 17 July,⁸ 29 July,⁹ 6 August¹⁰ and 13 August,¹¹ respectively.
6. After requesting¹² and being granted an extension,¹³ the DRC authorities filed their Observations on 1 September 2009 and the parties and participants were notified on 2 September 2009.¹⁴
7. The Prosecution hereby responds to the four Legal Representatives' Observations and the DRC's Observations.

Submissions

8. The Observations present different submissions related to each of the five grounds raised by the Appellant. The Prosecution will address below the relevant submissions related to the instant appeal.

Inaction of the DRC authorities and admissibility of the case

9. The DRC authorities - the competent jurisdiction to investigate and prosecute the case - reaffirm in their Observations that they never conducted any investigation into the crimes committed in Bogoro involving the Appellant.¹⁵
10. The various Legal Representatives' Observations further support this position¹⁶ and rightly note that "the DRC authorities have never opened an investigation or prosecution on the crimes committed in Bogoro on 23 February 2003".¹⁷

Chamber considered all of the documents and concluded that the case was admissible. The closely linked arguments presented by the Appellant in the Third, Fourth and Fifth Grounds of Appeal do not demonstrate that the Trial Chamber made any substantive error in finding that the case was admissible. The findings in the Decision, albeit largely considered under the rubric of unwillingness, amply demonstrated that the Trial Chamber found that the DRC authorities were inactive, i.e. they were not investigating or prosecuting the case against the Appellant.

⁷ Note that the Registry appointed the Principal Counsel of the Office as Legal Representative of 52 victims on 6 March 2009 (ICC-01/04-01/07-945) and 9 March 2009 (ICC-01/04-01/07-947-Conf-Exp.Anxs 1-40).

⁸ ICC-01/04-01/07-1318 OA8.

⁹ ICC-01/04-01/07-1342-tENG OA8.

¹⁰ ICC-01/04-01/07-1354. The Prosecution notes that these Legal Representatives refer to the observations previously submitted on 16 April 2009, ICC-01/04-01/07-1060-tENG.

¹¹ ICC-01/04-01/07-1369.

¹² ICC-01/04-01/07-1427-Anx1.

¹³ ICC-01/04-01/07-1432.

¹⁴ ICC-01/04-01/07-1449-Anx1 ("the DRC's Observations"). The DRC's Observations are signed by "L'Auditeur Général des Forces Armées de la République Démocratique du Congo". The Prosecution notes that the DRC authorities wrongly assert that the Appellant pleaded guilty at the hearing on the confirmation of charges. See pp. 3, 5.

¹⁵ ICC-01/04-01/07-1449-Anx, pp. 3-4.

11. Thus, the Observations all reinforce the position that the case was neither investigated nor prosecuted by the DRC, as submitted by the Prosecution before the Trial Chamber¹⁸ as well as in its Response to this appeal,¹⁹ and accepted by the Trial Chamber in the Decision.²⁰

12. The Prosecution also concurs with the argument of the Legal Representatives that in a situation of domestic inactivity (i.e. where the competent domestic authorities are not investigating or prosecuting the case), the case is admissible before the ICC under the plain language of Article 17(1)(a).²¹ Article 17 must be read as a whole,²² and under its provisions if a case is not being investigated or prosecuted then the question of “unwilling” within the meaning of Article 17(2) does not arise.²³ In any event, even if a specific “unwillingness” inquiry is required, the OPCV observes that “it would be an illogical conclusion to rule the case inadmissible before the Court simply because the unwillingness by the State is evident [by it taking no action], as opposed to covert [by initiating non-genuine proceedings].”²⁴

13. Furthermore, the Legal Representatives and the DRC authorities concur that the Trial Chamber correctly assessed that there are no documents containing decisive

¹⁶ ICC-01/04-01/07-1318; ICC-01/04-01/07-1342-tENG; ICC-01/04-01/07-1354, para.11 referring to ICC-01/04-01/07-1060 (see para. 21 thereof). Although the OPCV (ICC-01/04-01/07-1369) does not explicitly deal with this issue, in their prior observations to the Trial Chamber on the Defence Admissibility Challenge, it expressly stated that “...the arrest and detention of Germain Katanga by the DRC authorities, as laid out by the Defence Motion, do not rise to the level of an investigation or prosecution as those terms were intended to be defined by the delegations during the drafting of the Rome Statute...”. See ICC-01/04-01/07-1369, 28 April 2009, para. 33.

¹⁷ ICC-01/04-01/07-1318, para. 23. See also ICC-01/04-01/07-1342-tENG, p. 19; ICC-01/04-01/07-1318, paras. 15, 23 and ICC-01/04-01/07-1060, para. 21, per reference from ICC-01/04-01/07-1354, para.11.

¹⁸ ICC-01/04-01/07-958-Conf-Exp, paras. 109-110. A public redacted version of this document was filed on 30 March 2009.

¹⁹ Prosecution’s Response, paras. 60-65.

²⁰ Decision, paras. 77, 80, 92-93. See also para. 71. As stated in the Prosecution’s Response (para. 63) the Trial Chamber went further and also found that the DRC did not intend to investigate or prosecute the case in the future. Furthermore, the fact that the analysis of inaction was conducted under the rubric of an additional form of unwillingness (Decision, paras. 77-78) does not alter the fact that the Chamber considered and found that the case was not “being investigated or prosecuted by a State which has jurisdiction over it”, i.e. the DRC. The nature of unwillingness found by the Chamber is defined as “when a State chooses not to investigate a particular case” (Decision, paras. 77- 81). Therefore, this “unwillingness” is inactivity.

²¹ ICC-01/04-01/07-1342-tENG, pp. 16-17: “In conclusion, the petitioners maintain that as Mr Germain Katanga was not the focus of any investigation or prosecution by the DRC regarding the acts committed in Bogoro on 24 February 2003, he has no interest in calling for a definition of the term “unwillingness” used in article 17(2) of the Statute since such an interpretation is of no advantage in his specific case (as under no circumstances can the case be deemed inadmissible in view of these particulars) whereas, in parallel, the willingness of the DRC regarding not trying Mr Germain Katanga and its willingness to ensure that he is tried by the Court are clear and cannot be disputed. As a result, the application itself of the principle of complementarity would indicate that the Court has jurisdiction in the present case.”

²² ICC-01/04-01/06-1318, paras. 19-20.

²³ ICC-01/04-01/07-1342-tENG, pp. 19-20.

²⁴ ICC-01/04-01/06-1369, para. 26.

information – i.e. documents that reflect investigative steps taken by the DRC authorities in relation to the case – and thus that the Prosecution did not wrongly withhold relevant documents from the Pre-Trial Chamber.²⁵

Commencement of Trial

14. The Legal Representatives and the DRC authorities adopted different positions regarding the Trial Chamber’s interpretation on “commencement of trial”.²⁶

15. The Prosecution reiterates its position that the Trial Chamber’s finding on this issue did not impact on the outcome of the Decision.²⁷

Additional Submissions

16. The Prosecution notes that the Observations put forward additional submissions on issues which are not required for the resolution of the present appeal.²⁸ The Prosecution will therefore not address these arguments.

²⁵ ICC-01/04-01/07-1342-tENG, p. 13; see also Decision, para. 72. The Legal Representatives noted that the Prosecution acted diligently before reaching this conclusion: the Prosecutor checked with the DRC authorities who informed him that there was no ongoing investigation on the case (ICC-01/04-01/07-1342-tENG, p. 11; ICC-01/04-01/07-1318, para. 15) and that a document dated 2 March 2007 mentioning Bogoro (“the Prorogation Document”) did not constitute an investigative act (ICC-01/04-01/07-1342-tENG, p. 12; ICC-01/04-01/07-1318, para. 16). The DRC’s Observations confirm this fact, see ICC-01/04-01/07-1449-Anx, p. 3.

²⁶ The Legal Representatives in their Observations (ICC-01/04-01/07-1318 and 01/04-01/07-1342-tENG) support the interpretation of “commencement of trial” purported by the Trial Chamber, the OPCV (01/04-01/07-1359) simply refers to the Prosecution’s Response and the DRC authorities present an ambiguous position on this issue.

²⁷ Prosecution Response, paras. 36 and 37.

²⁸ For instance, the OPCV submits that article 17(2) constitutes a non-exhaustive list of “unwillingness” (ICC-01/04-01/07-1369, paras. 22-26) and the States have a right to waive their own jurisdiction (ICC-01/04-01/07-1369, paras. 31-35). As stated in its Response, the Prosecution submits this is a case of “inactivity” or “inaction” within the terms of article 17(1)(a) and thus it is not necessary to engage in further discussions regarding the additional limbs of Article 17 (as correctly identified in other victims’ Legal Representatives’ Observations – see e.g. ICC-01/04-01/07-1342-tENG, pp. 16-17, 19-20). In addition, the submissions relating to the alleged inability of the DRC authorities are similarly irrelevant (see e.g. ICC-01/04-01/07-1318, paras. 26-28), and in reality descriptions of the difficulties faced by the DRC authorities in investigation of such crimes simply serve to explain the inactivity in relation to this case (see e.g. ICC-01/04-01/07-1342-tENG, p. 21; ICC-01/04-01/06-1449-Anx, p. 4).

Conclusion

17. The Prosecution concurs generally with the Observations, which agree that the Appellant was not being investigated or prosecuted by the DRC authorities in relation to the crimes committed in Bogoro and that the Trial Chamber correctly found the case admissible.



Luis Moreno-Ocampo, Prosecutor

Dated this 7th day of September 2009

At The Hague, The Netherlands