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THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko

**Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Ekaterina Trendafilova
Judge Joyce Aluoch**

SITUATION

IN THE CASE OF

THE PROSECUTOR v. Germain KATANGA and Mathieu NGUDJOLO CHUI

Public Document

**Observations of the Legal Representatives of Victims a/0330/07 and a/0331/07 on
the Appeal of the Defence for G. Katanga under Article 19(3) of the *Rome Statute*
and Rule 59(3) of the *Rules of Procedure and Evidence***

Source: Legal Representatives of Victims a/0330/07 and a/0331/07

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

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States' Representatives

The Government of the Democratic
Republic of the Congo

States' Representatives

The Government of the Democratic
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REGISTRY

Registrar

Ms Silvana Arbia

I. Procedural background

1. On 10 February 2009, the Defence for Germain Katanga filed a motion challenging the admissibility of the case under article 19(2)(a) of the Statute which was classified as “*ex parte*, only available to the Defence” (“the Challenge”).¹ After being reclassified as confidential by the Registry at the Chamber’s request,² the Challenge was transmitted to the Office of the Prosecutor on 25 February 2009, in accordance with rule 58(3) of the *Rules of Procedure and Evidence* (“the Rules”).

2. On 5 March 2009, the Chamber issued a decision in accordance with rules 58 and 59 of the Rules setting out the procedure to be followed under article 19 of the Statute.³ In that decision, it ordered the Prosecutor to submit his written observations on the Challenge and to file a public redacted version thereof. It further ordered the Registrar to transmit a summary of the Challenge to the authorities of the Democratic Republic of the Congo (DRC), the Legal Representatives of the anonymous and non-anonymous victims and those victims who had already communicated with the Court.⁴

3. A public redacted version of the Challenge was filed on 11 March 2009 to which the Prosecutor responded on 19 March 2009.⁵ The Defence for Germain

¹ Defence for Germain Katanga, “Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute”, 10 February 2009, ICC-01/04-01/07-891-Conf-Exp.

² ICC-01/04-01/07-T-59-CONF-EXP-ENG ET, 25 February 2009, p. 35, lines 6 and 8.

³ *Decision Prescribing the Procedure to be Followed Under Article 19 of the Statute (Rule 58 of the Rules of Procedure and Evidence)*, 5 March 2009, ICC-01/04-01/07-943-Conf-tENG.

⁴ *Ibid.*, para. 9.

⁵ Office of the Prosecutor, “Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)”, 19 March 2009, ICC-01/04-01/07-96S-Conf-Exp.

Katanga requested the Chamber's leave to file a reply,⁶ which was granted on 27 March 2009.⁷

4. On 16 April 2009, the Legal Representatives of the Victims submitted their observations on the Challenge.⁸ After having sought and obtained an extension of the time limit granted, the Office of Public Counsel for Victims ("the OPCV") filed its observations on 28 April 2009.⁹

5. The Chamber initially scheduled a public hearing in the presence of the Congolese authorities for 18 May 2009.¹⁰ At the request of the DRC authorities, the Chamber rescheduled the hearing for 1 June 2009, since it considered their presence indispensable.¹¹

II. Subject of the appeal lodged by the Defence for Germain Katanga

6. Considering that the Defence for Germain Katanga relies on the following grounds in support of its appeal:¹²

⁶ Defence for Germain Katanga, "Defence Application for Leave to Reply to the Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 26 March 2009, ICC-01/04-01/07-994.

⁷ *Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the Regulations of the Court)*, 27 March 2009, ICC-01/04-01/07-1004-tENG.

⁸ Legal Representatives of Victims a/0330/07 and a/0331/07, "*Représentation concernant la requête sur l'exception d'irrecevabilité introduite par la Défense de M. Germain Katanga (art. 19 du Statut de Rome)*", 16 April 2009, ICC-01/04-01/07-1058-Conf; Legal Representatives of Victims a/0333/07 and a/0110/08, "*Représentation des victimes a/0333/07 et a/110/08 sur l'exception d'irrecevabilité déposée par la Défense de M. Katanga (Règle 59-3 du Règlement de procédure et de preuve)*", 16 April 2009, ICC-01/04-01/07-1059-Conf; Legal Representatives of the Victims, "*Observations des victimes quant à l'exception d'incompétence soulevée par La Défense de Germain Katanga dans sa requête du 10/2/2009*", 16 April 2009, ICC-01/04-01/07-1060.

⁹ *Observations du BCPV sur l'exception d'irrecevabilité de l'affaire de la Défense de Germain Katanga avec une annexe confidentielle ex parte réservée au BCPV et trois annexes publiques*, 28 April 2009, ICC-01/04-01/07-1083.

¹⁰ *Ordonnance aux fins de la convocation d'une audience (règle 58-2 du Règlement de procédure et de preuve)*, 7 May 2009, ICC-01/04-01/07-1112.

¹¹ *Ordonnance aux fins de report de l'audience relative à l'exception d'irrecevabilité (règle 58-2 du Règlement de procédure et de preuve)*, 15 May 2009, ICC-01/04-01/07-1140.

¹² "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 8 July 2009, para. 2.

- (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 documents related to Bogoro;
- (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;
- (E) The Trial Chamber’s erroneous definition of “unwilling” has deprived the accused of a real and effective right to challenge admissibility.

DISCUSSION

III. Stage of proceedings at which a challenge to admissibility must be raised

7. Considering that, firstly, the Defence for Germain Katanga states that the challenge to admissibility was submitted to the Chamber within an acceptable time and that, in its opinion, the Chamber incorrectly interpreted article 19(4).

8. Considering that article 19(4) of the *Rome Statute* provides:

The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

9. Considering that, in the Defence’s view, the term “trial” must mean the period beginning with the opening statements prior to the calling of witnesses and that, contrary to the position of Trial Chamber II,¹³ the Defence for Germain Katanga submits that the term “trial” does not give rise to any ambiguity or differing

¹³ Trial Chamber II, “Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, ICC-01/04-01/07-1213-tENG.

meanings in respect of the provision referring to it. It remains of the view that all provisions must be interpreted in the same way.

10. Considering that the Defence submits that the Chamber erred in its understanding of the object and purpose of article 19. The Defence argues that the methods used for interpretation in criminal law have equal force as those applicable to the law of treaties in international criminal justice and that, accordingly, the “*dubio pro reo*” principle is applicable. Since, in particular, the accused was not informed of the warrant of arrest until after his transfer to the Court, the Defence acknowledges that because of these constraints it submitted its request late, but submits that the date of filing cannot reasonably be considered unlawful under the Statute and the relevant rules.

11. Considering that the Legal Representatives of the Victims submit that a trial is generally supposed to commence as of the first hearing held by the constituted chamber. At that time, the handling of the case is already beginning through status conferences which settle all preliminary issues, including challenges, by issuing binding decisions, prior to any discussions on the merits.

12. Considering that the Legal Representatives are of the view that article 19(4) of the Statute must be understood as meaning that the last opportunity to file a motion challenging admissibility is the first hearing held by the constituted chamber. Nevertheless, it remains possible subsequently to raise a challenge to admissibility (based on the *ne bis in idem* principle) in exceptional circumstances and with the leave of the trial chamber.

13. Considering that lacking any other specific indications in the text of article 19(4), the Legal Representatives concur with Trial Chamber II’s finding in paragraph 38 of its decision that the term “trial” must be understood in the same way as the provisions of the Statute which the Chamber characterises as the first category: article 61 of the Statute (Confirmation of the charges before trial), the title of

Part VI of the Statute (“The trial”): articles 63, 64(2), 64(3)(a), 64(3)(b), 64(7), 67(d), the French version of the title of article 68 and of the Rules; articles 74(1) and 93(10)(b)(i)(a); the French version of rule 39; rule 137 and the title of rule 165 of the Rules.

IV. The claim that the issuance of the arrest warrant was flawed

14. Considering that the Defence then submits that the Bogoro documents should have been brought to the attention of the Pre-Trial Chamber. Considering the fact that the Prosecutor must disclose crucial documents to the Pre-Trial Chamber. Considering that the Trial Chamber erred in finding that the documents indicating Katanga’s alleged criminal conduct in Bogoro were not crucial.

15. Considering that, during the examination of the impugned Challenge to Admissibility, the Prosecutor stated that he had not informed the Pre-Trial Chamber of the existence of those documents because he had verified their relevance with the competent authorities of the DRC, who had assured him that they were not investigating the crimes committed in Bogoro on 24 February 2003.

Moreover, this information was confirmed by the representatives of the DRC at the hearing of 1 June 2009.¹⁴ The Prosecutor explained that he had concluded from that that no obvious or ostensible investigation into those crimes had been conducted by the DRC, and that he had informed the Pre-Trial Chamber of this when he filed his application for a warrant of arrest.

16. Considering that the application for an extension of provisional detention and the “Pro-Justitia, Record of Interview” of Germain Katanga dated 20 January 2006 do not constitute proof that the judicial authorities of the DRC were conducting an investigation into the crimes of which the Court is seized.

¹⁴ Transcript of the hearing of 1 June 2009, ICC-01/04-01/07-T-65-ENG ET WT, pp. 77 to 79.

17. Considering that Trial Chamber II rightly considered that the said documents did not appear to contain crucial information about the “circumstances of the case”.¹⁵

V. The interpretation of “unwillingness” in light of article 17 and the complementarity principle

18. Considering that the Defence states that the Chamber’s interpretation of the term “unwillingness” of the State is erroneous in respect of article 17 and the complementarity principle, and that the Chamber interpreted the article broadly, considering it not to be exhaustive. The Defence contends, on the contrary, that article 17 contains an exhaustive list of circumstances justifying the unwillingness of a State to prosecute.

19. Considering that, although it is not provided for at article 17(2) of the Statute, the Legal Representatives concur with Trial Chamber II’s reasoning whereby a State which thus chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as unwilling in accordance with article 17 of the Statute.

20. Considering that they are of the view that, even though the drafters of the Statute did not explicitly provide for this situation, it is nevertheless consistent with the spirit of the provisions of article 17 of the Statute, as Trial Chamber II has shown.

21. Considering further that the Legal Representatives of Victims a/0330/07 and a/0331/07 are of the view that the documents in the case file of the DRC authorities, although unrelated to the crimes of which the Court is seized,¹⁶ indisputably show unwillingness on the part of the DRC to prosecute the accused, and that the proceedings initiated against Germain Katanga by the Congolese authority suffered

¹⁵ ICC-01/04-01/07-1213-tENG, pp. 28-30, paras. 69 to 72.

¹⁶ The case file of the proceedings initiated in the DRC against Germain Katanga clearly shows that he was not being prosecuted for the same crimes as those of which the Court is seized. Bogoro has never been the subject of an effective prosecution by the DRC authorities.

an unwarranted delay which was inconsistent with an intention to prosecute the accused.

22. Considering that, as for the complementarity principle, the Defence mainly contends that States must be encouraged to investigate and prosecute international crimes, and that encouraging transfers to the ICC when States can act negates the principle of primacy.

23. Considering that nowhere is it contested that it is the national criminal authorities which must have primary responsibility for criminal prosecutions, even in the case of crimes for which the Court has jurisdiction.

Considering that, in the present case, the authorities of the DRC never initiated an investigation or prosecution relating to the crimes committed in Bogoro on 23 February 2003 and, furthermore, they expressly rejected the idea that the DRC may have to try Katanga.¹⁷

VI. Confusion of unwillingness and inability of a State

24. Considering that the Defence believes that the Chamber is confusing the State's unwillingness and inability and regrets that the Court did not respond to an issue raised about the DRC's ability. Considering that it further submits that focusing on unwillingness is an error, and the confusion between the absence of objection by the DRC and the lack of willingness calls into question the application of the complementarity principle.

25. Considering that, when examining the admissibility of a case, the Court need not necessarily verify all the conditions provided for by article 17(2) and 17(3) of the

¹⁷ Registry, "English translation of Annex of *Transmission par le Greffier des observations écrites des autorités congolaises telles que présentées à l'audience du 1er juin 2009*", 4 June 2009, ICC-01/04-01/07-1189-Anx-tENG.

Statute, and that it is not bound to ascertain whether the second criterion has also been met should it consider one of them to be met.¹⁸

26. Considering nevertheless that, in the present case, the participants and the DRC authorities were in agreement about the DRC's inability. In their written observations,¹⁹ the authorities of the DRC responded to this concern as follows:

If we consider the factual circumstances at the time of the crimes (February 2003) – a country ravaged by rebel groups and armed gangs; generalised insecurity in Ituri, making victims and witnesses inaccessible, with the latter justifiably fearing for their safety in a country lacking any system for their protection; the unavailability of judicial structures, aggravated by the inadequacy of operational capacities; the uncertainties of the peace process, with a variety of politico-military agreements between ex-belligerents; the lack of expertise in dealing with mass crimes and in the collection and preservation of evidence of such crimes – all of these factors taken together show that the DRC was unable genuinely to investigate the crimes at Bogoro. Sadly, since then the situation has shown little improvement.

27. Considering that the dysfunctioning of the Congolese judicial system has been the subject of several reports to the Congolese Government, which to date has been unable to remedy it.²⁰

28. Considering that, in addition to this dysfunctioning, the system is still plagued by several grave problems which was again condemned by the Head of State in a speech he gave at the commemoration of the 49th anniversary of independence on 30 June 2009:

[TRANSLATION] To this effect, I have – on many occasions since December 2007 – voiced my concerns about how justice is dispensed in our country, which is rightly perceived by the legislators as a guarantor of societal peace and an essential factor for political stability and social and economic development. Today, the justice system itself is in the dock. If a judge abuses the independence which is, however, linked to the sensitivity and nobility of his office,

¹⁸ ICC-01/04-01/07-1213, page 32, paras. 74 and 75.

¹⁹ *Idem*.

²⁰ MONUC, *Arrestations et detentions dans les prisons et cachots de la RDC, PARTIE I: La légalité des arrestations et des détentions* [report on arrests and detentions in DRC prisons. PART I: Lawfulness of arrests and detentions] (March 2006), page 3: “[TRANSLATION] Overcrowding in most of the Congolese prisons is thus not due only to the absolute number of detained persons accommodated in too few places of detention, but also to the average length of incarceration of each detained person, aggravated by the poor functioning of the justice system, especially military justice.”

he too makes himself guilty of fraud, misappropriation of public funds, corruption and even offences of ordinary law.²¹

VII. Erroneous interpretation and depriving the accused of an effective right to challenge the admissibility of the case and the right to a fair trial

29. Considering that, lastly, the Defence for Germain Katanga submits that, due to its erroneous interpretation of unwillingness, the Chamber has deprived the accused of an effective right to challenge the admissibility of the case and thus violated the right to a fair trial. In fact, the Accused has had no way of challenging the transfer of the case to the ICC.

30. Considering that, as regards the violation of the fundamental rights of the accused (removing the accused from the court which would lawfully exercise jurisdiction over him, depriving him of his right to family life, etc.),²² the Trial Chamber rightly stated that article 17 of the Statute does not mention this violation as one of the grounds for the inadmissibility of cases brought before the Court.

31. Considering that, as for the rest, the Legal Representatives concur with the Trial Chamber's reasoning that any form of "waiver" on the part of a State can be based only on sub-paragraphs (a) and (b) of article 17(1) of the Statute and that it does not in any way deprive the Defence of its right to challenge the admissibility of a case on the basis of the *ne bis in idem* principle or the level of gravity of the case.²³

²¹ Extract from the speech given by the Head of State on 30 June 2009, available [in French] at www.justice.gov.cd.

²² ICC-01/04-01/07-949, paras. 22 to 25.

²³ ICC-01/04-01/07-1213-tENG, page 35, paras. 86 to 88.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER:

To dismiss the appeal of the Defence for Germain Katanga and uphold the decision of Trial Chamber II.

[signed]

Flora Mbuyu Andjelani

[signed]

Fidel Luvengika Nsita

Flora Mbuyu Andjelani, Fidel Luvengika Nsita and Vincent Lurquin (absent when signed), Legal Representatives of Victims a/0330/07 and a/0331/07

Dated this 17 July 2009

At Brussels, Belgium and Lubumbashi, DRC