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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

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

Public Document

Defence Observations on the Document Summarising the Charges

Source: Defence for Mr Germain Katanga

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 for Germain
Katanga**

Mr David Hooper
Mr Andreas O'Shea

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

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

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Procedural background.

1. The Amended Charging Document was filed on 26 June 2008.¹ The 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 (“Confirmation Decision”).²
2. On 12th March 2009, the Defence filed its application for a new amended document containing the charges reflecting the position post the decision on confirmation.³ On the 13th March 2009, the Trial Chamber issued its order to the Prosecutor to file a detailed table of the evidence supporting the charges.⁴ On 17th July 2009, the Defence filed its renewed application for an amended document containing the charges.⁵ On the 21st October 2009, the Trial Chamber ordered the Prosecutor to draft a résumé of the charges against the accused⁶, using the actual terms of the Pre-Trial Chamber in its decision with respect to the confirmation of the charges. On the 28th October 2009, the Prosecutor filed its Document Containing the Charges as Confirmed by the Pre-Trial Chamber.⁷ On the 3rd November 2009, this same document was renamed and refiled as Document Summarising the Charges Confirmed by the Pre-Trial Chamber⁸ (‘Document Summarising the Charges’) in order to comply fully with the Chamber’s order of 21st October and its oral decision of 2 November 2009.⁹

¹ ICC-01/04-01/07-649-Anx1A,, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, 26 June 2008.

² ICC-01/04-01/07-716, Decision on the confirmation of charges, 26 September 2008.

³ ICC-01/04-01/07-954, Defence Application for an Amended Document Containing the Charges, 12 March 2009.

⁴ ICC-01/04-01/07-956, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009.

⁵ ICC-01/04-01/07-1310, Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges, 17 July 2009.

⁶ ICC-01/04-01/07-1547, Décision relative au dépôt d’un résumé des charges par le Procureur, 21 octobre 2009.

⁷ ICC-01/04-01/07-1568, Document Containing the Charges as Confirmed by the Pre-Trial Chamber in accordance with the «Décision relative au dépôt d’un résumé des charges par le Procureur», 28 October 2009; ICC-01/04-01/07-1568-Anx1, 28 October 2009.

⁸ ICC-01/04-01/07-1588, Document Summarising the Charges, 3 November 2009; ICC-01/04-01/07-1588,-Anx1, Document Summarising the Charges Confirmed by the Pre-Trial Chamber, 3 November 2009.

⁹ See transcript ICC-01/04-01/07-T-74-ENG RT, p. 29, lines 8-16.

3. On 10th November 2009, the Trial Chamber accorded the Defence until the 19th November 2009 to make its final observations on the Document Summarising the Charges.¹⁰

B. Nature of Defence observations

4. The Defence accepts that the Document Summarising the Charges, complies with the Trial Chamber's order of 21st October 2009, and the request of the Defence, in that it constitutes a synthesis of the charges against the accused as reflected in the Confirmation Decision, which may serve as a point of reference throughout the trial.
5. The Defence understands that the Decision on Confirmation is authoritative , and that the Document Summarising the Charges is a comprehensive summary of the position post Confirmation Decision.
6. Nevertheless, the Defence notes that Document Summarising the Charges remains highly significant in that, in summary form, it sets out the nature and extent of the charges and thus demonstrates the parameters of notice to the accused. Moreover, it is to be noted that it is the Prosecutor who formulates the charges against the accused and brings the case, and that this is the only document emanating from the Prosecutor after the Confirmation Decision. The Defence therefore wishes to ensure that the accused has been provided with a clear and detailed exposition of the factual premises of the charges against him, enabling him to meet the prosecution case effectively. The Defence also wishes to ensure that the Prosecutor is not permitted to rest on vague assertions and mould his case during the course of the trial.
7. In certain respects, ambiguities may derive from the confirmation decision itself, and to that extent the Prosecutor is not being criticised. Nonetheless, whether such ambiguities derive from the Pre-Trial Chamber's own analysis, or the manner in which issues were presented to it by the Prosecutor, the Prosecutor remains in a position to provide specificity to matters vaguely presented even if so presented by the Pre-Trial Chamber. This is so because such specifications do not alter the effect of the

¹⁰ ICC-01/04-01/07-1619, Décision relative à la demande de la Défense de Germain Katanga aux fins de prorogation du délai imparti pour faire valoir ses observations sur le résumé des charges (norme 35 du Règlement de la Cour), 10 novembre 2009.

Pre-Trial Chamber's decision. They do not amount to amendments but clarify and provide detail of an assertion made by the Prosecutor, relied upon by the Pre-Trial Chamber and constituting notice to the accused.

8. Moreover, in the Defence submission there is nothing incongruous in requesting specificity in a document described as a summary – the summary must be comprehensive in its important particulars, as well as accurate and unambiguous.
9. Accordingly, the Defence herein submits certain requests with a view to ensuring that the said document serves its purpose in providing an accurate, precise and clear summary of the charges against the accused.

C. Applicable legal principles

10. It is submitted that it is inherent to the right to a fair trial, that the accused should not be placed in a position where he has to confront allegations which are not defined with sufficient precision so as to enable the Defence to effectively investigate and confront such allegations. It is further submitted that a fair trial requires the Prosecutor not to take unfair advantage of the accused by keeping allegations vague and sitting on the fence with a wait and see attitude as to the identity and parameters of the specifics of such allegations.
11. The observations contained herein and consequent applications made are based upon the fundamental principal of adequate notice of the case one has to meet. Thus, pursuant to article 67(1)(a) the accused is entitled, as a minimum guarantee, to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks. This principle is given life in the procedural requirements pursuant to Rule 121(3), according to which the Prosecutor must provide to the Chamber, and to the accused, 'a detailed description of the charges', and Regulation 52, according to which the document containing the charges shall include 'a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial.' While these latter provisions address the preliminary stages of the proceedings, it is submitted that they reflect a continuing obligation on the part of the

Prosecutor to ensure clear and consistent notice to the accused of the exact nature of the charges against him.

12. It follows, that where the factual basis of the charges remains vague the accused is entitled to greater precision to enable constructive defence investigations, cross-examination of prosecution witnesses, and preparation of the Defence case; as well as to ensure that the Prosecutor is not left in a position where he is permitted to mould the precise nature of the allegation as the trial advances. This was recognised in the case of *Prosecutor v Kupreskic*, where the ICTY Appeals Chamber held:

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

13. That it should be possible to seek and obtain appropriate clarification to prosecution documents purporting to represent the case against the accused is reflected in the Pre-Trial Chamber's Decision on the Three Defence Requests Regarding the Prosecution's Amended Charging Document, decision dated 25 June 2008¹², in which Single Judge of Pre-Trial Chamber One ordered the deletion of, *inter alia*, the expression 'in at least the following ways', on the basis that it rendered the charge too vague.

D. General observations

14. While the Document Containing a Summary of the Charges must be read in the light of the Confirmation Decision, it remains part of the documentation upon which notice to the accused must be judged. It further falls squarely within the responsibility of the Prosecutor to provide adequate notice to the accused, and this responsibility is not relinquished by the Confirmation Decision.

15. Additionally, the fact that the document is described as a summary of the charges does not permit the use of expressions and factual frames of reference which leave

¹¹ *Prosecutor v Kupreskic*, Appeals Judgement of 23 October 2001, par 92

¹² ICC-01/04-01/07-648, Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008.

ambiguity as to the scope of the charges against the accused. The document should provide as much precision as can be reasonably expected from the Prosecution in order to provide a concise but clear picture to the accused.

16. The documents providing notice to the accused of the charges should, if submitted, enable the accused to prepare his case and avoid any prospect of unfair surprise. In the case of Mr. Katanga, the prosecution has had every opportunity to refine the exact nature, scope and detail of its case against the accused. A final witness list has been established and the trial focuses on a single, well defined event. The accused can reasonably expect that the expression of the charges sets clear limits to the nature and scope of the case against him and reflects the prosecution's actual evidence and intentions. It should not leave loopholes or prospects for expanding the case against Mr. Katanga. It is submitted that in the circumstances and having particular regard to the fact that this trial relates to a focused event, a high degree of precision may reasonably be expected.

17. Advance notice of witness testimony does not rectify the question of ambiguities in documents produced by the Prosecutor for a variety of reasons. There is a clear distinction between the charges and the evidence supporting those charges, and it is notice of the charges with which we are concerned here. It is the Prosecutor and not the witnesses who brings the case and has the prerogative of formulating it. The Prosecutor's case will not necessarily always coincide with the position of particular Prosecution witnesses on particular issues. The witnesses themselves may manifest differences in their accounts. The Prosecutor may apply to introduce further evidence under the rules. Moreover, the document containing a summary of the charges is a form of notice of the charges in itself and the Defence should not be placed in a position where the document introduces ambiguity as to the particulars of such notice. The Defence reminds the chamber of the extensive nature of some of the witnesses' statements and transcripts which makes identifying the precise elements of the evidence relied on by the Prosecution that much more difficult.

18. Finally, by way of general observation, the Defence submits that requests for specificity of the charges are not amendments of the charges, and as such the existence of a confirmation decision confirming the charges does not remove the necessity or the obligation to provide a clear picture to the accused where ambiguity persists.

E. Specific observations relating to inadequacies in the exposition of the charges

Time frames.

19. In paragraph 22, the Defence requests that the Prosecutor insert the dates of the FNI/FRPI attacks it is referring to following BOGORO in Bunia/Nyakasanza, Tchomia, and Katato, Mandro, Kilo and Drodoro, with as much precision as possible.
20. Also, the word ‘regularly’ should be deleted from paragraph 25 dealing with the abduction of women, and instead the dates of these alleged abductions should be specified with as much precision as possible.
21. The expression ‘prior to, during and following the Bogoro attack’ in paragraph 38 should be replaced with a statement of the specific time periods when it is alleged that identified children were used in specific ways.
22. In paragraph 42, the Prosecutor should specify on how many occasions and when in 2001 and 2002 it is alleged there were attacks by Lendu militia.
23. In paragraph 43, the Prosecutor should specify what it means by ‘aftermath’. On which specific day or days was there pillaging in BOGORO following the attack.
24. In paragraphs 52, 54 and 55, the Prosecutor should state what he means by ‘aftermath’ and specify the periods of enslavement, imprisonment or times of rape with respect to individually identified victims (by pseudonym in the case of witnesses).

Locations

25. In order for the Defence to investigate the allegations effectively, it is essential that the precise locations, which form the foundation of prosecution assertions, are made clear.
26. Therefore, at paragraph 22, the Prosecutor should not be permitted to say ‘throughout the region of Ituri in the DRC, in particular in the village of Nyankunde’. It is submitted that the Prosecutor must be compelled either to confine its comment to

Nyankunde or, in the alternative, to specify the names of the territories, *groupements*, localities and actual villages where it is asserted that these 1200 civilians were killed.

27. Similarly, the word 'regularly' should be deleted from paragraph 25 dealing with the abduction of women, so that it is clear that the allegation is confined to the locations mentioned after the expression 'In particular'. Moreover, the Prosecutor should not be permitted to state 'and other villages', but simply state the villages, localities and *groupements* forming the basis of the allegation. It is important to mention more than the name of the village because village names can exist in different areas.

28. The Prosecutor must specify in which camps it is alleged that FRPI and FNI soldiers were trained, and where these camps were located.

Circumstances surrounding the alleged conduct of the accused

29. It is submitted that the exposition of the charges must clearly indicate the exact nature of the conduct with which the accused is charged, with all the material facts pleaded, including the means of the alleged conduct, the identity of the victims, and the identity of subordinates where applicable.

30. Thus, with respect to Count 3 on the use of children, Count 7 on sexual slavery and Count 8 on rape, the Defence is entitled to the names or descriptive elements sufficient to identify the alleged child soldiers, or the women victims of the alleged rape or sexual slavery.

31. With specific reference to the document containing a summary of the charges, it is requested that:

(a) In paragraphs 16 and 38, the Prosecutor specify the identity of the child soldiers it is alleged the accused used, providing names or sufficient identifying elements, or pseudonyms in the case of witnesses;

(b) In paragraph 25, specify the identity of the women abducted, imprisoned, raped and sexually enslaved, using names or sufficient identifying elements, or

pseudonyms in the case of witnesses. In paragraph 51 specify the identity of the women, by sufficient identifying elements, abducted, imprisoned and forced to become wives of FNI/FRPI combatants. In paragraph 58, similarly specify the identity of women and girls abducted.

32. Also, with regard to Counts 1-9, the Prosecutor must specify for the purposes of its allegations the identity of the other persons through which Mr Katanga is said to have acted.

33. So, the Prosecutor should:

- (a) In paragraph 24, specify the identity of the alleged participants in the alleged common policy and organised common plan;
- (b) In paragraph 25, sufficiently specify the identity of the alleged members of the FNI/FRPI who abducted, imprisoned in military camps, and subsequently raped and sexually enslaved women;
- (c) In paragraph 48, sufficiently identify the FNI/FRPI combatants who are alleged to have destroyed and burned houses, or if the identity of such combatants is unknown to the Prosecutor, state that they are unknown;
- (d) In paragraph 51 and 56, specify the identity of the FNI/FRPI combatants to whom women were forced to marry, and specify who forced them;
- (e) In paragraph 55, identify the combatants and commanders who it is alleged had sexual slaves.

34. With respect to paragraph 45, to the extent possible, the Prosecutor should describe the vehicles it is alleged were stolen for the purpose of transporting the pillaged goods.

35. With respect to paragraph 48, the Prosecutor should state which main buildings were destroyed and delete the expression 'and others'.

36. With respect to paragraph 50, the Prosecutor should state the four directions from which it is alleged the combatants came.

RELIEF SOUGHT

The Defence requests the Trial Chamber to order the Prosecutor to re-file 'The Document Summarising the Charges' and to provide greater precision, where reasonable to do so, and with reference in particular to the matters above.



David HOOPER

Dated this 19 November 2009

At The Hague