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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

**Defence Request for Leave to Appeal the Trial Chamber's Oral Decision of 23
November 2009 on the Defence Request for Clarification of 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
Ms Fatou Bensouda
Mr Eric MacDonald

Counsel for the Defence of Mr Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

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

Legal Representatives of Victims

Mr Fidel Nsita Luvengika
Mr Jean-Louis Gilissen

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

[2 names maximum]

**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

Introduction

1. The Defence for Mr. Germain Katanga (“Defence”) requests leave to appeal the Trial Chamber’s oral decision of 23 November 2009 (“Oral Decision”)¹, in which it denied the Defence request (“Defence Request”)² that the Trial Chamber order the Prosecutor to re-file *The Document Summarising the Charges* (“Summary of Charges”).³ In particular, the Defence requested that the Prosecution provide greater precision, where reasonable to do so, with regard to the identified time frames, locations, and circumstances surrounding the alleged conduct of the accused; that is, of the material facts on which it relies.

2. The Defence submits that the Oral Decision contains an error warranting the Appeals Chamber’s consideration for the following reasons (elaborated below under the section on the issue on appeal): The existing documents (the Decision of Confirmation of Charges⁴ and the Table of Incriminating Evidence⁵) are inadequate in providing precision as to the material facts underlying the charges. The Summary of Charges itself creates or reinforces existing ambiguities that are not cured by the Table of Incriminating Evidence or by the Confirmation Decision. It is unclear which evidence corresponds to the factual premises relied upon by the Prosecution.

3. Also, it is not an answer that the summary of the charges reiterates the Confirmation Decision. This decision necessarily relies on information provided by the Prosecutor. There are thus instances where the Defence’s best hope for clarification lies in having regard to a number of sources in a footnote in the Confirmation Decision, or to wade through a variety of sources cited in the Table of Incriminating Evidence, which may or may not contain information internally inconsistent or inconsistent with the Prosecution position. Even if the Summary of Charges reflects the Confirmation Decision, it remains the Prosecution case; in other words, the Prosecution is in a position to clarify the relevant information. Whilst the findings by the Pre-trial Chamber in the Confirmation Decision are based on submissions of the Prosecution, the request of the Defence does not involve a

¹ ICC-01/04-01/07-T-79-Red-ENG WT, dated 23 November 2009.

² ICC-01/04-01/07-1653, Defence Observations on the Summary of Charges, 19 November 2009.

³ 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.

⁴ ICC-01/04-01/07-716, Decision on the confirmation of charges, 26 September 2008.

⁵ ICC-01/04-01/07-1174, Avec 16 Annexes A à P confidentielles, *ex parte*, réservées à l’Accusation et à la Défense et 1 annexe Q, confidentielle, *ex parte*, réservée à l’Accusation. Mémoire aux fins de depot du tableau des éléments à charge, de la liste des témoins de l’Accusation et de la liste des pièces à charge, 27 mai 2009.

variation of the charges, and therefore does not offend the Pre-Trial Chamber's authority or require reliance on article 64.

4. The Defence files this Defence Request for Leave to Appeal pursuant to article 82(1)(d) of the Rome Statute, rule 155 of the Rules, and regulation 65 of the Regulations of the Court.

Procedural Background

5. The Amended Charging Document was filed on 26 June 2008.⁶ A confirmation of charges hearing then took place from 27 June to 18 July 2008; the Decision on Confirmation of Charges was delivered on 26 September 2008.⁷
6. On 12 March 2009, the Defence filed its application for a new amended document containing the charges reflecting the position post the decision on confirmation.⁸ On 13 March 2009, the Trial Chamber issued its order to the Prosecutor to file a detailed table of the evidence supporting the charges.⁹ On 17 July 2009, the Defence filed its renewed application for an amended document containing the charges.¹⁰ On 21 October 2009, the Trial Chamber ordered the Prosecutor to draft a summary of the charges against the accused¹¹, using the actual terms of the Pre-Trial Chamber in its decision with respect to the confirmation of the charges.
7. On 28 October 2009, the Prosecutor filed its Document Containing the Charges as Confirmed by the Pre-Trial Chamber.¹² On 3 November 2009, this same document was renamed and refilled as Document Summarising the Charges Confirmed by the Pre-Trial

⁶ ICC-01/04-01/07-649-Anx1A,, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, 26 June 2008.

⁷ ICC-01/04-01/07-716, Decision on the confirmation of charges, 26 September 2008.

⁸ ICC-01/04-01/07-954, Defence Application for an Amended Document Containing the Charges, 12 March 2009.

⁹ ICC-01/04-01/07-956, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009.

¹⁰ 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.

¹¹ ICC-01/04-01/07-1547, Décision relative au dépôt d'un résumé des charges par le Procureur, 21 octobre 2009.

¹² 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.

Chamber¹³ in order to comply fully with the Chamber's order of 21 October and its oral decision of 2 November 2009.¹⁴

8. On 10 November 2009, the Trial Chamber accorded the Defence until 19 November 2009 to make its final observations on the Document Summarising the Charges Confirmed by the Pre-Trial Chamber.¹⁵ On 19 November 2009, the Defence filed Defence Request.¹⁶ A public hearing was then held on 23 November 2009, during which the parties discussed the said filing of 19 November.¹⁷ In its Oral Decision of 23 November 2009, the Chamber rejected the Defence filing of 19 November 2009, stating *inter alia*, that "the only document defining the charges and the decision of Confirmation of Charges issued by the Pre-Trial Chamber".¹⁸
9. The Chamber instead invited the Defence and the Prosecution to "...consult one another as necessary with a view to sharing, basing yourselves on the [Decision of the Confirmation of Charges and the Table of Incriminating Evidence] with all and any information that could provide the clarifications that [the Defence] wish[es] to have".¹⁹
10. On 28 November 2009, the Defence by way of oral application requested an extension of time to comply with the Oral Decision before deciding whether or not to seek leave to appeal the said Decision.²⁰ During the hearing on 30 November 2009, the Trial Chamber denied this Defence request.

Threshold Criteria for Leave to Appeal

11. The Chambers have repeatedly stated that leave to appeal pursuant to article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of

¹³ 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.

¹⁴ See transcript ICC-01/04-01/07-T-74-ENG RT, p. 29, lines 8-16.

¹⁵ 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.

¹⁶ ICC-01/04-01/07-1653, Defence Observations on the Summary of Charges, 19 November 2009.

¹⁷ ICC-01/04-01/07-T-78-ENG ET WT, dated 23 November 2009.

¹⁸ ICC-01/04-01/07-T-78-ENG ET WT, dated 23 November 2009, p. 2.

¹⁹ ICC-01/04-01/07-T-79-Red-ENG WT, dated 23 November 2009.

²⁰ ICC-01/04-01/07-T-86-CONF-ENG ET 27-11-2009 4/31 NB T, pp 3-4.

appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria:

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. It must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²¹

12. It is respectfully submitted that these criteria are met in the present situation for the reasons set forth below.

Issue of Appeal

13. In its Oral Decision, the Chamber rejected the Defence filing of 19 November 2009, stating *inter alia*, that “the only document defining the charges and the decision of Confirmation of Charges issued by the Pre-Trial Chamber”.²² The Chamber held too, that the second of the two documents for which clarification was sought by the Defence (the Table of Incriminating Evidence), is “a table that includes all the items of evidence that the Prosecution intends to base itself on. This table is exhaustive. ...It results that the framework of this case is well defined today, and it is proper to refer to these two documents to obtain a reply to the question [the Defence has] asked”.²³

14. As noted above, however, neither one of these two documents put the Defence on notice with sufficient precision of the material facts on which the Prosecution relies. Whilst the Prosecution has agreed to provide to the Defence the clarifications sought in its Request, it relies in doing so *inter alia*, on the Confirmation Decision and on the Table of Incriminating Evidence.²⁴ Perhaps more importantly, when asked by the Presiding Judge whether it was possible to find the answers to all clarifications sought by the Defence in its Request, the Prosecution replied, “[m]ostly, yes”.²⁵ The Defence submits that in the

²¹ ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

²² ICC-01/04-01/07-T-78-ENG ET WT, dated 23 November 2009, p. 2.

²³ ICC-01/04-01/07-T-78-ENG ET WT, dated 23 November 2009, p. 2.

²⁴ ICC-01/04-01/07-T-78-ENG ET WT 23-11-2009 21/35 NB T, pp 19-21.

²⁵ ICC-01/04-01/07-T-78-ENG ET WT 23-11-2009 21/35 NB T, p. 21.

absence of clarification in full of the material facts on which the Prosecution relies, Mr. Katanga is denied his right pursuant to article 67, to a fair trial.

15. There are several sub issues to this appeal. First, the question arises whether any lack of clarity on the facts underlying the charges may be cured by informal contact between the Prosecution and the Defence. It is suggested that difficulties arise here because of the public nature of the trial and, further the ability of the defence to rely upon prosecution clarifications which do not form part of the formal record in the trial. One of the Defence concerns is that the Prosecution should not be allowed to mould its case as it goes along.
16. Second, there is the question as to whether the accused should be obliged wade his way through 1165 pages of a table referring to multifarious, multi-paginated sources to attempt to decipher the prosecution's theory of the case, let alone his lawyers. It must be borne in mind that the charges are central to the trial and the accused must himself be in a position to understand them.
17. Third, is left the question whether these documents in fact answer the questions of the Defence. The evidence which the Prosecutor proposes to submit before the Chamber, and the charges are separate matters which do not necessarily coincide. It is the case of the Prosecutor which is presented in the charges. Evidence from various sources may not be consistent or even concomitant with the Prosecution case.
18. Fourth, there is the issue as to whether the requests of the Defence in any way impinges upon the role and function of the Pre-trial Chamber and whether it is proper to request the Prosecution to provide clarification of charges set out in a confirmation Decision. The Defence reiterates that it is the Prosecutor who brings the case and the Prosecutor who provides the information which forms the foundation of the charges later confirmed. The Defence is not seeking any amendment in the charges, but clarification of factual assertions already confirmed by the pre-Trial Chamber.
19. Whatever one's perspective on the correctness of the Defence stance on these issues, or the lateness of the debate, it remains the case that we are in virgin territory with the unique procedure of this Court and these questions carry a certain public importance in addition to the primordial importance for Mr Katanga. So, finally, one must consider the actual

fundamental nature of the clarifications sought, i.e. identity of perpetrators and victims, time frames and locations. In the light of this the question arises whether the Defence can be foreclosed of his right to know the case against him, a fundamental right, for procedural reasons. The plea has no bearing on this. There was sufficient information for the accused to plead. This does not mean that he has sufficient information to properly defend himself.

20. Moreover, the Defence has been persistently seeking a document from the Prosecution since March of this year, and anticipated the Prosecution to act of its own initiative before that. The delays rest essentially in the development of the proper modalities and their application by the Prosecutor, understandably within the context of a new regime. The summary of the charges is the first document on the charges emanating from the Prosecution since the Decision on Confirmation. Whatever its relation with the Confirmation Decision it holds a fundamental importance by virtue of its source and its purport to represent the charges, albeit in summary form, against the accused.

Impact on the Fairness of the Proceedings

21. The Trial Chamber is bound pursuant to article 64 (Functions and powers of the Trial Chamber), to ensure that a trial is fair and is conducted with the respect in full of the rights of the accused.²⁶ Article 67 (Rights of the accused) guarantees the accused the right to a fair trial and, as a minimum guarantee, to “be informed promptly and *in detail* of the nature, cause and content of the charge ...”.²⁷ The accused is also entitled with regard to his right to a fair trial, and as a minimum guarantee, to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Also pursuant to same, he is entitled to raise defences and to present other evidence admissible under the Statute.²⁸
22. Regulation 52 (Document containing the charges) similarly provides that a document containing the charges must include a statement of the facts, including the time and place

²⁶ Article 64(2).

²⁷ Article 67(1). Emphasis added.

²⁸ Article 67(1)(e).

of the alleged crimes, that provides a sufficient factual basis to bring a person to trial.²⁹ In this regard, the Trial Chamber in *Lubanga* held that whilst Article 61³⁰ and Regulation 52 relate to proceedings before the Pre-Trial Chamber, [...] the Trial Chamber considers that filing an amended ‘Document containing the charges’ is necessary to ensure that there is a complete understanding of the ‘statement of facts’ underlying the charges confirmed by the Pre-Trial Chamber, and to enable a fair and effective presentation of the evidence (as part of a fair and expeditious trial in accordance with Article 64 of the Statute)”.³¹

23. It is therefore inherent to the right to a fair trial that the accused confront allegations that are defined with sufficient precision so as to enable the Defence to effectively investigate and to confront such allegations. In the current case, the Pre-Trial Chamber ordered the deletion *inter alia*, of the expression “in at least the following ways”, on the basis that it rendered the charge in question too vague.³² This decision is indicative of the need by the Prosecution in its relevant documents to comply with the fundamental principle of adequate notice of the case that the Defence has to meet.

24. It follows that insofar as the factual premise of the charges remains vague, the accused is entitled to request and obtain the level of precision necessary to enable constructive Defence investigations, cross-examination of Prosecution witnesses, and preparation of the Defence case. By denying the Defence Request, the Oral Decision would significantly affect the fairness of the proceedings. It infringes on the right of the accused to a fair trial otherwise guaranteed in full by article 67.

Impact on the Expeditiousness of the Proceedings

25. In *Kony*, the Pre-Trial Chamber observed that “Such impact [on the expeditiousness of proceedings] is commonly understood in the case-law of the *ad hoc* Tribunals as existing whenever failure to provide for an immediate resolution of the issue at stake by the Appeals Chamber would entail the risk that lengthy and costly trial activities are nullified

²⁹ Regulation 52(b).

³⁰ Article 61 (Confirmation of the Charges before trial).

³¹ *Prosecution v. Lubanga*, ICC-01/04-01/06-1548, Order for the prosecution to file an amended document containing the charges, 9 December 2008, para. 13. Emphasis added.

³² ICC-01/04-01/07-648, Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, 25 June 2008.

at a later stage, following the decision of first instance by the Trial Chamber.”³³ The Defence in the present case is deprived of fundamental factual information on which the Prosecution relies. In the event that the Appeals Chamber determines that this issue has been incorrectly decided upon, it may be necessary to nullify previous witness testimony and recommence the trial. It would then be necessary to recall all or most of the Prosecution witnesses in order to permit the Defence to cross-examine with adequate notice, which would lengthen the overall length of proceedings.

26. Furthermore, the Oral Decision will affect the manner in which the Defence case in its entirety is carried out. The absence of sufficiently detailed information will require the Defence more time for its investigations, its cross-examination of witnesses, its preparation generally the duration of the Prosecution phase of the case, as well as that of the Defence, and its examination-in-chief of its witnesses, as well as the cross-examination of defence witnesses. Clearly, such practice would lengthen the overall proceedings (and therefore have a significant impact on the expeditiousness of the proceedings). Also, it would jeopardise the defendant’s right to be tried without undue delay.³⁴

Impact on the Outcome of the Trial

27. The Defence recalls that it must demonstrate the cumulative criteria only insofar as the appealable issue would significantly affect both the fair *and* expeditious conduct of the proceedings. It need not prove that the issue in question would also significantly impact the outcome of the trial (“*or* the outcome of the trial”), and therefore advances these submissions in the alternative to those identified above.

28. The denial of the Defence adequate time to seek clarification of Prosecution information is so significant that it would impact the outcome of the trial. If the Defence is missing crucial information, it may not be able to prepare an adequate defence to rebut the charges against Mr. Katanga. Indeed, lack of sufficient notice of the case that it has to meet

³³ Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for Warrants of Arrest under Article 58, 19 August 2005 ICC-02/04-01/05-20-US-Exp (Unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13.10.2005), para 36.

³⁴ See article 67(c).

impacts on every Defence aspect of the trial (its investigations, its cross-examination, and its examination-in-chief). Clearly, this would significantly affect the outcome of the trial.

An Immediate Resolution may Materially Advance the Proceedings

29. An immediate decision of the Appeals Chamber would avoid the undesirable possibility that witnesses may eventually need to be recalled, which in addition to affecting the expeditiousness of the proceedings, would entail great expense, and could potentially traumatise them. It is now that the Defence needs the information in question so that it can adequately prepare for trial and for the cross-examination of Prosecution witnesses. Also, such precision is required at this stage so that the Defence can conduct its case generally in a timely and succinct manner. At the very least, an immediate resolution may materially advance the proceedings.

Conclusion

30. On the basis of the foregoing, the Defence requests the Trial Chamber to grant leave to appeal the Trial Chamber's Oral Decision pursuant to article 82(1)(d) of the Rome Statute, rule 155 of the Rules of Procedure and Evidence, and to regulation 65 of the Regulations of the Court.

Respectfully submitted,



David HOOPER
Lead Counsel for Germain Katanga

Dated this 30th November 2009

At The Hague