

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-01/04-02/07**

Date: **18 February 2008**

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

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

Public Document

**Defence observations on the joinder of the cases against Mathieu Ngudjolo and
Germain Katanga pursuant to the oral request of Pre-Trial Chamber I at the
hearing of 12 February 2008**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo
Ms Fatou Bensouda
Mr Éric MacDonald

Duty Counsel

Mr Jean-Pierre Kilenda Kakengi Basila

1. PROCEDURAL BACKGROUND

1. On 6 July 2007, Pre-Trial Chamber I of the International Criminal Court issued a warrant of arrest for Mathieu Ngudjolo.¹
2. In a decision rendered on 7 February 2008, Pre-Trial Chamber I unsealed the warrant of arrest issued for Mathieu Ngudjolo.²
3. On 11 February 2008, Mr Jean-Pierre Kilenda Kakengi Basila, in his capacity as duty counsel,³ assisted Mathieu Ngudjolo at his first appearance before Pre-Trial Chamber I.
4. On 11 February 2008, the Registry extended Mr Jean-Pierre Kilenda Kakengi Basila's mandate as duty counsel for Mathieu Ngudjolo.
5. On 12 February 2008, Pre-Trial Chamber I submitted *proprio motu* to the parties the issue of a possible joinder of the proceedings in the Ngudjolo and Katanga cases, requesting written observations thereon from the Office of the Prosecutor and from counsel for Mr Mathieu Ngudjolo and Mr Germain Katanga respectively.
6. On 14 February 2008, the Office of the Prosecutor submitted its observations to Pre-Trial Chamber I.⁴
7. Duty counsel for Mr Mathieu Ngudjolo, Mr Jean-Pierre Kilenda Kakengi Basila, respectfully files his written submissions on the issue of a joinder of the cases

¹ Case of *The Prosecutor v. Mathieu Ngudjolo Chui*, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July 2007, ICC-01/04-02/07.

² Decision to unseal the warrant of arrest against Mathieu Ngudjolo Chui, 7 February, ICC-01/0402/07-10.

³ "Enregistrement de la désignation et de la déclaration d'acceptation de Maître Jean-Pierre Kilenda Kakengi Basila en qualité de conseil de permanence de M. Mathieu Ngudjolo Chui", 8 February 2008, ICC-01/04-02/07-16-Anx2.

⁴ "Prosecution's Observations on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI", 14 February 2008, ICC-01/04-02/07-22.

against Mathieu Ngudjolo and Germain Katanga raised by Pre-Trial Chamber I at the hearing of 12 February 2008.

2. IN LAW

8. On 12 February 2008, Pre-Trial Chamber I seized itself, *proprio motu*, of the matter of a possible joinder of the proceedings in the Ngudjolo and Katanga cases, requesting written observations from the parties.
9. The Defence observes, in the main, that the Pre-Trial Chamber lacks jurisdiction to rule on this matter, for which only the Trial Chamber has jurisdiction during the trial phase. In the alternative, the Defence respectfully submits its observations on certain consequences which may prejudice Mr Mathieu Ngudjolo's defence if a joinder of the cases were to be ordered. Lastly, duty counsel wishes to draw the Chamber's attention to the limited scope of his mandate and the practical consequences for the present proceedings.

In the main,

2.1. A joinder of proceedings cannot occur at the pre-trial phase

10. The Defence respectfully submits that the issue of a joinder of proceedings is, firstly, outwith the Pre-Trial Chamber's jurisdiction and, secondly, that it is premature at this stage.

2.1.1. The texts governing the joinder of proceedings apply to the trial stage

11. The Defence observes that rule 136 of the Rules of Procedure and Evidence ("the Rules") on joint and separate trials provides that:

(1) Persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2.

(2) In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

The joinder or severance of trials clearly seems to be restricted to the trial phase; this conclusion is supported *inter alia* by the fact that, firstly, rule 136 of the Rules falls under Chapter 6, “Trial procedure”, and has no equivalent under the chapter devoted to the pre-trial phase. Secondly, the rule states “the accused”, and the person concerned only becomes accused after a decision confirming the charges has been rendered by the Pre-Trial Chamber, committing the suspect (within the meaning of article 55 of the *Rome Statute*) to the Trial Chamber for trial as an accused person. In the instant case, Mr Mathieu Ngudjolo is only a suspect at the pre-trial phase. Furthermore, the wording in the rule, “persons accused jointly” seems to indicate that the charges have been confirmed and then joined. Lastly, the fact that the Trial Chamber is mentioned in this context confirms the use of joinder solely within the context of the trial.

12. This conclusion is also supported by article 64(5) of the Statute (Functions and powers of the Trial Chamber), which falls under Part VI, “The trial” and stipulates that:

Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be a joinder or severance in respect of the charges against more than one accused.

The Defence notes that this provision has no equivalent under article 57 of the Statute governing the “Functions and powers of the Pre-Trial Chamber”.

2.1.2. A joinder of the proceedings would be premature at the pre-trial stage

13. The Defence notes that the possibility of a joinder of the proceedings at the trial phase and not at the pre-trial phase is easily conceivable, since the issues relating to the mode of liability and the alleged crimes will be discussed exhaustively at trial, which can be held only if the charges against the suspects Mathieu Ngudjolo and Germain Katanga are confirmed. The Defence considers that it is therefore premature to envisage a joinder of the proceedings against two suspects when the

charges against them have not been confirmed and, may in fact not actually be confirmed, thereby leading to a committal for trial.

14. Furthermore, the Defence observes that, at this stage, it cannot possibly identify potential conflicts of interests between the proceedings against Mr Mathieu Ngudjolo and the proceedings against Mr Germain Katanga. Indeed, any potential conflicts of interests between the two defence strategies may not emerge until the end of the confirmation of charges phase. At this stage, it is not yet possible to determine any conflicts – they can only be a matter of conjecture. This shows that such a joinder at the pre-trial phase would be premature.
15. In fact, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia considered the Chamber's concern to avoid conflicts of interest which could cause serious prejudice to the accused to be one of the factors it must take into account when exercising its discretion to grant or refuse joinder.⁵ Likewise, the Trial Chamber of the same Tribunal indicated in another case that, before exercising its discretion, it must pay close attention to Rule 82(B), so that joinder will not be ordered in circumstances where separate trials are considered necessary, to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.⁶
16. In addition to the possible existence of a conflict of interest, the Defence objects to the Prosecutor's argument that a joinder of proceedings would contribute to judicial economy. The Prosecutor contends that joining the cases would prevent the parties from calling the same witnesses for the pre-trial and trial phases. The Defence submits that this argument is irrelevant, since it is mere conjecture;

⁵ *Prosecutor v. Milan Martić, Prosecutor v. Jovica Stanić and Franko Simatović, Prosecutor v. Vojislav Šešelj*, Case Nos. IT-95-11-PT, IT-03-69-PT, IT-03-67-PT, *Decision On Prosecution Motion For Joinder*, 10 November 2005, para. 32.

⁶ *Prosecutor v. Vidoje Blagojević, Prosecutor v. Dragan Obrenović, Prosecutor v. Dragan Jokić*, Case Nos. IT-98-33/1-PT, IT-01-43-PT, IT-01-44-PT, *Written Reasons following Oral Decision of 15 January 2002 on the Prosecution's Motion for Joinder*, 16 January 2002, para. 21.

indeed, the Prosecutor and the Defence may not necessarily intend to call witnesses during the confirmation hearing.

17. For this reason, Mr Ngudjolo respectfully opposes the ordering of a joinder, insofar as the Defence is not currently in a position to analyse the facts. Since the Defence does not yet have the list of witnesses and evidence – against either Mr Germain Katanga or Mr Mathieu Ngudjolo – it cannot possibly know the number of witnesses who may be common to Mr Katanga and Mr Ngudjolo, which would enable it to assess the appropriateness of such a joinder in practical terms,⁷ subject to the aforementioned conditions.

18. Moreover, Mr Ngudjolo respectfully opposes the joining of his case with Mr Katanga's insofar as the Prosecutor has no evidence to prove complicity between Mr Ngudjolo and Mr Katanga.

19. Mr Ngudjolo further submits that the Prosecutor has not shown that he was in any way linked to members of the FNI or the FRPI, or that he was in any way linked to Mr Katanga.

20. Under such circumstances, he therefore does not see on which legal or factual bases he should be tried with Mr Katanga, since their cases differs substantially.

In the alternative

2.2. The joinder of proceedings could adversely affect the suspect's defence

21. The Defence recalls that rule 136 of the Rules, which deals with the joinder and severance of trials, provides that the Trial Chamber may order

⁷ Regarding the issue of whether there is an economic interest in joining a case, the Chamber considered the annexes filed by the Prosecutor containing the number of witnesses and amount of evidence common to the various cases. The annexes were also provided to the Defence in order to facilitate their right to be heard on the issue: *Prosecutor v. Milan Martić*, *Prosecutor v. Jovica Stanić and Franko Simatović*, *Prosecutor v. Vojislav Šešelj*, Case Nos. IT-95-11-PT, IT-03-69-PT, IT-03-67-PT, *Decision On Prosecution Motion For Joinder*, 10 November 2005, paras. 35-43.

(...) that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2.

22. The Defence draws the Chamber's attention to factors that in its view may cause serious prejudice to Mr Ngudjolo in case of a joinder of proceedings.

2.2.1. The fundamental rights of the two suspects will necessarily be at odds in case of joinder of proceedings

23. The Defence respectfully notes that under article 67(1)(b) of the Statute, Mr. Mathieu Ngudjolo has the right to have "adequate time and facilities for the preparation of [his] defence". For his part, in accordance with article 67(1)(c) of the Statute, Mr. Germain Katanga has the right to "be tried without undue delay" taking into consideration, among other things, his period of detention (in this regard, the Defence notes that the date for the confirmation of charges in the *Katanga* Case, which was initially fixed for 28 February 2008, has been postponed to a date to be determined later).⁸

24. The Defence notes that a joinder of the proceedings would therefore infringe Mr Ngudjolo's right to be afforded adequate time to prepare his defence in that it would amount to an acceleration of his own proceedings, and would also infringe Mr Katanga's right to be tried without delay so that his period of detention should not be unduly extended.

25. On this point, the Defence draws the Chamber's attention to the jurisprudence of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, which held that the duration of the detention of one of the accused

⁸ ICC-01/04-01/07-172.

persons was a determining factor in rejecting the joinder of proceedings requested by the Prosecutor.⁹

26. Furthermore, the Defence notes that the working language of Mr Katanga's defence team is English, while counsel for Mr Ngudjolo uses French. If a joinder of proceedings were ordered, the observations of the respective counsel would have to be translated in order to be communicated properly in the working language used by the other counsel. This will be in addition to the documents from the Prosecutor and the Chamber, and would cause undue delay at this stage in the proceedings.

2.2.2. The Defence's inability to challenge certain legal allegations in case of joinder of proceedings

27. The Defence notes that the proceedings against Mr Katanga are necessarily more advanced than those against Mr Ngudjolo. Accordingly, if a joinder of these two proceedings were to be ordered, the Defence of Mr Ngudjolo might no longer be in a position to challenge matters already raised by the Defence of Mr Katanga that have been determined by the Pre-Trial Chamber.

28. Exercising his legitimate right to defend himself effectively, Mr Ngudjolo might wish not to be bound by the determinations of the Pre-Trial Chamber on legal issues raised in the case of Mr Katanga and wish to exercise his right to challenge them at the first instance or, if necessary, on appeal.

2.2.3. The question of redactions and the possible prejudice to the Defence of the suspect in case of joinder of proceedings

29. The Defence emphasises that as redactions can only be authorised in light of the particular circumstances relating to the prosecuted person, it is impossible to conceive of evidence being disclosed to Mr Ngudjolo in the format in which it

⁹ *Prosecutor v. Milan Martić, Jovica Stanišić, Franko Simatović, Vojislav Šešelj: Decision on Prosecution Motion for Joinder*, Trial Chamber III, 10 November 2005, <http://www.un.org/icty/seselj/trialc/decision-e/051110.htm>.

was disclosed to Mr Katanga. Matters relating to redactions and disclosures will necessarily be dealt with separately in the two cases and in a manner designed to take account of the context and particular circumstances relating to the case of Mr Ngudjolo, in order to respect his rights in the proceedings against him.

2.2.4. The existence of possible conflicts of interest that could be seriously prejudicial to the suspect

30. The Defence recalls that rule 136 of the Rules provides for the severance of trials “in order to avoid serious prejudice to the accused”. And yet, as was previously held in the jurisprudence referred to above in the International Criminal Tribunal for the former Yugoslavia, the existence of conflicts of interests may cause such prejudice.¹⁰

31. On this point, the Defence notes that, at the pre-trial stage, as unredacted versions of the documents containing the charges against Mr Ngudjolo and Mr Germain Katanga cannot be disclosed, counsel for Mr Ngudjolo is not in a position to identify possible conflicts of interest that could subsequently arise in the course of the proceedings. Accordingly, the Defence maintains that a joinder at the pre-trial stage, solely in light of the documents disclosed at this stage, would be premature and cause serious prejudice to the suspect.

32. Furthermore, the Defence recalls that rule 136 of the Rules provides for the severance of trials “because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2”. The Defence emphasises that articles 64(8)(a) and 65 of the Statute provide that a person being proceeded against may make an admission of guilt in line with his or her defence strategy, for example, only at the commencement of trial. Thus, if a joinder were ordered at the pre-trial phase, it would be both premature in that it would not afford the Defence the opportunity to raise the issue of severance, and because it could result in conflicts of interests in constructing defence strategies.

¹⁰ Paras. 12 and 13 and footnotes 5 and 6 of this submission.

2.3. The limited mandate of duty counsel and its implications for the ongoing proceedings

33. Mr Ngudjolo appointed duty counsel to assist him during his first appearance.

This mandate was extended for the purposes of representing Mr Ngudjolo's interests during the hearing of 12 February 2008 and submitting observations requested by the Pre-Trial Chamber at that hearing. The appointment of the duty counsel is in no way indicative of Mr Ngudjolo's final choice of permanent counsel for the other aspects of the proceedings.

34. Duty counsel wishes to draw the Chamber's attention to the fact that Mr Ngudjolo is yet to appoint his permanent counsel, at his sole discretion, based on a list of counsel provided for in regulation 70 of the Regulations of the Court. Although the mandate of the duty counsel was extended by the Registrar, this must not infringe the suspect's right free choice of counsel to represent his interests in relation to this quite specific and complex issue of joinder of proceedings.

35. Duty counsel further notes that no legal instruments provides for the assignment of assistants to duty counsel, unlike the counsel finally chosen by the client who, based on the resources made available through the legal assistance scheme of the Court, may request an assistant and a case manager.

36. Accordingly, duty counsel emphasises that in the interests of the Defence of Mr Ngudjolo, he should be granted the necessary time to appoint his permanent counsel and organise an efficient defence.

FOR THESE REASONS

37. The Defence of Mr Ngudjolo respectfully requests Pre-Trial Chamber I:

- i. In the main, to decline jurisdiction to rule on a possible joinder of proceedings;
- ii. In the alternative, to suspend the proceedings pending disclosure to the Defence of the unredacted charging documents for the suspects Ngudjolo and Katanga and Mr Ngudjolo's appointment of his final counsel.

AND JUSTICE WILL BE DONE

[signed]

Jean-Pierre Kilenda Kakengi Basila
Duty Counsel

Dated this 18 February 2008
At Brussels, Belgium