

1 International Criminal Court

2 Pre-Trial Chamber I

3 Situation Democratic Republic of Congo, ICC-01/04-01/07;

4 ICC-01/04-02/07

5 Status Conference – Open Session

6 Tuesday, 12 February 2008

7 The hearing commences at 2.05 p.m.

8 THE USHER: All rise. The International Criminal Court is now in
9 session. Please be seated.

10 JUDGE KUENYEHIA: May I ask the security to bring in the
11 detainees, please.

12 (The accused entered the courtroom)

13 JUDGE KUENYEHIA: Thank you.

14 I would like to welcome all of you to this meeting and to ask all
15 those who are participating to introduce themselves, starting with the
16 Office of the Prosecutor.

17 MR. MACDONALD: Good afternoon. The Office of the Prosecutor
18 will be represented today by Ms. Florence Darques-Lane, Ms. Dianne
19 Luping, Mr. Pubudu Sachithanandan, and myself, Eric Macdonald.

20 JUDGE KUENYEHIA: Thank you.

21 I now would like to ask the Defence team to introduce themselves,
22 starting with the Defence team of Mr. Germain Katanga and then the
23 Defence team of Mr. Mathieu Ngudjolo Chui.

24 MR. HOOPER: On behalf of Germain Katanga, I'm David Hooper, and
25 I'm assisted this afternoon by Professor Goran Sluiter and Ms. Sophie

1 Menegon. Ms. Caroline Buisman who is to be here has unfortunately got
2 stuck in London in fog.

3 JUDGE KUENYEHIA: Thank you.

4 MR. KILENDA (interpretation): Thank you, your Honours. I will
5 be assisting Mr. Mathieu Ngudjolo and I am Mr. Jean-Pierre Kilenda
6 Kakengi Basila of the bar of Brussels.

7 JUDGE KUENYEHIA: Thank you very much.

8 The Chamber has convened this meeting -- this hearing to listen
9 to the observations of the Prosecution and both the Defence teams
10 before joining the cases of the Prosecutor versus Germain Katanga and
11 the Prosecutor versus Mathieu Ngudjolo Chui.

12 The Chamber observes that the Prosecution had initially presented
13 a joint application seeking warrants of arrest for both Mr. Germain
14 Katanga and Mathieu Ngudjolo Chui for crimes committed during and in
15 the aftermath on the joint attack on the village of Bogoro by the FNI
16 and FRPI on the 24th of February, 2003.

17 Forgive me. I'm in too much of a hurry.

18 May I ask the court officer to call the cases, please.

19 THE REGISTRAR (interpretation): Situation Democratic Republic of
20 Congo in the cases of the Prosecutor versus Germain Katanga, number
21 ICC-01/04-01/07, and the Prosecutor versus Mathieu Ngudjolo Chui, case
22 number ICC-01/04-02/07.

23 JUDGE KUENYEHIA: Thank you very much. I will start again.

24 The Chamber has convened this hearing to listen to the
25 observation of the Prosecution and both Defences before possibly

1 joining the cases of The Prosecutor versus Germain Katanga and the
2 Prosecutor versus Mathieu Ngudjolo Chui. The Chamber would like to
3 observe that the Prosecution had initially presented a joint
4 application seeking warrants of arrest for both Germain Katanga and
5 Mathieu Ngudjolo Chui for crimes allegedly committed during and in the
6 aftermath of the joint attack on the village of Bogoro by the FNI and
7 the FRPI on the 24th of February, 2003. Moreover, the warrants for
8 arrest issued for both Germain Katanga and Mathieu Ngudjolo Chui upon
9 the Prosecution's application in respect of their alleged
10 co-responsibility for the crimes allegedly committed during the said
11 attack on the village of Bogoro. Furthermore, all supporting
12 materials and evidence mentioned in the Prosecution application relate
13 to both alleged co-perpetrators.

14 I would now like to turn to the Prosecutor to ask him or her to
15 present their observations on the matter.

16 MR. MACDONALD: Thank you, your Honour.

17 As stated in your opening, the Prosecution requested to join --
18 that both cases be joined from the outset as we filed the common
19 arrest warrant application. Why did we file a joint or common arrest
20 warrant application for both persons sought? Because the Prosecution
21 is alleging that they joined forces on the 24th of February, 2004,
22 as -- to attack the village of Bogoro. Not only did they join forces
23 on that day but prior to that there was a common plan to attack the
24 village.

25 The evidence in relation to this attack is based on documentary

1 evidence, eventually also statements of witnesses, as outlined in the
2 arrest warrant application, and additional witnesses the Prosecution
3 intends to rely on that are both relevant to the current two cases
4 against Mr. Ngudjolo and Mr. Katanga.

5 There may be small differences in the testimony -- let me
6 rephrase this. Some witnesses may be more relevant to one part of the
7 case against Mr. Ngudjolo or one part of the case against Mr. Katanga,
8 but in general either the crime-base or insider witnesses interviewed
9 and submitted talk about the attack itself. So the evidence is
10 common.

11 We also believe that for economy of time and resources, it is
12 preferable to join the cases now from the outset, from this day or as
13 early as possible, and this in the long run hopefully will save time,
14 will save time on the parties, will save time also on the Trial
15 Chamber. This means one hearing for the Confirmation Hearing, this
16 means one presentation of the case for all the parties involved, and
17 in the end one final decision, one final evaluation of the facts by
18 the Pre-Trial Chamber.

19 So, your Honour, we understand that by joining the case of
20 Mr. Katanga to the one of Ngudjolo - Mr. Katanga has been detained
21 since around the 18th of October - so this would mean a delay for the
22 case of Mr. Katanga or of his confirmation to be heard. But we
23 believe that it is better to have time spent here at this early stage
24 than later, because then if we have two separate Confirmation Hearings
25 then we have to rejoin the cases at trial following Rule 136. There's

1 a presumption that cases should be joined at trial.

2 So no matter how we look at it, in the case of Mr. Katanga,
3 unfortunately he will -- he would have to spend an additional three
4 months or so, considering the date that you've set of the 21st of May
5 in the case of Mr. Ngudjolo was the one for a joint Confirmation
6 Hearing.

7 Also I'd like to stress that if there was a separation of the two
8 individuals or persons sought and two court cases were opened, or two
9 court files were opened, it was purely for an administrative reason.
10 It was expected that Mr. Katanga would be transferred to the Court
11 prior to the arrest of Mr. Ngudjolo, Mr. Katanga being in detention in
12 Kinshasa at the CPRK detention centre. So for administrative reasons,
13 having separate court cases made it easier to proceed with the
14 notification of the arrest warrants and requests for arrest and
15 surrender in both cases.

16 Having one accused -- sorry, one person sought transferred
17 earlier to the other -- prior to the other also meant questions of
18 confidentiality and disclosure and all the problems surrounding the
19 protection of witnesses, or at least the difficulties surrounding
20 witness protection.

21 In other words, the case against Mr. Ngudjolo had to be kept
22 secret until his arrest, had to be kept secret from the parties, so
23 that the operation for an arrest and a surrender could be successful.
24 So from the outset I understand that this was the route chosen by the
25 Pre-Trial Chamber in separating initially both cases.

1 So let me conclude by restating that a joinder of proceedings
2 will minimise the potential impact on witness protection, whose
3 evidence is necessary for both cases. Secondly, a joinder ensures
4 that the same issues arising in both cases are dealt with
5 consistently. Finally, a joinder avoids the unnecessary expense and
6 time of the Court of holding two separate Confirmation Hearings.

7 And finally, again, I don't want to presume, although I had a
8 discussion with my colleague Mr. Hooper a few days ago, I'd like to
9 remind the Pre-Trial Chamber that it was decided that in the case of
10 Mr. Lubanga, that a detention of seven months and three days at the
11 seat of the Court was not considered an unreasonable delay prior to
12 the Confirmation Hearing. And like I mentioned, Mr. Katanga has been
13 detained since October, so over -- close to four months now. We
14 submit respectfully that such a delay at this stage, in addition to
15 the three months and a week or so to the 21st of May, if that was to
16 be the date of the Confirmation Hearing, would not constitute an
17 unreasonable pre-trial detention delay.

18 Thank you.

19 JUDGE KUENYEHIA: Thank you very much.

20 May I now call upon Mr. Hooper to make his observations.

21 MR. HOOPER: Yes, thank you very much.

22 I think the first matter is really a matter of concern that we
23 have and that is that we received no formal indication of this
24 application being made. The first indication we had that this matter
25 was to be raised today was by way of an e-mail yesterday afternoon or

1 yesterday evening stating that the issue of joinder was before the
2 Court this afternoon.

3 Now, my friend's just referred to a conversation he had with me.
4 On Thursday or Friday - I think it was Friday of last week, in fact
5 Friday would be the 7th, I think - as a result of matters that have
6 been dealt with in this court on the 6th and documents that have been
7 filed as a result of that, I telephoned Mr. Macdonald in order to ask
8 him, as it were, what was it he wanted in terms of the difficulties
9 that he said were created by having these two gentlemen in the same
10 cellblock, and it was in the course of that conversation that I asked
11 him whether in fact the Prosecution intended at any time to seek
12 joinder, and I was told that there would be such an application made
13 but I certainly wasn't led to believe it was imminent.

14 JUDGE KUENYEHIA: May I interrupt you for a minute. There has
15 been no such application. This is only a proprio motu action by the
16 Chamber. The Prosecution has not made any such application.

17 MR. HOOPER: Very well. It just very much sounded like one a
18 moment ago. Very well. So the position seems to be that this is very
19 much a look-see and an attempt in order to see the Prosecution's
20 intentions by you the Judges and in the course of that we are becoming
21 informed of what those intentions are.

22 Well, thank you for that indication. So in those circumstances I
23 take it the Court doesn't seek or wish for me to give a formal Defence
24 response this afternoon in respect of the Prosecution application yet
25 to be made, and so I will not make one. But --

1 JUDGE KUENYEHIA: Mr. Hooper, if you will excuse me, this is the
2 Chamber itself, having regard to the original warrant of arrest and
3 original application that came before the Chamber as a result of which
4 the Chamber issued warrants of arrest, it is as a result of that the
5 Chamber decided to have this hearing this afternoon in order to join
6 the cases. The Chamber does not expect -- because the Chamber had all
7 the information before it and decided to have this hearing rather than
8 simply taking, what I may describe as a decision joining the cases, we
9 decided that in accordance with provisions that relate to trial we
10 would have this hearing this afternoon to hear you before possibly
11 taking that decision.

12 MR. HOOPER: Well, we are still very much disadvantaged. First
13 of all, we don't share the information, first of all, that the Court
14 has had. I haven't seen a joint application, as it were, of warrant
15 of arrest and in my submission, redacted or otherwise, it's a document
16 that we should possess before the Court makes any decision as to
17 joinder.

18 Secondly, there may be arguments, as the Prosecution have
19 advanced, for joinder. Equally, there may be arguments against
20 joinder. In order to properly submit those latter arguments to the
21 Court, then we need adequate time and we need adequate information.

22 The position is that we are very much in the dark, and we
23 would -- we don't even know the essential statutory basis upon which
24 the Prosecution are seeking joinder in this case at this stage. We
25 need to look at that and review that. In our submission it's not a

1 course that can or should be taken by the Court without hearing
2 submissions and this afternoon is not the time, in our respectful
3 submission, for such submissions.

4 So what I -- we anticipate, in the light of the indication that
5 the Prosecution now seek in fact to join those who are not joined, is
6 that a formal application be made. We can respond to that. We're
7 quite content to respond to that either in writing or orally either
8 later this week or the beginning of next week. But we did not
9 certainly anticipate that the Chamber itself was moving towards a
10 decision on joinder without hearing the parties. I don't think that's
11 your intention, as I understand it, in any event.

12 So I well appreciate that it's in the interest of all parties
13 that such a decision of joinder should be taken sooner than later
14 because it would be to the benefit of all parties to know what the
15 position is. On the other hand, we know that the proposed co-accused
16 is not, in fact, represented at the moment by counsel of choice, no
17 doubt however competent my esteemed friend is. So those, again, are
18 matters for the Chamber to consider.

19 Finally, we are not in a position to know at the moment - we
20 don't know - that if there is to be a joinder, whether that joinder
21 will mean - I take it it will because of what Mr. Macdonald has just
22 said - that there will be an application at least by the Prosecution,
23 if not a decision by the Chamber itself, to delay the process of
24 confirmation and to put that back to the proposed date, which I
25 understand is the 21st of May for Mr. Chui.

1 So there are a number of factors which, taken together, we
2 require time to consider and would respectfully ask the Chamber to
3 furnish us with the information I've indicated, in particular the
4 joint arrest warrant which will indicate the span and sharing of
5 conduct, in order to enable us to properly advise Mr. Katanga and to
6 make a reasonable and proper response to the Chamber.

7 Thank you.

8 JUDGE KUENYEHIA: Thank you very much.

9 May I hear Maitre Kilenda, please.

10 MR. KILENDA (interpretation): Thank you, your Honours.

11 The joinder of one or two trials can be pleaded. You must be
12 able to prove that the joinder of trials sought includes trials that
13 have a link that will enable us then to be tried together and avoid
14 inconvenience. I am only duty counsel for my client, Mr. Ngudjolo. I
15 have not become aware of the elements on which both the Court and the
16 Prosecution are relying to seek the joinder of the two trials. I do
17 not know exactly for what Mr. Katanga is being prosecuted.

18 Furthermore, I do not know whether Mr. Katanga acted in joint
19 criminal enterprise with my client. I am therefore disadvantaged in
20 pleading a joinder. I cannot tell you whether the two cases for which
21 the two individuals are prosecuted have a link that will enable them
22 to be tried together.

23 It is for these reasons that, similar to my eminent colleague, I
24 request a reasonable time frame so that your Court and the Prosecution
25 can provide the Defence with all the information that will enable it

1 to plead this joinder and which would enable me to advise my client
2 usefully.

3 Thank you.

4 JUDGE KUENYEHIA: Thank you very much.

5 My colleague, Judge Steiner, would like to say something.

6 JUDGE STEINER: Thank you, Madam President.

7 It's just to make it clear once again that there has been no
8 application for joinder or for severance and there have been no joint
9 warrants of arrest. There has been a joint application to the Chamber
10 for issuing two warrants of arrest. Both warrants of arrest at this
11 moment in time have been reclassified as public, so the content of
12 both warrants of arrest are exactly the same. So I'm a little bit
13 concerned about the fact that both Defence counsels come to a hearing
14 that was convened exactly for the purpose of discussing the
15 possibility of joining the cases, saying that they had no knowledge at
16 all about the content of the warrants of arrest against both accused.

17 When Madam President mentions that the Chamber has already
18 elements in front of it, it's referring exactly to the warrants of
19 arrest, the elements contained in the warrants of arrest, the same
20 charges, the same attack, in co-perpetration, co-responsibility, and
21 the same evidence mentioned in the warrants of arrest as giving
22 supporting materials.

23 So I have some concerns about the alleged lack of knowledge of
24 both Defence counsel in relation to the reasons for joinder cases or
25 severance of the cases.

1 Thank you, Madam President.

2 JUDGE KUENYEHIA: I think Mr. Kilenda has the floor.

3 MR. KILENDA (interpretation): Thank you, Madam President, your
4 Honours.

5 When I spoke on behalf of Mr. Ngudjolo that I was opposed to a
6 joinder or severance, all I said was that at this stage I find it
7 premature to take a decision on joinder, considering that I am
8 disarmed and I admit that I have no knowledge of the warrant of arrest
9 that was issued against Mr. Katanga. I am therefore not in a position
10 to tell you why Mr. Katanga is being prosecuted and whether these
11 facts or events for which he is prosecuted have anything to do with
12 those for which my client is being prosecuted.

13 I do not say that I am opposed to a joinder. What I say is that
14 the Chamber should give the Defence a possibility to make submissions
15 on joinder or severance when there is a joinder or severance in the
16 future. For the time being we do not have the information that would
17 make us to make submissions in one way or another.

18 Thank you.

19 JUDGE KUENYEHIA: Mr. Hooper, please.

20 MR. HOOPER: Yes. The first notice we had was at half past six
21 last night when we accessed the e-mail. Now, that cannot be proper
22 notice for an application like this and it certainly wasn't in my mind
23 that the Chamber would be today considering joinder in the sense of
24 full argument, not a Court that has been particularly orally
25 concerned. We've had a lot of motions in this Court, endless motions.

1 So we didn't anticipate that this matter was going to be a question of
2 shooting from the hip this afternoon.

3 There are matters here, including jurisdictional matters, that
4 concern us. We've had the opportunity to discuss within our team
5 certain basic matters. We certainly haven't even had the opportunity
6 to discuss this with Mr. Katanga. We haven't had the opportunity to
7 do so. He was brought here, as is usually the case, just a few
8 minutes before you, the Judges, came in. We asked him to be produced
9 earlier. That's not possible, and I wasn't able to see him this
10 morning in order to meet my commitments for discussion with other
11 parties -- with other persons in this case.

12 So I'm taken aback by the suggestion that we should be -- have
13 been fully forearmed in the way that's suggested.

14 (The Pre-Trial Chamber confers)

15 JUDGE KUENYEHIA: Okay. The Chamber has taken note of your
16 observations, Mr. Hooper, Maitre Kilenda. They are reasonable. We
17 don't deny it. We will give the Office of the Prosecutor -- today's
18 Tuesday. We'll give the Office of the Prosecutor until Thursday to
19 file the observations on the issue of joinder and we'll give the
20 Defence until Monday, 4.00, to file their observations in writing to
21 enable the Chamber to take a decision one way or the other.

22 MR. HOOPER: As I've indicated, we have no objection to a hearing
23 in the early part of next week, if that assists. I say that because
24 it would give the Prosecution at least an opportunity to respond to
25 any reaction that we make and any final comment from us. But I'm

1 entirely in you, the Judges, hands. If you feel that that would
2 expedite the matter, we are available for that. But if you'd prefer
3 to have a written motion, then we will endeavour to submit that by
4 4.00 on Monday.

5 JUDGE KUENYEHIA: If the Chamber has all the motions and there's
6 a need for a hearing, the Chamber will certainly convene a hearing for
7 that purpose.

8 This, then, brings us to the end of the first part of this
9 hearing. There will be a break for 45 minutes and then the Single
10 Judge will continue the hearing. So this first part of the hearing is
11 ended. Thank you very much, everybody.

12 THE USHER: All rise.

13 The hearing adjourns at 2.40 p.m.

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