

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No: ICC-01/04-02/07

Date: 10 March 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 CONGO
IN THE CASE OF
THE PROSECUTOR *v.* MATHIEU NGUDJOLO CHUI**

Public

**Decision on the Joinder of the Cases against Germain KATANGA and Mathieu
NGUDJOLO CHUI**

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mrs Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Trial Lawyer
Ms Florence Darques-Lane, Legal
Adviser

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

Mr Jean-Pierre Kilenda Kakengi Basila

**Counsel for the Defence of Germain
Katanga**

Mr David Hooper
Mr Göran Sluiter
Ms Caroline Buisman
Ms Sophie Menegon

PRE-TRIAL CHAMBER I of the International Criminal Court (“The Chamber” and “the Court”, respectively);

NOTING the “Prosecution’s application for warrants of arrest under article 58 of the Statute, part one and two”¹ (“the Prosecution Application”) filed jointly against both Germain Katanga and Mathieu Ngudjolo Chui by the Prosecution on 22 and 25 June 2007;

NOTING the Warrant of Arrest against Germain Katanga issued by Pre-Trial Chamber I (“the Chamber”) on 2 July 2007;²

NOTING the Warrant of Arrest against Mathieu Ngudjolo Chui issued by the Chamber on 6 July 2007;³

NOTING the “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga”⁴ (“the First Decision on Evidence and Information”) and the “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui” (“the Second Decision on Evidence and Information”)⁵ both issued by the Chamber on 6 July 2007;

¹ “Submission of the Redacted English and French Versions of Prosecution’s Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI” (ICC-01/04-01/07-196, ICC-01/04-01/07-196-Conf, ICC-01/04-01/07-196-Conf-AnxA, ICC-01/04-01/07-Conf-AnxA1-AnxA10 and ICC-01/04-01/07-196-AnxB) and “Submission of the Redacted English and French Versions of Prosecution’s Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI” (ICC-01/04-02/07-24, ICC-01/04-02/07-24-Conf, ICC-01/04-02/07-24-Conf-AnxA, ICC-01/04-02/07-24-Conf-AnxA1-A10 and ICC-01/04-02/07-24-Conf-AnxB).

² ICC-01/04-01/07-1

³ ICC-01/04-02/07-1

⁴ ICC-01/04-01/07-4

⁵ ICC-01/04-02/07-3

NOTING the initial appearance of Germain Katanga before the Chamber on 22 October 2007, during which the confirmation hearing in the case of *The Prosecutor v. Germain Katanga* was scheduled to start on 28 February 2008;⁶

NOTING the “Decision on the Suspension of the Time-Limits Leading to the Initiation of the Confirmation Hearing” (“the Decision postponing Confirmation Hearing”) issued by the Chamber on 30 January 2008 in which the confirmation hearing in the case of *The Prosecutor v. Germain Katanga* was postponed until a date to be determined by the Chamber;⁷

NOTING the initial appearance of Mathieu Ngudjolo Chui before the Chamber on 11 February 2008,⁸ during which the confirmation hearing in the case of *The Prosecutor v. Mathieu Ngudjolo Chui* was scheduled to start on 21 May 2008;

NOTING the hearing held before the Chamber on 12 February 2008,⁹ in which the possibility of joining the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui* was discussed, and the Prosecution and both Defences for Germain Katanga and Mathieu Ngudjolo Chui were given the opportunity to file additional observations in writing;

NOTING the “Prosecution’s Observations on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹⁰ filed by the Prosecution on 14 February 2008, in which the Prosecution requested that the cases against Germain Katanga and Mathieu Ngudjolo Chui be joined as soon as practicable on the basis that the Prosecution had always sought to prosecute the suspects for their joint

⁶ ICC-01/04-01/07-T-5-ENG ET

⁷ ICC-01/04-01/07-172.

⁸ ICC-01/04-02/07-T-3-ENG ET

⁹ ICC-01/04-01/07-T-17-ENG ET; and ICC-01/04-02/07-T-4-ENG ET

¹⁰ ICC-01/04-01/07-195, ICC-01/04-01/07-195-Anx, ICC-01/04-02/07-22, and ICC-01/04-02/07-22-Anx1

participation in the same attack and for that purpose initially submitted a joint arrest warrant application;

NOTING the “Defence Observations on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹¹ filed by Defence Counsel for Germain Katanga on 18 February 2008, in which the Defence stated that there was “a persuasive argument for joinder of the two cases ... [and]... that it can raise no effective argument against such joinder in principle;” but nevertheless raised concerns relating to the potential prejudice to Germain Katanga from a delay in the proceedings; and therefore requested that the Chamber support its request to the Registry concerning additional support to the Defence team;

NOTING the “*Observations de la Défense concernant la question de la jonction de procédures entre l’affaire Mathieu Ngudjolo et l’affaire Germain Katanga, en application de la requête orale présentée par la Chambre préliminaire I lors de l’audience du 12 février 2008*”¹² filed by Duty Counsel for Mathieu Ngudjolo Chui on 18 February 2008, in which the Duty Defence Counsel argued, *inter alia*, (i) that the Chamber had no jurisdiction to join the cases at the Pre-Trial stage; and (ii) that the matter of joinder should be analysed by the permanent Counsel for Mathieu Ngudjolo Chui, once appointed;

NOTING the “Decision concerning the issue of joinder, ordering a report on protective measures by the Registrar and convening a hearing”¹³ issued by the Single Judge on 20 February 2008 in which it was decided that “as long as permanent Defence Counsel for Mathieu Ngudjolo Chui is appointed within twenty-five days following the date of arrival of Mathieu Ngudjolo to the Detention Center at the seat of the Court in The Hague:

¹¹ ICC-01/04-01/07-203

¹² ICC-01/04-02/07-29

¹³ ICC-01/04-01/07-214 and ICC-01/04-02/07-32

- (i) the Registrar shall immediately notify permanent Defence Counsel for Mathieu Ngudjolo Chui of all relevant documents concerning the issue of joinder of the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*;¹⁴ and
- (ii) permanent Defence Counsel for Mathieu Ngudjolo Chui shall have seven days from the date of appointment to file written observations on the issue of joinder;"

NOTING the "*Enregistrement de la désignation de maître Jean-Pierre Kilenda Kakengi Basila par M. Mathieu Ngudjolo Chui comme conseil et de la déclaration d'acceptation du mandat par le conseil*" filed by the Registry on 25 February 2008;¹⁵

NOTING the hearing *ex parte* and in closed session with the Prosecution and the Victims and Witnesses Unit held on 3 March 2008 ("the Hearing of 3 March 2008"),¹⁶ during which issues of witnesses protection were discussed;

NOTING that the permanent Counsel for Mathieu Ngudjolo Chui did not file any observations on the subject matter within the time limits given by the Chamber in its decision of 20 February 2008;

NOTING articles 21, 61, 57, 58, 60, 61 64(5), 67 and 68 of the *Rome Statute* ("the Statute") and rules 86, 121, 122, 123, 124 and 136 of the *Rules of Procedure and Evidence* ("the Rules");

¹⁴ In addition to the present decision, these documents are the following ICC-01/04-01/07-196, ICC-01/04-01/07-196-Conf, ICC-01/04-01/07-196-Conf-AnxA, ICC-01/04-01/07-Conf-AnxA1-AnxA10 and ICC-01/04-01/07-196-AnxB; ICC-01/04-01/07-T-17-ENG ET, ICC-01/04-01/07-195, ICC-01/04-01/07-195-Anx; ICC-01/04-01/07-203; ICC-01/04-02/07-24; ICC-01/04-02/07-24-Conf; ICC-01/04-02/07-24-Conf-AnxA, ICC-01/04-02/07-24-Conf-AnxA1-A10 and ICC-01/04-02/07-24-Conf-AnxB, ICC-01/04-02/07-22, ICC-01/04-02/07-22-Anx, ICC-01/04-02/07-T-3-ENG ET, ICC-01/04-02/07-T-4-ENG ET, and ICC-01/04-02/07-29

¹⁵ ICC-01/04-02/07-42 and ICC-01/04-02/07-42-Anx1-Anx2.

¹⁶ ICC-01/04-01/07-T-20-Conf-Exp-ENG ET

CONSIDERING that the Prosecution sought initially to prosecute jointly Germain Katanga and Mathieu Ngudjolo Chui, as shown by the Prosecution's joint application for warrants of arrest against them for crimes allegedly committed during, and in the aftermath, of the joint attack on the village of Bogoro by the FNI and FRPI on 24 February 2003; that the warrants of arrest issued by the Chamber for both Germain Katanga and Mathieu Ngudjolo Chui upon the Prosecution's joint application are in respect of their alleged co-responsibility for the crimes allegedly committed during and in the aftermath of the said attack on the village of Bogoro; that all supporting materials and evidence in the Prosecution's joint application relate to both alleged co-perpetrators;¹⁷ and that the Prosecution has requested that the Chamber join the cases;¹⁸

CONSIDERING that, according to the Statute and Rules, the functions of the Pre-Trial Chamber include: (a) taking appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses pursuant to articles 57 3(c) and 68 of the Statute; (b) conducting the proceedings in a fair and efficient manner from the first appearance of the person before the Court until the end of the Pre-Trial phase pursuant to articles 57 to 61 of the Statute and rules 118 to 128 of the Rules; and (c) ensuring the protection of the rights of the arrested person provided for in articles 61 (3) and 67 of the Statute and rule 121 of the Rules, including the right to have adequate time and facilities for the preparation of his or her defence and the right to be tried without undue delay;

¹⁷ "Submission of the Redacted English and French Versions of Prosecution's Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI" (ICC-01/04-01/07-196; ICC-01/04-01/07-196-Conf, ICC-01/04-01/07-196-Conf-AnxA, ICC-01/04-01/07-Conf-AnxA1-AnxA10 and ICC-01/04-01/07-196-AnxB) and "Submission of the Redacted English and French Versions of Prosecution's Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI" (ICC-01/04-02/07-24, ICC-01/04-02/07-24-Conf, ICC-01/04-02/07-24-Conf-AnxA, ICC-01/04-02/07-24-Conf-AnxA1-A10 and ICC-01/04-02/07-24-Conf-AnxB)

¹⁸ ICC-01/04-01/07-195 and ICC-01/04-02/07-22.

CONSIDERING that article 64(5) of the Statute establishes that “upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused”, and rule 136 of the Rules provides that “persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecution 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;”

CONSIDERING that, as this Chamber has repeatedly stated, the Chamber, in determining the contours of the statutory framework provided for in the Statute, the Rules and the Regulations, must, in addition to applying the general principle of interpretation set out in article 21(3) of the Statute, look at the general principles of interpretation as set out in article 31(1) of the *Vienna Convention on the Law of Treaties*, according to which “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose;”

CONSIDERING that, in the view of the Chamber, the ordinary meaning of article 64(5) of the Statute and rule 136 of the Rules provides that there shall be joint trials for persons accused jointly, and establishes a presumption for joint proceedings for persons prosecuted jointly;¹⁹

¹⁹ The Chamber notes that rule 136 of the Rules uses the word “*shall* be tried together” [Emphasis added] instead of “*may* be tried together”. As pointed out by the Prosecution in paragraph 7, footnote 11 of the Prosecution’s Observations “Rule 136 of the Rules contains a presumption in favour of joinder of persons accused jointly, in contrast to the similar Rule 48 of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), International Criminal Tribunal for Rwanda (“ICTR”) and Special Court for Sierra Leone (“SCSL”), which provide instead that “[p]ersons accused of the same or different crimes committed in the course of the same transaction *may* be jointly charged and tried.” [Emphasis added]”

CONSIDERING that joint proceedings during the Pre-Trial phase is consistent with the object and purpose of the Statute and the Rules insofar as:

- (i) joinder enhances the fairness as well as the judicial economy of the proceedings because, in addition to affording to the arrested persons the same rights as if they were being prosecuted separately, joinder:
 - a. avoids having witnesses testify more than once and reduce expenses related to those testimonies;²⁰
 - b. avoids duplication of the evidence;²¹ and
 - c. avoids inconsistency in the presentation of the evidence and would therefore afford equal treatment to both arrested persons;²²
- (ii) joinder minimises the potential impact on witnesses, and better facilitate the protection of the witnesses' physical and mental well-being;²³ and
- (iii) concurrent presentation of evidence pertaining to different arrested persons does not *per se* constitute a conflict of interests;²⁴

CONSIDERING further that, although article 64(5) of the Statute and rule 136 of the Rules are included in Chapter VI of the Statute and of the Rules which deals with the "Trial Procedure", the Chamber considers that the contextual interpretation of such

²⁰ *The Prosecutor v. Mejakic et al* [IT-95-4], Decision on the Prosecution's Motion to Joint Trials (14 April 2000), *The Prosecutor v. Theoneste Bagaosora* [ICTR-96-7], *The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze* [ICTR-97-34] and [ICTR-97-30], *The Prosecutor v. Anatole Nsengyumva* [ICTR-96-12] Decision on Prosecutor's (29 June 2000), *The Prosecutor v. Vujadin Popovic et al* [IT-02-57], Decision on Motion for Joinder (21 September 2005).

²¹ *The Prosecutor v. Mejakic et al* [IT-95-4], Decision on the Prosecution's Motion to Joint Trials (14 April 2000)

²² *The Prosecutor v. Mejakic et al* [IT-95-4], Decision on the Prosecution's Motion to Joint Trials (14 April 2000), *The Prosecutor v. Delalic et al* [IT-92-21-T] Decision on the Motion by the Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him (1 July 1998), *The Prosecutor v. Kayishema* [ICTR-95-1-T], Decision on the Joinder of the Accused and Setting the Date for Trial (6 November 1996), *The Prosecutor v. Bagaosora et al* [ICTR-96-7] See also ICC-01/04-01/07-195, para 13

²³ ICC-01/04-01/07-195, para 12, also see *The Prosecutor v. Popovic et al* [IT-02-57], Decision on Motion for Joinder (21 September 2005), *The Prosecutor v. Kayishema*, [ICTR-95-1-T], Decision on the Joinder of the Accused and Setting the Date for Trial (6 November 1996)

²⁴ *The Prosecutor v. Kovacevic et al* [IT-97-24-AR73] Decision on the Motion for Joinder of Accused and Concurrent Presentation of Evidence (14 May 1998), ICTR, *The Prosecutor v. Barayagwiza* [ICTR-97-19-I] Decision on the Request of the Defence for Severance and Separate Trial (26 September 2000) The International Tribunals for the former Yugoslavia and Rwanda have also held that (i) the mere possibility of "mutually antagonistic defences" does not constitute a conflict of interest capable of causing serious prejudice to the suspects See *Prosecutor v. Brdanin and Talic* [IT-99-36-T] Decision on Prosecution's Oral request for the Separation of Trials (20 September 2002), citing *Prosecutor v. Simic et al* [IT-95-9-PT], Decision on Defence Motion to Sever Defendant and Counts (15 March 1999)

provisions, in light of the above-mentioned provisions relating to the Pre-Trial proceedings of a case before the Pre-Trial Chamber included in Chapter V of the Statute and the Rules, does not preclude joint proceedings at the Pre-Trial stage, but rather supports the general rule that there is a presumption of joint proceedings for persons prosecuted jointly;

CONSIDERING that a different interpretation, as the Defence for Mathieu Ngudjolo Chui puts forward, would mean that (i) Pre-Trial proceedings must be conducted separately for persons prosecuted or charged jointly; (ii) trial proceedings must as a general rule be conducted jointly for persons accused jointly; (iii) the issue of joinder will inevitably arise just before the trial; and (iv) all arrangements relating to joinder will have to be dealt with at a later stage of the proceedings (that is to say at the trial stage) as opposed to at an earlier stage of the proceedings (such as immediately after the initial appearance of the persons for whom warrants of arrest have been issued) in which such arrangements will be far less cumbersome;

CONSIDERING that presumption for joint proceedings for persons prosecuted jointly is also consistent with the jurisprudence of the International Tribunals for the former Yugoslavia and Rwanda in that:

the preference for joint trials of individuals accused of acting in concert in the commission of a crime is not based merely on administrative efficiency. A joint trial relieves the hardship that would otherwise be imposed on witnesses whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; minimizes the possibility of inconsistencies in treatment of evidence, sentencing, or other matters, that could arise from separate trials [...].²⁵

CONSIDERING that, absent any declaration of guilt by Germain Katanga or Mathieu Ngudjolo Chui, the above-mentioned circumstances require the application of the general rule for joint proceedings for persons prosecuted jointly unless it is

²⁵ The Prosecutor v. Bagosora et al [ICTR-98-41-T], Decision on request for Severance of Three Accused, (27 March 2006), and reference to ICTY precedents in The Prosecutor v. *Brdanin and Talic*, *Delalic et al*, *Simic et al*

shown that separate proceedings are necessary in order to avoid serious prejudice to Germain Katanga or Mathieu Ngudjolo Chui or to protect the interests of justice;

CONSIDERING that neither Defence has shown that joining the cases would prejudice the suspects or would be contrary to the interests of justice insofar as: (i) the Defence for Germain Katanga does not oppose the joinder of the cases; and only raised the issue of prejudice in relation to the efficient and effective management of Germain Katanga's defence and any delay in the proceedings which could prolong Germain Katanga's detention; (ii) and the Defence for Mathieu Ngudjolo Chui based its objection to the joinder on the inapplicability of article 64(5) of the Statute and rule 136 of the Rules in the proceedings leading to the confirmation hearing;

CONSIDERING that the joinder of the cases in the proceedings leading to the confirmation hearing does not preclude the Defences for Germain Katanga and Mathieu Ngudjolo Chui from seeking severance at a later stage;

CONSIDERING that, after the hearing held in closed session with the Prosecution and the representatives of the Victims and Witnesses Unit on 3 March 2008 in the case of *The Prosecutor v. Germain Katanga*, the Chamber was informed that there are still a number of pending requests for adoption and implementation of protective measures in relation to witnesses on which the Prosecution intends to rely at the confirmation hearing; that a number of requests for redactions are also still pending insofar as the decision on its merits depends to an important extent on the decision on the pending requests for adoption and implementation of protective measures; and that a number of interlocutory appeals are still pending before the Appeals Chamber in the case of *The Prosecutor v. Germain Katanga*;

CONSIDERING, therefore, that the date of 21 May 2008, which is the date on which the initiation of the confirmation hearing in the case of *The Prosecutor v. Mathieu Ngudjolo Chui* has been scheduled, is, in the view of the Chamber, an appropriate date to schedule the initiation of the confirmation hearing in the joint case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*; and that, considering the above-mentioned circumstances, Germain Katanga will suffer no prejudice from scheduling the initiation of the confirmation hearing in the joint case on this date;

FOR THESE REASONS

DECIDES to join the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*;

CONFIRMS that Judge Sylvia Steiner shall remain the Single Judge, including for disclosure issues, for the joint case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*;

DECIDES that the hearing on the confirmation of the charges in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* shall start on 21 May 2008.

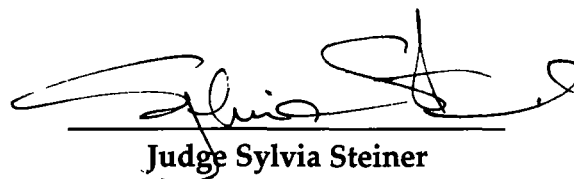
Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka



Judge Sylvia Steiner

Dated this Monday 10 March 2008

At The Hague

The Netherlands