Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **01/04-01/07 (OA 3)**
Date: **27 May 2008**

THE APPEALS CHAMBER

Before: **Judge Erkki Kourula, Presiding Judge**
Judge Philippe Kirsch
Judge Georghios M. Pikis
Judge Navanethem Pillay
Judge Sang-Hyun Song

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA

Public document

Judgment

on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages"

Judgment 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
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Mr. David Hooper
Ms. Caroline Buisman

REGISTRY

Registrar
Ms. Silvana Arbia

The Appeals Chamber of the International Criminal Court (hereinafter: "Court"),

In the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I of 21 December 2007 entitled "Decision on the Defence Request Concerning Languages"[1],

After deliberation,

Delivers, Judge Pikis partly dissenting, the following

JUDGMENT

1. The decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages" of 21 December 2007 is reversed to the extent that the Pre-Trial Chamber erred in its interpretation of the standard to be applied under article 67 (1) (a) and (f) of the Rome Statute as relevant to this appeal.

2. The Pre-Trial Chamber is directed, Judge Pikis dissenting, to decide anew the Appellant's request for interpretation in light of the Appeals Chamber's interpretation of article 67 (1) (a) and (f) of the Rome Statute as set out in this judgment.

REASONS

I. KEY FINDINGS

1. An accused's request for interpretation into a language other than the Court's language must be granted as long as he or she is not abusing his or her rights under article 67 of the Statute.

2. If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess, on the facts on a case-by-case basis, whether this is so.

3. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she

[1] ICC-01/04-01/07-127.

has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated.

II. PROCEDURE

A. Procedural History

4. On 22 October 2007, the Registrar submitted to the Pre-Trial Chamber, ex-parte and available only to the Prosecutor and the Defence, information on the arrest and surrender of Germain Katanga (hereinafter: "Appellant")[2].

5. Also on 22 October 2007, the Pre-Trial Chamber conducted a public hearing on the occasion of the first appearance of the Appellant following his arrest and surrender. At this hearing, when asked whether he spoke French or any other language, the Appellant replied: "I speak Lingala best"[3]. The Presiding Judge asked if she understood that the Appellant also spoke French and the Appellant replied: "Not really"[4]. The Presiding Judge then stated that "[t]he Court is obliged, under Article 67, to have you speak the language which you fully understand. Does the Chamber understand that you do not speak and understand French?", to which the Appellant replied: "I hope -- I do not speak French fluently, and sometimes it is difficult for me to understand and how -- difficult for me to express myself"[5].

6. Following this hearing, the Pre-Trial Chamber ordered the Registrar to provide "any additional information concerning languages read, spoken or understood by" the Appellant[6]. The Registrar submitted its report on the Appellant's language proficiency on 9 November

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[2] Information to the Chamber on the Execution of the Request for the Arrest and Surrender of Germain Katanga, ICC-01/04-01/07-40-Conf-Exp, reclassified as public by way of oral decision dated 14/12/2007. The Registry also submitted the "Addendum to the Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga (ICC-01/04-01/07-40-Conf-Exp)", ICC-01-04-01-07-44-Conf-Exp, reclassified as public by way of oral decision dated 14 December 2007.
[3] First Appearance Hearing - Open Session, Transcript ICC-01-04-01-07-T-5-Eng, Monday, 22 October 2007 (hereinafter: "Transcript of First Appearance"), p. 3, lines 6-8.
[4] Transcript of First Appearance, p. 3, line 11.
[5] Transcript of First Appearance, p. 3, lines 16-21.
[6] Order for a Report of Additional Information on the Detention and Surrender of the Detainee Germain Katanga, ICC-01/04-01/07-45, p. 3

2007[7]. The Appellant and the Prosecutor were given an opportunity to submit observations thereon[8] and did so on 19 November 2007[9] and 23 November 2007[10], respectively.

7. At a hearing before the Pre-Trial Chamber held on 14 December 2007, the Registry, the Appellant and the Prosecutor provided additional information to the Chamber concerning the Appellant's language abilities[11].

8. Thereafter, on 21 December 2007, Judge Sylvia Steiner, acting as the Single Judge of Pre-Trial Chamber I, rendered the "Decision on the Defence Request Concerning Languages"[12] in which the Chamber, *inter alia*, found that the Appellant's competency in French met the standards set by articles 67 (1) (a) and (f) of the Rome Statute (hereinafter: "Statute") and rejected the requests by the Appellant.

9. The Appellant filed the "Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages" on 27 December 2007[13]. The Appellant sought leave to appeal on the following issue: whether "[t]he Pre-Trial Single Judge incorrectly found that Mr. Katanga's competency in French meets the standards of articles 67(1)(a) and (f) of the Statute"[14]. The Prosecutor responded to the Application for Leave to Appeal on 8 January 2008[15] and on 18 January 2008, the Pre-Trial Chamber granted leave to appeal[16].

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[7] Report of the Registry on the Additional Information Concerning the Languages Spoken, Written and Understood by Germain Katanga, ICC-01/04-01/07-62-tENG.
[8] Decision on Time Limit for the Submission of Observations on the 'Rapport du Greffe relative aux renseignements supplémentaires concernant les langues parlées, écrites et comprises par Germain Katanga', ICC-01/04-01/07-76, p. 4.
[9] Observations of the Defence of Germain Katanga on the 'Report of the Registry on the Additional Information Concerning the Languages Spoken, Written and Understood by Germain Katanga', ICC-01/04-01/07-78-tENG (hereinafter "Defence Observations on the Report of the Registry")
[10] Prosecution's Observations on the 'Rapport du Greffe relatif aux renseignements supplémentaires concernant les langues parlées, écrites et comprises par Germain Katanga,' ICC-01/04-01/07-81 (hereinafter "Prosecutor's Observations on the Report of the Registry").
[11] Status Conference – Open Session, Friday, 14 December 2007, ICC-01/04-01/07-T11-ENG (hereinafter "Transcript of the 14 December 2007 Hearing").
[12] Decision on the Defence Request Concerning Languages, ICC-01/04-01/07-127 (hereinafter "Impugned Decision").
[13] Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages, ICC-01/04-01/07-130 (hereinafter, "Application for Leave to Appeal").
[14] Application for Leave to Appeal, para. 10.
[15] Prosecution's Response to the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages, ICC-01/04-01/07-137 (hereinafter "Prosecutor's Response to Application for Leave to Appeal").
[16] Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages, ICC-01/04-01/07-149 (hereinafter "Decision Granting Leave to Appeal"), p. 7

10. The Appellant filed a document in support of the appeal on 31 January 2008[17] and on 14 February 2008, the Prosecutor filed his response[18].

B. Preliminary procedural issues

1. Time limit for filing of the Document in Support of the Appeal

11. The Decision Granting Leave to Appeal was received by the Registry on Friday 18 January 2008 at 6:05 p.m. and was marked 'urgent' on the cover page. The decision was notified to the participants on the same day. The Document in Support of the Appeal was received by the Registry on 31 January 2008 at 4:26 p.m. Regulation 65 (4) of the Regulations of the Court provides: "When leave to appeal is granted, the appellant shall file, within ten days of notification of the decision granting leave to appeal, a document in support of the appeal in accordance with regulation 64, sub-regulation 2. [...]" and regulation 33 of the Regulations of the Court concerns calculation of time limits.

12. The Appeals Chamber notes that the Document in Support of the Appeal was filed 26 minutes out of time. It will nevertheless accept the filing because of the negligible extent of the delay and because there was no objection to the late filing by the Prosecutor. The Appeals Chamber also notes that doubt may be raised as to whether the Decision Granting Leave to Appeal should have been notified to the participants on the day it was notified[19]. However, it does not find it appropriate to consider the issue further in the circumstances of this case.

13. The Appeals Chamber would, however, emphasise to participants the importance of complying with the deadlines prescribed in the relevant legal texts and stresses that acceptance of the filing in this appeal is on an exceptional basis; participants are reminded that failure to comply with prescribed time-limits may otherwise entail rejection of a document filed late.

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[17] Defence Document in Support of Appeal Against « Decision on the Defence Request Concerning Languages », ICC-01/04-01/07-175 (and ICC-01/04-01/07-175-AnxA) (hereinafter: "Document in Support of the Appeal")

[18] Prosecution's Response to the Defence Document in Support of Appeal Against 'Decision on the Defence Request Concerning Languages' ICC-01/04-01/07-194 (hereinafter: "Prosecutor's Response"), para 46

[19] The Appeals Chamber notes regulation 33 of the Regulations of the Court (calculation of time limits) which provides in sub-regulation 3 that "[u]nless otherwise ordered by the Presidency or a Chamber, documents, decisions or orders received or filed after the filing time prescribed in sub-regulation (2) shall be notified on the next working day of the Court". Sub-regulation 2 provides: "Documents shall be filed with the Registry between 9am and 4pm The Hague time [.]" In the circumstances of this case, the Appeals Chamber does not consider it appropriate to decide whether the placing of the word 'urgent' on the cover page of the Decision Granting Leave to Appeal suffices to constitute an 'order' as referred to in sub-regulation 3

2 Reasons for the decision by the Appeals Chamber of 16 April 2008

14. On 4 April 2008, the Prosecutor submitted the "Prosecution Request for Leave to Present Additional Authority Regarding Defence Appeal against 'Decision on the Defence Request Concerning Languages'"[20]. The Prosecutor stated that "[r]ecently, and after the filing of all submissions by both parties, the Appeals Chamber of the [International Criminal Tribunal for the former Yugoslavia] has issued a decision which goes to the core issue in this appeal, namely the interpretation and application of the right of an accused person to be provided with relevant material in a language that they understand"[21]. He submitted that "this authority is relevant to the present appeal, and may assist the Appeals Chamber in its consideration and resolution of the issue before it" and he "therefore seeks leave to place this authority, which was unavailable to either party at the time of filing their submissions, before the Appeals Chamber[22]. He requested the Chamber to "authorise it to file a supplementary list of authorities to its response to the Appeals Brief, and to consider the additional authority in its determination of this appeal"[23].

15. The Appeals Chamber issued a decision dated 16 April 2008 allowing the Prosecutor to "file, without any accompanying argument, the supplementary list of authorities to the 'Prosecution's Response to Defence Document in Support of Appeal Against 'Decision on the Defence Request Concerning Languages'' as referred to in [its] [r]equest", stating that reasons for the decision would be provided in this judgment[24]. On 18 April 2008, the Prosecutor filed a supplementary list of authorities and the additional authority referred to therein, being a decision by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") dated 28 March 2008[25].

16. The Appeals Chamber noted that the Prosecutor did not cite any legal basis for his request although he did note in a footnote the fact that "the Appeals Chamber has previously permitted a party to present additional authorities, as well as additional details, after the presentation of the primary submissions (albeit in different circumstances)", noting also that the reasons for the relevant order he referred to had not yet been delivered[26]. In paragraph 18

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[20] ICC-01/04-01/07-366 (hereinafter: "Prosecutor's Request").
[21] Prosecutor's Request, para. 6.
[22] Prosecutor's Request, para. 7.
[23] Prosecutor's Request, para 9
[24] Decision on the "Prosecution Request for Leave to Present Additional Authority Regarding Defence Appeal Against 'Decision on the Defence Request Concerning Languages'", ICC-01/04-01/07-402, 16 April 2008
[25] Prosecution's Submission of Additional Authority Regarding Defence Appeal against 'Decision on the Defence Request Concerning Languages', ICC-01/04-01/07-409
[26] Prosecutor's Request, footnote 8

of the Appeals Chamber's judgment of 13 May 2008 entitled "[j]udgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", it is stated that "the Appeals Chamber considers that a Chamber may act pursuant to regulation 28 of the Regulations [of the Court] upon request or upon its own motion"[27]. In the current appeal, albeit it was not referred to by the Prosecutor, the Appeals Chamber considered the Prosecutor's Request as falling under regulation 28 of the Regulations of the Court. In the circumstances of this case, the Appeals Chamber allowed the submission of the supplementary list of authorities and thereby of details of a recent decision by the Appeals Chamber of the ICTY, "without any accompanying argument", on the basis that it may be of assistance to the Appeals Chamber in deciding on this appeal.

III. MERITS OF THE APPEAL

17. On 18 January 2008, the Pre-Trial Chamber granted the Application for Leave to Appeal "in relation to the issue of whether the [Impugned] Decision 'incorrectly found that Mr. Katanga's competency in French meets the standards of articles 67(1)(a) and (f) of the Statute'"[28]. The Pre-Trial Chamber, in that decision, considered that the issue for which leave to appeal was sought:

> "appear[ed] to refer to two interlinked matters: (i) the content of the standard embraced in article 67(1)(a) and (f) of the Statute in relation to the level of competency in French required of Germain Katanga; and (ii) the assessment by the Single Judge of the evidence presented by the Prosecution, the Defence and the Registry which led the Single Judge to conclude that such a standard was met by Germain Katanga"[29].

18. In the Document in Support of the Appeal, the Appellant argues "that the Single Judge's finding that Mr. Katanga's 'competency in French meets the standards of articles 67(1)(a) and (f) of the Statute' is erroneous"[30]. Following the aforementioned sub-division by the Pre-Trial Chamber, the Appellant divides his arguments into two grounds of appeal, the first related to an erroneous legal standard and the second related to an erroneous factual assessment.

19. The Appellant has modified his requests in the course of the proceedings before the Pre-Trial Chamber. In the Defence Observations on the Report of the Registry the Appellant

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[27] Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', ICC-01/04-01/07-476, (OA2), para 18.
[28] Decision Granting Leave to Appeal, p. 7.
[29] Decision Granting Leave to Appeal, p 5.
[30] Document in Support of the Appeal, para. 2

sought both translation and interpretation[31]. He changed this request during the 14 December 2007 hearing, during which he requested interpretation and stated that he may request translation of some documents[32]. Later, in the Application for Leave to Appeal, the Appellant stated that he was "willing to abandon Mr. Katanga's request for translation of documents"[33]. This was noted in the Decision Granting Leave to Appeal by the Pre-Trial Chamber wherein the Chamber granted leave to appeal on the aforementioned issue having considered, *inter alia*, that the Appellant had abandoned his request for translations[34]. Before the Appeals Chamber, the Appellant stated that he would be "satisfied if the interpreting facility is in place at the beginning of the trial"[35]. He also stated that although he was not requesting the translation of all documents, he "reserve[d] the right to request, on a case-by-case determination upon showing good cause, the translation of some significant documents, for instance, the indictment, the defence and closing brief"[36]. In his conclusion, the Appellant "pray[ed] the Appeals Chamber to find that the Single Judge erroneously found that Mr. Katanga's competency meets the requirements of articles 67(1)(a) and (f); to reverse the Single Judge's Decision not to grant Mr. Katanga the right to a Lingala interpreter in the Courtroom; and to order the Registrar to put the facility in place in order that such Lingala interpretation can be offered to Mr. Katanga"[37]. Since the Appellant seems to have abandoned his request for translation in his Application for Leave to Appeal, the Appeals Chamber will proceed on the basis that his request is limited to interpretation. Indeed, although he raises the issue of translation again in his Document in Support of the Appeal, he does so on the basis that he reserves the right to request certain translations.

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[31] In the Defence Observations on the Report of the Registry, para 43, the Appellant asked the Pre-Trial Chamber. "a) to take into consideration his limited ability to understand and speak French, b) to order that documents in French transmitted to him as part of the proceedings be accompanied by a translation in Lingala, c) to grant him the right to be assisted by a Lingala interpreter and translator during the proceedings, [ ], e) to order all other necessary measures to allow him to follow and participate in his trial in Lingala, which is the language he understands, writes and speaks best".

[32] During the hearing of 14 December 2007, the Appellant submitted that he did not require translation of all documents but that there may be some more significant and intricate documents that they would wish to be translated. Transcript of the 14 December 2007 hearing, pp 19 and 20.

[33] Application for Leave to Appeal, para. 16. He also submitted: "However, the Defence insists that it is of fundamental importance that Mr Katanga be assisted by an interpretor at least during the hearings at trial" (Application for Leave to Appeal, para. 16) Later, he stated "The Defence restates that in order not to unnecessarily delay the case it is not requesting translation of documents, nor asking that the necessary interpreting facility for Lingala be in place until, in the event of confirmation, the trial itself" (Application for Leave to Appeal, para 22).

[34] Decision Granting Leave to Appeal, pp 6 and 7

[35] Document in Support of the Appeal, para 63.

[36] Document in Support of the Appeal, para. 63 and footnote 74.

[37] Document in Support of the Appeal, para. 66

A. First ground of appeal: Erroneous Legal Standard

20. The Appellant's first ground of appeal concerns "the content of the standard embraced in article 67(1)(a) and (f) of the Statute in relation to the level of competency in French required of Germain Katanga"[38].

1 Relevant part of the Impugned Decision

21. In the Impugned Decision, in the introduction, the Pre-Trial Chamber stated:

> "1. Under article 60(1) of the Statute, the Chamber has a duty to satisfy itself that the person surrendered to the Court and appearing for the first time before the Chamber has been informed of his or her rights under the Statute.
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> 2. Furthermore, according to rule 121(1) of the Rules, in proceedings regarding the confirmation hearing, subject to the provisions of articles 60 and 61 of the Statute, a person appearing before the Chamber shall enjoy the rights set forth in article 67 of the Statute. In fact, paragraph article 67(1)(a) enshrines the right "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". In addition, article 67(1)(f) of the Statute provides for the right "to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks."
>
> 3. The Single Judge is mindful that, as Duty Counsel for the Defence states in the Defence Observations,[] the rights to be promptly informed of the nature, cause and content of the charges and to have adequate time and facilities to be in a position to mount an effective defence against such charges, which include the rights provided for in articles 67(l)(a) and (f) of the Statute, have been recognized by human rights courts and international criminal tribunals.
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> 4. The Single Judge fully acknowledges the jurisprudence of these courts and tribunals and will not elaborate further on precedents, since she has already recognized such fundamental rights in the case of the Prosecutor v Thomas Lubanga Dyilo.[]
>
> 5. In the view of the Single Judge, the main question in the instant case is to determine whether the competency of the arrested person in French, which is one of the working languages of the Court, is sufficient to meet the standards set by articles 67(l)(a) and (f) of the Statute. In this regard, the Single Judge notes that the European Court of Human Rights ("the ECHR") held in *Hermi v. Italy*, as relied upon by Duty Counsel in the Defence Observations, that "in the context of application of paragraph 3(c), the issue of the defendant's linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court [...]"
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> 6. In performing her analysis, the Single Judge is mindful that the ECHR indicated in *Brozicek v Italy*, made clear that interpretation into the language requested by an

[38] Document in Support of the Appeal, para. 2

arrested person should be granted unless there is evidence showing that the person understands the actual language of the proceedings.[]"[39]

22. Later, in its conclusions, and before proceeding to analyse documents that had been submitted to the Pre-Trial Chamber, the Pre-Trial Chamber stated:

> "30. At the outset, the Single Judge notes that articles 67(1)(a) and (f) of the Statute do not grant Germain Katanga the right to choose the language in which he must be informed of the charges against him and in which translation of documents and interpretation must be provided.[] On the contrary, a proposal to this effect was defeated during the lengthy negotiations which led to the adoption of the Statute,[] and the standard that was adopted was that of a language that the arrested person or the accused 'fully understands and speaks' so as to guarantee the requirements of fairness.[]
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> 31. The Single Judge observes that Duty Counsel for the Defence acknowledged that Germain Katanga's competency in French was good in terms of both his passive (reading and listening) and active (speaking) knowledge of French.[] Counsel for Defence also confirmed this at the 14 December 2007 hearing when he acknowledged that 'there's no doubt that Mr. Katanga does speak French to a reasonable standard, and indeed that's our language of communication with him'.[]
>
> 32. A number of documents were submitted to the Chamber and discussed at the 14 December 2007 hearing on Germain Katanga's competency in French. Having analysed them, the Single Judge finds that Germain Katanga's competency in French meets the standards of articles 67(1)(a) and (f) of the Statute."[40]

2 Arguments of the Appellant

23. The Appellant's first argument turns on an interpretation of the French and English versions of article 67 (1) (a) and (f) of the Statute. He submits that the Pre-Trial Chamber applied a legal standard that was not consistent with the wording and spirit of article 67 (1) (a) and (f), in particular the French version[41]. He states that the Pre-Trial Chamber held that "the standard that was adopted [in Rome] was that of a language that the arrested person or the accused '**fully** understands and speaks' so as to guarantee the requirements of fairness"; he contends, however, that although this corresponds with the English version of articles 67 (1) (a) and (f), "it does not correspond with the French version"[42]. The Appellant submits that the French text "requires a level of perfection", while the English text "requires a level of fluency", and argues that "a level of perfection is higher than a level of fluency"[43]. The Appellant then argues that article 128 of the Statute and rule 2 of the Rules of Procedure and Evidence (hereinafter: "Rules") make the two texts equally authentic. He states that in the ad

[39] Impugned Decision, paras 1-6.
[40] Impugned Decision, paras. 31-32
[41] Document in Support of the Appeal, para. 12
[42] Document in Support of the Appeal, para 12.
[43] Document in Support of the Appeal, para. 15

hoc tribunals, "'[i]n case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail.'[] This has been interpreted to imply that the version most preferable to the Accused should be upheld, in accordance with the general principles of law"[44]. He states that "this principle is line with the well-established principle of *in dubio pro reo* (doubt must be interpreted in favour of the Accused)"[45]. He also submits that "[a]nother factor to be considered in determining which version is more 'consonant with the spirit of the Statute and the Rules' is which language is being used by the Accused"[46]. The Appellant therefore claims that based on the above, and in determining which version should prevail, the French should prevail, it being more favourable to the Appellant[47]. The Appellant argues that if, however, the Appeals Chamber finds there to be no discrepancy between the English and French versions, "then the English term 'fully' must be interpreted in light of the French term 'parfaitement' in order to avoid any ambiguity"[48]. On that basis, he contends that "the requirement that the defendant speaks and understands the language used in the proceedings 'fully' should be read as 'perfectly', which is a very high standard. This standard is not met if a defendant speaks a language well, even very well, as long as he or she has not reached a level of perfection"[49].

24. The Appellant further notes that by making the standard so high, the drafters intended to set a higher standard as compared to those in national jurisdictions and the minimum standards of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "European Convention on Human Rights"[50]) and the International Covenant on Civil and Political Rights (hereinafter: "ICCPR"[51]), "thereby giving full consideration to the complexity of the cases and serious consequences of the procedure before the ICC"[52].

25. The Appellant also raises two arguments not included directly within this ground of appeal, but which are nevertheless related. First, stating that the Appellant's case may be seen as borderline, "given that he speaks French to a reasonable standard", he submits that "it is a well-established principle that, in case of doubt, the benefit of doubt must go to the defendant

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[44] Document in Support of the Appeal, para. 16.
[45] Document in Support of the Appeal, para 16
[46] Document in Support of the Appeal, para. 17
[47] Document in Support of the Appeal, para. 18
[48] Document in Support of the Appeal, para. 19
[49] Document in Support of the Appeal, para 19
[50] 4 November 1950 as amended by Protocol 11, 213 United Nations Treaty Series 221 et seq., registration no 2889
[51] General Assembly Resolution 2200A (XXI), U N Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171
[52] Document in Support of the Appeal, para. 20.

(*in dubio pro reo*)"[53]. He refers to jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (hereinafter: "ICTR") and argues that the approach in article 22 (2) of the Statute, which concerns the definition of crimes, "is by analogy also applicable to procedural norms"[54]. He submits that "[t]he latter are construed, amongst other[s], with the objective that the rights and interests of the accused are duly protected during the proceedings"[55]. He submits that "[i]n light of this principle, [...] Mr Katanga's reasonable request to an interpreter should be granted"[56]. Second, he puts forward what he categorises as "[i]nconvenience arguments" and submits that he "understands the main dilemma to be one of costs and delay"[57]. He submits that "[i]t is blatantly obvious that Mr. Katanga's fundamental rights, guaranteed in the Statute should not be compromised for reasons of expense or inconvenience"[58]. He argues that, in terms of delay, he would be satisfied for interpretation facilities to be ready at the beginning of trial[59]. Concerning costs, he states that he is not seeking translation of all documents[60]. He concludes by referring to the Defence Observations on the Report of the Registry wherein he quotes it as stating that there will in any event be a need for a Lingala interpretation facility at the ICC, what with two Lingala speaking persons in custody, the fact that many witnesses for or against them will be Lingala speakers and there being a reasonable expectation that more arrests of Lingala speakers will follow[61].

3 Arguments of the Prosecutor

26. The Prosecutor submits that "in interpreting Articles 67(1)(a) and (f), the central question is not whether an accused meets a rigid and absolute threshold of language ability to the level of perfection, but whether, in the circumstances of the case, the accused's language capabilities are sufficient to secure his or her right to a fair trial"[62]. In relation to the Appellant's argument in this ground of appeal, the Prosecutor claims that the standard of

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[53] Document in Support of the Appeal, para 57.
[54] Document in Support of the Appeal, para 58 Article 22 (2) of the Statute provides: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted".
[55] Document in Support of the Appeal, para 58.
[56] Document in Support of the Appeal, para 59.
[57] Document in Support of the Appeal, para 60.
[58] Document in Support of the Appeal, para. 61
[59] Document in Support of the Appeal, para. 63
[60] Document in Support of the Appeal, para. 63.
[61] Document in Support of the Appeal, para 64.
[62] Prosecutor's Response, para. 2.

review for an error of law "requires the Appellant to identify the alleged error, to present arguments in support of its claim, and to explain how the error invalidates the decision"[63].

27. The Prosecutor disagrees that the English and French versions of article 67 (1) (a) and (f) of the Statute articulate different required language capabilities and submits that "the plain meaning of these terms is essentially the same"[64]. Referring to the primary concern of the provision being whether the language capabilities of an accused are fully sufficient to secure his right to a fair trial, the Prosecutor submits that "[t]his is consistent with the jurisprudence of international and regional human rights bodies,[] which consider, for instance, whether the nature of the offence charged and any communications by the authorities are sufficiently complex to require a detailed knowledge of the language used in court"[65]. He argues for a similar approach at the ICC[66]. He further submits that the fact that article 67 of the Statute does not require a level of perfection is further supported by the fact that many native speakers do not have perfect knowledge of their mother tongue[67]. A level of perfection might also imply that an accused must understand the legal terminology and technical proceedings of the Court, which, he submits, cannot be the purpose and meaning of the provision[68].

28. Finally, the Prosecutor claims, based on the legislative history, that article 67 (1) (a) and (f) of the Statute does not grant the accused the right to choose the language of the proceedings, citing a proposal to this effect which was rejected during negotiations[69]. He submits that "[t]his implies that the accused does not have a 'right' under the Statute to be informed in his native language. In order to comply with the standard of Articles 67(1)(a) and (f), an accused may also be informed in a language other than his native language, provided that he or she fully understands and speaks it, which enables him or her to a fair trial"[70].

29. On the Appellant's argument related to the principle *in dubio pro reo*, the Prosecutor submits that even if it would apply to procedural law it would not apply in the current case[71]. He submits that the Appellant has not established that an error of law or fact was committed, that the decision is solid and therefore "the current case is not a borderline one, and there is no

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[63] Prosecutor's Response, para. 12
[64] Prosecutor's Response, para 20
[65] Prosecutor's Response, para. 22.
[66] Prosecutor's Response, para. 22.
[67] Prosecutor's Response, para 23
[68] Prosecutor's Response, para. 23
[69] Prosecutor's Response, para. 24
[70] Prosecutor's Response, para 24
[71] Prosecutor's Response, para 15.

justification for reference to the principle of *in dubio pro reo*"[72]. On the Appellant's argument related to costs and inconvenience, he submits that "nothing in the impugned Decision suggests that costs or inconvenience were a factor, let alone a determining one"[73].

4 Determination by the Appeals Chamber

30. The issue which the Appeals Chamber is called upon to decide in the first ground of appeal is whether the Pre-Trial Chamber erred in its interpretation of the standard under article 67 (1) (a) and (f) of the Statute. For the reasons set out below, the Appeals Chamber finds that the Pre-Trial Chamber did err.

(a) Relevant statutory provisions

31. Provisions in the Statute which are relevant to this ground of appeal are articles 67 and 50.

> **"Article 67, Rights of the accused**
>
> 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
>
> (a) 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;
>
> [...]
>
> (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
>
> [...]"

> "**Article 50, Official and working languages**
>
> 1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.
>
> 2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

[72] Prosecutor's Response, para. 15
[73] Prosecutor's Response, para. 16.

> 3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified."

(b) Relevant finding by the Pre-Trial Chamber

32. The Pre-Trial Chamber's legal reasoning can be found in both the introduction and conclusion to the Impugned Decision.

33. In the introduction, the Pre-Trial Chamber determined the main question to be "whether the competency of the arrested person in French, which is one of the working languages of the Court, is sufficient to meet the standards set by articles 67(1)(a) and (f) of the Statute"[74]. Having recalled provisions in the Statute and the Rules, the Pre-Trial Chamber 'acknowledged' the jurisprudence of human rights courts and international criminal tribunals[75]. The Chamber stated, however, that it would not elaborate on these precedents, because it had already recognised such fundamental rights in *The Prosecutor v Thomas Lubanga Dyilo*[76]. It went on to 'note' a decision by the European Court of Human Rights (hereinafter: "ECHR"), *Hermi v Italy*, stating that it held that "in the context of the application of paragraph 3(e) [of the European Convention on Human Rights], the issue of the defendant's linguistic knowledge is vital" and that the court "must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court [...]"[77]. The Pre-Trial Chamber then stated that it was 'mindful' that the same court in another decision, *Brozicek v. Italy*, "made clear that interpretation into the language requested by an arrested person should be granted unless there is evidence showing that the person understands the actual language of the proceedings"[78].

34. Having 'introduced' its decision in this way, the Pre-Trial Chamber set out the submissions made by the Appellant, Prosecutor and Registrar, before entering its conclusion and stating:

> "At the outset, the Single Judge notes that articles 67(1)(a) and (f) of the Statute do not grant Germain Katanga the right to choose the language in which he must be informed

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[74] Impugned Decision, para. 5
[75] Impugned Decision, para. 4.
[76] Impugned Decision, para. 4.
[77] Impugned Decision, para 5.
[78] Impugned Decision, para 6.

> of the charges against him and in which translation of documents and interpretation must be provided.[] On the contrary, a proposal to this effect was defeated during the lengthy negotiations which led to the adoption of the Statute,[] and the standard that was adopted was that of a language that the arrested person or the accused 'fully understands and speaks' so as to guarantee the requirements of fairness"[79].

35. The Pre-Trial Chamber held that the Appellant's competency in French meets the standard in article 67 (1) (a) and (f) of the Statute.

(c) Reasons and finding

36. The standard adopted by the Pre-Trial Chamber in its interpretation of article 67 (1) (a) and (f) of the Statute is not wholly clear. On the one hand, as set out in the preceding paragraphs, in the introduction of the Impugned Decision, the Chamber noted and was mindful of, respectively, two decisions issued by the European Court of Human Rights. The first decision (*Hermi v. Italy*), as quoted, found that "the issue of the defendant's linguistic knowledge is vital". It also referred to the need to "examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court"[80]. No reference to the latter criteria appear later in the Impugned Decision and it is not clear if the Chamber accepted them as being persuasive in its interpretation of article 67 and thereafter relied on them when assessing the facts. Regarding the second decision (*Brozicek v. Italy*), although on a reading of the conclusion to the Impugned Decision it seems that the Chamber may have followed the approach cited in its consideration of the facts, it did not state that this approach reflected what was required by article 67. Later, the Pre-Trial Chamber noted that article 67 did not accord the Appellant the right to choose a language, relying on the rejection of a proposal to that effect during negotiations on the Statute[81]. As will be set out below, the Appeals Chamber considers that there is more to the drafting history of the Statute as far as the background to the adoption of article 67 is concerned. The Pre-Trial Chamber concluded by stating that the standard that was adopted in Rome was of a language the accused fully understands and speaks "so as to guarantee the requirements of fairness"[82].

37. The Appeals Chamber does not find that the Pre-Trial Chamber committed any error in referring to fairness when interpreting article 67 of the Statute. However, the Appeals

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[79] Impugned Decision, para. 30.
[80] Impugned Decision, para 5.
[81] Impugned Decision, para. 30.
[82] Impugned Decision, para. 30.

Chamber finds that the Pre-Trial Chamber did not comprehensively consider the importance of the fact that the word "fully" is included in the text, and the article's full legislative history. For this reason, the Appeals Chamber holds that the Pre-Trial Chamber erred in its interpretation of the standard to be applied under article 67 (1) (a) and (f) of the Statute as relevant to this appeal, a standard which the Appeals Chamber interprets to be higher than that put forward by the Pre-Trial Chamber.

38. The key question in this ground of appeal is how to interpret the phrase "fully understands and speaks" as it appears in both article 67 (1) (a) and article 67 (1) (f) of the Statute in relation to a request for interpretation. In addition to applying article 21 (3) of the Statute, as has been previously recalled, article 67 (1) (a) and (f) are to be interpreted in light of the Vienna Convention on the Law of Treaties, in particular, article 31 (1), which provides:

> "1. 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 the light of its object and purpose"[83].

39. The Appeals Chamber, in a decision of 13 July 2006, stated:

> "The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose.[] The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety.[] Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty"[84].

40. Article 67 (1) (a) prescribes the right to be informed "in a language which the accused fully understands and speaks", and paragraph 1 (f) prescribes the right to have "the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks". The language in paragraph (1) (a) and (1) (f) is similar in that the phrase "fully understands and speaks" is repeated[85]. On its

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[83] Vienna Convention on the Law of Treaties, signed on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Treaty Series 18232.

[84] Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para 33. *See* also Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against decision of Pre-Trial Chamber I entitled 'Décision sur la confirmation des charges' of 29 January 2007, ICC-01/04-01/06-926, OA8, 13 June 2007, para 8

[85] The following provisions in the Statute, Rules and Regulations of the Court are also noted article 55 (1) (c) of the Statute, rules 76 (3), 112 (1) (a), 117 (1), 144 (2) (b), 187 and 190 of the Rules, regulations 40 (2) (b) and 93 (1) of the Regulations of the Court, noting the differences in rule 144 (2) and regulation 40 (2) (b)

face it is clear that this standard is not low. It is a language an accused must both understand and speak and this, fully understand and speak. 'Fully' is defined in the online Oxford English Dictionary as "[i]n a full manner or degree; to the full, without deficiency; completely, entirely; thoroughly, exactly, quite". The French version of 'fully' in the Statute is '*parfaitement*', which is defined in "*Le Nouveau Petit Robert, Dictionnaire Alphabétique et Analogique de la Langue Française*" as, *inter alia*, "*[d]'une manière parfaite*", "*[s]avoir parfaitement une langue*" and "*[a]bsolument, complètement, entièrement*", "*être parfaitement heureux*"[86]. The Appeals Chamber does not consider it necessary to enter further into any possible differences between the two words. It suffices to state that the meaning of this provision based on these definitions provides that the standard that must be required under article 67 is very high.

41. Looking at article 67 as a whole emphasises that the right to interpretation, one of the basic rights of the accused, is an essential component of a fair trial. Article 67, entitled "[r]ights of the accused", is situated in Part 6 of the Statute, "The Trial", and is made applicable to proceedings at the pre-trial phase by virtue of rule 121 of the Rules which states that "[s]ubject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67". The *chapeau* of article 67 (1) states that the accused shall have the right "to a fair hearing conducted impartially" and that the accused shall be entitled to a list of rights stipulated to be "minimum guarantees, in full equality". The inclusion of the right to interpretation in the terms provided in article 67 as a whole indicates that this right is a *sine qua non* for the holding of a fair trial.

42. The fact that this standard is particularly high is also emphasized through consultation further afield. The rights set out in paragraphs (1) (a) and (f) are not dissimilar to comparable provisions to be found in legal texts associated with other courts and tribunals. However, those legal texts, contrary to article 67 of the Statute, do not, in relevant part, include the word "fully". In this regard, one may note the following provisions.

43. Article 6 (Right to a fair trial) of the European Convention on Human Rights:

> "3. Everyone charged with a criminal offence has the following minimum rights:
> a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> [...]

[86] *Le Nouveau Petit Robert, Dictionnaire Alphabétique et Analogique de la Langue Française*, p. 1847

c to have the free assistance of an interpreter if he cannot understand or speak the language used in court."[87]

44. Article 14 of the ICCPR :

"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
[...]
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;"[88]

45. Article 8 (Right to a Fair Trial) of the American Convention on Human Rights provides:

"2. [...] During the proceedings, every person is entitled, with fully equality, to the following minimum guarantees:

(a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;"[89]

46. Article 21 (Rights of the accused) of the Updated Statute of the ICTY:

"4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality.
(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
[...];
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;"[90]

47. Article 20 (Rights of the Accused) of the ICTR Statute:

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[87] Emphasis added.
[88] Emphasis added
[89] Emphasis added. American Convention on Human Rights, "Pact of San Jose, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955.
[90] Emphasis added Rule 3 of the Rules of Procedure of the ICTY provides: "(A) The working languages of the Tribunal shall be English and French. (B) An accused shall have the right to use his or her own language. (C) Other persons appearing before the Tribunal, other than as counsel, who do not have sufficient knowledge of either of the two working languages, may use their own language (D) Counsel for an accused may apply to the Presiding Judge of a Chamber for leave to use a language other than the two working ones or the language of the accused If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the defence and the interests of justice. (E) The Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages. (F) If: (i) a party is required to take any action within a specified time after the filing or service of a document by another party, and (ii) pursuant to the Rules, that document is filed in a language other than one of the working languages of the Tribunal, time shall not run until the party required to take action has received from the Registrar a translation of the document into one of the working languages of the Tribunal" (emphasis added) IT/32/Rev. 40, 12 July 2007

"4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

[...];

(f) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;"[91]

48. All of these provisions use the term "understands" or "understand or speak"; article 67 of the Statute refers to "fully understands and speaks". As a result, the assistance to be derived from any jurisprudence interpreting these provisions is limited in light of the differences between the relevant provisions. The jurisprudence does not offer direct guidance as to what the standard under article 67 of the Statute should be; it indicates how the standard "understands" has been implemented in practice at the international level[92].

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[91] Emphasis added Rule 3 of the Rules of Procedure and Evidence of the ICTR (14 March 2008) provides: "(A) The working languages of the Tribunal shall be English and French (B) The accused or suspect shall have the right to use his own language. (C) Counsel for the accused may apply to a Judge or a Chamber for leave to use a language other than the two working ones or the language of the accused If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the Defence and the interests of justice (D) Any other person appearing before the Tribunal, who does not have sufficient knowledge of either of the two working languages, may use his own language (E) The Registrar shall make any necessary arrangements for interpretation and translation of the working languages" (emphasis added).

[92] For decisions from the European Court of Human Rights related to interpretation and translation *see* e.g. Grand Chamber, *Hermi v Italy*, "Judgment", 18 October 2006, Application no 18114/02; *Lagerblom v Sweden*, "Judgment", 14 January 2003, Application no 26891/95; *Cuscani v the United Kindgom*, "Judgment", 24 September 2002, Application no. 32771/96, *Gungor v Germany*, "Décision sur la recevabilité", 17 May 2001, Application no 31540/96, *Brozicek v Italy*, "Judgment", 19 December 1989, Application no 10964/84; *Kamasinski v Austria*, "Judgment", 19 December 1989, Application no 9783/82.

For decisions from the ICTY related to interpretation and translation *see* e.g Appeals Chamber, *Prosecutor v Zdravko Tolimir*, "Decision on Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007", 28 March 2008, Case no IT-01-88/2-AR73 1; Trial Chamber II, *Prosecutor v Vujadin Popovic et al*, "Decision on Joint Defence Motion Seeking the Trial Chamber to Order the Registrar to Provide the Defence with BCS Transcripts of Proceedings in Two Past Cases Before the International Tribunal", 6 March 2006, Case no IT-05-88-PT; Trial Chamber I, *Prosecutor v Momcilo Krajisnik*, oral decision, 30 July 2004, Case no. IT-00-39-T, transcript pp 4993 et seq., Trial Chamber I, *Prosecutor v Fatmir Limaj et al*, "Decision on Defence's Applications for Extension of Time to File Pre-Trial Briefs and Order for Filing of Expert Reports and Notice Under Rule 94*BIS*, IT-03-66-PT", 7 May 2004, Case no IT-03-66-PT; Trial Chamber II, *Prosecutor v Vojislav Seselj*, Decision on Prosecutor's Motion for Order Appointing Counsel to assist Vojislav Seslj with his Defence, 9 May 2003, Case no. IT-03-67-PT, Trial Chamber I, *Prosecutor v Pasko Ljubcic*, "Decision Relative à la Requête de la Défence Aux Fins de la Traduction de Tous Les Documents", 20 November 2002, Case no IT-00-41, Appeals Chamber, *Prosecutor v Miroslav Kvocka et al*, "Decision on Zoran Zigic's Motion for Translation of Documents Pertaining to His Appeal", 3 October 2002, Case no IT-98-30/1-A, Trial Chamber I, *Prosecutor v Mladen Naletilic et al*, "Decision on Defence's Motion Concerning Translation of All Documents", 18 October 2001, Case no. IT-98-34-T; Trial Chamber I, *Prosecutor v Slobodan Milosevic*, "Decision on Prosecution Motion for Permission to Disclose Witness Statements in English", 19 September 2001, IT-99-37-PT, Trial Chamber, *Prosecutor v Simo Zaric*, "Decision on Defence Application for Leave to Use the Native Language of the Assigned Counsel in the Proceedings", 21 May 1998, Trial Chamber, *Prosecutor v Zejnil Delalic et al*, "Order on the Motion for Application of Redress of the Accused's Right of Information Pursuant to Articles 20 and 21 of the Statute of the International Tribunal", 16 January 1998, Case

49. Turning back to article 67, and as compared to the provisions set out above, the Appeals Chamber notes the addition of the word "fully" to both paragraphs (1) (a) and (f), the cumulative requirement to fully "understand *and* speak" in both paragraphs, and the addition of a requirement to fully understand *and speak* in paragraph (1) (a). There seems to have been an intention to grant to the accused before the Court, rights of a higher degree than in other courts referred to. There must be a difference between an entitlement to a language one understands or speaks (or simply understands) and a language one fully understands and speaks.

50. The fact that this standard is high is confirmed and further clarified by the preparatory work of the Statute, to which the Appeals Chamber turns under article 32 of the Vienna Convention on the Law of Treaties:

> "Article 32, Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

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no IT-96-21; *Prosecutor v Zejnil Delalic et al*, "Decision on Defence Application for Forwarding the Documents in the Language of the Accused", 25 September 1996, Case no. IT-96-21.
For decisions from the ICTR related to interpretation and translation, *see* e g Appeals Chamber, *Mikeali Muhimana v Prosecutor*, "Decision on Motion for Extension of Time for Filing of Notice of Appeal", 2 June 2005, Case no ICTR-95-1B-A, Trial Chamber I, *Prosecutor v Aloys Simba*, "Decision on Defence Request for Protection of Witnesses", 25 August 2004, Case no ICTR-01-76-I; Appeals Chamber, *Jean de Dieu Kamahunda v Prosecutor*, "Decision on Motion for Extension of Time for Filing of Notice of Appeal and Appellant's Brief Pursuant to Rules 108, 111, 115 and 116 of the Rules of Procedure and Evidence", 8 March 2004, Case no ICTR-99-54A-A, Trial Chamber III, *Prosecutor v Laurent Semanza*, "Judgment and Sentence", 15 May 2003, Case no ICTR-97-20-T; Trial Chamber I, *Prosecutor v Siméon Nshamihigo*, "Decision on the Defence Motion Seeking Release of the Accused person and/or any other remedy on the basis of abuse of process by the Prosecutor", 8 May 2002, ICTR-2001-63-DP, Trial Chamber I, *Prosecutor v Mika Muhimana*, "Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel", 6 November 2001, Case no ICTR-95-1B-I; Trial Chamber II, *Prosecutor v Juvenal Kajelijeli*, "Decision on Defense Motion Seeking to Interview Prosecutor's Witnesses or Alternatively to be Provided With a Bill of Particulars", 12 March 2001, Case no ICTR-98-44A-T; Trial Chamber II, *Prosecutor v Pauline Nyiramasuhuko*, "Decision on Defense Motion for Disclosure of Evidence", 1 November 2000, Case No ICTR-97-21-T; Trial Chamber I, *Prosecutor v Ferdinand Nahimana*, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 5 November 1999, Case no ICTR-96-11-I

51. The 1993[93] and 1994[94] ILC Draft Statutes had a version of article 67 which referred to "understands" in paragraph (1) (a) and "understands and speaks" in paragraph (1) (f)[95]. The 1997 Preparatory Committee version was formulated in such a way that paragraphs (a) and (f) read "understands" and "understands and speaks", respectively, although paragraph (1) (a) also had a phrase in square brackets, "in his own language":

> "(a) to be informed promptly and in detail, in a language that the accused understands **[in his own language]**, of the nature, cause and content of the charge;
> [...]
> (f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness"[96].

52. The draft which resulted from a Preparatory Committee meeting in Zutphen, The Netherlands, in January 1998, maintained the set of square brackets in paragraph 1 (a) but put the first phrase also in square brackets:

> "(a) to be informed promptly and in detail, [in a language that the accused understands] [in his own language], of the nature, cause and content of the charge;
> [...]
> (f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness"[97].

53. The 1998 Preparatory Committee version did not change from the latter version[98]. In 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in a working paper on article 54 dated 18 June 1998, article 54 ter (Rights of suspects and other persons during an investigation) included a paragraph 2 (c) providing that a person: "[s]hall, if questioned in a language other than a

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[93] Report of the International Law Commission on the work of its forty-fifth session (3 May - 23 July 1993), Document A/48/10, pp 119 – 120 (Article 44, Rights of the accused).
[94] Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, General Assembly Official Records, Forty-ninth Session, Supplement No 10 (A/49/10), pp. 114 – 115 (Article 41, Rights of the accused).
[95] For the work of the Preparatory Committee in 1996, *see* Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly Official Records, Fifty-first session, Supplement No 22 (A/51/22) and Volume II (Compilation of proposals), General Assembly Official Records, Fifty-first session, Supplement No 22A (A/51/22)
[96] Decisions taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, A/AC 249/1997/L 8/Rev.1, 14 August 1997, pp 33 – 35 (Article 41, Rights of the accused).
[97] Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC 249/1998/L 13, 4 February 1998, pp 114 – 115 (Article 60[41], Rights of the accused)
[98] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, A/CONF 183/2/Add 1, 14 April 1998, pp. 106 – 108 (Article 67, Rights of the accused).

language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness"[99]. This same wording was included in a report dated 24 June 1998 which the Working Group on Procedural Matters submitted to the Committee of the Whole[100]. Concerning article 67, a "[p]roposal submitted by the delegations of Egypt, Oman and the Syrian Arab Republic" regarding, *inter alia*, paragraph (1) (a) read as follows: "(a) to be informed immediately and in detail, in his or her own language or in a language of his or her choice, of the nature..."[101]. The chairman of the Working Group on Procedural Matters later submitted a proposal:

> "(a) To be informed promptly and in detail in a language the accused understands or in his or her own language of the nature, cause and content of the charge;
> [...]
> (f) If any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;"[102]

54. In the Report of the Working Group on Procedural Matters (Addendum) of 11 July 1998 transmitted to the Committee of the Whole[103], article 67 read as follows:

> "(a) To be informed promptly and in detail in a language the accused fully understands and speaks of the nature, cause and content of the charge; [footnote reference - 5];
>
> ...
>
> (f) If any of the proceedings of or documents presented to the Court are not in a language the accused fully understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;"
>
> [Footnote 5 to paragraph (1) (a) read: "It is understood that this expression means the language for which the accused, in good faith, has clearly expressed his or her preference."]

55. The final version of article 67[104], as seen above in paragraph 31, reads:

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[99] Working Paper on Article 54, A/CONF.183/C.1/WGPM/L.1, 18 June 1998.
[100] Report of the Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L.2, 24 June 1998 (Article 54 ter (3) (c)). See also Report of the Drafting Committee to the Committee of the Whole, A/CONF 183/C.1/L.87, 15 July 1998 (article 54 ter, Rights of persons during an investigation).
[101] Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, A/CONF 183/C.1/WGPM/L 36, 29 June 1998
[102] Draft Proposal for Article 67 submitted by the chairman, A/CONF.183/C 1/WGPM/L.42*,3 July 1998,
[103] Report of the Working Group on Procedural Matters, Addendum, A/CONF 183/C 1/WGPM/L 2/Add 6, 11 July 1998
[104] *See* also Report of the Drafting Committee to the Committee of the Whole, A/CONF 183/C.1/L.88, 16 July 1998 for article 67 (1) (a) and (f).

> "(a) 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;
>
> [...]
>
> (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;"

56. What significance does the Appeals Chamber attribute to this history? It is the case, as stated by the Pre-Trial Chamber, that a proposal to allow for the language of choice was not adopted. At the same time, however, two occurrences, of significance to the Appeals Chamber, did take place. First, having gone from a draft confined to a language an accused understands or understands and speaks, proposals to have "a language of his or her choice" or "his or her own language" were considered. The final provision adopted was a language an accused "fully" understands and speaks. This suggests that the intent was to raise the standard of understanding to higher than plain understanding as appears in the conventions referred to above, in the interests of the fair-trial rights of the accused. Second, the footnote to sub-paragraph (1) (a) confirms that it was understood that the expression means the language for which the accused has clearly expressed his or her preference – in good faith. That is, the intent was to allow for the language preferred as long as the request for that language is in good faith. It is noted that the footnote is only attached to paragraph (1) (a). However, since it refers to the meaning of the 'expression' the Appeals Chamber concludes that this 'meaning' also was intended to apply to paragraph (1) (f).

57. It is recalled, of course, that the formulation of the footnote was not adopted as the final version of the provision. However, the Appeals Chamber finds that this footnote confirms that the standard is higher than simply a language the accused understands or speaks and that the issue of bad faith, or abuse of the right to interpretation, is relevant in a Chamber's consideration of the right to interpretation.

58. The ICC has certain working languages - English and French in the first place, with a possibility for others as referred to in the Statute and Rules[105]. Whether one speaks of article 67 (1) (a) or (f) of the Statute, it seems that the starting point, as far as languages are concerned, will be a working language of the Court. That is, proceedings will in principle be

[105] See Article 50 of the Statute, rule 41 of the Rules and regulation 40 of the Regulations of the Court.

offered in English or French[106]. An accused may state, however, that he or she wishes to use another language – presumably on the basis that he or she does not fully understand and speak a working language of the Court.

59. The subject of understanding is exclusively the accused. Thus, the Chamber must give credence to the accused's claim that he or she cannot fully understand and speak the language of the Court. This is because it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks.

60. The matter does not, however, end there. What if the accused fully understands and speaks the language of the Court? The Chamber may have reasons as to why it does not find it appropriate to grant a request to have interpretation into another language. For example, an accused may fully understand and speak more than one language and it may be evident that he or she is asserting the right to use a different language to that being offered by the Court even though the latter is one of the languages that he or she also fully understands and speaks. The Chamber may consider that the accused is acting in bad faith, is malingering or is abusing his or her right to interpretation under article 67. If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess, on the facts on a case-by-case basis, whether this is so.

61. Given the addition of the word fully, and the drafting history, the standard must be high. Therefore, the language requested should be granted unless it is absolutely clear on the record that the person *fully* understands *and* speaks one of the working languages of the Court and is abusing his or her right under article 67 of the Statute. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated. Ultimately, the Chamber in question is responsible for ensuring the fair trial of the accused.

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[106] This is even clearer in relation to paragraph (1) (f), with the addition of the phrase "if any of the proceedings are not in a language which the accused fully understands and speaks". However, since article 50 stipulates the working languages of the Court, this also seems to be the case for paragraph (1) (a). See also regulation 40 (2) (b) of the Regulations of the Court which requires the Registrar to provide interpretation services in all proceedings "[f]or the language of the [accused] if he or she does not fully understand or speak any of the working languages"

62. In conclusion, the Appeals Chamber considers that the standard applicable under the Statute is high – higher, for example, than that applicable under the European Convention on Human Rights and the ICCPR. To give effect to this higher standard must mean that an accused's request for interpretation into a language other than the Court's language must be granted as long as he or she is not abusing his or her rights under article 67 of the Statute.

63. With regard to this ground of appeal, the Appeals Chamber considers that the Pre-Trial Chamber erred in its interpretation of the standard to be applied under article 67 (1) (a) and (f) of the Statute as relevant to this appeal, a standard which the Appeals Chamber interprets to be higher than that put forward by the Pre-Trial Chamber.

B. Second ground of appeal: Erroneous Factual Assessment

64. As his second ground of appeal, the Appellant submits, *inter alia*, that the Pre-Trial Chamber's "factual analysis was erroneous because it attached too much weight to the evidence allegedly suggesting that Mr. Katanga's level of French meets the requirements of articles 67(1)(a) and (f); and too little weight to the submissions made on behalf of Mr. Katanga suggesting that his level of French is nothing higher than reasonable"[107].

65. The Appeals Chamber has stated that the Pre-Trial Chamber erred in its interpretation of the standard to be applied under article 67 (1) (a) and (f) of the Statute as relevant to this appeal. In this case, the Appeals Chamber determines that the matter should be remitted to the Pre-Trial Chamber, which has daily control of the case and a full awareness of the complete factual background, for a new determination of the request that formed the subject-matter of the appeal based on the correct interpretation as set out by the Appeals Chamber in this judgment. For this reason, the Appeals Chamber shall not consider the second ground of appeal.

IV. APPROPRIATE RELIEF

A. Relief sought by the Appellant

66. The Appellant requests the Appeals Chamber "to find that the Single Judge erroneously found that Mr. Katanga's competency meets the requirements of articles 67(1)(a) and (f); to reverse the Single Judge's Decision not to grant Mr. Katanga the right to a Lingala interpreter

[107] Document in Support of the Appeal, para. 31.

in the Courtroom; and to order the Registrar to put the facility in place in order that such Lingala interpretation can be offered to Mr. Katanga"[108].

B. Relief sought by the Prosecutor

67. In the first place, the Prosecutor submits that the appeal should, "in its totality", be denied[109]. However, he also submits the following:

> 47. If the Appeals Chamber grants the first ground of appeal, i.e. if the Appeals Chamber finds that the Single Judge applied the incorrect legal standard, then the Prosecution submits that the Appeals Chamber refer the issue back to the Single Judge for a new determination as to whether Mr KATANGA's competency in French meets the standards of Articles 67(1)(a) and (f) as defined by the Appeals Chamber. In that case, it is submitted that the Appeal Chamber must not enter any findings with respect to the second ground of appeal.
>
> 48. If the Appeals Chamber dismisses the first ground of appeal, but grants the second ground of appeal, i.e. if the Appeals Chamber finds that the Single Judge - although applying the correct legal standard - erred in fact in finding that Mr KATANGA's level of French met the requirements of Articles 67(1)(a) and (f), then the Prosecution requests that the Appeals Chamber remand the issue back to the Single Judge for a new factual determination pertaining to the remaining possible languages, including a determination on whether Mr KATANGA's competency in Congolese-Swahili meets the standards of Articles 67 (l) (a) and (f)"[110].

C. Determination by the Appeals Chamber

68. In an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules).

69. As stated above, the Appeals Chamber determines that the Impugned Decision should be reversed to the extent that the Pre-Trial Chamber erred in its interpretation of the standard to be applied under article 67 (1) (a) and (f) of the Statute as relevant to this appeal, and the matter is remitted, Judge Pikis dissenting, to the Pre-Trial Chamber for a new determination of the Appellant's request.

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[108] Document in Support of the Appeal, para. 66.
[109] Prosecutor's Response, para. 46.
[110] Prosecutor's Response, paras. 47 – 48

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

Judge Erkki Kourula
Presiding Judge

Dated this 27th day of May 2008

At The Hague, The Netherlands

Partly Dissenting opinion of Judge G.M. Pikis

1. I am at one with our judgment on the language issue and the reasons behind it. Therefore, I associate myself with the reversal of the decision of the Pre-Trial Chamber respecting the issue[1] set down for determination by the Appeals Chamber, and endorse paragraph 1 of the determinative part of the judgment.

2. I disagree with the second paragraph inasmuch as we should determine the issue ourselves and not remit the case back to the Pre-Trial Chamber to address anew the request of the appellant for interpretation in the language he "fully understands and speaks", namely Lingala. All relevant material on the subject is before the Appeals Chamber. Deciding the issue ourselves would be consistent with the finality attached to the appellate process by rule 158 (1) of the Rules of Procedure and Evidence, empowering the Court to confirm, reverse or amend the sub judice decision; a provision importing power to allow the appeal by substituting the decision that ought to have been given for the one given, varying the sub judice decision as deemed necessary by the Appeals Chamber or confirming it by dismissing the appeal.

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

Judge Georghios M. Pikis

Dated this 27th day of May 2008

At The Hague, The Netherlands

[1] *Prosecutor v Katanga* "Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages" 18 January 2008 (ICC-01/04-01/07-149), page 7. "[whether the Decision 'incorrectly found that Mr Katanga's competency in French meets the standards of articles 67 (1) (a) and (f) of the Statute']"