

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 25 June 2008

**PRE-TRIAL CHAMBER I**

**Before: Judge Sylvia Steiner, Single Judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
THE PROSECUTOR  
*v. Germain Katanga and Mathieu Ngudjolo Chui***

**Public Document**

**URGENT**

**Decision on the Three Defences' Requests Regarding the Prosecution's Amended  
Charging Document**

Decision 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  
Mr Éric MacDonald, Senior Trial Lawyer

**Counsel for the Defence for Germain  
Katanga**

Mr David Hooper  
Ms Caroline Buisman

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

Mr Jean-Pierre Kilenda Kakengi  
Ms Maryse Alié

**Legal Representatives of the Victims**

Ms Carine Bapita Buyagandu  
Mr Joseph Keta  
Mr J. L. Gilissen  
Mr Hervé Diakiese  
Mr Jean-Christostome Mulamba  
Nsokoloni

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**I, Judge Sylvia Steiner**, judge at the International Criminal Court (“the Court”);

**NOTING** the “Prosecution’s Submission of the Document Containing the Charge and List of Evidence”<sup>1</sup> (“the Prosecution’s Charging Document”) filed by the Prosecution on 21 April 2008;

**NOTING** the “Defence Motion seeking the Amendment of the Document containing the Charges”<sup>2</sup> (“the Defence for Germain Katanga’s Request”), filed as urgent by the Defence for Germain Katanga on 9 June 2008;

**NOTING** the “*Requête de la Défense de Monsieur Mathieu Ngudjolo en vue de solliciter la suppression du paragraphe 92 du document relatif à la notification des charges en application de l’Article 61-3-a du Statut*”<sup>3</sup> (“the Defence for Mathieu Ngudjolo Chui’s Request”), filed by the Defence for Mathieu Ngudjolo Chui on 10 June 2008;

**NOTING** the public hearing held on 10 June 2008<sup>4</sup> (“the 10 June 2008 Hearing”) with the Prosecution, the Defences for Germain Katanga and Mathieu Ngudjolo Chui, the Legal Representatives of Victims<sup>5</sup> as well as the representatives of the Registry during which the Single Judge gave deadlines for the submissions of observations on the Defences’ requests;<sup>6</sup>

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<sup>1</sup> ICC-01/04-01/07-422

<sup>2</sup> ICC-01/04-01/07-574 and its Annex

<sup>3</sup> ICC-01/04-01/07-575-Conf (reclassified as public pursuant to an oral decision rendered on 10 June 2008 - ICC-01/04-01/07-T-35-ENG ET WT, p. 4, lines 5-14)

<sup>4</sup> ICC-01/04-01/07-T-35-ENG ET.

<sup>5</sup> Ms Carine Bapita Byuagandu and Mr J. L. Gillissen

<sup>6</sup> ICC-01/04-01/07-T-35-ENG ET, p. 4, line 15 to p. 5 line 3.

**NOTING** the “*Requête de la Défense de Mathieu Ngudjolo en vue de faire sienne les points a (à l’exclusion des faits spécifiques à Mr Katanga), b, c, d et e contenus dans la ‘Defence Motion Seeking the Amendment of the Document containing the Charges’ déposée par l’équipe de Défense de Germain Katanga le 9 juin 2008*”<sup>7</sup> (“the Defence for Mathieu Ngudjolo Chui’s Second Request”), filed on 10 June 2008, whereby the Defence for Mathieu Ngudjolo Chui joined in the Defence for Germain Katanga’s Request in relation to points (a), (b), (c), (d) and (e) and enumerated and developed them therein;

**NOTING** “the Prosecution’s Submission of Amended Document Containing the Charges and Additional List of Evidence”<sup>8</sup>, (“the Prosecution’s Amended Charging Document”) filed by the Prosecution on 12 June 2008;

**NOTING** the “Prosecution’s Consolidated Response to the Defences’ Motions Regarding the Document Containing the Charges”<sup>9</sup> (“the Prosecution’s Consolidated Response”) filed by the Prosecution on 13 June 2008, whereby the Prosecution requested the Chamber to dismiss the Defence for Germain Katanga’s Request and the Defence for Mathieu Ngudjolo Chui’s two Requests;

**NOTING** the “*Observations des victimes a/0327/07, a/0329/07 à a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/044/08, a/0046/08, a/0049/08 à a/0051/08, a/0055/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0071/08, a/0073/08, a/0076/08, a/0078/08 à a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0100/08, a/0101/08, a/0103/08 et a/0104/08 sur les demandes introduites par les deux équipes de la Défense et visant l’amendement du document de notification*”

<sup>7</sup> ICC-01/04-01/07-577.

<sup>8</sup> ICC-01/04-01/07-584 with its Public, Confidential-Ex Parte-Prosecution Only and Confidential annexes

<sup>9</sup> ICC-01/04-01/07-590 and its annex

*les charges*<sup>10</sup> (“the Victims’ Observations”) filed by Ms Carine Bapita Buyangandu on Monday 16 June 2008;

**NOTING** the “*Requête de la Défense de Monsieur Mathieu Ngudjolo afin de répliquer à la réponse consolidée du Procureur relative au document détaillé des charges*”<sup>11</sup> filed by the Defence for Mathieu Ngudjolo Chui on 17 June 2008 ;

**NOTING** the “Decision on the Request for Leave to Reply”<sup>12</sup> issued by the Single Judge on 17 June 2008 and by which she decided to give the Defences for Mathieu Ngudjolo Chui and for Germain Katanga until Friday 20 June 2008 to reply to the Prosecution Response;

**NOTING** the “*Réplique de la Défense de Monsieur Mathieu Ngudjolo à la réponse consolidée du Procureur relative au document détaillé des charges*”<sup>13</sup> filed by the Defence for Mathieu Ngudjolo Chui on 20 June 2008 ;

**NOTING** the “Defence Reply to Prosecution’s Consolidated Response to the Defences’ Motions Regarding the Document Containing the Charges”<sup>14</sup> filed by the Defence for Germain Katanga on 20 June 2008;

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<sup>10</sup> ICC-01/04-01/07-593

<sup>11</sup> ICC-01/04-01/07-599

<sup>12</sup> ICC-01/04-01/07-600

<sup>13</sup> ICC-01/04-01/07-615

<sup>14</sup> ICC-01/04-01/07-620

**NOTING** articles 61 and 67 of the Rome Statute (“the Statute”), rule 121 of the Rules of Procedure and Evidence (“the Rules”) and regulations 33, 34, 36 and 52 of the Regulations of the Court (“the Regulations”)

### **I. Preliminary Remarks.**

1. At the outset, the Single Judge would like to note that the Victims’ Observations, although signed on Friday 13 June 2008, were sent to the Registry on Saturday 14 June 2008, and filed on Monday 16 June 2008. Furthermore, the Single Judge notes that the Victims’ Observations do not conform to the format of documents to be filed before the Court as provided by regulation 36 of the Regulations.

2. As a result, the Single Judge shall not consider the Victims’ Observations for the purpose of the present decision. Moreover, the Single Judge reminds Ms Carine Bapita Buyagandu to pay particular attention to regulations 33 and 36 of the Regulations.

3. The Single Judge observes that the three requests of the Defences for Germain Katanga and Mathieu Ngudjolo Chui seek:

a. an amendment of the Prosecution Charging Document on the account that it does not provide, as required by articles 61 (3), 67 (1) (a) and (b) of the Statute, rule 121 of the Rules and regulation 52 of the Regulations:

(i) sufficient factual details in the description of the participation of the suspects in common plan;

- (ii) the names and specific acts of those individuals that allegedly co-perpetrated the crimes along with the Germain Katanga and Mathieu Ngudjolo Chui;
  - (iii) the identity of the victims; and
  - (iv) sufficient factual details concerning the charge of using children under the age of fifteen to actively participate in the hostilities.
- b. to strike out certain parts of the Prosecution Charging Document on the basis that:
- (i) they use expressions that are “too vague”; or
  - (ii) they include admissions allegedly made by the suspects that constitute evidence as opposed to material facts.

4. The Single Judge observes that the Prosecution, in the Prosecution’s Consolidated Response stated:

All motions, for differing reasons, seek various amendments to the Prosecution’s Document Containing the Charges. The Prosecution notes that these motions were lodged with the Chamber prior to the Prosecution having filed its amended charging document, and consequently were premised on and referenced to the Document Containing the Charges filed by the Prosecution on 21 April 2008. On June 2008, the Prosecution filed the “Prosecution’s Submissions of Amended Document Containing the Charges and Additional List of Evidence.” The Prosecution, in the instant document, addresses the complaints directed by the Defences on the basis that similar allegations would be directed at the Amended Document Containing the Charges (the amended “DCC”).<sup>15</sup>

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<sup>15</sup> ICC-01/04-01/07-590, para 4.

5. The Single Judge agrees with the Prosecution that the three requests of the Defences for Germain Katanga and Mathieu Ngudjolo Chui must be treated as having been made in relation to the Prosecution Amended Charging Document filed by the Prosecution on 12 June 2008.

6. The Single Judge also observes that, in justifying their requests, the Defences for Germain Katanga and Mathieu Ngudjolo Chui heavily rely on the case law of the International Criminal Tribunal for the former Yugoslavia ("the ICTY") and the International Criminal Tribunal for Rwanda ("the ICTR"). The Defences base their submissions on this point on the similar role allegedly played by (i) the "Indictment" in the criminal procedure before the ICTY and the ICTR; and (ii) the Charging Document in the criminal procedure before the Court.

7. In this regard, the Single Judge emphasises the differences between the criminal procedures at this Court and at the *ad hoc* Tribunals.

8. According to the criminal procedure at the *ad hoc* Tribunals, an indictment is prepared by the Prosecution and confirmed by a Pre-Trial Judge without any intervention by the Defence insofar as a warrant of arrest, or a summons to appear, is only issued by the Pre-Trial Judge upon the confirmation of the indictment.<sup>16</sup> Once the accused voluntarily appears or is surrendered to the ICTY or the ICTR, the Defence has 30 days, as provided for in rule 72 of both the ICTY and ICTR Rules of Procedure and Evidence, to allege defects in the form of the indictment so as to ensure full compliance with the accused's rights pursuant to articles 21(2) and (4)(a) of the ICTY Statute and articles 20(2) and (4)(a) of the ICTR Statute.

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<sup>16</sup> Rule 47 of Rules of Procedures and Evidence of the ICTY, special attention to Rule 47 (B), 47(F) and 47(H)(1) and (ii)



9. The criminal procedure at this Court is rather different insofar as, except for those exceptional situations in which the confirmation hearing is held *in absentia*, the Charging Document is filed by the Prosecution with the Pre-Trial Chamber for the purpose of the confirmation hearing after the suspect has voluntarily appeared, or has been surrendered to the Court.

10. As a result, by the time the Prosecution files with the Pre-Trial Chamber its Charging Document, the Defence, as shown by the present case, is in a position to seek its amendment even prior to the initiation of the hearing - in which the "core" evidence gathered by the Prosecution in the relevant case (along with any evidence on which the Defence may decide to rely at this stage) is debated for the purposes of deciding whether or not to confirm the charges contained in the Charging Document.

11. The Single Judge also observes that, as a result of the evidentiary debate held at the confirmation hearing, the Pre-Trial Chamber must issue, pursuant to article 61(7) of the Statute, a decision providing the reasons for the confirmation or not of the charges. As shown by the decision on the confirmation of the charges in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("the Lubanga case"), such a decision may be particularly detailed on the factual and legal basis for the confirmation of the charges, or some of them, contained in the Prosecution's Charging Document.

12. Moreover, in the event that the charges are confirmed, nothing in the Statute and the Rules prevents the filing in the pre-trial proceedings before the Trial Chamber of an amended Charging Document in which the underlined facts and their legal characterisation are adjusted in light of the Pre-Trial Chamber's decision confirming the charges.

13. As a result of the specific features of the procedure before this Court, the question arises as to whether, in the system of the Statute and the Rules, the standards concerning the Prosecution's Charging Document are the same for the purposes of the confirmation hearing as for the purposes of the trial. Absent any case law of the Appeals Chamber on this matter, and in order to avoid any prejudice to the Defence, the Single Judge shall address the three requests of the Defences for Germain Katanga and Mathieu Ngudjolo Chui on the assumption that the answer to the above question is in the affirmative.

14. The Single Judge further notes that, although acknowledging the different nature of the notions of co-perpetration based on functional control under article 25(3)(a) of the Statute, and co-perpetration based on joint criminal enterprise pursuant to articles 7(1) of the ICTY Statute and 6 (1) of the ICTR Statute, the Defences base their allegations on the deficient pleading of the notion of functional control on the case law of the *ad hoc* Tribunals concerning the pleading of joint criminal enterprise. In this regard, the Defence for Germain Katanga expressly highlights that:

The Defence is aware that, in *Lubanga*, the Pre-Trial Chamber has broadened the liability under Article 25 (3)(a) to cover the type of crime described in the current Document Containing the Charges, which, on its surface, would more appropriately fit the specific liability of commission "by a group of persons acting with a common purpose" set out in Article 25 (3)(d). In line with the Pre Trial Chamber's analysis in *Lubanga*, the type of crimes Mr Katanga is charged with can, accordingly to this Pre-Trial Chamber, be charged as co-perpetration crimes under Article 25 (3)(a).<sup>17</sup>

The Defence does, however, submit that it is improper to use commission under Article 25 (3)(a) as an umbrella mode of participation in order to circumvent the very specific requirements set out in Article 25 (3)(d) in relation to a common plan type of commission. Unlike in the *ad hoc* International Criminal Tribunals, where the mode of 'commission' has been held to include Joint Criminal Enterprise in absence of a more specific provision covering this mode of liability, the ICC Statute has incorporated a provision explicitly criminalising the type of crime described in the

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<sup>17</sup> ICC-01/04-01/07-574, para. 13

Document Containing the Charges. However, as this Pre-Trial Chamber has already ruled on this issue, the Defence will, at present, leave this matter alone.<sup>18</sup>

The Prosecution has nonetheless charged the liability of co-perpetration with insufficient specificity. Given the resemblance to the notion of JCE, the jurisprudence of the *ad hoc* International Criminal Tribunals on JCE is relevant. Indeed, JCE and the common purpose doctrine have been held to be the same.<sup>19</sup>

15. The Single Judge is seriously concerned with the approach taken by the Defence for Germain Katanga, which, on the one hand, seems to highlight the improper use of the very mode of liability contained in the Prosecution's Amended Charging Document, and, on the other hand, the Defence for Germain Katanga states that it prefers, at present, to "leave this matter alone".

16. Furthermore, the Single Judge emphasises the fundamental misunderstanding of the Defence for Germain Katanga regarding the mode of liability contained in the Prosecution's Amended Charging Document insofar as:

- a. it is referred to as a "type of crime" by the Defence; and
- b. in relation to which the Defence states that it is used to "circumvent" the far less stringent requirements of the residual form of accomplice liability provided for in article 25(3)(d) of the Statute.

17. The Single Judge also recalls that, as this Chamber has already held in the Decision on the confirmation of the charges in the *Lubanga* case, there are significant differences between the notions of co-perpetration based on joint control of the crime embraced by article 25(3)(a) of the Statute and the notion of

<sup>18</sup> ICC-01/04-01/07-574, para. 13, footnote 8

<sup>19</sup> ICC-01/04-01/07-574, para 14

co-perpetration based on joint criminal enterprise endorsed by the ICTY and ICTR case law.<sup>20</sup>

18. As a result, the Single Judge considers that the case law of the *ad hoc* Tribunals on the pleading of the different elements of the notion of co-perpetration based on joint criminal enterprise in an indictment before the *ad hoc* Tribunals is not directly applicable to the pleading before this Court of the notion of co-perpetration based on functional control in the Prosecution's Charging Document.

## II. Relevant Provisions and Case Law of the Chamber

19. The Single Judge recalls that the controlling provisions on the matter before the Single Judge are, first of all, articles 61(3) and 67(1)(a) and (b) of the Statute, according to which Germain Katanga and Mathieu Ngudjolo Chui:

- a. "shall be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial";
- b. "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";
- c. "have adequate time and facilities for the preparation of the defence".

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<sup>20</sup> ICC-01/04-01/06-803, para 329, 330

20. These provisions are complemented by:

- a. rule 121 (3) of the Rules, which establishes that:

The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of evidence which he or she intends to present”;

- b. regulation 52 of the Regulations of the Court, according to which:

The document containing the charges referred to in article 61 shall include:

- (a) The full name of the person and any other relevant identifying information;
- (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
- (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

21. Moreover, the Single Judge recalls that according to the case law of this Chamber in the *Lubanga* case:

- a. “the Prosecution is under no obligation to articulate in the Document Containing the Charges its legal understanding of the various modes of liability and the alleged crimes;”<sup>21</sup>
- b. “nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the acts or omission with which the suspect is charged, especially if that

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<sup>21</sup> ICC-01/04-01/06-803-tEN, para 151

would be helpful in better understanding the context in which the conduct charged occurred”;<sup>22</sup> and

- c. “the Document Containing the Charges transmitted by the Prosecution is to be read in conjunction with the Prosecution List of Evidence.”<sup>23</sup>

22. In relation to this last proposition, the Single Judge highlights that the evidence included in the Prosecution List of Evidence is limited to the “core” evidence gathered by the Prosecution in relation to the case at hand.

### **III. Specific Allegations of the Defences for Germain Katanga and Mathieu Ngudjolo Chui**

23. Concerning the specific allegations made by both Defences, the Single Judge finds that paragraph 63 of the Prosecution’s Amended Charging Document specifies the names of the two individuals, Germain Katanga and Mathieu Ngudjolo Chui, who, according to the Prosecution’s Consolidated Response, are the only co-perpetrators of the crimes included in the Prosecution’s Amended Charging Document, insofar as they were the only members of the common plan “whose role and contribution give them control over the commission of the crime[s].”<sup>24</sup>

24. The Single Judge also finds that the other members of the common plan - who, in the Prosecution’s view, cannot be considered as co-perpetrators due to

<sup>22</sup> ICC-01/04-01/06-803-tEN, para. 152

<sup>23</sup> ICC-01/04-01/06-803-tEN, para 150

<sup>24</sup> ICC-01/04-01/07-590, paras 7, 8 and 11

the lesser importance of their roles and contributions – can be sufficiently identified by reading (i) paragraphs 42, 44, and 63 to 78 of the Prosecution’s Amended Charging Document, along with (ii) the evidence relating to such paragraphs contained in the Prosecution Amended List of Evidence. In this regard, the Single Judge highlights that the Prosecution is not required to identify every single member of the common plan who is not considered to be a co-perpetrator of the relevant crimes.

25. Moreover, although, as claimed by both Defences, the reference to “other” FNI and FRPI commanders in paragraphs 63 and 95 of the Prosecution’s Amended Charging Document appears *prima facie* to be “too vague”, the Single Judge considers that, when read in light of the parts of the Prosecution’s Amended Charging Document and the evidence referred to in the previous paragraph, the Defences’ claim has no merit.

26. The Single Judge also finds no merit in the Defences’ submission concerning the specific roles and contributions played by Germain Katanga and Mathieu Ngudjolo Chui, as well as the other members of the common plan who, according to the Prosecution’s Consolidated Response, are not co-perpetrators. In this regard, the Single Judge finds that paragraphs 42, 44, and 63 to 78, 85 and 87 of the Prosecution’s Amended Charging Document, along with the evidence relating to such paragraphs, sufficiently specifies (i) the roles and contributions played by Germain Katanga and Mathieu Ngudjolo Chui in the common plan; and (ii) the roles and contributions of other members of the common plan who, according to the Prosecution, are not co-perpetrators of the crimes.

27. Furthermore, the Single Judge finds that in the present case – in which the Prosecution alleges that the crimes were committed in the implementation by,

two organised armed groups, of a common plan to carry out a coordinated indiscriminate attack, and in which the suspects are allegedly the highest commanders of the said groups - there is no need to specify in the Prosecution's Amended Charging Document to which of the two relevant groups the physical perpetrators of each of the relevant crimes belonged.<sup>25</sup>

28. With regard to the Defence's allegation that the Prosecution's Amended Charging Document fails to specify the identity of the victims, the Single Judge observes that the identity of many of those who survived the alleged attack has been redacted pursuant to rule 81(4) of the Rule, and therefore cannot appear in the Prosecution's Amended Charging Document for the purposes of the confirmation hearing. Moreover, with regard to those who died in the alleged FNI/FRPI joint attack on Bogoro on or around 24 February 2003, the Single Judge agrees with the Prosecution that the information provided in paragraph 87 and the related evidence is sufficient to satisfy the requirements of articles 61(3) and 67(1)(a) and (b) of the Statute, rule 121(3) of the Rules and regulation 52 of the Regulations.

29. The Single Judge also rejects the Defences' claim relating to the insufficiency of the factual allegations contained in the Prosecution's Amended Charging Document with regard to the charge of active use in hostilities of children under the age of fifteen. In this regard, the Single Judge observes that in the Decision on the confirmation of the charges in the *Lubanga* Case, this Chamber held that:

Nevertheless, the Chamber finds that articles 8 (2) (b)(xxvi) and 8(2)(e) (vii) apply if children are used to guard military objectives, such as military quarters of the various

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<sup>25</sup> Nevertheless, the Single Judge is aware that the determination of the specific organised armed group to whom the physical perpetrators belonged may be of relevance in relation to determination, pursuant to article 61(7) of the Statute, in respect of the alleged responsibility of Germain Katanga and Mathieu Ngudjolo Chui under article 25(3)(b) of the Statute for "ordering" the crimes contained in the Prosecution Amended Charging Document.



units of the parties to the conflict, or to safeguard the physical safety of military commanders (in particular, where children are used as bodyguards). These activities are indeed related to hostilities in so far as i) the military commanders are in a position to take all necessary decisions regarding the conduct of hostilities, ii) they have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.<sup>26</sup>

30. In light of this case law, the Single Judge finds that the reading of paragraphs 50 to 52, 61, 62, 78 and 88 of the Prosecution's Amended Charging Document, along with the evidence relating to such paragraphs in the Prosecution's List of Evidence, is sufficient to satisfy the requirements of articles 61(3) and 67(1)(a) and (b) of the Statute, rule 121(3) of the Rules and regulation 52 of the Regulations.

31. The Defences for Germain Katanga and Mathieu Ngudjolo Chui also challenge the use in the Prosecution's Amended Charging Document of certain expressions that they qualify as "vague phrases".

32. The first one is the expression "wipe out" in paragraph 93 of the Prosecution's Amended Charging Document. The Single Judge sees no merit in this claim when the expression "wipe out" is read in the context of paragraph 93 as a whole, along with paragraph 66 and the evidence relating to these two paragraphs.

33. The second one is the expression "in at least the following ways" in paragraph 95 of the Prosecution's Amended Charging Document. The Single Judge observes that this expression leads to an open-ended list of ways in which Germain Katanga and Mathieu Ngudjolo Chui allegedly contributed to the common plan. Moreover, according to this paragraph, it is the sum of this open-

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<sup>26</sup> ICC-01/04-01/06-803-tEN, para 263

ended list of alleged contributions by the suspects which amount to their essential contribution to the common plan (a key element of the notion of co-perpetration based on functional control).

34. As a result, the Single Judge finds that, as submitted by both Defences, the expression “in at least the following ways” is impermissibly vague, and must therefore be replaced by an explicit reference to those paragraphs in which the alleged contributions of the two suspects are specifically described. Hence, the Single Judge concludes that the expression “in at least the following ways” in paragraph 95 of the Prosecution’s Amended Charging Document must be replaced by the expression “in the ways described in paragraphs 42, 44, 63 to 78, 85 and 87, including the following.”

35. The Defences for Germain Katanga and Mathieu Ngudjolo Chui also request the deletion of subsection II. E of the Prosecution’s Amended Charging Document, which is comprised of paragraphs 90 to 92 and is entitled “Admissions Made by Katanga and Ngudjolo.” In this regard, the Single Judge observes that none of the three paragraphs included in this subsection refers to “underlined facts” or to their legal characterization. On the contrary, the Single Judge finds that they only refer to evidence. Furthermore, the Single Judge also notes that two out of the three paragraphs of subsection II. E (paragraphs 90 and 92) refer exclusively to alleged admissions of certain facts by Germain Katanga and Mathieu Ngudjolo Chui, which both Defences vehemently opposed as having indeed taken place. Under these circumstances, the Single Judge concludes that the whole subsection II. E must be stricken out from the Prosecution’s Amended Charging Document.

36. Finally, the Single Judge considers that there is no reason to further postpone the confirmation hearing due to start on 27 June 2008 as a result of the present decision. In this regard, the Single Judge observes that the present decision only affects the Prosecution's Amended Charging Document by (i) making clear that paragraph 95 is confined to those alleged contributions of the suspects to the common plan that have already been described in other paragraphs of the Prosecution's Amended Charging Document; and (ii) striking out subsection II.E of the Prosecution's Amended Charging Document because it only refers to evidence, which is mostly comprised of heavily contested admissions of facts by the suspects. As a consequence, no prejudice can be claimed by any of the Defences as a result of tomorrow's re-filing of the Prosecution's Amended Charging Document in compliance with the present decision.

#### **FOR THESE REASONS**

**DECIDE** to partially accept the requests of the Defences for Germain Katanga and Mathieu Ngudjolo Chui in relation to their allegations concerning:

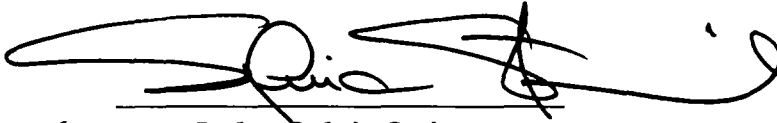
- a. the use of the expression "in at least the following ways" in paragraph 95 of the Prosecution's Amended Charging Document; and
- b. subsection II.E (paragraphs 90 to 92) of the Prosecution's Amended Charging Document.

**DECIDE** that the Prosecution shall, by Thursday 26 June 2008 at 14h00, re-file the Prosecution's Amended Charging Document, in which:

- (i) the expression "in at least the following ways" shall be replaced by the expression "in the ways described in paragraphs 42, 44, 63 to 78, 85 and 87, including the following"; and
- (ii) subsection II.E (current paragraphs 90 to 92) shall be deleted.

**DECIDE** that no postponement of the confirmation hearing due to start on 27 June 2008 is required by the present decision.

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



Judge Sylvia Steiner  
Single Judge

Dated this Wednesday 25 June 2008

At The Hague, the Netherlands