

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 April 2008

PRE-TRIAL CHAMBER I

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

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

**Public Document
with Public Annexes 1A and 2A
Confidential, Ex Parte, Prosecutor Only Annexes 1B and 2B
Confidential Annexes 1D and 2D**

**Prosecution's Submission of the Document Containing the Charges and List of
Evidence**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

**Counsel for the Defence of Germain
Katanga**

Mr. David Hooper

Mr. Göran Sluiter

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

Mr. Jean-Pierre Kilenda Kakengi Basila

Ms. Maryse Alié

Legal Representatives of Victims

Mr Joseph Keta

Ms Carine Bapita Buyangandu

Legal Representatives of 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

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Office of the Prosecutor ("Prosecution") herewith submits, in appended annexes to this document, the English and French versions of the document containing the charges against Germain KATANGA and Mathieu NGUDJOLO ("Document Containing the Charges") and the list of evidence, in its unredacted as well as redacted versions, on which the Prosecution intends to rely at the confirmation hearing ("List of Evidence")¹ scheduled on 21 May 2008. The Document Containing the Charges and the List of Evidence are submitted pursuant to articles 61(3) of the Rome Statute ("Statute"), Rule 121(3) of the Rules of Procedure and Evidence ("Rules") and Regulation 52 of the Court.

Furthermore, in light of the Single Judge's confidential *ex parte* decision issued on 18 April 2008² ("18 April Decision") the Prosecution is hereby notifying Pre-Trial Chamber I ("PTC I") and each Defence counsel that it is not currently alleging the charge of sexual slavery levelled in the arrest warrant application against Germain KATANGA and Mathieu NGUDJOLO, punishable under Article 8(2)(e)(vi) or Article 8(2)(b)(xxii) and Article 25(3)(a) or (b) of the Statute.³ The Prosecution will be seeking leave to appeal the 18 April Decision regarding the exclusion of evidence in support of the allegation of sexual slavery and the decision-making process and the implementation of protective measures. Should the appeal be granted, the Prosecution will be in a position to reintroduce the charges of sexual slavery and add the charges of rape and outrage upon personal dignity. Therefore, to provide notice to the Defence and PTC I, the Prosecution maintains the factual allegations in relation to charges of sexual offences it may seek to bring against both persons charged, pending a resolution of the matter.

¹ The annexes appended to this document are the following: Annex 1A (Document Containing the Charges – English); Annex 1B (List of Evidence – English – Unredacted); Annex 1D (List of Evidence – English – Redacted); Annex 2A (Document Containing the Charges – French); Annex 2B (List of Evidence – French – Unredacted); Annex 2D (List of Evidence – French – Redacted). When listing the annexes the Prosecution has tried to follow, to the extent possible, the structure of the annexes of the document containing the charges against Germain KATANGA filed on 29 January 2008 (*See* ICC-01/04-01/07-170)

² ICC-01/04-01/07-411.

³ ICC-01/04-01/07-196-Conf-AnxA and ICC-01/04-01/07-283-Conf-AnxA.

The Prosecution notifies PTC I and Germain KATANGA and Mathieu NGUDJOLO, pursuant to Rule 121(3) and Regulation 52, that the Document Containing the Charges charges both Germain KATANGA and Mathieu NGUDJOLO with the additional count of destruction of property, punishable under Article 8(2)(e)(xii) or Article 8(2)(b)(xiii) of the Statute.⁴ The Prosecution further informs PTC I and each of the persons charged that the Document Containing the Charges rests on alternative modes of liability pursuant to article 25(3)(a) (joint perpetration) or (b) (ordering) of the Statute.

Request for Receipt of Certain Annexes as Confidential, *Ex Parte*, Prosecutor Only and Certain Other Annexes as Confidential

The Prosecution requests that Annexes 1B and 2B, appended to this submission, be received by the Single Judge as “Confidential – *Ex Parte* – Prosecution Only”. These annexes are the unredacted versions, in both English and French, of the List of Evidence. The Prosecution further requests that Annexes 1D and 2D, which are redacted versions, in both English and French, of the List of Evidence, be received as “Confidential”. These requests are made to protect victims and witnesses pursuant to Article 68 (1) of the Statute.

Background

1. On 29 January 2008, the Prosecution filed the document containing the charges against Germain KATANGA in the case of *The Prosecutor v. Germain KATANGA*, in which, in addition to charging Germain KATANGA with the crimes contained in the Arrest Warrant Application (“AWA”), it included the count of destruction of property.⁵ The charging document against KATANGA

⁴ Pursuant to the decision to join the cases of *The Prosecutor v. Germain KATANGA* and *The Prosecutor v. Mathieu NGUDJOLO*, the Document Containing the Charges supersedes the document containing the charges against Germain KATANGA filed on 29 January 2008. *See* ICC-01/04-01/07-257.

⁵ *See* ICC-01/04-01/07-170-Conf-Annex 1C.

also contained alternative modes of liability: article 25(3)(a) (joint perpetration) or (b) (ordering) of the Statute, differently from the AWA which rested simply on “ordering”.⁶

2. On 10 March 2008, PTC I decided to join the cases of *The Prosecutor v. Germain KATANGA* and *The Prosecutor v. Mathieu NGUDJOLO* and scheduled the hearing for the confirmation of charges to take place on 21 May 2008.⁷
3. Also that day, PTC I decided that the Prosecution must file, in French, the Prosecution charging document and the list of evidence and established a calendar for the parties’ disclosure of evidence.⁸
4. On 18 April 2008 the Single Judge issued a confidential *ex parte* decision which excluded the evidence of two Prosecution witnesses, for the purpose of the confirmation hearing.⁹

The Counts of Sexual Slavery, Rape and Outrage upon Personal Dignity

5. As a result of the 18 April Decision, the Prosecution is now precluded from relying at the confirmation hearing on the evidence provided by two key witnesses. Furthermore, its abilities to preserve and collect new evidence are drastically affected. Under these circumstances, the Prosecution will be unable to satisfy the threshold required at the trial stage and therefore has decided not to allege counts of sexual offences including sexual slavery, rape and outrage upon personal dignity punishable under the Statute.

⁶ *Ibid.* and ICC-01/04-01/07-196-Conf-AnxA and ICC-01/04-01/07-283-Conf-AnxA.

⁷ ICC-01/04-01/07-257, pp. 11 and 12.

⁸ ICC-01/04-01/07-259, pp. 13-15.

⁹ ICC-01/04-01/07-411, para. 39.

6. The Prosecution, nonetheless, maintains the factual underpinnings of these sexual offences, which the Prosecution intends to level against both persons charged in the Document Containing the Charges. These allegations serve as notice to the Defence that the Prosecution will pursue such charges at the Confirmation Hearing if relevant aspects of the 18 April Decision are reversed. For that reason the Prosecution will seek leave to appeal the 18 April Decision.

Additional Count of Destruction of Property

7. The Prosecution considers that after review of the evidence available regarding destruction of property during the Bogoro attack, including as detailed in the AWA and witness statements disclosed to date,¹⁰ there is sufficient evidence to establish substantial grounds to believe that both persons charged are criminally responsible for the crime of destruction of property in Bogoro village and surrounding areas constituting a war crime punishable under Article 8(2) (c)(xii) or Article 8(2) (b) (xiii) of the Statute. In fact, when deciding to join the cases the Single Judge considered that “the Prosecution’s charging document against Germain Katanga only added: (i) one count of destruction of property [...]”¹¹ Therefore, this crime has been added to the Document Containing the Charges. Such addition in no way prejudices either of the persons charged.

¹⁰ The Prosecution has disclosed to both the Defence of Germain KATANGA and Mathieu NGUDJOLO the evidence underlying the crime of destruction of property in a number of documents, such as: ICC-01/04-01/07-129-Conf-AnxA; ICC-01/04-01/07-100; ICC-01/04-01/07-101, ICC-01/04-01/07-136; ICC-01/04-01/07-135; ICC-01/04-01/07-157; ICC-01/04-01/07-157-Conf-AnxA; ICC-01/04-01/07-135-Conf-AnxA; ICC-01/04-01/07-136-Conf-AnxA; ICC-01/04-01/07-101-Conf-AnxA; ICC-01/04-01/07-100-Conf-AnxA.

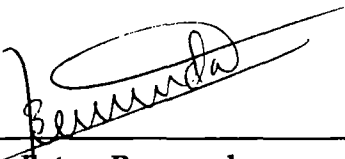
¹¹ ICC-01/04-01/07-291, p. 6. Emphasis added.

Addition of an Alternate Mode of Liability

8. The Prosecution submits, as determined by PTC I, that Germain KATANGA and Mathieu NGUDJOLO are criminally liable as principals for the joint attack on the village of Bogoro pursuant to a common plan, and charges them as joint perpetrators pursuant to Article 25(3) (a) of the Statute.¹²

9. The Prosecution is of the view that ordering as a mode of liability set out in Article 25(3) (b) of the Statute is not necessarily a form of accessory liability. On that basis, the Prosecution maintains, in the alternative, that Germain KATANGA and Mathieu NGUDJOLO, as principals, ordered the attack on Bogoro.¹³

10. The Prosecution respectfully submits, pursuant to Article 61(3) of the Statute, Rule 121(3) of the Rules and Regulation 52, the Document Containing the Charges and the List of Evidence in the annexes appended to this motion.



Ratou Bensouda
Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo
Prosecutor

Dated this 21st day of April 2008

At The Hague, The Netherlands

¹² ICC-01/04-01/07-4, paras. 55-60; ICC-01/04-01/07-262, paras. 56-61.

¹³ See ICC-01/04-01/07-170 for the Prosecution's arguments and authorities in support of the Prosecution's position on the matter.