

1 International Criminal Court

2 Trial Chamber II

3 Situation in the Democratic Republic of Congo- ICC-01/04-01/07

4 Case against Germain Katanga and Mathieu Ngudjolo Chui

5 Hearing - Open Session

6 Friday, 12 June 2009

7 The hearing starts at 9.04 a.m.

8 COURT USHER: All rise. The International Criminal Court is now
9 in session.

10 PRESIDING JUDGE COTTE (interpretation): The court is in session.
11 Please be seated.

12 Are the accused in the courtroom? Yes.

13 The Chamber would like to extend to you the apologies of the
14 government of the Democratic Republic of the Congo, which for reasons
15 related to distance cannot be represented here today by its Minister of
16 Justice, especially as this hearing is very close to that which was held
17 on the 1st of June. The government of the DRC will be represented by
18 Ms. Pierrette Mwenze Kisonga, who is in charge of the (indiscernible)
19 service in the embassy of the DRC in Brussels. Ms. Kisonga will be
20 arriving soon, but we have to start this hearing, because the trial of
21 Mr. Lubanga will resume immediately after the holding of this brief
22 hearing.

23 I wish to extend to you the apologies of Mr. Hooper, who is
24 represented here by the members of his team, and the apologies of
25 Ms. Bapita who cannot attend this hearing today. We are going to make

1 the introductions very rapidly. The Prosecution team is represented by
2 Mr. MacDonald. Can you please give us your name and the name of your
3 colleagues.

4 MR. MacDONALD (interpretation): Good morning, your Honour. We
5 have Ben Batros, Mr. Guariglia.

6 PRESIDING JUDGE COTTE (interpretation): Thank you. The team of
7 Mr. Hooper, please introduce yourselves.

8 MS. O'SHEA: (Previous translation continues)... O' Shea, and I'm
9 here with Ms. Caroline Buisman, and Ms. Sophie Menegon.

10 PRESIDING JUDGE COTTE (interpretation): The team of Mr. Kilenda.

11 MR. KILENDA (interpretation): We have Mr. Fofe co-counsel and
12 Ms. Roche as case manager, and I am the lead counsel.

13 PRESIDING JUDGE COTTE (interpretation): Thank you.
14 Representatives of victims, please.

15 MR. KETA (interpretation): I am Mr. Keta. I am standing for the
16 victims I usually represent, together with Mr. Gilissen.

17 MS. YAZJI (interpretation): Maria Victoria Yazji, and I'm
18 representing the Office of Public Counsel for Victims along with
19 Mr. Orchlon Narantsetseg.

20 PRESIDING JUDGE COTTE (interpretation): Thank you. So the
21 Chamber is composed today of Judge Diarra and Judge Kaul and myself as
22 usual.

23 The Chamber's going to give today its oral decision on the
24 admissibility of the case. May I point out that its arguments will be
25 presented in detail in a decision to which everyone may have access at

1 the beginning of next week. The Registry is going to inform the
2 participants of the proceedings and the representatives of the Democratic
3 Republic of the Congo as soon as that decision is registered.

4 May I further add that a decision is taken unanimously and that
5 the time limit for appeal, which is a legitimate right here provided for
6 in Rule in 154 of the Rules of Procedure and Evidence will take effect
7 from the date of the filing in the Registry of the relevant decision.

8 This decision is in response to the admissibility challenge
9 deposited on the 10th of February, 2009 by the Defence team of Germain
10 Katanga. It gave rise to various submissions filed by the various
11 parties as well as a hearing, a public hearing held by the Chamber on 1st
12 of June, 2009 in the presence of the competent authorities of the
13 Democratic Republic of the Congo.

14 Before we examine the substantive arguments presented by the
15 participants, the Chamber has to determine the admissibility of the
16 challenge. In particular, it has to determine whether the Statute allows
17 a party to file an admissibility challenge after charges have been
18 confirmed and in the affirmative determine the grounds for such a
19 challenge. On that point, after reviewing all the provisions of the
20 Statute and analysing the intent of its drafters, the Chamber finds that
21 with respect to admissibility challenges, the Statute provides for a
22 procedure in three phases.

23 In the first phase, which ends with the filing in the Registry of
24 the decision to confirm the charges, it is possible to raise all four
25 grounds for challenge of admissibility mentioned in Article 17(1) of the

1 Statute on condition in the case of States that they act as soon as
2 possible.

3 The second phase between the filing in the Registry of the
4 decision to confirm the charges and the setting up of the Trial Chamber
5 is a short period during which it is still possible to raise challenges
6 based on Article 17(c) relating to or which deals with the principle of
7 ne bis in idem.

8 Lastly, once the Chamber has been set up, it is possible to raise
9 an admissibility challenge based on the ne bis in idem principle only
10 under exceptional circumstances and with the authorisation of the Trial
11 Chamber. Hence after the filing in the Registry of a decision to confirm
12 the charges, a case must be considered as admissible except where it is
13 established that the principle of ne bis in idem has not been upheld.

14 In this case, the admissibility challenge filed by the Defence
15 team of Germain Katanga is not based on the principle of ne bis in idem.
16 It, rather, realises on Article 17(1)(a) and (b) of the Statute. It
17 follows, therefore, that the challenge in this case should be declared
18 inadmissible. However, considering the equivocal nature of the
19 provisions of the Statute and of the Rules, the Chamber considers that
20 there are reasonable grounds to believe that the Defence had neither the
21 awareness nor the intention of filing its admissibility challenge outside
22 the statutory time limit.

23 On the contrary, the position adopted by the Pre-Trial Chamber in
24 the course of the pre-trial phase could even have led the Defence to feel
25 that it was authorised to file its challenge after the charges had been

1 confirmed on the basis of Article 19 of the Statute and by invoking one
2 of the grounds provided for in Article 17(1). Hence the Chamber finds
3 that there is need to rule on the merits of the admissibility challenge.
4 To that end, the Chamber asks itself two main questions. First of all,
5 whether there was a procedural flaw in the issuance of the warrant of
6 arrest.

7 The Defence team of Germain Katanga argues that there was a
8 defect in the issuance of the warrant of arrest, because they feel that
9 the Prosecutor did not give requisite information to the Chamber when he
10 applied for the warrant of arrest and when he stated that the accused was
11 not being prosecuted for the acts for which he had been brought before
12 the court. He considered that if the Pre-Trial Chamber had had knowledge
13 of certain documents and certain information, it would have considered
14 that application inadmissible. Also, it has stated that this Chamber has
15 to reopen the issue of admissibility taking as its reference point the
16 period during which the error was allegedly committed, that is with
17 respect to the issuance of the warrant of arrest.

18 On this point, recalling the terms of an appeal decision issued
19 on the 13th of July, 2006, the Chamber would like to state that the
20 Prosecutor is under no obligation to provide the Pre-Trial Chamber "with
21 factual information needed to take a ruling on the admissibility of a
22 case," when the Prosecutor applies for a warrant of arrest.

23 However, the Chamber considers that the Prosecutor still has to
24 at least provide it with all the requisite information which will enable
25 it to exercise its discretionary powers, discretionary powers recognised

1 by the Appeals Chamber, in case there exists a well-defined case law
2 certain relevant facts which make the case clearly inadmissible.

3 According to the Chamber, it is only after it has such
4 information at its disposal that the Pre-Trial Chamber can appreciate
5 whether there exists one of the circumstances that justify the exercise
6 of its discretionary powers, because it is only then that it can ensure
7 that the Prosecutor has correctly weighed the decisive character of the
8 information he has at his disposal with respect to admissibility.

9 The Chamber considers feels that the question of determining
10 whether one of the circumstances mentioned by the Appeals Chamber is met
11 to justify a proprio motu examination is the responsibility of the
12 Pre-Trial Chamber alone. Hence the question which arises in this case is
13 whether the information mentioned by the Defence was so crucial that it
14 had to be disclosed by the Prosecutor to the Pre-Trial Chamber, and to
15 that end the Defence team of Germain Katanga argues that the Prosecutor
16 misled the Pre-Trial Chamber by refraining inadvertently or through
17 negligence to disclose information which clearly indicates that the
18 investigations carried out by the authorities of the Democratic Republic
19 of the Congo with respect to Germain Katanga related to Bogoro.

20 One of such items of information features in an application to
21 extend the provisional detention of Germain Katanga and seven other
22 persons presented on this -- or filed 2nd March 2007 before the Supreme
23 Military Court of Kinshasa. In that document Bogoro is mentioned among
24 the ten localities in which persons were killed during systematic attacks
25 directed against the civilian population.

1 In its decision the Chamber considers that the document of the
2 2nd of March, 2007, does not appear to contain decisive information on
3 the circumstances of the case as this term is understood by the Appeals
4 Chamber in its above-mentioned judgement and that should have been --
5 that the Prosecution should have informed the Pre-Trial Chamber of. And,
6 therefore, the Chamber believes that it is not necessary to decide
7 whether the document in question would have led the Pre-Trial Chamber to
8 exercise its discretionary power in a different manner and to examine
9 proprio motu the admissibility issue. For these reasons, the Chamber
10 believes that the issuance of an arrest warrant is in no way flawed.

11 The second question which concerns how well-founded the challenge
12 to admissibility is has to do with the admissibility of the case in the
13 light of the intention of the DRC to institute proceedings against
14 Germain Katanga. The Chamber points out that the provisions of Article
15 17 of the Statute have to be read in the light of the tenth paragraph of
16 the preamble and in the light of Article 1 of the Statute. These
17 provisions, when read together, establish one of the fundamental
18 principles of the Statute, according to which the court is complementary
19 to national criminal jurisdictions and thus pursuant to the provisions of
20 the Statute, the court shall only exercise its jurisdiction if States
21 that have jurisdiction for international crimes are either unable or
22 unwilling to carry out an investigation and, if necessary, to prosecute
23 the perpetrators of the crimes in question.

24 As it's sufficient for one of the two criteria to be satisfied,
25 the Chamber would like to point out that if one of the criteria is

1 satisfied, it is not necessary to verify whether the second criteria has
2 also been satisfied as far as the first criteria is concerned, namely,
3 the willingness to carry out an investigation and, if necessary, to
4 institute proceedings against the perpetrators of the crimes.

5 The Chamber is not in a position to know the reasons for which a
6 State decides not to prosecute a given case. Although the principle of
7 complementarity is not unknown, a state may - if it deems this
8 appropriate - refer a situation to a court, a situation that concerns its
9 own territory, and may similarly decide not to carry out an investigation
10 or to institute proceedings with regard to a given case. A State may
11 take such a decision if it believes that it is unable to organise an
12 expeditious and fair trial or if it believes that the circumstances are
13 not propitious to carrying an efficient investigation or to organizing a
14 fair trial.

15 The Chamber is of the opinion that what must be taken into
16 account when determining whether a state is unwilling to act pursuant to
17 the provisions of Article 17 and is unwilling to seize itself of the
18 case, what is important is to determine the intention of the State to
19 institute proceedings against the persons in question. The State can
20 demonstrate this intention either within the specific framework of
21 proceedings or before a court or in a general manner. This intention can
22 also be inferred from factual and unequivocal elements.

23 If the Chamber is to decide whether a State has the intention to
24 institute proceedings against someone or not, the Chamber believes that
25 this should be decided on a case-by-case basis and the precise

1 circumstances of the case must be taken into consideration. With this
2 regard, it is particularly interesting to point out that in the case in
3 hand, it is the State that is concerned that referred the situation to
4 the court and did not oppose having the accused delivered to the court
5 and did not make any challenges to admissibility. One should also take
6 into consideration in order to assess the real intentions of the State
7 the degree and form of cooperation of the State with the court with
8 regard to a given case.

9 In order to determine whether DRC had the intention of not
10 instituting proceedings against Germain Katanga in the case it is seized
11 of, the Chamber must first of all take into consideration the clearly
12 stated desires of the representatives of the State.

13 In a document of the 14th of March, 2009, entitled "The
14 Observations of the DRC on the Challenge to Admissibility Made by the
15 Katanga Defence," which was a document addressed to the Prosecution, the
16 director of the cabinet of the Auditeur General at the Supreme Military
17 Court, indicated quite clearly that the Auditeur General didn't launch
18 any investigations into Germain Katanga with regard to the attack against
19 Bogoro on the 24th of February, 2003.

20 In addition, at the hearing of the 1st of June, 2009, the DRC
21 representatives pointed out that in 2004 this State referred the
22 situation concerning its territory to the court as a result or because of
23 its engagement in a fight against impunity, and they stated that the
24 Chamber should dismiss the challenge to admissibility in order to be able
25 to prosecute the case. In addition, in the submissions made at the

1 hearing and confirmed in a written document that has been filed, they
2 excluded the idea that the DRC could now institute proceedings against
3 Germain Katanga.

4 Given these submissions, the Chamber can do no more than note the
5 fact that the DRC is quite clearly unwilling to prosecute this case.

6 The Chamber would like to point out that the Chamber did not
7 challenge the admissibility of the case when they received the arrest
8 warrant and when -- when the seal was lifted for the arrest warrant the
9 transfer of Germain Katanga to The Hague was ordered immediately. The
10 Chamber therefore concludes that the DRC has quite clearly decided to
11 allow the court to institute proceedings against Germain Katanga and to
12 put Germain Katanga on trial for the crimes committed in Bogoro on the
13 24th of February, 2003.

14 For these reasons, the Chamber dismisses the challenge to
15 admissibility and hereby declares that the case concerning Germain
16 Katanga is admissible before the court.

17 Before we adjourn, I would like to greet Madam Pierrette Mwenze
18 Kisonga. Madam, we have started this hearing before you arrived because
19 this courtroom is needed by another Chamber very soon, another Chamber
20 that is seized of a different case. The Chamber would like to thank you
21 for your presence and we will now adjourn.

22 The hearing ends at 9.25 a.m.

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