

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: **ICC-01/04-01/07 OA 6**  
Date: **9 June 2008**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI**

**Public document**

**Judgment**

**on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases**



**Decision/Order/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 Mr Katanga**

Mr David Hooper  
Mr Goran Sluiter

**Counsel for Mr Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila  
Ms Maryse Alié

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mathieu Ngudjolo Chui pursuant to the decision of Pre-Trial Chamber I of 9 April 2008, entitled “Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder” (ICC-01/04-01/07-384),

*Delivers* unanimously the following

## JUDGMENT

1. The appeal is dismissed.
2. The decision of Pre-Trial Chamber I of 10 March 2008 entitled “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI” (ICC-01/04-01/07-307<sup>1</sup>) is confirmed.

### REASONS

1. In proceedings leading up to the confirmation of the charges against Mr. Katanga and Mr. Ngudjolo Chui, the Prosecutor “requested that the two cases against Germain Katanga and Mathieu Ngudjolo Chui be joined as soon as practicable on the basis that the Prosecution had always sought to prosecute the suspects for their joint participation in the same attack and for that purpose initially submitted a joint arrest warrant application”<sup>2</sup>. The Pre-Trial Chamber, in its decision, notes that the crimes allegedly committed by the two persons arise from the same facts, that is, a “joint attack of the village of Bogoro by the FNI and FRPI on 24 February 2003”<sup>3</sup> and that a joint application had been made by the Prosecutor for their arrest. The Pre-Trial Chamber, noting “...the crimes allegedly committed during and in the aftermath of the said attack on the village of Bogoro; that all supporting materials and evidence in the Prosecution’s joint application relate to both alleged co-perpetrators; and that the Prosecution has requested that the Chamber join the

<sup>1</sup> In the document in support of the appeal, reference is made to ICC-01/04-01/07-257, which corresponds to ICC-01/04-01/07-307.

<sup>2</sup> *Prosecutor v Ngudjolo Chui* “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI” 10 March 2008 (ICC-01/04-01/07-307), page 3.

<sup>3</sup> *Ibid*, page 6.

cases...”<sup>4</sup>, approved the joinder of the two persons in the same document of charges for the purpose of the confirmation hearing; holding that it had power to do so under the Statute<sup>5</sup> and the Rules of Procedure and Evidence<sup>6</sup> and that so doing is in the interests of justice, avoiding replication of the proceedings.

2. A neat question was certified by Pre-Trial Chamber I<sup>7</sup> as the subject of this appeal<sup>8</sup>: “whether the Chamber erred in violation of the principle of legality in its interpretation of article 64(5) of the Statute and rule 136 of the Rules”<sup>9</sup>. In its decision giving rise to the definition of the sub judice issue, the Pre-Trial Chamber held: “the ordinary meaning of article 64 (5) of the Statute and rule 136 of the Rules provides that there shall be joint trials for persons accused jointly, and establishes a presumption for joint proceedings for persons prosecuted jointly.”<sup>10</sup> The appellant challenges the correctness of this decision, allegedly issued in defiance of or in breach of the principle of legality, depicted as the foundation of criminal justice. Legality entails, in his submission, “the prior definition of the substantive and procedural rules laid down by the lawmaker in light of the issues at stake in criminal proceedings, the purpose of which is to sanction violations of the fundamental values of society while ensuring respect for the rights of persons suspected of having broken criminal laws. Criminal legality is ‘the keystone of criminal law’. It presupposes that the definitions of crimes and their punishments are limitatively defined by the law. It is the law which is the source of crime and punishment.”<sup>11</sup> He disputes the applicability of the Vienna Convention on the Law of Treaties<sup>12</sup>, regarded as irrelevant to the interpretation of the Statute, or, at best, as subordinate to the principle of legality.

<sup>4</sup> *Prosecutor v. Ngudjolo Chui* “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI” 10 March 2008 (ICC-01/04-01/07-307), page 6.

<sup>5</sup> Rome Statute [hereinafter “the Statute”].

<sup>6</sup> Hereinafter “the Rules”.

<sup>7</sup> Hereinafter “Pre-Trial Chamber”.

<sup>8</sup> Under the provisions of article 82 (1) (d) of the Rome Statute.

<sup>9</sup> *Prosecutor v. Katanga and Ngudjolo Chui* “Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder” 9 April 2008 (ICC-01/04-01/07-384), page 8.

<sup>10</sup> *Prosecutor v. Ngudjolo Chui* “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI” 10 March 2008 (ICC-01/04-01/07-307), page 7.

<sup>11</sup> *Prosecutor v. Katanga and Ngudjolo Chui* “Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Cases” 21 April 2008 (ICC-01/04-01/07-421-t(ENG)), para 15.

<sup>12</sup> Vienna Convention on The Law of Treaties, United Nations Treaty Series 18232, vol. 1155, p 331, signed on 23 May 1969 and entered into force on 27 January 1980 [hereinafter “Vienna Convention”].

3. In sum, the appellant contends that power to authorise joinder, that is, the joining of two or more persons as the subjects of the same or related charges, is confined to the Trial Chamber. Neither article 64 (5) of the Statute nor rule 136 of the Rules provides otherwise. The powers of the Pre-Trial Chamber, in his submission, are none other than those enumerated in article 57 of the Statute. Joinder of offenders in the same context, document containing the charges, for the purposes of a confirmation hearing, is not amongst them. And no such power can be assumed by the Pre-Trial Chamber. By the logic of this submission, there is no room for the joining of two or more persons in the same document or holding a hearing for the confirmation of the charges laid down against them; even where the charges are common and the persons joined are accused as co-perpetrators in the commission of the same crimes. So to do would be, as the appellant asserted, “neither logical,” and continued, “nor effective in proceedings before the International Criminal Court”<sup>13</sup>. What the logic of the matter warrants is not explained, nor is the source of its emanation. Joinder is a substantive matter, he argued, “subject to the legality principle”<sup>14</sup>.

4. In his response<sup>15</sup>, the Prosecutor informs that the person jointly accused with the appellant, in the charges preferred against them for confirmation, did not oppose the joinder. He submitted that article 64 (5) of the Statute and rule 136 of the Rules, by reference to any rule of interpretation, lead to the unavoidable conclusion that it is permissible to join two or more persons in the same document of charges for the purpose of determining whether it should be confirmed.

## RESOLUTION OF THE ISSUE BEFORE THE APPEALS CHAMBER

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<sup>13</sup> *Prosecutor v Katanga and Ngudjolo Chui* “Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Cases” 21 April 2008 (ICC-01/04-01/07-421-tENG), para. 23.

<sup>14</sup> *Ibid*, para. 23 (5).

<sup>15</sup> *Prosecutor v Katanga and Ngudjolo Chui* “Decision on Prosecution Response to the Defence Document in Support of Appeal against Decision on the Joinder of Cases” 28 April 2008 (ICC-01/04-01/07-455).



5. Contrary to the submission of the appellant, the Vienna Convention provides the guide to the interpretation of the Statute and the Rules. This was affirmed in “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal,” where the following was stated:

“The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32. The principal rule of interpretation is set out in article 31 (1) that reads: 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”<sup>16</sup>.

Thereafter it is explained in the same judgment:

“The context of a given legislative provision is defined by the particular subsection 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”<sup>17</sup>.

6. Following the writ of the Statute is the norm of legality and, to that the Appeals Chamber shall immediately turn. Article 64 (5) of the Statute reads:

“Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.”

7. The power to sever charges against more than one accused presupposes that the charges levied against them are the subject of the same accusation. The next question is who approves the charges set out in the document containing the charges. The answer is the Pre-Trial Chamber in the context of a confirmation hearing. The view that charges can be joined is reinforced by the opening statement of rule 136 of the Rules, which reads, “Persons accused jointly shall be tried together...” unless the Trial Chamber

<sup>16</sup> *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168), para. 33.

<sup>17</sup> *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168), para. 33.

decides otherwise.<sup>18</sup> The phrase “persons accused jointly shall be tried together” is, founded on the premise that joinder of more than one person in the same document containing the charges, is the norm. No one is treated by or referred to in the Statute or the Rules of Procedure and Evidence as “the accused” prior to the confirmation of charges. Until that moment, the persons facing the charges are persons under investigation.

8. The interpretation accorded to article 64 (5) of the Statute and rule 136 of the Rules tallies with the object of the Statute being, in this regard, the assurance of the efficacy of the criminal process, and promotes its purpose that proceedings should be held expeditiously. Proceedings should be held without delay, a course consistent with the rights of the accused, assured by article 67 (1) (c) of the Statute, and the rights of a person facing charges at the confirmation hearing (rule 121 (1) of the Rules). This is what underlies the relevant provisions of the Statute and the Rules and founds the logic of the matter warranting joinder.

9. The Appeals Chamber resolves the issue posed for resolution by holding that the interpretation accorded to article 64 (5) of the Statute and rule 136 of the Rules by the Pre-Trial Chamber in no way violates the principle of legality. What it does is give expression to it, a conclusion justifying the confirmation of the sub judice decision and, sequentially, the dismissal of the appeal.

10. In the document in support of the appeal<sup>19</sup>, the appellant moved the Appeals Chamber that suspensive effect be given to the appeal, a discretionary remedy provided for in article 82 (3) of the Statute. As the Appeals Chamber examined the merits of the issue of suspension concurrently with the merits of the appeal and came to a conclusion as to its outcome, the Appeals Chamber decided that suspension would be a superfluous

<sup>18</sup> Rule 136 provides: [“1. Persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interest of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2. 2. In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.”].

<sup>19</sup> *Prosecutor v. Katanga and Ngudjolo Chui* “Decision on Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Cases” 21 April 2008 (ICC-01/04-01/07-421-t(ENG)).

measure and on that account should not be made the subject of any order. In the result, this sub judice decision is confirmed and the appeal is dismissed.

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

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right, positioned above a solid horizontal line.

**Judge Georghios M. Pikis**  
**Presiding Judge**

Dated this 9<sup>th</sup> day of June 2008

At The Hague, The Netherlands