Cour Pénale Internationale

International Criminal Court

Original: **English**

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

PRE-TRIAL CHAMBER I

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

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

Public Document

URGENT
Defence Motion seeking the Amendment of the Document containing the Charges

Source: **Defence for Mr Germain Katanga**

Document 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 Eric 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 Basila
Ms Maryse Alié

Legal Representatives of Victims
[1 name per team maximum]

Legal Representatives of Applicants
[1 name per team maximum]

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
[2 names maximum]

The Office of Public Counsel for the Defence
[2 names maximum]

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

INTRODUCTION

1. The Defence for Mr. Germain Katanga ("the Defence") submits that the *Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute*[1]("Document Containing the Charges") is defective in the following ways:

   (a) The Document provides insufficient factual details describing Mr. Katanga's participation in the Common Plan;

   (b) The Document fails to provide the names and specific acts of Mr. Katanga's alleged co-perpetrators;

   (c) The Document fails to specify the identity of the victims;

   (d) Impermissibly vague phrases are being used;

   (e) The Charge of Child Soldiers lacks details;

   (f) Mr. Katanga's alleged admission of his responsibility in the attack on the villages of Bogoro and Mandro does not belong in the factual description of the charges.

   More details of those defects are given in this Motion. The Defence seeks an order from the Pre-Trial Chamber to the Prosecution to adjust the Document Containing the Charges to meet Defence's concerns and remedy the defects before the Document enters into the case file as the Indictment against Mr. Germain Katanga. The Defence notes that the Prosecution may amend the charges no later than 15 days prior to the confirmation hearing pursuant to Rule 121(4) of the Rules of Procedure and Evidence ("Rules") and requests, therefore, that these amendments be made prior to 12 June 2008 in order that the confirmation hearing not be affected.

LEGAL BASIS

2. Article 67(1) (a) of the Rome Statute sets out the right of the defendant to be informed promptly and in detail of the nature, cause, and content of the charge. Pursuant to Article 67(1)(b) the defendant has the right to have adequate time and facilities to prepare the defence case. In order for these rights to be effective, the Document Containing the Charges must be framed in a clear and unambiguous manner, and contains only the relevant material facts which the Prosecution will seek to establish.

3. Rule 121(3) of the Rules of Procedure and Evidence ("Rules") mandates the Prosecution to "provide to the Pre-Trial Chamber and the person, no later than 30 days

[1] No. ICC-01/04-01/07-436-Anx 1 (latest public version, dated 21 April 2008, filed on 24 April 2008).

before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing".

4. Pursuant to Regulation 52 of the Regulations of the Court (RoC) the Document Containing the Charges shall include: (a) the full name of the person and any 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.

5. This Regulation must be applied in a manner which is consistent with Article 67(1)(a) and (b) of the Statute; as such, Regulation 52 cannot be cited to deprive the Defence of additional information which may be necessary to satisfy the requirements of Article 67(1)(a) and (b).

6. The right to be promptly and in detail informed of the nature, cause and content of the charges is an essential prerequisite for ensuring that the proceedings are fair, and has also been recognised by the human rights courts and the *ad hoc* international criminal tribunals.[2] Of particular relevance to the instant case is the interpretation of this right in connection with the details required in the indictment to comply with this right by the *ad hoc* international criminal tribunals.

7. In this regard, the relevant article and rule governing the form of an indictment at the ICTY and ICTR require the Prosecution to set out a concise statement of the facts and crimes for which the accused is charged.[3] These provisions must be read in light of the overarching rights set out in Article 21(2) and 21(4)(a) and (b) of the ICTY Statute; and Article 20(2) and 20(4)(a) and (b) of the ICTR Statute, which in most respects mirror Article 67(1) of the Rome Statute.[4] On the basis of those provisions, the *ad hoc* Tribunals have imposed extensive requirements governing the form and specificity of

[2] See Article 14(3)(a) of the International Covenant on Civil and Political Rights ("ICCPR"); Article 6(3)(a) of the European Convention on Human Rights ("ECHR"); Article 21(2) and 21(4)(a) and (b) of the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY"); Article 20(2) and 20(4)(a) and (b) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR").
[3] Article 18(4) of the ICTY Statute; Article 17(4) of the of the ICTR Statute; and Rule 47(c) of the ICTY and ICTR Rules of Procedure and Evidence.
[4] As was, *inter alia*, stated in: *Prosecutor v. Rasevic and Todovic,* Decision on Todovic Defence Motion on the Form of the Joint Amended Indictment, IT-97-25/1-PT, 21 March 2006, para. 11.

an indictment, in order to enable the defendant to "prepare a defence effectively and efficiently".[5]

8. Failing to plead the Prosecution case with sufficient clarity and precision in the charging document may result in this document being materially defected. Such material defects cannot generally be remedied by reference to supporting evidence.[6] The only proper manner in which to cure a defective charging document is to adjust the document prior to trial. If this is not done now, the material defects may affect the Indictment to such an extent that it cannot be cured in any way other than dismissal of the affected components in the indictment.

9. The Defence fully endorses the observation of an ICTR Trial Chamber that "any lack of precision or specificity in an indictment interferes with judicial economy. Not only does a clear and unambiguous indictment lie in the interests of the Accused as a matter of right; but the Prosecutor benefits from a clear and unambiguous indictment since it enables him to focus his case and hence allocate his limited resources reasonably. During the trial, a precise and specific indictment ensures an essential prerequisite for a fair and expeditious trial."[7]

10. On these considerations, the Defence requests that the Document Containing the Charges be amended to provide more clarity in regards to the matters further described below.

(a) Insufficient Factual Details in Description of Participation in Common Plan

11. As aforementioned, in accordance with Regulation 52(c), the Document Containing the Charges must include "the precise form of participation under articles 25 and 28".

---

[5] *Prosecutor v. Pavkovic et al*, Decision on Vladimir Lazarevic's Preliminary Motion on Form of Indictment, 8 July 2005, para 6, http://www.un.org/icty/pavkovic/trialc/decision-e/050708-2.pdf; citing Kupreskic Appeals Judgement, 23 October 2001, para 88.

[6] *Prosecutor v. Krnojelac*, Decision On The Defence Preliminary Motion On The Form Of The Indictment, 24 February 1999 para 15, http://www.un.org/icty/krnojelac/trialc2/decision-e/902247325494.htm; See also Trial Judgement in Prosecutor v. Ntagerura: "Although Article 20(4)(a) of the Statute does not require that the nature and the cause of the charge be communicated to the accused in any particular format, it is clear from the Statute and the Rules that this information should be included in the indictment, which is the only accusatory instrument provided for therein." 25 February 2004, para 29.See also *Prosecutor v. Brdjanin and Talic*, Decision on Motion to Dismiss Indictment, 5 October 1999: The Chamber held that for the purpose of determining whether a *prima facie* cases existed in relation to the confirmation of the indictment, "the supporting material may not be used to fill in any gaps which may exist in the material facts so pleaded when determining whether a *prima facie* case exists in accordance with Article 19.1 of the Statute." at para 13. http://www.un.org/icty/brdjanin/trialc/decision-e/91005DC29627.htm

[7] *Prosecutor v. Protais Zigiranyirazo*, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 2004, page 5.

The Defence notes that, for each of the eight counts, Germain Katanga has been charged under Article 25(3)(a) or (b).

12. Articles 25(3)(a) and (b) provide:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

13. 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" as 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, according to this Pre-Trial Chamber, be charged as co-perpetration crimes under Article 25(3)(a).[8]

14. 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.[9] It has clearly been set out that the defendant must be informed of the nature of his own participation in the enterprise,[10] as well as that of his alleged co-perpetrators, subordinates or accomplices.[11] The Document Containing the Charges failed to do so.

---

[8] *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, paras. 322-341. 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 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.

[9] *Prosecutor v. Milutinovic et al*, IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 36.

[10] *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19; *Prosecutor v. Ntagerura et al*, No. ICTR-99-46-T, Judgment, 25 February 2004, para. 34; *Prosecutor v. Boskoski & Tarculovski*, IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment, 1 November 2005, para. 30.

[11] *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19; *Prosecutor v. Prlic et al*, IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, 22 July 2005, para. 27.

15. It is not clear from the charges as to how the different perpetrators co-ordinated their action in attacking Bogoro, such that it can be said that each contribution was the *sine qua non* (or essential contribution) towards realising the common plan.[12]

16. The Document Containing the Charges alleges that Mr. Katanga essentially contributed to the common plan by (1) providing weapons and ammunition to FNI and FRPI commanders; (2) overseeing and ensuring that the common plan was executed by FNI and FRPI forces in a coordinated and joint manner; (3) communicating details of the plan to all the FRPI and FNI commanders; (4) ordering their subordinates to execute the common plan (para. 95).

17. These descriptions of acts allegedly performed by Mr. Katanga clearly lack detail. As for the alleged provision of weapons and ammunition, it must, as a minimum, be set out whether he was the only provider, or at least the main provider, of such weapons and ammunition. The same can be said about the communication of details. Lacking such information, it is impossible to determine whether Mr. Katanga's contribution was essential.[13]

18. As regards the allegation that Mr. Katanga oversaw and ensured that the common plan was executed, no information is given as to what measures he took to perform those acts of "overseeing" and "ensuring". These terms are so vague that they leave the Prosecution room to fill in the blanks when they have more information as to what activities Mr. Katanga in fact allegedly undertook.

19. The Defence wishes to remind the Prosecution and Pre-Trial Chamber that «[i]t is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.»[14]

20. Further details are, therefore, required. This is so particularly because Mr. Katanga is being charged with acts, which are physically perpetrated by other persons. In such

[12] See *Prosecutor v. Krajisnik*, Judgement of 27 September 2006, para. 884, where the Trial Chamber held (citing Stakic Appeals Chamber Judgement, para. 69): "It is evident, however, that a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, it is the interaction or cooperation among persons – their joint action – in addition to their common objective that makes those persons a group. The persons in a criminal enterprise must be shown to act together or in concert with each other in the implementation of the common objective if they are to share responsibility for the crimes committed through the joint criminal enterprise." http://www.un.org/icty/krajisnik/trialc/judgement/kra-jud060927e.pdf

[13] See 'Decision on Vladimir Lazarevic's Preliminary Motion on Form of Indictment', Prosecutor v. Pavkovic et al, 8 July 2005 at p 21 cited above, in which OTP were obliged to specify whether other groups were involved in the alleged events.

[14] *Prosecutor v. Kupreskic et al*, Appeals Chamber Judgement, 23 October 2001, para. 92.

situations, there is a heightened obligation on the Prosecution to plead with greater detail the acts and conduct of the defendant in order to demonstrate that he possessed the intent that these acts be committed. [15]

21. In respect of the allegation that Mr. Katanga ordered his subordinates to execute the common plan, it is unclear who are those subordinates; and whether this component falls under the Article 25(3)(a) or (b) or both. This confusion is caused by the fact that the Document Containing the Charges (paras. 42 - 92) does not clearly demarcate between the acts and conduct which support its theory of committing, and those which support its theory of liability for ordering.[16] For example, the essential contribution of Mr. Katanga is described as ordering troops to carry out the alleged attack, and informing the FNI and FRPI commanders of the details of the attack (para 95). It is not clear from the above whether that conduct is being plead in support of co-perpetration or in support of 'ordering'. The defendant's right to a fair trial should not depend on such ambiguities.[17]

(b) Omission of Names and Specific Acts of Mr. Katanga's alleged Co-Perpetrators

22. Paragraph 95 refers to FNI and FRPI commanders and forces and subordinates of Mr. Katanga without defining who they are. The Document Containing the Charges further states at paragraph 63 that the common plan was agreed upon by Katanga, Ngudjolo and 'other' FNI and FRPI commanders. The Defence submits that the reference to 'other' FNI and FRPI commanders is too vague; the Defence is not in a position to determine whether Mr. Katanga's alleged contribution was essential (in the sense that he could have frustrated the realisation of the alleged common plan by not performing his task)[18] if it is unaware of who and how many people were part of the common plan.

[15] *Prosecutor v. Kvocak et al*, Appeals Chamber Judgement, 28 Feb 2005 para 65, citing *Prosecutor v. Galic*, IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001, para. 15.
[16] The Defence submitted that Prosecution is obliged to clearly and separately set out which conduct and acts support each mode of liability it intends to rely on. See *Prosecutor v. Strugar*, Decision of 28 June 2002, para 19; *Prosecutor v. Ntagerura et al*, Judgment, 25 February 2004, para 38; *Prosecutor v. Semanza*, Judgment, 15 May 2003 para 59.
[17] It has been firmly stated that pleading individual responsibility by reference merely to all the terms set out in the Statute is likely to cause ambiguity, unless the Prosecution intends to rely on all such forms of liability. The nature of the prosecution case should not be dependent upon such an ambiguity: *Prosecutor v. Brdjanin and Talic*, Decision of 20 Feb 2001, para 10.
[18] *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, para. 367.

23. The Defence further notes that co-perpetration is dependent on the Prosecution demonstrating that each member of the common plan was mutually aware of and accepted the risk that implementing the common plan may result in the realisation of the elements of the crime; and reconciled with or consented to it. Indeed, the Pre-Trial Chamber has specified that it is precisely because of those elements of awareness and acceptance that each co-perpetrator may be held criminally responsible also for acts not committed by them personally or for the crime as a whole even if, personally, they only carried out part of the crime.[19] Again, it is impossible for the Defence to assess the elements of mutual awareness and acceptance if it is left in the dark as to whom are the co-perpetrators and how many there are.

24. In the ICTR case of *Karemera et al*, it was held that the Defence must be informed with whom the defendant is alleged to have participated in the JCE.[20] Likewise, Mr. Katanga has the right to be informed with whom he is alleged to have participated in the alleged common plan to attack 'indiscriminately both civilians not taking part in hostilities and UPC soldiers located in a camp inside Bogoro' (para. 93).

25. In accordance with the jurisprudence on JCE, the defendant is also entitled to be informed of his own conduct, as well as the acts of his alleged co-perpetrators, subordinates, or accomplices.[21] The Document Containing the Charges does not specify which offences were physically perpetrated by which militia. Such information is required in order to enable the Defence to verify whether the actual physical perpetrators were co-perpetrators, subordinates, or accomplices, or otherwise 'controlled' by one or more members of the common plan,[22] as opposed to action occurring independently of this plan.

---

[19] *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, para. 362.

[20] *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19; *Prosecutor v. Ntagerura et al*, No. ICTR-99-46-T, Judgment, 25 February 2004, para. 34. See also *Prosecutor v. Gatete*, No. ICTR-00-61-I, Decision on Defence Preliminary Motion, 29 March 2004, paras. 12-13, where it was held that the Defence must be informed of the identities of at least those perpetrators the Prosecution is aware of. See also the ICTY cases of *Prosecutor v. Pavkovic et al*, IT-03-70-PT, Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment, 8 July 2005, para. 25; *Prosecutor v. Prlic et al*, IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, 22 July 2005, para. 11.

[21] *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19.

[22] The ICTY Appeals Chamber has held that if the actual physical perpetrator is not a member of the common plan, it is necessary to demonstrate that their actions can be imputed to a member of the common plan: *Prosecutor v. Brdjanin and Talic*, Appeals Judgement, 3 April 2007, para. 413:
"Considering the discussion of post-World War II cases and of the Tribunal's jurisprudence above, the Appeals Chamber finds that, to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and

(c) Failure to Specify the Identity of the Victims

26. The Document Containing the Charges does not identify the victims of the alleged attack of Bogoro. In accordance with the jurisprudence on specificity in the Indictment, to the extent that the identities of the victims are known, they should be plead in the Indictment.[23] This is valuable information for the preparation of the defence case.[24] Otherwise, it is impossible to determine whether the victims were actively participating in the hostilities or not. Witness protection cannot be relied upon by the Prosecution as a valid reason for not including the identity of victims in the Indictment.[25]

(d) Vague Phrases

27. At paragraph 93 of the Document Containing the Charges, the Prosecution alleges that Mr. Katanga has agreed to a common plan to "wipe out" Bogoro. It is submitted that this phrase is impermissibly vague and should be deleted from the Document Containing the Charges.

28. Moreover, the Prosecution asserts that Mr. Katanga made an essential contribution to the common plan in "at least the following ways" (at para 95). The use of the word 'at least' should be struck as subject to interpretation and overly vague for the purposes of identifying the allegations against which Mr. Katanga has to defend himself.[26] The use of such phrase is also prejudicial to the Defence as it allows the Prosecution to mutate its case depending on the evidence it collects.[27]

---

that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis."
See also para 430: "Where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan."

[23] *Prosecutor v. Prlic et al*, IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, 22 July 2005, para. 11; *Prosecutor v. Gatete*, ICTR-00-61-I, Decision on Defence Preliminary Motion, 29 March 2004, paras. 12-13.

[24] *Prosecutor v. Kupreskic*, Appeals Chamber's Judgment, para. 90; http://www.un.org/icty/kupreskic/appeal/judgement/index.htm.

[25] *Prosecutor v. Ntagerura*, Judgment, 25 February 2004, footnote 41 "Of course, witness protection cannot be used as a pre-text to frustrate the proper preparation of a defence.", citing *Prosecutor v. Gacumbitsi*, ICTR-2001-64-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para. 11: "The protection of witnesses should not . . . serve to frustrate or hinder an effective defence".

[26] *Prosecutor v. Blaskic*, Decision on the Defence Motion to Dismiss the Indictment based upon Defects in the Form thereof, 4 April 1997, paras. 22-24.

[27] "However, even where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused and the trial should only proceed where the right of the accused to know the case against him and to prepare his defence has been assured. The

(e) Defects in Charge of Child Soldiers

29. As regards Mr. Katanga's contribution to the crime of using children in hostilities, it is unclear on which factual elements this crime is based. The only allegation in this respect laid out in the Document Containing the Charges is that Mr. Katanga used children as escorts without specifying whether he has used those children as escorts in active hostilities. More details describing this crime must thus be provided.

(f) Admission allegedly made by Mr. Katanga

30. Paragraphs 90 and 91 of the Document Containing the Charges provide as follows:

> KATANGA has admitted his responsibility in the attack on the village of Bogoro. KATANGA admitted ordering the attack on Bogoro to avenge massacres that the Hema had perpetrated on another village. He also admitted that one of the motives for the attack was the Ngiti's reaction to the creation of the FIPI. KATANGA considered KAHWA, the PUSIC leader present at the FIPI, a criminal who had committed crimes against the Ngiti and the Lendu. KATANGA did not distinguish the PUSIC from the UPC and, for this reason, the FRPI attacked Bogoro and Mandro, which were predominantly Hema villages. The only thing that mattered to KATANGA was to attack Hema villages.
>
> MONUC reported, in the United Nations Special Report on the events in Ituri January 2002-December 2003, that when its investigators travelled to Bogoro on 26 March 2003, they had a discussion with Commander DARK, who was in control of the town. He refused to grant permission to inspect the place where the killings allegedly took place in Bogoro, and stated that he was under the order of KATANGA.

31. The Defence seeks the exclusion of those two paragraphs as they contain evidence, not material facts that need to be pleaded in the indictment, and make reference to another attack on Mandro, which is irrelevant to the charges against Mr. Katanga. The inclusion of those paragraphs, therefore affects the fairness and integrity of the proceedings.

Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses"; Kvocka Appeals Judgement, at para 30, : http://www.un.org/icty/kvocka/appeal/judgement/index.htm; citing Kupreskic Appeals Judgement, at para. 92.

"It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair. The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance." *Prosecutor v.. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment , 24 February 1999, para. 40

32. A distinction must be made between the facts of the case and the evidence required to prove those facts. The Prosecution has an obligation to plead all material facts with sufficient detail so that the accused can prepare his defence, but not the evidence by which the material facts are to be proven.[28] As held in *Krajisnik*: "The facts must be pleaded whilst the evidence is adduced at trial. It is then for the Trial Chamber to determine at the end of the trial whether there is enough evidence to support the charges pleaded in the indictment."[29]

33. This, of course, does not automatically oblige the Prosecution to delete all evidence from the Document Containing the Charges. However, the inclusion of these paragraphs is confusing. Paragraph 90 contains an alleged admission made by Mr. Katanga in respect of two alleged attacks, one of which is unrelated to the charges proposed. The reference to Mando is incriminating while unnecessary in respect of the charges proposed. Paragraph 91 contains hearsay evidence that more than one month after the alleged attack on Bogoro occurred, another person, Mr. Dark, allegedly refused to permit MONUC investigators to inspect the crime site in Bogoro; and in doing so, he allegedly stated that he acted on the orders of Mr. Katanga. Whether or not, on this instance over one month after the alleged attack, Mr. Dark indeed acted on the orders of Mr. Katanga is completely irrelevant to the proposed charges against Mr. Katanga. If the Prosecution intends to rely on Mr. Dark's statement, the Defence suggests that it calls Mr. Dark as a *viva voce* witness to confirm that he made this statement. It is, however, not proper to leave another person's irrelevant admission in the Document Containing the Charges, particularly because it contains prejudicial evidence.

34. In *Krnoljelac*, the Trial Chamber clearly enunciated that there existed the option of simple extraction of erroneous, irrelevant or misleading information from the indictment: 'Another form of relief in an appropriate case may be to strike out any offending part of an indictment and then to grant leave to the prosecution to amend.'[30]

---

[28] *Prosecutor v Simic*, IT-95-9-A, Appeal Chamber's Judgment, 28 November 2006, para 20; *Prosecutor v Kordic and Cerkez*, IT-95-14/2-A, Appeals Chamber's Judgment, 17 December 2004, para. 135.

[29] *Prosecutor v. Krajisnik*, IT-97-25-TC, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, para. 8; *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 October 1999, para. 15; *Prosecutor v. Kvocka*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 13; *Prosecutor v Stakic*, IT-97-24-A, Appeals Chamber's Judgment, 22 March 2006, para. 116; *Prosecutor v Krnojelac*, Decision on the form of the Indictment, 24 February 1999, para. 12.

[30] *Prosecutor v Krnoljelac*, IT-97-25 –TC, Decision on the Prosecutor's Response to Decision of 24th February 1999, 20 May 1999, para. 7.

In *Simic et al*, the Trial Chamber granted the 'striking out' of prejudicial aliases in an indictment.[31]

35. Similarly, on 4 April 2008, a defence motion was successful in the case of Ohmar Ahmed Khadr at the US Military commission to strike surplus language from a charging document.[32] The decision in this case was based on the fact that the Prosecution had included irrelevant and prejudicial examples of Al'Quaeda activity which were outside the scope and timeframe of the charges which the defendant was facing.

36. The Defence concedes that, in line with the Decision on the Confirmation of Charges in *Lubanga*, the Prosecution may refer to events which occurred before or during the alleged commission of the crimes charged if such would be helpful in better understanding the context in which the crimes were allegedly committed.[33] However, the admissions allegedly made and included in paras. 90 and 91 do not fall within that category. These are statements allegedly made after the time period of the alleged offences for which Mr. Katanga is being prosecuted which neither affects the legal qualification of the offences nor adds anything with regards to the material facts in terms of providing a fuller picture of the circumstances in which the offences took place. Thus, the Prosecution has no need to include this irrelevant material in the Document Containing the Charges, whilst its inclusion is clearly prejudicial to Mr. Katanga.

37. The effect of including Mr. Katanga's alleged admission within the Document Containing the Charges prejudices the right of the defendant to the presumption of innocence in the sense that by having the 'seal of approval' of the Pre-Trial Chamber, the case proceeds to trial on the basis that there are substantial grounds to believe that the defendant has already conceded responsibility for the attack for which he is being prosecuted.

38. In light of the reference to another attack on Mandro, which is not part of the charges proposed, it further appears that the Prosecution seeks to introduce inadmissible and highly prejudicial 'similar fact'/pattern of conduct evidence through the back door. It is submitted that such evidence is not admissible. Had the Prosecution included the admission as evidence on the proposed supporting document, the Defence would have

[31] *Prosecutor v Simic et al*, IT-95-9-TC, Defence request in Order Disposing of Pre-Trial Motions, 19 March 1999, para 5.
[32] http://www.defenselink.mil/news/Apr2008/rullingchargeIII.pdf
[33] *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, para. 152.

left it alone at this stage and followed the normal procedure of objecting to its admissibility at trial. The inclusion of evidence on the proposed supporting document does not in itself mean that the evidence is admissible at trial, and the Trial Chamber retains the ultimate power to determine the admissibility of such evidence. However, in the instant case, the Defence is not able to follow the normal procedure, as it is not included as evidence but as an element of the factual description of the charges. This leads to the absurd situation in which the alleged statement may be excluded from the list of evidence, but not from the Document Containing the Charges.

39. If the reference to similar fact / pattern of conduct evidence in the Document Containing the Charges is, on itself, not prejudicial enough, due consideration should be given to the fact that, letting those paragraphs in as part of the indictment against Mr. Katanga would open doors for the Prosecution to adduce all sorts of irrelevant evidence at trial in relation to the alleged attack on Mandro simply to blacken Mr. Katanga's character. As held in the ICTR case of *Bagosora et al*, "[e]videncen of past crimes, introduced merely to blacken the character of the Accused and show a propensity and capacity to commit the crimes charged, is improper. This is so because the damning effect of the evidence tends to outweigh its true probative value and to obscure more direct evidence of the crime alleged. In this sense, the evidence is "prejudicial" in a manner that compels exclusion."[34]

40. Human Rights Watch has expressed a similar opinion on the introduction of evidence of prior criminal activity. During the drafting process of the ICC RPE, Human Rights Watch observed that "The presumption of innocence is one of the most basic human rights, enshrined in many human rights instruments, including Article 11 of the Universal Declaration of Human Rights. Admitting evidence of prior criminal activity of the accused, even with a view to demonstrating a consistent pattern of behavior puts in serious jeopardy this fundamental principle and should be opposed. Such considerations may be brought to bear at the sentencing stage, but conduct not connected to the commission of the crime with which the person is charged must not be introduced as a factor to determine guilt or innocence in respect of their crime."[35]

[34] *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 17. http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/180903.htm ; as confirmed on appeal: *Prosecutor v. Bagosora et al*, ICTR-94-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding the Exclusion of Evidence, 19 December 2003. http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/191203.htm

[35] Human Rights Watch Commentary To The Preparatory Commission Rules Of Evidence And Procedure For The International Criminal Court Part 1February 1999

41. Finally, the including of this prejudicial reference in the actual charging document fundamentally violates the right of the defence to challenge all aspects of the charging document, as enshrined in Article 61(6). In this connection, the defendant's right to silence and not to incriminate himself is sacrosanct, as recognised by Article 67(1)(g). However, the defendant cannot properly contest this allegation and the circumstances of the alleged admission without violating his right to silence. This is even more problematic as regards the admission of the co-defendant Ngudjolo. Since it must be presumed at this point in time that Ngudjolo may not testify in his defence, the Katanga Defence will never have an opportunity to effectively cross-examine him in relation to the particular details of the admissions referred to in the charging document.[36]

CONCLUSION

42. On these grounds, the Defence requests that the Document Containing the Charges be adjusted in line with the propositions set out in this Motion. If the Prosecution is willing to meet the concerns of the Defence without an order of the Pre-Trial Chamber, the Pre-Trial Chamber's intervention may not be necessary. If, on the other hand, the Prosecution is not willing to adjust the Document Containing the Charges, the Defence requests that the Pre-Trial Chamber order the Prosecution to do so in the manner suggested in this Motion.

Respectfully submitted,

David HOOPER

[36] See *inter alia* cite Prosecutor v. Borovcanin, Decision on the Admissibility of the Borovcanin Interview and the Amendment of the Rule 65 *ter* exhibit list', 25 October 2007, http://www.un.org/icty/popovic88/trialc/decision-e/071025.pdf

Dated this 9th June 2008

London