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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI**

Public Document

Decision on the Filing of a Summary of the Charges by the Prosecutor

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

The Office of the Prosecutor

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TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 61, 64 and 74 of the Rome Statute (“the Statute”), rule 134 of the Rules of Procedure and Evidence (“the Rules”) and regulations 37, 52, 54 and 55 of the Regulations of the Court, decides as follows.

I. Background

1. On 27 May 2009, at the request of the Chamber,¹ the Prosecutor filed a table setting out all his incriminating evidence (“the Table”) and the list of witnesses he intended to call to trial.² This document was intended to relate the charges confirmed by Pre-Trial Chamber I in its decision of 26 September 2008³ (“the Confirmation Decision”) and the modes of responsibility to the alleged acts and the evidence on which the Prosecutor intended to rely at trial.

2. In its decision ordering the filing of the Table, the Chamber considered that the provision of a such a document would enable the Defence in particular to have, in a timely manner, a structured presentation of all of this evidence and to thus be in possession of all the pieces of information which it is entitled to request under article 67 of the Statute. The Chamber considered that this would avoid any ambiguity as to the facts underpinning the charges confirmed by the Pre-Trial Chamber⁴ and that the accused would have adequate time and facilities for the preparation of the defence.⁵ It further emphasised, as also recalled by the Defence at the time, that the accused persons had to be informed – sufficiently in advance of the commencement of the hearings on the merits – of the precise evidence on which the Prosecutor intended to

¹ *Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol*, 13 March 2009, ICC-01/04-01/07-956.

² Office of the Prosecutor, “*Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l’Accusation et de la liste des pièces à charge*”, 27 May 2009, ICC-01/04-01/07-1174, with 17 confidential annexes.

³ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/07-716-Conf.

⁴ ICC-01/04-01/07-956, para. 5.

⁵ *Ibid.*, para. 6.

rely.⁶ In this instance, the Chamber therefore did not consider it necessary to request that the Prosecutor submit a further document setting out the charges within the meaning of regulation 52 of the Regulations of the Court, in contrast to the position adopted by Trial Chamber I in *Lubanga*, also endorsed by Trial Chamber III in *Bemba*.

It further stated that:

In this respect, unless the Defence can demonstrate the contrary, it seems to the Chamber that a well-structured table can fulfil the function of an amended document containing the charges. Indeed, if the table is filled in appropriately, it will provide the same information as a narrative document containing the charges, with the added benefit of detailed information and more precision.⁷

3. The resulting Table and its annexes ran to 1165 pages. On 17 July 2009, the Defence for Germain Katanga drew the Chamber's attention to the difficulties associated with using it, as follows:

Having reviewed the 1165 page document produced by the Prosecution, the Defence has reached the conclusion that while useful in providing notice of the evidence which the Prosecution intends to rely upon, this lengthy and inter-dependent document does not fulfil the practical purpose of providing the Defence with a single, reliable and clear point of reference for the charges against the accused.⁸

In its opinion, the Table did not enable the precise acts ascribed to the accused persons to be determined, an allegation which it reiterated on 14 August 2009⁹ in the context of the precise proposals that the Chamber had invited it submit.¹⁰ The Defence for Germain Katanga therefore requested the Chamber to order the Prosecutor to file a further document ("the Request of the Defence for Germain Katanga"), specifying the factual and legal elements in the case and relying on the Confirmation Decision and not the document which he had previously prepared at the confirmation hearing pursuant to regulation 52 of the Regulations of the Court

⁶ *Idem*.

⁷ See ICC-01/04-01/07-956, para. 7.

⁸ Defence for Germain Katanga, "Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges", 17 July 2009, ICC-01/04-01/07-1310, para. 2.

⁹ Defence for Germain Katanga, "Defence Proposals to Remedy Deficiencies in the Notice to the Accused", 14 August 2009, ICC-01/04-01/07-1377, para. 7.

¹⁰ *Order on the submissions by the Defence on the Table of Incriminating Evidence and on the sequence of Prosecution witnesses*, 27 July 2009, ICC-01/04-01/07-1337.

(“the Document Containing the Charges”). It further requested that a table based on this new document be filed in the record.¹¹

4. In the view of the Defence for Mathieu Ngudjolo, which also wished to state its position¹² and from which the Chamber also requested further proposals,¹³ the Table’s main defect was to be found in the Prosecutor’s decision to refer to the Document Containing the Charges and not to the Confirmation Decision issued by the Pre-Trial Chamber.¹⁴ Sharing the concerns set out by the other Defence team, it also expressed the desire for the Prosecutor to produce a new table taking into account only the factual elements in the Confirmation Decision, which in its opinion, implies the exclusion of a certain amount of evidence¹⁵ (“the Request of the Defence for Mathieu Ngudjolo”).

5. The Prosecutor responded to the Defence arguments on 21 August 2009, maintaining that such criticism was unfounded and that the Table responded to the objective which had been set.¹⁶ In a submission filed on 17 September 2009, he stated his position, emphasizing that the Document Containing the Charges “[TRANSLATION] sets out his arguments [...] in the most comprehensive and detailed manner [...] [and] remains the reference document for the duration of the trial, except for those charges which the Pre-Trial Chamber has not confirmed”.¹⁷

6. The Chamber used the occasion of a status conference on 1 and 2 October 2009 to invite the Defence to respond to the position thus adopted, leading it to

¹¹ ICC-01/04-01/07-1310, p. 11; ICC-01/04-01/07-1377, para. 8.

¹² Defence for Mathieu Ngudjolo, “*Soumission de la Défense de Mathieu Ngudjolo suite à la « Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges » enregistrée le 17 juillet 2009 (ICC-01/04-01/07-1310)*”, 20 July 2009, ICC-01/04-01/07-1324.

¹³ ICC-01/04-01/07-1337.

¹⁴ ICC-01/04-01/07-1324, para. 10; Defence for Mathieu Ngudjolo, “*Observations de la Défense de Mathieu Ngudjolo relatives au Tableau des éléments à charge élaboré par le Procureur (ICC-01/04-01/07-1174)*”, 14 August 2009, ICC-01/04-01/07-1375, paras. 6 to 15 and 37.

¹⁵ ICC-01/04-01/07-1324, p. 5; ICC-01/04-01/07-1375, p. 21.

¹⁶ Office of the Prosecutor, “*Réponse de l’Accusation aux observations et propositions de la Défense relatives au Tableau des éléments à charge*”, 21 August 2009, ICC-01/04-01/07-1416.

¹⁷ Office of the Prosecutor, “*Mémoire de l’Accusation à la suite de la Décision de la Chambre de première instance II en date du 31 août 2009*”, 17 September 2009, ICC-01/04-01/07-1479-Conf-Exp, para. 4.

initiate a hearing on that matter.¹⁸ At the hearing, it asked the participants to respond in writing to the following issue: “[...] *were the Chamber to request that the Prosecutor file a document summarising the charges, [...] the Prosecutor, should he, with reference to the presentation of facts underpinning those charges [...] use the terms used by the Pre-Trial Chamber in its confirmation of charges decision, or may he present his facts in a free manner, remaining mindful [...] not to betray either the contents or the spirit of the decision of confirmation of charges [...].*”¹⁹ The participants filed their written contribution on 6 October 2009.²⁰

7. As matters now stand, their position may be summarised as follows. For the Prosecutor, “[TRANSLATION] it is in the disposition of a [Confirmation Decision] that the scope of the confirmed charges is defined”²¹ and for each charge, it is appropriate to read this disposition in conjunction with the findings stated by the Pre-Trial Chamber in the grounds for its decision, at the end of its presentation of the facts for each of the charges.²² These findings are introduced by expressions such as “in conclusion, the Chamber finds [...]” or “the Chamber therefore holds that there are [...]”. The Prosecutor makes a distinction between the aforementioned *facts constituting the charges* and the *facts of the case*, which, in his view, are “[TRANSLATION] none other” than “[TRANSLATION] concise summaries of the evidence”.²³ Having made such a distinction, he has no objections to a summary document being prepared “[TRANSLATION] which could present the facts of the case in a free manner that does not betray the spirit or the content of the Confirmation

¹⁸ ICC-01/04-01/07-T-71-CONF-ENG CT 01-10-2009, p. 18, lines 17 to p. 42, line 12.

¹⁹ ICC-01/04-01/07-T-71-CONF-ENG CT 01-10-2009, p. 42, lines 18 to 25.

²⁰ Defence for Germain Katanga, *Defence Observations on a ‘Summary Document reflecting the Charges’*, 6 October 2009, ICC-01/04-01/07-1509; Defence for Mathieu Ngudjolo, “*Réponse de la Défense de Mathieu Ngudjolo à la question posée par la Chambre en date du 1^{er} octobre 2009 lors de la Conférence de mise en état en rapport avec un document de synthèse reflétant les charges*”, 6 October 2009, ICC-01/04-01/07-1510; Office of the Prosecutor, “*Réponse de l’Accusation à la question posée par la Chambre de première instance II lors de l’audience du 1^{er} octobre 2009*”, 6 October 2009, ICC-01/04-01/07-1513.

²¹ ICC-01/04-01/07-1513, para. 6.

²² *Ibid.*, paras. 8 and 9.

²³ *Ibid.*, para. 11.

Decision [...], its being recalled, moreover, that the facts of the case have never varied in the present case file".²⁴

8. The Defence for Germain Katanga, for its part, emphasises that the Prosecutor may produce a document presenting the charges in a free manner, whilst recalling that the Confirmation Decision remains the authoritative document and that it would be wise if the Prosecutor employed, where practicable, the same or similar language to that employed by the Pre-Trial Chamber.²⁵ It further expressed its concern that the Prosecutor considers that he has the option to mould his case as the trial progresses.²⁶ This was explained by the Defence as follows:

While the Defence accepts that a further charging document may not refer to all the detailed evidence against the accused it does expect that the essential facts underlying each charge relied upon be set out clearly. Further, the Defence submits that where greater particularity can be provided - as would be the case for example where the name of a person raped, murdered, abducted as a sexual slave, or used as a child soldier, is known - then such specific assertion should be contained in the document. Similarly, the Defence should have indicated to it all other salient, underlying facts known to and intended for use by the Prosecution.²⁷

9. According to Mathieu Ngudjolo's Defence, the Prosecutor could, if the Chamber considered it appropriate, prepare a concise document on condition that the document reiterates the language used by the Pre-Trial Chamber in its Confirmation Decision with respect to both the facts and their legal characterisation.²⁸ It emphasises that the unrestrained use of different language to present the facts runs the risk of modifying the meaning or adversely affecting the intelligibility thereof, whereas they are clearly described in the Confirmation Decision.²⁹ Lastly, it notes that the accuracy required for the overview of the facts is,

²⁴ *Ibid.*, para. 17.

²⁵ ICC-01/04-01/07-1509, para. 2.

²⁶ *Idem.*

²⁷ *Idem.*

²⁸ ICC-01/04-01/07-1510, paras. 2 and 19.

²⁹ *Ibid.*, para. 7.

on the other hand, not appropriate for that evidence with respect to which the Prosecutor has greater discretion.³⁰

II. Analysis

10. Moreover, unless there is a discussion on the point, a “charge” must be understood further to a combined reading of article 74(2) of the Statute and regulation 52 of the Regulations of the Court as:

- a statement of the facts and circumstances *including* the time and place of the alleged crimes; and

- a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 of the Statute and the precise form of participation under articles 25 and 28 of the Statute.

Article 74(2) of the Statute states that the “facts and circumstances” are an integral part of the charges and that in drafting its judgment, the Trial Chamber may not exceed them. Regulations 52 and 55 of the Regulations of the Court clearly set out the charges on the basis of the statement of the facts on the one hand and their legal characterisation on the other, regulation 55 authorising the Trial Chamber to change, where appropriate, only the legal characterisation of the facts “without exceeding the facts and circumstances described in the charges”. Therefore, under no circumstances can a charge be a mere statement of the legal characterisation.

11. The positions stated by the participants in the present case, and which to a large extent are at the root of the postponement of the initial date scheduled for the commencement of the hearings on the merits, lead the Chamber to pose the following question: Would the Prosecutor’s preparation of a new document provide the accused persons with more information enabling them to be better apprised,

³⁰ *Ibid.*, para. 8.

within the meaning of article 67 of the Statute, of the nature, cause and content of the charges brought against them, and if so, what degree of precision should be required in the statement of the facts and circumstances described in the charges, understood within the meaning of article 74(2) of the Statute?

12. In this case, the Chamber considers that the preparation of a concise document reflecting the charges is necessary (“the Summary of the Charges”) since it will promote a greater understanding of the charges against which Germain Katanga and Mathieu Ngudjolo will have to defend themselves. They most probably have numerous pieces of information on the subject from, *inter alia*, the Confirmation Decision and the Table. The fact remains that the sheer volume of such material and the difficulties experienced in collating it make the preparation of a more concise document reiterating all the charges confirmed by the Pre-Trial Chamber indispensable.

13. In the view of the Chamber, only the production of such a document will ultimately enable full effect to be given to the provisions of article 67(1)(a) of the Statute for the following reasons:

- the Confirmation Decision issued in the present case runs to 244 pages. Its disposition essentially consists of a list of only the legal characterisations accepted by the Pre-Trial Chamber, the statement of the facts and circumstances included in the reasoning which it developed as it considered each of the crimes. As a result, the Chamber and the participants cannot, as matters now stand, rely on any document emanating from the Pre-Trial Chamber itself, which accurately recapitulates in summary form the facts and circumstances described in the charges as well as the legal characterisations which it intended to confirm;

- moreover, in its current format and contrary to what the Chamber had envisaged, the Table, which runs to more than 1000 pages, cannot constitute the concise and structured document of value to the hearings on the merits. The column headed

“Factual Allegation” is in fact too fragmented and therefore does not constitute a real account of the facts which is readily accessible to the reader. In addition, it is based only on the Prosecutor’s factual allegations contained in the Document Containing the Charges, filed before the confirmation hearing.

14. In the view of the Chamber, the Document can no longer serve as a reference for the hearings on the merits. As the Chamber itself stated in its decision ordering the filing of the Table, “the point of reference for the trial proceedings is no longer [this] document [...] but the [Confirmation] Decision [...]”³¹

15. Several arguments support such a position. Firstly, in that part of the Statute pertaining to the trial (Part VI), there is no mention of the “copy of the document containing the charges” referred to at article 61(3) of the Statute or of the “detailed description of the charges” referred to at paragraph 3 of rule 121 of the Rules or of the “Document containing the charges” which is the subject of regulation 52 of the Regulations of the Court. This regulation is, moreover, not contained in the section of the Regulations of the Court pertaining to the “Trial” (Chapter 3, Section 3) or in the one entitled “Provisions relating to all stages of the proceedings” (Chapter 3, Section 1) but rather in the section devoted only to the “Pre-Trial” phase (Chapter 3, Section 2).

16. Under the Statute, however, the decision on the confirmation of the charges is the only document which can serve as a reference during Trial Chamber proceedings. Article 61(7)(a) states that, where appropriate, the Pre-Trial Chamber shall commit the person to a Trial Chamber for trial *on the charges* it has confirmed. Article 64(8)(a) of the Statute further states that at the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Statute confers on the Pre-Trial Chamber the discretion to assess the facts – which are the subject of the prosecution and are set out in the

³¹ ICC-01/04-01/07-956, para. 9.

document containing the charges – as well as the evidence produced by the Prosecutor in support thereof. This discretion, which authorises it to accept certain facts and to reject others, so as to ultimately confirm only those charges for which it considers that there is “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”, does not mean that it is merely a Chamber for the registration or rejection of the Document Containing the Charges.

17. From the foregoing, it follows that the hearings on the merits must take into consideration not only the legal characterisations accepted by the Pre-Trial Chamber, which are of course subject to an application of regulation 55 of the Regulations of the Court, but also the facts and circumstances which it describes in its Confirmation Decision. On the other hand, those that are in the Document Containing the Charges produced by the Office of the Prosecutor for the sole purpose of the confirmation hearing cannot be taken into account. The requested Summary of the Charges will therefore have to comply with this requirement and reiterate the same language used by the Pre-Trial Chamber in its Confirmation Decision.

18. Since the participants’ definitions thereof do not appear to be consonant, it is now necessary to clarify what precisely must be understood by “facts and circumstances” within the meaning of article 74(2) of the Statute. As previously stated, the Prosecutor contends that a distinction must be made between the facts constituting the charges and the facts of the case. He adds that the Summary of the Charges should mention only those findings of the Pre-Trial Chamber contained at the end of the statement of the facts effected for each of the charges, to the exclusion of the other arguments it presents. The Chamber considers that such a limited presentation does not satisfy the degree of precision of the information on the facts and circumstances which article 67(1)(a) of the Statute requires be given to an accused and which is complied with by the *ad hoc* international criminal tribunals

pursuant to their Statutes.³² In particular, it considers that the arguments used in the Pre-Trial Chamber's reasoning contain information necessary to the Defence and which, as such, merits reiteration in the Summary of the Charges. Those elements of the Confirmation Decision that the Prosecutor seeks to retain appear to be too limited with respect to the arguments which the Pre-Trial Chamber intended for use in the presentation of each charge and therefore with respect to the precision which it is appropriate to require in that regard.

19. Irrespective even of this requirement for precision, the Chamber is unable to accept the distinction made by the Prosecutor between the facts constituting the charges and the facts of the case. The core legal texts make no distinction of this sort, but only between the "facts and circumstances" and the "legal characterisations"³³ on the one hand – both of which constitute the charges – and the evidence on the other. Even if the Prosecutor intends to define in the instant case, the "facts of the case" as mere "[TRANSLATION] concise summaries of the evidence",³⁴ in practice, the distinction he advocates and the resulting use of the term "fact" may constitute a source of ambiguity, confusion and contention at trial. It is appropriate to prevent the Chamber from having to consider new facts, which have not expressly been accepted by the Pre-Trial Chamber as this would run contrary to the provisions of the Statute. To grant the Trial Chamber the power to not only modify the legal characterisation of the facts, as permitted by regulation 55 of the Regulations of the Court, but also to modify the facts of which it is seized or to deal with new facts, would confer upon it power not bestowed by the core legal texts.

20. In this respect, the Chamber can only point out the ambiguous nature of some of the language used by the Prosecutor at the status conference of 1 October 2009:

³² International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Vladimir Santic*, Judgement, 23 October 2001, IT-95-16-A, paras. 88 *et seq.* ("Kupreskic Judgement").

³³ Article 74 of the Statute.

³⁴ Article 69 of the Statute.

Now, we submit to you, Mr. President, Your Honours, is that the charges and the facts included therein are, in fact, fixed. Now, the way chosen by the Office of the Prosecutor, in order to prove the facts supporting this charge, well, they are not fixed, as such. This way forward, this path has not been fixed. Now, in submitting factual allegations these are the reflection of the corpus of evidence gathered by the Office of the Prosecutor. This is a summary that we are exposing to the Chamber and to the parties and participants, and the DCC is the most precise image that we have of this. Now you, the Trial Chamber, you will of course be master of the facts, not the Pre-Trial Chamber. The Pre-Trial Chamber was not the master of the facts; it was in charge of confirming the charges and the facts therein.³⁵

Moreover, this position seems to reiterate the one stated in the following terms before the Appeals Chamber in *Lubanga*:

[...] [T]he Defence wrongly argues that the Pre-Trial Chamber's decision on confirmation of charges, and not the charging document itself, defines the factual scope of the trial. The trial's factual scope is defined by the [Document containing the charges] as confirmed in the decision on confirmation of charges.³⁶

[...] While the Confirmation Decision may not directly address all the facts pleaded, this does not entail that these facts are not confirmed for the purpose of the trial. The factual scope of the trial is defined by the facts in the [Document containing the charges], as long as they have not been expressly rejected by the Pre-Trial Chamber.³⁷

[C]ontrary to the Defence's submissions, the charges are not "fixed" by the Pre-Trial Chamber. The Prosecution has the discretionary authority to define and present the charges before the Pre-Trial Chamber, which under Article 61(7) can authorise them, refuse to authorise them, request additional evidence, or propose a possible amendment.³⁸

21. The Chamber recalls that, under article 74(2) of the Statute, the Trial Chamber is bound by the "facts and circumstances described in the charges" and cannot modify them. Thus it may only evaluate them differently or give them a different legal characterisation in accordance with regulation 55 of the Regulations of the Court. Under the terms of article 61 of the Statute, it is the Pre-Trial Chamber, and it alone, which is competent, if so requested, to authorise the Prosecutor to modify the charges, and hence the facts and circumstances which they describe. Article 61(9) provides for the possibility of such amendment being effected during the period

³⁵ ICC-01/04-01/07-T-71-CONF-ENG CT 01-10-2009 p. 34, lines 23 to 25 and p. 35, lines 1 to 8.

³⁶ Office of the Prosecutor, "Prosecution's Response to the Defence Appeal against the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' and request for suspensive effect", 22 September 2009, ICC-01/04-01/06-2136, para. 12.

³⁷ *Ibid.*, footnote on page 23.

³⁸ *Ibid.*, para. 12.

between the confirmation of the charges and the commencement of the trial, although the Chamber considers it necessary to recall that, within the meaning of that article, the concept of “commencement of the trial” has yet to be precisely defined.³⁹ Regarding the period after the commencement of the trial, the article provides only for the situation where the Prosecutor seeks to withdraw the charges, subject to leave of the Trial Chamber. However, that same article makes no provision for any amendment or addition of new facts after the commencement of the trial. It would appear to the Chamber, however, that such a possibility, if compatible with the texts currently in force, would mean that the Prosecutor would have to institute new proceedings against the suspect before the Pre-Trial Chamber.

22. In providing for a pre-trial phase, whose culminating point is the decision on the confirmation of the charges, rendered following an adversarial hearing, and in requiring the Trial Chamber to be bound by the facts and circumstances described in the charges as thus confirmed, and by them alone, the Statute does not allow either the Chamber, or even the Prosecutor, to add new facts in the course of the trial as and when they are disclosed by the ongoing investigations. Thus it should be recalled that the filing of the Confirmation Decision represents not the starting point of the preliminary proceedings but in fact their termination. In the Chamber’s view, the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused. If the Prosecutor were to be entitled to present at the confirmation hearing a mere sample of the facts with which he intends to charge the accused, and to reserve the

³⁹ “Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 36; Appeals Chamber, *Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, 25 September 2009, ICC-01/04-01/07-1497.

right subsequently to add new facts at the trial, this requirement of certainty could not be satisfied.

23. The Chamber thus considers that it is incumbent upon the Prosecutor to present, during the pre-trial phase, *all* of the facts and circumstances relating to his case. To hold otherwise would be to call into question the very purpose of a pre-trial phase, at the close of which the charges are fixed and settled. Such a solution would, moreover, render useless the months of work devoted by the Pre-Trial Chamber to preparing the case for trial and, to a large extent, would make it pointless even to hold a confirmation hearing where evidence is presented, and at the close of which the trial is supposed to commence. As the *ad hoc* international criminal tribunals have stressed, the Prosecutor “is expected to know [his] case before it goes to trial. It is not acceptable for the Prosecut[or] 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.”⁴⁰

24. The Defence for Germain Katanga has moreover recalled that it is essential in international trials for the Prosecutor be made to stick to “[his] case, as pleaded”⁴¹ and that he cannot “model” it as the hearing on the merits progresses.⁴² In the view of the Defence for Mathieu Ngudjolo: “*The crimes charged, or the facts charged against the accused have been clearly defined in the [...] the decision on confirmation of charges. [...] If there is a hearing of confirmation of charges it is for there to be provided a decision on confirmation of charges for the accused to be referred to [the Chamber].*”⁴³

25. In the Chamber’s view, while the facts can no longer be amended once the Pre-Trial Chamber has rendered its decision on the confirmation of the charges, the

⁴⁰ Kupreskic Judgement, para. 92.

⁴¹ Defence for Germain Katanga, “*Defence Observations concerning Prosecution Table of Disclosure*” 23 January 2009, ICC-01/04-01/07-845, para. 6.

⁴² ICC-01/04-01/07-T-71-CONF-ENG CT 01-10-2009, p. 36, line 16 to 19 . See also ICC-01/04-01/07-1310, para. 8.

⁴³ ICC-01/04-01/07-T-71-CONF-ENG CT p. 36 lines 24-25; p. 37 lines 2-4.

evidence presented during the pre-trial phase can, by contrast, be amended or added to in the course of the trial. This distinction between the facts and the evidence is essential, for it enables the Prosecutor, at the confirmation hearing, to select at this stage only such evidence as appears to him to be “sufficient” to give the Pre-Trial Chamber substantial grounds to believe that an accused committed the crimes with which he is charged. It should be recalled that, under article 66 of the Statute, the evidentiary standard applicable in order for the Court to reach a guilty verdict requires that the judges be convinced beyond all reasonable doubt, as a result of which the Prosecutor may be impelled to produce in the course of the trial, subject to time limits fixed by the Trial Chamber, the new evidence which he considers decisive.

26. The Chamber considers that to take the view that the facts cannot change over time does not run counter to the position adopted by the Appeals Chamber in its decision of 13 October 2006.⁴⁴ In that decision, the Appeals Chamber accepted that the Prosecutor is entitled to continue his investigations after the confirmation hearing, recalling that “the possibility to amend the charges, albeit with the permission of the Pre-Trial Chamber, must necessarily mean that the investigation could continue after the confirmation of the charges”.⁴⁵

27. In continuing his investigations the Prosecutor is thus enabled to gather new evidence on:

(1) the *charges that have already been confirmed* (the facts and circumstances, and their legal characterisation), which he may, if he so wishes, use at the trial; in that case, the Trial Chamber must ensure that the evidence is properly disclosed, in a sufficiently timely manner to enable the trial to be prepared adequately in accordance with article 64(3)(c) of the Statute;

⁴⁴ Appeals Chamber, *Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”*, 13 October 2006, ICC-01/04-01/06-568.

⁴⁵ *Ibid.*, para. 53.

(2) *additional charges* (additional facts and circumstances and new legal characterisations) which were not confirmed by the Pre-Trial Chamber. In that case, the Prosecutor must again put the matter before that Chamber, in accordance with article 61(9) of the Statute, which contemplates the situation where a charge is *added* during the period preceding the trial. The Chamber likewise considers that, after the trial has commenced, only the Pre-Trial Chamber could, in such a situation, authorise the Prosecutor to institute any new proceedings against the suspect; and

(3) *new facts and circumstances* which could fall within the terms of the legal characterisations already accepted by the Pre-Trial Chamber in its Confirmation Decision. In that case, the Prosecutor would also have to put the matter before that Chamber under article 61(9) of the Statute if the trial had not already commenced, or, if the trial had commenced, institute fresh proceedings before it. In the view of the present Chamber, any *amendment* of the charges, as contemplated by article 61(9) of the Statute, may *inter alia* be effected through the addition of new facts and circumstances, within the framework of the legal characterisations already accepted. The Chamber considers that the determination of the truth, which is its aim, just as it is that of the Prosecutor, and which, in the view of the Appeals Chamber, justifies the continuation of the investigations beyond the confirmation of the charges hearing,⁴⁶ may be pursued at the trial only within the framework of the facts and circumstances described in the charges already confirmed. And it is for this reason that, in the scenario contemplated in the present sub-paragraph, it would be incumbent upon the Prosecutor to refer the matter once more to the Pre-Trial Chamber.

28. Finally, the Chamber emphasises, as it has already recalled, that the Pre-Trial Chamber may modify the legal characterisation of the facts, as provided in regulation 55 of the Regulations of the Court.

⁴⁶ *Ibid.*, para. 52.

29. Having regard to all the foregoing observations, and while emphasising that it regards this as an exceptional step, the Chamber considers that it must request the Prosecutor to prepare a Summary of the Charges reiterating the language of the Pre-Trial Chamber in its Confirmation Decision and proceeding charge by charge, numbering each one. It should be noted that this document cannot merely restate the finding of the Pre-Trial Chamber at the conclusion of each charge it examined. Thus the Prosecutor must also extract from the exposition preceding each conclusion, the factual findings on which that Chamber relied in order to reach its decision. The Summary of the Charges must comply with the requirements of regulation 37 of the Regulations of the Court; however, the Prosecutor may apply for an extension of the number of pages permitted by that provision.

30. The Prosecutor must also amend the column in the Table headed "Factual Allegation" by replacing the references to his Document Containing the Charges by references to the relevant paragraphs of the Summary of the Charges. The new Table must also take account, when filed, of the other changes suggested by the Chamber at the status conference of 1 and 2 October 2009, and of any agreements on evidentiary issues. The Chamber recalls in this regard that the Table will constitute a working document both for itself and for the participants, and that it intends to rely only on the Confirmation Decision and on the synthesis thereof represented by the Summary when, in accordance with article 74 of the Statute, it drafts its judgment.

31. Finally, it appears to the Chamber that a summary of the charges confirmed, as described above, should, in the future, be prepared not by the Prosecutor, but by the Pre-Trial Chamber itself, and should be included either at the end of its decision on the confirmation of the charges or in an annex constituting an integral part thereof. It would also emphasise that strict compliance with the provisions of articles 64(2) and 67(1)(a) of the Statute requires that the decision should set out, with a maximum of precision, the facts and circumstances in terms of times and locations and also, as far as possible, the precise numbers and identities of the victims and the means

employed to commit the crimes. This is information which the accused is entitled to know if he is to be in a position effectively to prepare his defence. To that same end, he is also entitled to expect of the Pre-Trial Chamber that, in the context of a particular charge, it will specify not only the facts and circumstances on which it expressly relies but also those which it considers should be dismissed from the scope of the prosecution.⁴⁷ Furthermore, without prejudging the stance to be taken on the modalities of their participation, the Chamber would point out that such a requirement will provide the Trial Chambers with material which, *inter alia*, will help them to examine more thoroughly victims' requests for participation. It should also, in particular, simplify, by reducing their number, the treatment of requests for redaction and disclosure. Finally, this requirement of precision is all the more vital in that, as has already been pointed out, the Pre-Trial Chamber's decision crystallises the charges, and the facts and circumstances described therein and will thus, given the authority that it carries, preclude in advance any possibility of subsequent dispute at the trial on this particular issue

FOR THESE REASONS,

GRANTS the Applications of the Defence for Germain Katanga and Mathieu Ngudjolo;

INSTRUCTS the Prosecutor to prepare, by 28 October 2009 at 4.00 pm, the Summary of the Charges referred to in paragraph 29 of this Decision;

ORDERS the Prosecutor to amend the column in the Table headed "Factual Allegation" by replacing the references to his Document Containing the Charges by references to the relevant paragraphs of the Summary of the Charges;

⁴⁷ See, for example, Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009, ICC-01/04-01/08-424.

INSTRUCTS the Prosecutor to file an amended version of the Table which also takes account of the other changes suggested by the Chamber at the status conference of 1 and 2 October 2009, and of any agreements on evidentiary issues; and

INVITES Counsel for the Defence and the Legal Representatives of the Victims to submit, at the status conference scheduled for 1 pm on 2 November 2009, any observations which the Summary of the Charges may call for on their part.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated 21 October 2009

At The Hague, The Netherlands