Cour Pénale Internationale

International Criminal Court

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N° : **ICC-01/04-01/07**
Date : **31 January 2008**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA

Public
Defence Document in Support of Appeal Against « Decision on the Defence Request Concerning Languages »

The Office of the Prosecutor
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Introduction

1. On 18 January 2008, the Defence for Mr. Germain Katanga ("the Defence") was granted leave to appeal the "*Decision on the Defence Request Concerning Languages*" ("impugned Decision")[1] in relation to the issue of whether, in this Decision, the Single Judge "incorrectly found that Mr. Katanga's competency in French meets the standards of articles 67(l)(a) and (f) of the Statute".[2] Accordingly, the Defence files this "*Defence Document in Support of Appeal Against « Decision on the Defence Request Concerning Languages"*" pursuant to article 82(1)(d) of the Rome Statute.

2. The Defence submits that the Single Judge's finding that Mr. Katanga's "competency in French meets the standards of articles 67(1)(a) and (f) of the Statute" is erroneous. As acknowledged by the Single Judge in her "*Decision on the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages*" ("Decision on Defence Application")[3], this issue of appeal refers to two interlinked matters: "(i) the content of the standard embraced in article 67(1)(a) and (f) of the Statute in relation to the level of competency in French required of Germain Katanga" (erroneous legal standard); and "(ii) the assessment by the Single Judge of the evidence presented by the Prosecution, the Defence and the Registry which led the Single Judge to conclude that such a standard was met by Germain Katanga" (erroneous factual assessment).

Procedural background

3. On 9 November 2007, the Registrar filed its "*Rapport du Greffe relatif aux renseignements supplémentaires concernant les langues parlées, écrites et comprises par Germain Katanga*" ("Registrar's Report"),[4] in which it noted that Mr. Katanga can speak, write, understand and read French.[5]

4. On 23 November 2007, the duty Counsel for Mr. Katanga filed the *« Observations de la Défense de Germain Katanga sur le 'Rapport du Greffe relatif aux renseignements supplémentaires concernant tes langues parlées, écrites et comprises par Germain*

[1] ICC-01/04-01/07-127.
[2] ICC-01/04-01/07-149, page 7.
[3] ICC-01/04-01/07-149.
[4] ICC-01/04-01/07-62.
[5] ICC-01/04-01/07-62, page 6.

Katanga' » ("Defence Observations"),[6] requesting the Pre-trial Chamber I to take into consideration Mr. Katanga's limited ability to understand and speak French, to order that the documents provided to him in French be translated in Lingala, and to grant him the right to be assisted by a Lingala interpreter and a translator during the proceedings.[7]

5. On 23 November 2007, the Prosecution filed the "*Prosecution's Observations on the 'Rapport du Greffe relatif aux renseignements supplémentaires concernant les langues parlées, écrites et comprises par Germain Katanga'"* ("Prosecution's Observations"),[8] supporting the Registrar's conclusions that Mr. Katanga fully understands, reads and speaks French and that his comprehension of the French language is sufficient for the purposes of following the proceedings before the Court. On those grounds, the Prosecution requested that Mr. Katanga's request to have the proceedings before the Court in Lingala be denied.[9]

6. During a Status Conference held on 14 December 2007,[10] the Defence, the Prosecution and the Registry made further submissions on the language issue. In particular, Defence Counsel underlined that French was the third language of Mr. Katanga.[11]

7. On 21 December 2007, the Single Judge of Pre-Trial Chamber I rendered a "*Decision on the Defence Request Concerning Languages"* ("impugned Decision").[12] The Single Judge found that Mr. Katanga's competency in French meets the standards of articles 67(l)(a) and (f) of the Statute.[13]

8. On 27 December 2007, the Defence filed a "*Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages*" ("Defence Application"),[14] praying the Single Judge of Pre-Trial Chamber I to grant leave to appeal the impugned Decision pursuant to article 82(1)(d) of the Rome Statute, rule

[6] ICC-01/04-01/07-78.
[7] ICC-01/04-01/07-78, page 12.
[8] ICC-01/04-01/07-81.
[9] ICC-01/04-01/07-81, page 7.
[10] ICC-01/04-01/07-T-l l-Fr. The Defence has used the French version of the transcripts because the English version of the transcripts is not available to the public on the ICC website as of yet.
[11] ICC-01/04-01/07-T-l l-Fr, page 18 lines 13-15.
[12] ICC-01/04-01/07-127.
[13] ICC-01/04-01/07-127, paras. 32 and 37.
[14] ICC-01/04-01/07-130.

155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court, on the ground that Mr. Katanga does not fully/parfaitement understand and speak French and must be entitled to a Lingala interpretor, a language he fully/parfaitement understands and speaks.[15]

9. On 8 January 2008, the Prosecution filed the "*Prosecution's Response to the Defence Application for Leave to Appeal the Decision on the Defence Request Concerning Languages*",[16] submitting that the Defence had met the requirements for leave to be granted under article 82(1)(d).[17]

10. On 18 January 2008, the Single Judge rendered her Decision on the Defence Application[18] and granted the Defence Application for leave to appeal in relation to the issue of whether the impugned Decision "incorrectly found that Mr. Katanga's competency in French meets the standards of articles 67(l)(a) and (f) of the Statute".[19]

Ground I: Erroneous Legal Standard

11. The impugned Decision clearly acknowledges that "the rights to be promptly informed of the nature, cause and content of the charges and to have adequate time and facilities to be in a position to mount an effective defence against such charges, which includes the rights provided for in articles 67(1)(a) and (f) of the Statute, have been recognised by human rights courts and international criminal tribunals" and were found to be fully applicable before the ICC.[20] The issue at stake is whether Mr. Katanga's competency level in French meets the standards set by articles 67(1)(a) and (f).

12. The Defence submits that one of the reasons that the Single Judge drew the erroneous conclusion that Mr. Katanga's competency level in French meets the standards set by articles 67(1)(a) and (f) of the Statute is that she applied an erroneous legal standard which is not consistent with the wording and spirit of these articles, particularly of the French version of the Rome Statute. The Single Judge held that "the standard that was adopted was that of a language that the arrested person or the accused "**fully** understands and speaks" so as to guarantee the requirements of fairness" (emphasis

[15] ICC-01/04-01/07-130, para. 1.
[16] ICC-01/04-01/07-137.
[17] ICC-01/04-01/07-137, para. 5.
[18] ICC-01/04-01/07-149.
[19] ICC-01/04-01/07-149, page 7.
[20] Impugned Decision, paras. 3-4.

added).[21] Whilst this standard corresponds with the English version of articles 67(1)(a) and (f), it does not correspond with the French version of those articles.

13. Articles 67(1)(a) and (f) in the English version of the Rome Statute provide:

> 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
> (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused **fully** understands and speaks;
> (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused **fully** understands and speaks.
> [Emphasis added]

14. Articles 67(1)(a) and (f) in the French version of the Rome Statute provide :

> 1. Lors de l'examen des charges portées contre lui, l'accusé a droit à ce que sa cause soit entendue publiquement, compte tenu des dispositions du présent Statut, équitablement et de façon impartiale. Il a droit, en pleine égalité, au moins aux garanties suivantes :
> a) Être informé dans le plus court délai et de façon détaillée de la nature, de la cause et de la teneur des charges dans une langue qu'il comprend et parle **parfaitement**;
> f) Se faire assister gratuitement d'un interprète compétent et bénéficier des traductions nécessaires pour satisfaire aux exigences de l'équité, si la langue employée dans toute procédure suivie devant la Cour ou dans tout document présenté à la Cour n'est pas une langue qu'il comprend et parle **parfaitement**.
> [Emphasis added]

15. There is a discrepancy between the level of competency in the language used in the proceedings required in the French text and the level required in the English text. Whilst the former requires a level of perfection, the latter requires a level of fluency.[22] It is submitted that a level of perfection is higher than a level of fluency.

16. Pursuant to article 128 of the Statute and rule 2 of the Rules of Procedure and Evidence ("Rules"), the English and French texts are equally authentic. In the *ad hoc* International Criminal Tribunals, "[i]n case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail."[23] This has been interpreted to imply that the version most favorable to the Accused should be upheld, in accordance with the general principles of law.[24] Indeed, this principle is in line with

[21] Impugned Decision, para. 31.
[22] The Defence already raised this argument in the Defence Application, para. 15.
[23] Rule 7(2) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"); the International Criminal Tribunal for Rwanda ("ICTR").
[24] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, "Judgement", 2 September 1998, paras. 319 and 501, http://69.94.11.53/default.htm. See also: *Prosecutor v. Karemera*, Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment, 25 april 2001, para. 8.

the well-established the principle of *in dubio pro reo* (doubt must be interpreted in favour of the Accused).[25]

17. Another factor to be considered in determining which version is more "consonant with the spirit of the Statute and the Rules" is which language is being used by the Accused.[26]

18. The Defence invites the Appeals Chamber to consider those carefully considered principles in determining which version of articles 67(1)(a) and (f) of the Statute prevails in the present application. In line with the above reasoning, the French version should prevail, the French text being more favourable to Mr. Katanga. Moreover, in choosing between English and French, it is indisputable that French is the language Mr. Katanga speaks, not English.

19. If the Appeals Chamber finds that there is no discrepancy between the English and French version of article 67(1)(a) and (f), then the English term "fully" must be interpreted in light of the French term "parfaitement" in order to avoid any ambiguity. In that light, the requirement that the defendant speaks and understands the language used in the proceedings "fully" should be read as "perfectly", which is a very high standard. This standard is not met if a defendant speaks a language well, even very well as long as he or she has not reached a level of perfection.

20. In adopting such a high standard, the drafters of the Rome Statute clearly intended to set a higher standard than the standard applied in any other criminal justice system and the minimum standards of the European Convention on Human Rights ("ECHR") and the International Covenant on Civil and Political Rights ("ICCPR"),[27] thereby giving full consideration to the complexity of the cases and serious consequences of the procedure before the ICC.

21. The European Commission also acknowledged that the language protection under the Rome Statute goes beyond the language protection offered by the ECHR. It held:[28]

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[25] See below, paras. 57-59.
[26] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, "Judgement", 2 September 1998, para. 319. http://69.94.11.53/default.htm
[27] Article 6 of the ECHR and Article 14 of the ICCPR refer to the language the Accused understands, which is clearly a lower standard.
[28] 52003DC0075, Green Paper from the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, Part 3.

> Under the Rome Statute, suspects and defendants have extensive rights under Article 55 (Rights of a person during an investigation) and Article 67 (Rights of the accused) which may be found in the Annex. It is clear that the Rome Statute goes somewhat further than the ECHR. It is interesting to note that this instrument, decided on an intergovernmental basis, provides very comprehensive safeguards to persons accused of serious violations of international humanitarian law. It was drawn up by representatives of the international community, including all the Member States. It is worth noting that the international community has accepted these safeguards as the "minimum" for future suspects and defendants at the International Criminal Court whilst suspects and defendants in "ordinary" criminal proceedings throughout the European Union do not always benefit from this level of protection.

22. Also, Professor W. Schabas, a leading academic in international criminal justice, emphasised that it is essential that an Accused before the ICC fully speaks and understands the language used in the proceedings in order that he or she is able to effectively participate in his or her own trial. An Accused who cannot fully speak and understand the language used in the Courtroom cannot be held to be present at all.[29]

23. The citations of ECHR cases, applying a lower standard, in the impugned Decision were, therefore, not helpful.

24. The Single Judge, herself, has previously confirmed that the rights under article 67 are minimum rights, and that the Chamber's duty to ensure fairness may in fact require the Chamber to exceed these rights.[30] It is, therefore, very surprising that, in the present application, the Single Judge adopted an interpretation of articles 67(1)(a) and (f) which is not fully respecting the right of a defendant to attend the proceedings against him in a language he speaks and understands perfectly. Had she accepted this as the appropriate standard, or even, had she properly applied her own set standard of full comprehension, she could not have been satisfied that Mr. Katanga's competency in French meets the standards of articles 67(l)(a) and (f) of the Statute on the basis of the documents submitted by the Registrar and Prosecution (as discussed below) and the Defence's admission that Mr. Katanga's level of French was reasonable.

Ground II: Erroneous Factual Assessment

Mr. Katanga's Submissions

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http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&type_doc=COMfinal&an_doc=2003&nu_doc=75&lg=en.

[29] W. Schabas, *Article 67* in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (1999), at 860.

[30] Procureur c/ Thomas Lubanga Dyilo, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2005, ICC-01/04-01/06-102 at para. 97.

25. In concluding that Mr. Katanga's competency in French meets the standards of articles 67(1)(a) and (f), the Single Judge primarily relied on: (1) the fact that Mr. Katanga has a diploma in secondary education which he followed in French; (2) documents produced by the Registrar and Prosecution all indicating that Mr. Katanga had been using French in previous procedures in the Democratic Republic of Congo ("DRC"); (3) the fact that, in his initial contacts with ICC officers, he used French without objection; (4) the fact that he communicates in French with his Defence legal team without the intervention of an interpreter; (5) the Defence admission that Mr. Katanga speaks and understands French to a reasonable level.

26. In relying on those items, the Single Judge had to draw inferences from indirect evidence. No direct witnesses have been called to testify. The main witness is Mr. Katanga himself. He knows better than anyone else what his French is worth. He has no ulterior motive in asserting that he feels significantly more comfortable in Lingala than in French. If he, indeed, would speak and understand French to a level of perfection or even fluency, he would have no interest in Lingala interpreters during the proceedings. Interpretation complicates matters also for the defendant, given that mistakes in translation are regularly being made.

27. Mr. Katanga submits that his preferred language is Lingala because this is the language he spoke in the army[31] as well as in prison in Kinshasa where he spent the last two years before being transferred to The Hague. Even if he speaks French reasonably well, he does not speak it to any level that would enable him to fully understand the highly technical proceedings against him before the ICC.

28. Kingwana is Mr. Katanga's childhood language. Contrary to the submissions from the Registrar and Prosecution,[32] Kingwana is clearly distinct from Swahili. Besides, he has not used this language in any official capacity and has, in his recent years, put way more emphasis on Lingala than on Kingwala, given the time spent in prison in a Lingala-speaking region.[33] Therefore, Swahili is no satisfactory alternative and Mr. Katanga requests that the proceedings be conducted with Lingala, not Swahili interpretation.

[31] ICC-01/04-01/07-T-l l-Fr, page 33.
[32] ICC-01/04-01/07-T-l l-Fr page 31, lines 13-14.
[33] The Kinshasa area is predominantly a Lingala-speaking region.

29. It is regrettable that the Registrar, the Prosecution and the Single Judge seem to doubt Mr. Katanga's motives or the seriousness of his request.[34] Without any cogent reason, bad faith should not be attached to Mr. Katanga's request for a Lingala interpreter. This corresponds with the Ontario Supreme Court's finding that "[i]t would require cogent and compelling evidence for a trial judge to conclude that the request for an interpreter is not made in good faith, but for an oblique motive".[35]

30. In this light, it is respectfully submitted that, unless there is significant evidence suggesting the contrary, Mr. Katanga's submissions should be accepted, particularly in the absence of any ulterior motive for him to lie on this issue. The evidence the Single Judge relied on in dismissing the submissions made on behalf of Mr. Katanga was not significant and partly unreliable. At most, the evidence available creates a doubt. However, the benefit of the doubt must always be given to the defendant in accordance with the principle of *in dubio pro reo*.[36] This is particularly so in the present application, given the fundamental importance of the right at stake.

31. For the reasons set out below, the Defence submits that the Single Judge's factual analysis was erroneous because it attached too much weight to the evidence allegedly suggesting that Mr. Katanga's level of French meets the requirements of articles 67(1)(a) and (f); and too little weight to the submissions made on behalf of Mr. Katanga suggesting that his level of French is nothing higher than reasonable.

Education in French

32. The Defence concedes that Mr. Katanga attended secondary education in French. However, his highest level of education is secondary education for which he obtained a diploma in 2004. He did not do extremely well at school; he only just passed at the rate of 51%.[37] The Duty Counsel already observed that the long-lasting conflict in the DRC has severely undermined the standard of teaching in the country.[38] Moreover, Mr. Katanga's school education has constantly been interrupted, often for lengthy

[34] ICC-01/04-01/07-T-l l-Fr, page 17, lines 22-23. The impugned Decision simply ignores the submissions made on behalf of Mr. Katanga.
[35] *R v. Petrovic*, Ontario Supreme Court, Court of Appeal, Judgment of 20 June 1984; 41 C.R. (3d) 275, 47 O.R. (2d)97, 10 D.L.R. (4th) 697, 12 C.R.R. 98, 13 C.C.C. (3d) 416, 4 O.A.C 29.
[36] See below, paras. 57-59
[37] 50% is the passing rate, as well explained by Mr. Dubuisson, page 28 lines 19-25.
[38] ICC-01/04-01/07-78, para. 32.

periods, due to the conflict.[39] Consequently, Mr. Katanga only completed his secondary education at the age of 26.

33. Outside school and during the lengthy interruptions, Mr. Katanga would switch back to Kingwana or Lingala. Thus, the fact that he has received education (secondary only, not primary) in French should not automatically lead to the conclusion that his level of French is such that he can comfortably follow the proceedings against him before the ICC.

34. In this context, it should be noted that the Kosovar Albanians who were accused before the International Criminal Tribunal for the former Yugoslavia ("ICTY")[40] had received education in the Serbian language, be it forcefully imposed. Nonetheless, the ICTY provided for translation and interpretation of the criminal proceedings into Kosovar Albanian. This was provided to them without any question or objection despite the facts that the Accused spoke and understood BCS (Bosniac, Croat, Serbian), one of the official languages of the Court; and that Kosovar Albanian was not an official language of the Court.[41]

35. There is a fundamental difference between following secondary education in French and following criminal proceedings in respect of war crimes and crimes against humanity in French. Mr. Katanga may well understand a part, or even most part, of the proceedings against him. However, there is a real risk that Mr. Katanga will miss some fundamental, important elements of the evidence against him.

36. Dr Roseann Duenas Gonzalez, a linguistic expert, has emphasised that the language spoken in the Courtroom (legal language) is not identical to the language ordinary citizens speak in day-to-day life. The legal language has its own features. For a defendant to fully understand and effectively participate in his own trial, Dr Gonzalez

[39] ICC-01/04-01/07-T-l l-Fr, page 25, lines 2-7.
[40] *Prosecutor v. Limaj et al*; *Prosecutor v. Haradinaj et al*. See also the cases of Slobodan Milosevic and Vojislav Seselj who were both authorized to use the language of their preference, BCS, and were entitled to receive translation of all documents from English into BCS despite the fact that both of them spoke English very well. Mr. Seselj had even taught law in English at the University of Michigan in the United States. See Prosecutor v. Milosevic, Decision on Prosecution Motion for Permission to Disclose Witness Statements in English, http://www.un.org/icty/milosevic/trialc/decision-e/10919DES16312.htm ; Prosecutor v. Seselj, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Voljislav Seselj with his Defence, 9 May 2003, http://www.un.org/icty/milosevic/trialc/decision-e/030509.htm ; Defence Observations, paras. 17-18.
[41] See also Defence Observations, para. 16.

holds that the level of education is insufficient evidence that the defendant has the required competency to understand a language on an intellectual level.[42]

37. On these grounds, the Single Judge has given way too much significance to his school diploma. His diploma does in no way prove that Mr. Katanga speaks and understands French perfectly/fully.

Documentary Evidence

38. The Defence notes that the Single Judge heavily relies on documents provided by the Registry and the Prosecution.[43] These documents relate to a hearing Mr. Katanga attended in the DRC and procedures that preceded his transfer to the ICC in The Hague.[44] The Defence objects to the heavy reliance on those documents.

39. At the Status Conference of 14 December 2008, Mr. Katanga has confirmed that he signed those documents and, or that the answers stated therein were his. Thus, their authenticity is not in question. The nature and context of those documents is, however, in question. The Defence, therefore, submits that the contents of the documents should not have been taken on face-value. The context in which Mr. Katanga signed those documents and answered the questions posed to him by Congolese authorities is completely unknown to the Single Judge. The Single Judge's heavy reliance on those documents without hearing the persons who produced the documents and other witnesses to the events in the context of which the documents were produced was improper.

40. The Defence is aware that documentary evidence is admissible before ICC proceedings and that such documentary evidence does not necessarily need to be introduced by a witness who can testify to the contents thereof. However, it is submitted that this type of evidence should be treated with caution, given the indirect nature thereof. In accordance with the "best-evidence" rule, a rule particularly well-known in common law jurisdictions, a judge should not rely on a document on its own where a witness who is familiar with the document is available for testimony. In the present situation, the Avocat Général of the High Military Court, the producer of most

[42] Charles M. Grabau and Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227 (1996) at page 10.
[43] Impugned Decision, para. 32.
[44] ICC-01/04-01/07-40-Conf-Anx; ICC-01/04-01/07-81-Conf-AnxA.

of the documents, and/or his legal representative in the DRC, who witnessed some of the proceedings, could and should have been brought before the ICC for testimony.

41. The Single Judge's ruling that Mr. Katanga's level of French meets the standards set by articles 67(1)(a) and (f) is significant and determinative for the whole proceedings against him. In order to make such an important determination, the Single Judge must have been satisfied that this was the only inference to be possibly drawn from the evidence. In case of doubt, the benefit thereof must go to Mr. Katanga.[45] It is respectfully submitted that the Single Judge could not have been so satisfied without hearing evidence, ideally from *viva voce* witnesses, relating to the context of those documents.

42. At the very least, a voir-dire should have been held to determine what weight, if any, to give to those documents. It is not sufficient to pose a number of questions to the defendant during a Status Conference without him having been so informed in advance. The Defence was put on notice that the language issue would be addressed. The Defence was, however, not informed of the nature of the questions that would be asked.[46] Neither was the Defence in the possession of the confidential annexes attached to the Registrar's and Prosecution's filings. The Defence saw the documents for the first time at the Status Conference of 14 December 2007.[47] The Defence was, therefore, in no position to discuss the document with the defendant and to make adequate submissions on their nature and contents.

43. The Defence heavily disputes the inferences drawn from those documents and submits that none of those documents demonstrate that his French is fluent/perfect. For example, Mr. Katanga denies that French was the language of his choice during the hearing before the High Military Court and that he was ever provided with the option of an interpreter.[48] Rather, French was imposed on him.[49] Mr. Katanga further denies that he ever submitted to the High Military Court that he spoke French and Swahili perfectly/fully.[50] It is, indeed, remarkable that Lingala and Kingwana are not

[45] This is in accordance with the principle of *in dubio pro reo*, as addressed more extensively below, paras. 57-59.
[46] Given the fully prepared notes of the Registry, the Defence was under the impression that other parties had received fuller advance notice of the nature of the issues that would be addressed.
[47] The Defence team had only recently been appointed and had not received any confidential filings yet. The previous filings on the language issue had been prepared by a duty Counsel who was appointed for that purpose.
[48] ICC-01/04-01/07-40-Conf-Anx 3.5 (reclassified as public); ICC-01/04-01/07-81-Conf-AnxA, pages 4-8. This was already pointed out in the Defence Observations, para. 29, but has been completely neglected.
[49] ICC-01/04-01/07-T-l l-Fr, page 36, line 16; page 39, lines 24-25.
[50] ICC-01/04-01/07-40-Conf-Anx 3.7 (reclassified as public).

mentioned in the box indicating which languages Mr. Katanga allegedly speaks perfectly/fully.[51]

44. In any event, the hearing conducted in French was short and Mr. Katanga's answers were short and simple.[52] The process-verbal of this hearing, which was not re-read to Mr. Katanga afterwards,[53] does, therefore, by no means prove that Mr. Katanga's speaks and understands French fully/perfectly.

45. The Single Judge is, further, completely unaware of the circumstances in which Mr. Katanga drafted his request for provisional release to the Congolese authorities;[54] whether he received assistance in the drafting in French and how much time he spent on its preparation.[55] Without such background information, the Single Judge could not have drawn any conclusion from this request for interim release. The fact that this request for interim release was written in French "to a good standard"[56] does certainly not support the conclusion that Mr. Katanga speaks and understands French fully/perfectly.

46. The same can be said regarding Mr. Katanga's observations written in French and signed by him in the DRC.[57] Mr. Katanga prepared those observations in the presence of his counsel. It is well possible, and indeed confirmed by Mr. Katanga, that his counsel assisted him in drafting the observations.

47. In conclusion, the Defence submits that these documents, at most, demonstrate that Mr. Katanga speaks and understands French to a reasonable standard. The Defence does not dispute that Mr. Katanga speaks and understands French to a reasonable standard.[58] The Defence, however, disputes that Mr. Katanga speaks and understands French perfectly/fully and submits that, thus, those documents do not support the Single Judge's finding that Mr. Katanga "fully understands and speaks" French.

Communication in French with ICC officers

[51] As previously observed by Defence Counsel on the Status Conference of 14 December 2007. Mr. Katanga did not personally fill out the boxes. See ICC-01/04-01/07-T-l l-Fr, page 40 lines 13-23.
[52] As already indicated in the Defence Observations, para. 27.
[53] ICC-01/04-01/07-T-l l-Fr, pages 36-37.
[54] ICC-01/04-01/07-81-Conf-AnxA, pages 1-3.
[55] At the Status Conference of 14 December 2007, Mr. Katanga confirmed that he received assistance in drafting the interim release request. See ICC-01/04-01/07-T-l l-Fr, page 36, lines 1-6.
[56] Impugned Decision, para. 34.
[57] ICC-01/04-01/07-40-Conf-Anx 3.3 (reclassified as public).
[58] ICC-01/04-01/07-78 (Defence Observations), para. 23; ICC-01/04-01/07-T-l l-Fr, page 18 lines 7-9.

48. The Defence concedes that Mr. Katanga did not immediately object to speaking in French with ICC officers. As outlined in the Defence Observations,[59] he soon realised that it was a significant effort on his part to conduct those conversations in French and that he would much rather communicate in Lingala. It is unfair to use Mr. Katanga's utmost efforts to fully cooperate with the ICC officers against him in support of the submission that Mr. Katanga speaks and understands French fully/perfectly. Moreover, none of those initial conversations addressed complicated subjects; indeed, they were rather basic. As aformentioned, the Defence concedes that Mr. Katanga's level of French is of a reasonable level, but not of a level required to fully comprehend criminal proceedings before the ICC, which are of a highly technical level.

49. Indeed, the Ontario Supreme Court held that "[a] person may be able to communicate in a language for general purposes while not possessing sufficient comprehension or fluency to face a trial with its ominous consequences without the assistance of a qualified interpreter."[60]

Client-Counsel communication

50. The Defence concedes that Mr. Katanga has chosen a Defence Counsel who does not speak Lingala despite the fact that his Duty Counsel and other Counsel on the list of Counsel provided to Mr. Katanga by the ICC speak Lingala. This is, however, no evidence that his French is perfect or even fluent. A defendant may choose his counsel on the basis of a variety of factors, including but not limited to his or her ability to communicate with counsel in his language of preference. Whilst adequate client-counsel communication is important, other factors, such as the level of counsel's trial experience particularly in international criminal courts, may be equally, if not more important. Clearly, Mr. Katanga did not base his choice of counsel on counsel's ability to speak Lingala or even French.[61] It is entirely his business on what grounds he has selected his counsel.

51. Defendants before the ICTR and the ICTY have not always chosen counsel who speak their language. At the ICTY, client-counsel communication regularly takes place with

[59] At para. 33.
[60] *R v. Petrovic*, Ontario Supreme Court, Court of Appeal, Judgment of 20 June 1984; 41 C.R. (3d) 275, 47 O.R. (2d)97, 10 D.L.R. (4th) 697, 12 C.R.R. 98, 13 C.C.C. (3d) 416, 4 O.A.C 29.
[61] At the Status Conference of 14 December 2007, Defence Counsel admitted that his French is not of an excellent standard. ICC-01/04-01/07-T-l l-Fr, page 13, lines 6-9.

the intervention of an interpreter.[62] At the ICTR, French-speaking defendants who were represented by English-speaking counsel have, over the many years in pre-conviction detention, picked up a sufficient level of English to communicate with their counsel in English, although insufficient to follow the criminal proceedings in English.[63]

52. The Defence team has managed reasonably well to communicate with Mr. Katanga. Admittedly, however, the Defence is somewhat handicapped in being unable to communicate with the defendant in his preferred language. Communication in French has, at times, proven difficult both for the native and non-native French-speaking members of the Defence team.[64] This handicap is, however, largely compensated by other qualities Mr. Katanga's defence team has to offer to him, including significant experience in international criminal proceedings and living, travelling and working in neighbouring (East-)African countries.[65] Moreover, the Defence team spends ample time with Mr. Katanga and thus, there are many opportunities to clarify and rectify misunderstandings.

53. There is a fundamental difference between the ability to interact with counsel and to follow legal proceedings. In the former, the client himself is engaged and actively participating in a one-to-one or two-to-one conversation. Given that many ICC officers operate in a language that is not their mother tongue, there should be awareness within the ICC of the fundamental difference between the ability to communicate and to follow highly technical legal proceedings in respect of charges of war crimes and crimes against humanity. Indeed, the non-native French speaking members of the Katanga defence team can attest that, on their curriculum vitaes, they would indicate that they speak fluent French, they are quite capable of communicating

[62] In *Prosecutor v. Limaj et al*, for example, the three Accused spoke Kosovar Albanian and barely a word of English. All Defence Counsel and legal assistants who worked on this case were English speakers who did speak a word of Kosovar Albanian. Client-Counsel communication always took place with the assistance of an interpreter. Nonetheless, the Accused were satisfied with their Defence teams, so much so that they were strongly recommended for the next KLA case, *Prosecutor v. Haradinaj*. Indeed, two Defence Counsel took up an assignment with the Haradinaj case.

[63] For instance, the Accused Nsengiyumva had an English-speaking defence team led by Counsel who did not speak any French; and Nzirorera was represented by an English-speaking Counsel, who, until recently, did not speak French. These Accused are nonetheless entirely satisfied with their Counsel.

[64] This difficulty is demonstrated in two Affidavits, attached as Annex A, signed by two members of the Defence team who have spent significant amounts of time with Mr. Katanga in prison.

[65] Both lead counsel and one of the assistant counsel have lived in Tanzania for many years while being involved in cases before the ICTR. In that capacity, both of them have travelled to Rwanda and other numerous African countries to interview witnesses.

in French with the client and others, but they would not feel comfortable to follow ICC criminal proceedings in French.[66]

54. A different level of French is required of Mr. Katanga to actively participate in his own trial than to understand and speak to his Defence team. Client and counsel can both immediately indicate to the other if either of them did not fully understand what the other said. They can take time to make themselves understood. In the latter, on the other hand, the proceedings continue regardless whether the Accused fully understands what is being said in the court-room. There is no opportunity to ask to repeat or for the Defence team to clarify the matters addressed with him. Moreover, the client himself is engaged in the one-to-one or two-to-one communication.

55. The Defence appreciates that the Defence team will have an opportunity to debrief with Mr. Katanga after court hearings and that written transcripts will be available. Hopefully, however, the Appeals Chamber will understand that these available tools may be very useful but does not fully remedy Mr. Katanga's lack of comprehension of what is going on as the trial proceeds. It may be important to have Mr. Katanga's comments on the evidence immediately during and after a Prosecution witness testifies for the purpose of the cross-examination.

56. Most importantly, if the defendant had to rely on live note as well as his Defence counsel to explain everything to him, he will be deprived of the opportunity to effectively participate in his own trial. The Defence reminds the Appeals Chamber of Professor Shabas's and Dr. Roseann Duenas Gonzalez's emphasis on the importance of effective participation in the defendant's own trial instead of being a passive bystander in which case the defendant must be considered as being absent.

In dubio pro reo

57. In its Defence Application, the Defence already acknowledged that Mr. Katanga's case may be perceived as a borderline case, given that he speaks French to a reasonable standard. However, it is a well-established principle that, in case of doubt, the benefit of such doubt must go to the defendant (*in dubio pro reo*).[67]

[66] The same holds true for a Lingala and French-speaking ICC jurist from DRC who informed the Defence team that he would prefer to follow ICC legal proceedings in Lingala because, if conducted in French, he would have to think. This was already submitted before the Pre-Trial Chamber I at the Status Conference of 14 December 2007. See ICC-01/04-01/07-T-l l-Fr, page 18 line 22-19 line 7.
[67] Defence Application, para. 20.

58. The maxim *in dubio pro reo*[68] is a general principle of criminal law regularly applied before the ICTY and ICTR.[69] It is also applicable to procedures before the ICC. Although it is generally referred to within the context of substantive criminal law, it is submitted that it must also apply in the realm of procedural rules. Article 22/2 Statute adopts the *in dubio pro reo* approach in relation to the definition of crimes. It is submitted that this approach is by analogy also applicable to procedural norms. The latter are construed, amongst other, with the objective that the rights and interests of the accused are duly protected during the proceedings.[70]

59. In light of this principle, the Defence submits that Mr. Katanga's reasonable request to an interpreter should be granted.

Inconvenience Arguments

60. The Defence understands the main dilemma to be one of costs and delay. The Registrar's submissions at the Status Conference of 14 December 2007 were striking: granting Mr. Katanga's request would result in at least six months delay, and probably longer, and between 650.000 and 800.000 Euros additional costs.[71]

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[68] The maxim translates as "in doubt you must decide for the defendant" and was developed by continental jurists in the 12th and early 13th centuries.

[69] Judge Shahabuddeen addressed the question of interpretation in its dissenting opinion in *Prosecutor v. Hadzihasanovic*. There the judge, in general terms, referred to his understanding of the injunctions of the maxim *in dubio pro reo* and of the associated principle of strict construction in criminal proceedings. He considered that when the meaning of a particular provision cannot be resolved by recourse to the provisions of the Vienna Convention on the Law of Treaties, the maxim to prefer the meaning which is more favourable to the accused would apply. Opinion available at http://www.un.org/icty/hadzihas/appeal/decision-e/030716do.htm. See also: *Prosecutor V. Dusko Tadic*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 73, available at http://www.un.org/icty/tadic/appeal/decision-e/81015EV36285.htm; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 319, available at http://69.94.11.53/default.htm; *Prosecutor V. Kayishema and Ruzindana*, Case No. ICTR ICTR-95-1-T, Trial Judgement, 21 May 1999, para. 103, available at http://69.94.11.53/default.htm.

[70] Fletcher and Olin for example write: "When there is a legality deficit in a criminal regime, you can assume this deficit exists to serve the interests of the prosecution. There is little doubt that a pro-prosecution mentality pervades the Rome Statute from the Preamble, stressing the suffering of the victims, to the abolition of the statute of limitations (Article 29). Typically, a criminal statute provides for a strict rule of interpretation in order to protect the interests of the accused. […] The interpretation should therefore favour the accused. It should reflect the principle in dubio pro reo […]"G.P.Fletcher and J.D; Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 Journal of International Criminal Justice 539, at 552 (emphasis added). See also J. Jackson and N. Kovalev, 'Lay Adjudication and Human Rights in Europe', (2006) 13 Columbia Journal of European Law 83, at 112.

[71] ICC-01/04-01/07-T-l l-Fr, page 16 lines 15-20; page 29 lines 17-21.

61. It is blatantly obvious that Mr. Katanga's fundamental rights, guaranteed in the Statute should not be compromised for reasons of expense or inconvenience. The Registrar's submissions were, therefore, not helpful and should not even be a consideration.

62. Indeed, it has clearly been established that the fundamental rights of the Accused should not compromised in light of budgetary restraints. Regarding the right to be informed in a language the Accused fully understands, the ICTY Trial Chamber in the case of Milosevic held that "these guarantees are so fundamental as to outweigh considerations of judicial economy".[72]

63. In addition, as much as the additional expenses and time sound; in reality they can easily be met. As indicated in the Defence Application, the Defence is satisfied if the interpreting facility is in place at the beginning of the trial.[73] This already takes care of the anticipated delay, as the trial will most likely not start before six months anyway, particularly in light of the delay of the confirmation hearing. As for the expenses, the Defence has also indicated that it is not requesting the translation of all documents.[74] This should reduce the costs. Moreover, in light of the totality of the ICC budget, an extra 650.000 to 800.000 Euros is not that significant.

64. Finally, the Defence reiterates:[75]

> The implementation of [a Lingala interpration facility], even if costly and time consuming at this moment, would greatly contribute to the institution building of the ICC. Currently, the ICC has two accused persons in its custody, both of whom are Lingala speakers, this being a widely-spoken language in the DRC. Many witnesses who will testify for or against them will be Lingala speakers. It is clearly within reasonable expectations that more arrests of Lingala interpretation will follow. It is likewise reasonably to be expected that more requests for Lingala interpretation will follow. That there is, therefore, a need for a Lingala interpretation system within the ICC is clear.

65. In light of the above considerations, in the interests of the Accused and the population in the DRC, if the ICC intends to be true to its words that, in all its activities, it will observe "the highest standards of fairness and due process",[76] then the Appeals Chamber should very carefully consider all the submissions before rendering what promises to be a very important decision.

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[72] *Prosecutor v. Milosevic*, Decision On Prosecution Motion For Permission To Disclose Witness Statements In English, 19 September 2001, http://wtm.un.org/ic^mflosevic/triaic/decision-e/l09l9DE5l63l2.hlm.
[73] Defence Application, para. 22.
[74] The Defence does, however, reserve the right to request, on a case-by-case determination upon showing good cause, the translation of some significant documents, for instance, the indictment, the defence and closing brief. The Defence already raised this during the Status Conference of 14 December 2007, ICC-01/04-01/07-T-l l-Fr, page 19 lines 11-16.
[75] Defence Application, para. 24. This was also argued at the Status Conference of 14 December 2007, *ibid*, page 19 lines 17-24.
[76] http://www.icc-cpi.int/about.html (About the Court).

Conclusion

66. On these grounds, the Defence prays the Appeals Chamber to find that the Single Judge erroneously found that Mr. Katanga's competency meets the requirements of articles 67(1)(a) and (f); to reverse the Single Judge's Decision not to grant Mr. Katanga the right to a Lingala interpreter in the Courtroom; and to order the Registrar to put the facility in place in order that such Lingala interpretation can be offered to Mr. Katanga.

Respectfully submitted,

Mr David Hooper, Defence Counsel

The 31st of January 2008

At Arusha, Tanzania