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**THE APPEALS CHAMBER**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**
***IN THE CASE OF***
***THE PROSECUTOR***
***v. GERMAIN KATANGA AND MATHIEU NGUDJOLO***

**Public Document**

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

**Source: Defence Team of Mathieu Ngudjolo**

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## I. PROCEDURAL HISTORY

1. On 6 July 2007, Pre-Trial Chamber I of the International Criminal Court issued a warrant of arrest for Mr Mathieu Ngudjolo.[1]

2. On 7 February 2008, Pre-Trial Chamber I rendered a decision to unseal the warrant of arrest issued against Mr Mathieu Ngudjolo.[2]

3. On 7 February 2008, the Pre-Trial Chamber scheduled the first appearance of Mr Mathieu Ngudjolo for 11 February 2008.[3]

4. On 12 February 2008, the Defence of Mr Mathieu Ngudjolo filed a *Requête en vue d'obtenir la prorogation des délais permettant à la Défense de déposer l'ensemble du dossier pouvant justifier l'exception d'irrecevabilité de la procédure*, in accordance with its submission at the pre-trial hearing of 11 February 2008.[4]

5. On 18 February 2008, the Defence of Mr Mathieu Ngudjolo submitted to Pre-Trial Chamber I its observations on the joinder of the cases against Mathieu NGUDJOLO and Germain KATANGA pursuant to the oral request of Pre-Trial Chamber I at the hearing of 12 February 2008.[5]

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[1] Warrant of Arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, ICC-01/04-02/07-1-tENG.

[2] *Decision to Unseal the Warrant of Arrest Against Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 7 February 2008, ICC-01/04-02/07-10.

[3] *Decision Scheduling the First Appearance of Mathieu Ngudjolo Chui and Authorising Photographs at the Hearing of 11 February 2008*, Pre-Trial Chamber I, 7 February 2008, ICC-01/04-02/07-20.

[4] *Requête en vue d'obtenir la prorogation des délais permettant à la Défense de déposer l'ensemble du dossier pouvant justifier l'exception d'irrecevabilité de la procédure*, Pre-Trial Chamber I, 12 February 2002, ICC-01/04-02/07-20.

[5] *Observations de la Défense concernant la question de la jonction de procédures entre l'affaire Mathieu Ngudjolo et l'affaire Germain Katanga, en application de la requête orale présentée par la Chambre Préliminaire I lors de l'audience du 12 février 2008*, Pre-Trial Chamber I, 18 February 2008, ICC-01/04-02/07-29.

6. On 25 February 2008, the appointment of Mr Jean-Pierre Kilenda Kakengi Basila as Permanent Counsel was registered.[6]

7. On 10 March 2008, the Pre-Trial Chamber decided to join the Katanga and Ngudjolo cases on the ground of the suspects' alleged joint criminal participation in the acts described in their respective warrants of arrest.[7]

8. On that same day, the Pre-Trial Chamber rendered a decision establishing a calendar in the new joint case. The Defence of Mr Mathieu Ngudjolo was given until 28 March 2008 to submit any applications for reconsideration or leave to appeal against the decisions rendered in the case of *The Prosecutor v. Germain Katanga.*[8]

9. On 17 March 2008, the Defence filed an application for leave to appeal against the 10 March 2008 decision on the joinder of the Germain Katanga and Mathieu Ngudjolo cases.[9]

10. On 9 April 2008, the Pre-Trial Chamber partially granted the application for leave to appeal, namely on the first issue, based on the Defence argument that the Chamber erred in its interpretation of article 64(5) of the Statute and rule 136 of the *Rules of Procedure and Evidence*, in violation of the principle of legality.[10]

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[6] *Enregistrement de la désignation de maître Jean Pierre Kilenda Kakengi Basila par M. Mathieu Ngudjolo Chui comme conseil et de la déclaration d'acceptation du mandat par le conseil*, Pre-Trial Chamber I, 25 February 2008, ICC-01/04-02/07-42.

[7] *Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI*, Pre-Trial Chamber I, 10 March 2008, ICC-01/04-01/07-257.

[8] *Decision Establishing a Calendar in the Case against Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 10 March 2008, ICC-01/04-01/07-259.

[9] "Application for Leave to Appeal the Decision on Joinder rendered on 10 March 2008 in the Germain KATANGA and Mathieu NGUDJOLO Cases", Pre-Trial Chamber I, 17 March 2008, ICC-01/04-01/07-328-tENG.

[10] *Decision on Application for Leave to Appeal by the Defence of Mathieu Ngudjolo Chui against the Decision on Joinder*, Pre-Trial Chamber I, 9 April 2008, ICC-01/04-01/07-384.

## II. AS TO THE LAW

### A. Preliminary submissions on the legality principle and the need therefor in international criminal proceedings.

11. In its *Vocabulaire Juridique* edited by Gérard Cornu, the Henri Capitant Association defines legality as "[TRANSLATION] consistency with the law, of being consistent with the law (in a formal sense); more broadly, with written law, or with positive law in general". It is further defined as the attribute of what must be established by the law, for example, the principle of the legality of crime and punishment, sometimes referred to as the principle of the legality of crime prevention.[11] Under a third definition, it is "[TRANSLATION] that which is required by the law, e.g., the legality of proceedings in the Federal Republic of Germany".[12]

12. Legality should be understood as a body of guidelines, manifestly normative, whose knowledge and application are the prerequisites for the proper administration of justice. Their identification and the determination of their substance are dependent on their origin. These guidelines, which are of diverse natures and origins, are the markers without which the judicial process is completely untrammelled, and at the mercy of the intuition, whims and caprices of the adjudicator.

13. As a system, criminal justice – whether at national or international level – is, to employ a sporting metaphor, a "team sport",[13] the success of which requires the contribution of a variety of actors. It consists in an interwoven series of dialectically related acts, the functional unity of its component organs being a factor which contributes both to their effectiveness and to their efficiency.

[11] Association Henri Capitant, *Vocabulaire Juridique*, Paris, *Presses Universitaires de France*, 1987, p. 467.
[12] Idem.
[13] Idem, p. 468.

14. To borrow another sporting metaphor, legality is the body of sporting regulations which binds the players in the penal arena to the notion of "fair play", essential underpinning to the morality - and hence the quality - of the game. In our view, Jean-Pierre Delmas Saint-Hilaire is right in considering legality to be "[TRANSLATION] a quality that must be present in all of the means used by society in order to punish crime (general rules laid down by the law-making power, individual judicial or administrative decisions, etc.). This means that there must be a proper nexus between the elements of this punitive apparatus and the law".[14]

15. Legality entails the prior definition of the substantive and procedural rules laid down by the lawmaker in light of the issues at stake in criminal proceedings, the purpose of which is to sanction violations of the fundamental values of society while ensuring respect for the rights of persons suspected of having broken criminal laws. Criminal legality is "the keystone of criminal law".[15] It presupposes that the definitions of crimes and their punishments are limitatively defined by the law. It is the law which is the source of crime and punishment.

16. The principle of legality further requires that the entire penal process, including its organisation, and issues of jurisdiction and procedure, be established in advance, in accordance with known procedural norms. On this depends the concern for legal certainty, transparency, and the protection both of the social order and of individual liberties, that is the necessary concomitant of predictability - considered by the European Court of Human Rights to be one of the characteristics of law.[16]

17. Even today, criminal lawyers still consider that "[TRANSLATION] adherence to the principle of legality continues to act both as a guarantee of human rights and as a

[14] OST, F. and Van der Kerchove, M.: *Les roles du judiciaire et le jeu du droit*, in *Acteur social et délinquence. Hommage à Chritian Debuyst*, Bussels, P. Margada, 1990, p. 271.
[15] Delmas Saint-Hilaire, J-P : *Les principes de la légalité des délits et des peines. Réflexions sur la notion de légalité en droit pénal*, in *Mélanges Bouzat*, Paris, A. Pédone, 1980, p. 25.
[16] Varinad, A. and Pradel, J. *Les grands arrêts du droit criminel*, Vol. 1, Paris, Dalloz, 1995, p. 25.

value standard".[17] The principle of legality is considered to be the guarantor of individual liberty.[18]

18. Conscious of respect for the value of human rights, the drafters of the *Rome Statute* establishing the International Criminal Court did not intend to place the penal process beyond the confines of the principle of legality. Articles 22, 23 and 24 of the *Rome Statute* ("the Statute") respectively enshrine the principles of *nullum crimen sine lege, nulla poena sine lege* and non-retroactivity *ratione personae*.

19. *The Rules of Procedure and Evidence* ("RPE") govern, down to the smallest detail, the provisions relating to the various stages of proceedings before the International Criminal Court.

20. In its above-mentioned decision of 10 March 2008, the Pre-Trial Chamber ordered joinder of the proceedings against Germain Katanga and Mathieu Ngudjolo. The Defence considers, for the reasons set out below, that to make such an order at the pre-trial stage is to contravene the principle of legality of proceedings before the International Criminal Court.

**B. Grounds invoked by the Defence in support of its appeal**

21. Mr Ngudjolo's Defence seeks formally to challenge the reasoning of the Pre-Trial Chamber in its decision to join the proceedings against Messrs Ngudjolo and Katanga, on the ground that it violates the principle of legality as enshrined in article 21 of *Rome Statute*.

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[17] Cerf-Hollander, A. and Pradel, J. : *Le nouveau code pénal et le principe de la légalité*, in *Archives de Politique Criminelle*, no. 16, Paris, A. Pédone, 1994, p. 10.

[18] Verhaegen, J. *Légalité et référence aux valeurs,* in *Revue de droit pénal et de criminologie*, Brussels, 1981, p. 311, cited by Tulkens, F. and Van de Kerchhove, M., *Introduction au droit pénal. Aspects juridiques et criminologiques*, 2nd ed. revised and updated, Brussels, E. Story scientia, 1993, p. 31. In the same vein, see also Dana, Ch., *Essai sur la notion d' infraction pénale*, Paris, Librairie Générale de Droit et de Jurisprudence, 1982, p. 13.

22. In the opinion of the Defence, the Chamber committed a manifest error of interpretation of article 64(5) of the Statute and of rule 136 of the RPE in applying article 31(1) of the *Vienna Convention on the Law of Treaties* so as to infer a presumption for joinder of the proceedings in cases where persons are being prosecuted together.

23. The Defence accordingly invokes *five grounds in support of its appeal:*

(1) The Defence disputes the existence of a *lacuna legis* as held by the Pre-Trial Chamber. The Chamber erred in not adhering to the hierarchy of applicable law as set out in article 21 of the Statute and thus failed to apply the clear provisions of the Statute and of the RPE.

(2) The Defence maintains that, in the unlikely event that the Vienna Convention were found to be applicable, this would support a restriction of joinder to the trial phase without extending it to the pre-trial phase, since that is what the drafters specifically envisaged.

(3) The Defence further asserts that joinder at the pre-trial phase is neither logical nor effective in proceedings before the International Criminal Court.

(4) The Defence further submits that the Pre-Trial Chamber erred in extending the provisions of article 64 of the Statute and rule 136 of the RPE by analogy to the pre-trial phase and circumventing the specific rules (namely the regime of article 51(3) of the Statute) applicable in the instant case, the application of which would have been consistent with the legality principle.

(5) Lastly, the Defence argues that the joinder issue, by virtue of its potentially adverse consequences for Mr Ngudjolo, is a substantive matter which is subject to the legality principle.

**1. Violation of article 21 with respect to the *lacuna legis* erroneously noted by the Pre-Trial Chamber**

24. The Chamber found that a presumption for joinder exists. However, as Mr Ngudjolo's Defence stated in support of its application for leave to appeal, "the presumption for joinder established by the Chamber is not based on the applicable norms, in that it disregards the hierarchy set out in article 21(1) of the Statute, the foundation on which the principle of legality rests. Simply ignoring the Statute, the Elements of Crimes and the RPP, the Chamber inferred a presumption for joinder on the basis of the international convention on the law of treaties, notwithstanding that it is under an obligation to give full effect to the clear provisions of the Statute and the Rules. In so doing, the Pre-Trial Chamber flouted the legality principle as recognized by the Court."[19]

25. Mr Ngudjolo's Defence further explained that "[t]he hierarchy of applicable norms established by article 21 of the Statute is as follows: in the first place, the Statute, the Elements of Crimes and the RPE; in the second place, where appropriate,[20] the Court shall apply applicable treaties and the principles and rules of international law and, failing that, general principles of law derived by the Court. The Defence submits that the expression "where appropriate" calls for recourse to such sources where the Statute, the Elements of Crimes and the RPE are unclear, ambiguous or lead to a result which is manifestly absurd or unreasonable."[21] Thus, article 21 of the Statute required that the issue of joinder be examined on the basis of article 64(5) of the Statute and rule 136 of the RPE.

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[19] "Application for Leave to Appeal against the Decision on Joinder rendered on 10 March 2008 in the Germain KATANGA and Mathieu NGUDJOLO Cases", Pre-Trial Chamber I, 17 March 2008, ICC-01/04-01/07-328-tENG, para. 22.

[20] The Defence is of the view that the expression "where appropriate" requires that these sources be applied when the Statute, the *Elements of Crimes* and the RPE are unclear, ambiguous or lead to a result which is manifestly absurd or unreasonable. Article 32 of the *Vienna Convention on the Law of Treaties* of 23 May 1969 may be indicative. Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[21] "Application for Leave to Appeal against the Decision on Joinder rendered on 10 March 2008 in the Germain KATANGA and Mathieu NGUDJOLO Cases", Pre-Trial Chamber I, 17 March 2008, ICC-01/04-01/07-328-tENG, para. 23.

26. The Defence submits that the procedural rules of the Statute and the applicable primary sources provide for a joinder mechanism at the trial phase but not at the pre-trial phase. Thus article 64(5) of the Statute confers upon the Trial Chamber the power, following notification of the parties, to order, as appropriate, joinder or severance in respect of charges against more than one accused. The Statute is silent on the Pre-Trial Chamber's powers in relation to joinders.

27. The Defence would emphasise that no argument can be made on the basis of a lack of precision on the part of Statute's drafters. Thus, from a reading of the *travaux préparatoires*, it is quite clear that only specific terms such as Pre-Trial Chamber, Trial Chamber, Appeals Chamber, etc., are used. The only article of the Statute where a more general term occurs is article 68(2),[22] an article completely irrelevant to joinder. Furthermore, it is immediately apparent that there is nothing confusing about the language of article 68(2), since the paragraph refers to all of the Court's Chambers. Therefore, reasoning by analogy, it is obvious that, if the drafters of the Statute had wanted the Pre-Trial Chamber to be granted the power to join cases, they would either have specifically so provided, or used a general, unambiguous expression (similar to that in article 68(2)), which is not the case here.

28. Moreover, the context of article 64 of the Statute and rule 136 of the RPE should not be ignored. Those provisions – the only ones pertaining to joinder – are to be found in Part VI of the Statute and in Chapter 6 of the RPE, entitled respectively "The trial" and "Trial procedure". Article 31 of the Vienna Convention is instructive on the value of the context in interpreting a text: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Defence therefore argues that the drafters of the statutory framework could have included

[22] Article 68(2) reads as follows: "As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness."

rule 136 in Chapter 4 of the RPE, "Provisions relating to various stages of the proceedings", if they had wished joinder to be possible at all stages in the proceedings.

29. The same conclusions as those in the previous two paragraphs can be drawn from a statutory analysis of the term "accused". Thus, while the Statute fails clearly to define the point in time when a person passes from being a suspect to being an accused, part V, which deals with investigations and prosecutions, makes no mention at all of persons concerned by an investigation or even of those brought before the Court. On the contrary, only terms such as "alleged perpetrator"[23] or just simply "person" are used to describe a suspect.[24] The term "accused" only appears in article 61(9), on the confirmation of charges: "After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges." It follows that, under the Statute, a person is only considered to be an accused after the confirmation hearing, and specifically when the Pre-Trial Chamber has found that there are sufficient charges to commit [that person] to trial.[25] It follows that, since article 64(5) of the Statute clearly lays down the Trial Chamber's powers of joinder with respect to accused persons, the proceedings against Mr Ngudjolo, who is a mere suspect at the current stage of the proceedings, and at least until 21 May 2008,[26] cannot be the subject of a joinder.[27]

30. It should further be observed that rule 136 of the RPE, the only rule governing joint and separate trials, provides: "Persons accused jointly shall be tried together

[23] Article 53(2)(c) of the Statute: "[…] A prosecution is not in the interests of justice, taking into account all the circumstances, including […] the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;"
[24] See articles 55 to 60 of the Statute.
[25] It should be further noted that this choice of language is clearly governed by the presumption of innocence. Insofar as there is a transition from incriminating evidence to corroborative evidence, there must be a sliding scale, going from suspect, to accused, to convicted person.
[26] Date of the confirmation hearing.
[27] Article 55 lists the rights afforded to a "person during an investigation'' and from its paragraph 2, it is clear that a suspect is always referred to as a "person".

unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2." The Defence would accordingly underscore the fact that, until the decision on the confirmation of charges, Mr Ngudjolo is a suspect and not an accused within the meaning of rule 136 of the RPE. Hence neither the Statute nor the RPE give the Pre-Trial Chamber power to order the joinder of proceedings at the current stage of the trial.

31. The Pre-Trial Chamber of the Court has clearly stated that compliance with the procedural basis of the Statute is necessary in order to preserve the integrity and transparency of Court proceedings, and that any departure therefrom would not only be contrary to the letter and spirit of the texts, but would also weaken the predictability of proceedings and therefore lead to undesirable practical results.[28] Accordingly, legal provisions and judicial practice, whether national or international, cannot be relied on outside the framework of article 21 of the Statute. Thus the Pre-Trial Chamber's reliance on the jurisprudence of the *ad hoc* criminal tribunals was misconceived.

32. The Defence maintains that article 64(5) and rule 136 of the RPE provide for joinder only at the trial stage, i.e. from the point in time in the proceedings when the suspects effectively have "accused" status, and not before. As the author Anne-Marie La Rosa has rightly stated: "[TRANSLATION:] In the case of the ICC, the Court may, after the confirmation of charges and having notified the parties accordingly,

[28] *Prosecutor v. J. Kony et al., Decision on the Prosecutor's position on the decision of PTC II to redact factual descriptions of crimes from the warrants of arrest, motion for reconsideration and motion for clarification*, 28 October 2005, ICC-02/04-01/05-60, para. 23. "In the view of the Chamber, such result would not only be contrary to the letter and spirit of the statutory texts, but would also result in weakening the predictability of proceedings before the Court and therefore lead to undesirable practical results". para. 23.

decide to join the cases."[29] In light of these considerations, to authorising a joinder before the trial phase is contrary to the letter and the spirit of the Statute, and that cannot be acceptable to your Court.

33. Article 61(11) of the Statute provides: "Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which […] shall be responsible for the conduct of subsequent proceedings […]". It follows that the Pre-Trial Chamber must not assume the joinder powers of the Trial Chamber, its own powers being set out in article 57 of the Statute, paragraph 1 of which moreover provides: "Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article." The Pre-Trial Chamber's functions are thus listed exhaustively in that article.[30] Furthermore, since there is no provision in the Statute which grants joinder powers to the Pre-Trial Chamber, it is clear that the Single Judge had no power to act.

34. It should be pointed out that, while article 61(11) of the Statute does indeed provide that the Trial Chamber may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in [the] proceedings, this power is subject to considerations of effectiveness and fairness. *A contrario*, no provision in the Statute allows the Pre-Trial Chamber to exercise the functions of the Trial Chamber before the confirmation of charges,[31] or the Trial Chamber to intervene before the

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[29] See Anne-Marie La Rosa in "*Juridictions pénales internationales, la procédure et la preuve*", *Publications de l'Institut universitaire de Hautes Etudes Internationales, Presses Universitaires de France* (P.U.F.), 1st edition, 2003, page 115.

[30] The Pre-Trial Chamber has previously held that the list of appealable decisions is exhaustive and that the absence of provisions pertaining to the possibility of appealing a decision to confirm charges could not be considered to be a statutory lacuna: "The wording of article 82 (1) b) of the Statute is explicit and as such it is the sole guide to the identification of decisions appealable under its provisions. There is no ambiguity as to its meaning, its ambit or range of application. It confers exclusively a right to appeal a decision that deals with the detention or release of a person subject to a warrant of arrest."
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[31] See also article 64(4) of the Statute which states that the Pre-Trial Chamber may be given powers or functions by the Trial Chamber after the confirmation of charges. The Pre-Trial Chamber cannot give itself these rights, especially at the pre-trial phase.

confirmation of charges, since at that point it has not yet been constituted. Thus, since the Pre-Trial Chamber cannot refer the issue of joinder to a Trial Chamber which has not yet been constituted (and which will not be constituted until the confirmation of charges - if there is confirmation), it is impossible for the proceedings against Messrs Ngudjolo and Katanga to be joined.

### 2. Misinterpretation and inapplicability of the Vienna Convention

35. The Defence stated in its application for leave to appeal: "In the present case, the Chamber, through its method of interpretation, arbitrarily applied the *Vienna Convention on the Law of Treaties*. The provisions in question are to be found in Chapter VI of the Statute and in the Rules governing trial, and have no equivalent in the provisions governing the pre-trial phase, or in those applicable to the various stages of the proceedings. The terms used clearly refer to the trial phase. (…)[32]". More specifically, even if the Court may, pursuant to article 21(1) of the Statute, apply the Vienna Convention, it had no legitimate ground for doing so in the present case. Thus it would have had to demonstrate the need to confirm the meaning of a statutory provision,[33] or indeed to provide an interpretation thereof.[34] However, in

[32] Request for Leave to Appeal the Decision on Joinder rendered on 10 March 2008 in the Germain KATANGA and Mathieu NGUDJOLO Cases, Pre-Trial Chamber I, 17 March 2008, ICC-01/04-01/07-328, para. 24.

[33] Article 31 of the Vienna Convention reads as follows: "General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (*c*) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

[34] Article 32 of the Vienna Convention: "Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

applying the Vienna Convention, the Pre-Trial Chamber did not demonstrate such a need. It simply stated that there was a presumption in favour of joinder for reasons of public interest and extended this presumption to the pre-trial phase, even though this is not provided for in the Statute;[35] such reasoning is clearly unacceptable.

36. If we examine the Appeals Chamber's judgment on the Prosecutor's Application for Extraordinary Review as cited below[36], we can follow its logic and conclude that the Statute specified the stage of the proceedings, and that there is no *lacuna*. The purpose of the Statute is achieved without joinder at the pre-trial stage. As the Chamber stated: "The self-evident purpose of the Statute is to make internationally punishable the heinous crimes specified therein in accordance with the principles and the procedure institutionalised thereby. As far as it may be gathered, nothing is left out with respect to the question under consideration otherwise expected from the tenor of the Statute."[37].

37. Furthermore, according to the jurisprudence of the International Court of Justice: "[…]If…the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words."[38] Consequently, in the unlikely event that the Vienna Convention were to be found to be applicable, then it would be appropriate, pursuant to article 32 of the Vienna Convention, to refer to the *travaux préparatoires* of

[35] *Decision on the Joinder of cases against KATANGA and NGUDJOLO*, Pre-Trial Chamber I, 10 March 2008, ICC-01/04-01/07-257; and ICC-01/04-01/07-307, on page 7, 'Considering that, in the view of the Chamber, the ordinary meaning of Art 64(5) and rule 136 provides that there shall be joint trials for persons accused jointly, and establishes a presumption for joint proceedings for persons prosecuted jointly'.
[36] *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, Appeals Chamber, 13 July 2006, ICC-01/04-168, see http://www.icc-cpi.int/library/cases/ICC-01-04-168_tFrench.pdf.
[37] *Idem.*, para. 37.
[38] Advisory Opinion of 3 March 1950, Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports 1950, 8.

the ICC Statute. However, we are bound to note that these are clear; they do not support the possibility of a joinder of cases at the pre-trial stage.[39]

### 3. It would be illogical and ineffective to join proceedings at the pre-trial stage

38. With regard to the Pre-Trial Chamber's arguments on procedural practicalities and judicial economy, the Defence submits that they are superfluous and purely hypothetical. As concerns witnesses, for example, under Article 61(5) the Prosecution may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial. However, the Prosecutor has not indicated hitherto his intention to call the witnesses in person, whereas the confirmation hearings are scheduled to start on 21 May 2008.

39. Furthermore, the Defence notes that articles 61(5) and 68(5) of the Statute and Regulation 81(4) of the RPE have been interpreted so as to allow the Court (1) to authorise the non-disclosure of the identity of certain witnesses on whose evidence

[39] Under article 38.3 of the draft Statute of an International Criminal Court of 1994, joinders fell within the jurisdiction of the Trial Chamber. The only modification made later was to include the possibility of severance, but this still remained a matter for the Trial Chamber. See Roy Lee, The Making of the Rome Statute, p. 250. Later on, the question of joinders was raised in proposals by Australia and the Netherlands. These were included in Part V: "The Trial", in Section III: "Conduct of the Trial". They have no equivalent in the preceding Part and Section on the investigation and prosecution phase.
See Articles 62 and 92, Preparatory Committee of 13 September 1996, Vol II, p. 185; also, during drafting of the current article 61 of the Statute concerning the confirmation of charges before the trial, there were proposals at the preparatory committee meeting in 1998[39], as well as in the Zutphen Draft, for the inclusion of provisions relating to the notification of the Document Containing the Charges and to the confirmation hearing for that document. At the time, indictment was the term used; and although the Statute did not retain the term indictment, the decision to confirm the charges serves as its equivalent. See, respectively: Article 61 "Notification of the indictment', para. 2(a), in 'The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute', M. Cherif Bassiouni, V.II, *International and comparative criminal law series*, p. 441 and Article 54[30] "Notification of an indictment" para. 1 bis. (a), A/AC.249/1997/L.8/Rev.1, pp. 25-27 in "The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute', M. Cherif Bassiouni, V.II, *International and comparative criminal law series*, p. 442. Hence, under these provisions, the preparatory documents included a power on the part of the Presidency or the Pre-Trial Chamber not to publicize the indictment, *especially in the event of a joinder of cases* [emphasis added]. The possibility of joinder was thus envisaged for the investigation phase. However, the preparatory documents did not retain this proposal, which demonstrates that, although the drafters envisaged it, they did not wish to include a joinder procedure in the pre-trial phase.

the Prosecution intends to rely at the confirmation hearings, and (2) to permit the Prosecutor to use summaries of statements and of transcripts of investigators' reports and interviews[40]. These decisions show that, while the charges are being confirmed, it is virtually impossible to conclude that joinder is appropriate. Thus, in order that the potential prejudice to a suspect from such a joinder may be determined, the documents containing the charges, all elements relating to witnesses, and all other evidence must have been transmitted to the Defence. This is manifestly not yet the case and, consequently, the appropriateness of a joinder cannot be assessed until the charges have been confirmed – assuming that they are confirmed.

40. Under article 64(8)(a) of the Statute, it is only after the commencement of the trial that the Trial Chamber allows a plea of guilty or not guilty to be entered. The Defence would accordingly emphasise that to join the cases against Messrs Ngudjolo and Katanga at the pre-trial stage of criminal proceedings is inconsistent with the logic of the procedure as envisaged by the Statute. Furthermore, in maintaining the current order for joinder, the Chamber could increase the risk of organisational difficulties if one of the future accused were to plead guilty. This is indeed one of the realities allowed for in rule 136 of the RPE, which provides for the severance of proceedings following a guilty plea by an accused, who may then be proceeded against under article 65(2). It follows from the logic of this provision, and since a guilty plea can be entered only at the commencement of trial, that joinder cannot be envisaged at the pre-trial stage. Furthermore, the interests of an accused may be seriously prejudiced in case of joinder at the pre-trial stage, for it is quite conceivable that, if one of the parties intends to enter a guilty plea, such party may well so inform the Prosecutor without the other party joined at the pre-trial phase being informed.

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[40] See, for example in the case of *The Prosecutor vs. Thomas Lubanga Dyilo* 'Judgment on the appeal of LUBANGA against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution requests and amended requests for redactions under Rule 81', Appeals Chamber, 14 December 2006, ICC-01/04-01/17-774; *First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81*, Pre-Trial Chamber I, 15 September 2006, ICC-01/04-01/06-437.

41. To conclude on the inappropriateness of joinder at the current stage of the proceedings, the Defence recalls that, in its application for leave to appeal, it stated: "It should in particular be recalled that Mr Ngudjolo's Defence challenged the admissibility of the case at the pre-trial hearing. Determination of admissibility is a lengthy process that will be bound to affect adversely the expeditiousness of the joint proceedings. Mr Ngudjolo's Defence will need to prepare its case on this point. It may even request further extensions of time. In the meantime, Mr Katanga's period of detention pending a final decision will be extended. Co-perpetration and membership in an armed group cannot be presumed prior to confirmation of the charges. However, in ordering the joinder of these cases, the Chamber has pre-judged such confirmation, thereby violating the principle of impartiality that should govern the activities of the judges of the Chamber. It was to safeguard the fair trial principle that joinder was provided for only at the trial phase. The possibility of severance at a later stage of the trial will not necessarily suffice to make good the adverse effects of final decisions taken in the interim."[41] In any event, it is clear that to raise a presumption of joinder at the pre-trial stage represents a regressive step in terms of criminal procedure before the Court.

**4. Violation of article 51(3) of the Statute and of the legality principle**

42. Whereas the Statutes of the *ad hoc* international criminal tribunals leave great scope for interpretation of their provisions, the *Rome Statute* is the product of lengthy negotiations and is exhaustive by nature. The same applies to the RPE. It is therefore apparent that the judges are bound by an obligation to give full effect to the clear provisions of the Statute and the Rules. The texts governing the Court deliberately limited the role of the judges, unlike the *ad hoc* international criminal tribunals. This follows from the fact that the legality principle applies to the *Rules of Procedure and*

[41] Application for Leave to Appeal against the Decision on Joinder rendered on 10 March 2008 in the Germain KATANGA and Mathieu NGUDJOLO Case, Pre-Trial Chamber, 17 March 2008, ICC-01/04-01/07-328-tENG, paras. 32 and 33.

*Evidence*. The legality principle cannot be confined to substantive law or to substantive rules; it applies also to procedural rules.[42]

43. The practical consequences of this conclusion include the intention, through the application of the legality principle, to guarantee certainty in criminal procedure and clarity in the relevant provisions. These criteria of clarity and certainty have also been identified by the European Court of Human Rights.[43] Furthermore, the Pre-Trial Chamber of this Court has clearly indicated that compliance with procedural provisions is necessary in order to preserve the integrity and transparency of Court proceedings, and that any departure therefrom would not only be contrary to the letter and spirit of the statutory texts, but would also diminish the predictability of the proceedings, and thus lead to undesirable results in practice.[44]

44. On the contrary, by raising in peremptory fashion a presumption for joint proceedings, the Pre-Trial Chamber has engendered procedural uncertainty. The judges cannot make new rules; they have no "law-making" power. Article 51 of the Statute was conceived by the drafters in order to establish procedural certainty in

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[42] '*The application of the principle of legality should not be confined to substantive law or substantive rules. The distinction between procedure and substance is often tenuous. Haveman writes that, specifically with regard to procedural rules, it is remarkable and questionable for a judiciary to make its own rules. He believes that this is serious violation [sic] not only of separation of powers but also of the principle of legality*.' Mia Swart, '*Ad Hoc* Rules for *Ad Hoc* Tribunals? The Rule-Making Power of the Judges of the ICTY and ICTR' (2002) 18 *S. Afr. J. on Hum. Rts.* 570 at 578, referring to R.H. Haveman, 'The Principle of Legality' in Haveman, Nicholls and Kavran (eds), *Supranational Criminal Law: A System Sui Generis* (2002), at 43.

[43] European Court of Human Rights – *Case of Salov v. Ukraine*, *Application no. 65518/01*, 6 September 2005, para. 66: *"From the Court's point of view, the remittal of the case for additional investigation marked a procedural step which was a precondition to a new determination of the criminal charge, even though it contained no elements of a final judicial decision in a criminal case and did not constitute the final determination of the charges against the applicant, an issue that should be considered in more detail in the examination of the merits of the applicant's complaints under Art.6(1) of the Convention. Taking into account the importance of these procedural decisions … and their influence on the outcome of the proceedings as a whole, the Court considers that the guarantees of Art.6(1) must be applicable to these procedural steps.'* Para. 96: *'An unlimited time frame for lodging an application for supervisory review against a procedural decision that had become final … cannot be considered normal from the point of view of observance of procedural time-limits, compliance with the requirements of procedural clarity, and foreseeability of the conduct of the proceedings in the criminal cases, which are matters of major importance under Art. 6(1) of the Convention".*

[44] *The Prosecutor v. J. Kony et al*., *Decision on the Prosecutor's position on the decision of PTC II to redact factual descriptions of crimes from the warrants of arrest, motion for reconsideration and motion for clarification*, 28 October 2005, ICC-02/04-01/05-60, para. 23.

accordance with the legality principle.[45] When a specific situation arises which is not covered by the RPE, the judges have no option but to follow the procedure set out in article 51(3) of the Statute, which provides: "After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties". Accordingly, the Pre-Trial Chamber cannot arbitrarily (*ultra vires*) decide that there is a '*lacuna legis*', and apply the Vienna Convention in order to establish a presumption for joint proceedings. As Broomhall has noted, the procedure under article 51 of the Statute was conceived so as to enable the legality principle to be applied to criminal law and to the law of criminal procedure.[46] The same author has further stated that "the task of elaborating and adopting rules of procedure and evidence would be inappropriate for a treaty regime based on the consent of States Parties".[47] Accordingly, article 51(3) is the only mechanism which allows provisional rules to be adopted in circumstances dictated by urgency. By way of example, Broomhall lists unreasonable delay, loss of evidence and damage to fairness or to the appearance of fairness.[48] Article 51(3) does not allow a single judge or a Chamber to adopt its own rules in less urgent situations. Broomhall thus adds that this option "of leaving it to the jurisprudence to develop rules, sits uneasily both with the principle of legality

[45] "According to Ken Roberts, there is no doubt that denying the judges of the ICC the power to make rules was the result of a conscious decision. … [T]he antipathy to judge-made rules was in part the result of a perceived difference in circumstances between the permanent court and the *ad hoc* Tribunal. Roberts repeats the reason often given for the substantial powers and the flexibility granted to and exercised by the judges of the ICTY – this being the unique nature of the Tribunal and the unforeseen circumstances for which the Tribunal could not be fully prepared. Roberts writes that the ICC, having had the benefit of the ICTY experience, is less likely to require the same volume of amendments. Article 51 of the ICC Statute reflects a desire by the drafters to establish certainty in procedure to the benefit of the parties to the proceedings (…)" K Roberts, 'Aspects of the ICTY Contribution to the Criminal Procedure of the ICC' in R. May; D. Tolbert & J. Hocking (eds) *Essays in ICTY Procedure and Evidence in Honour of Gabrielle Kirk MacDonald* (2001) 569 at 575-6.

[46] B. Broomhall "Article 51: the Rules of Procedure and Evidence", Commentary on the Rome Statute of the International Criminal Court (Triffterer, ed., 1999), pp. 681–683.

[47] B. Broomhall, *op. cit*., p. 686.

[48] B. Broomhall, *op. cit*., p. 689.

and the desire of the drafters of the Statute to leave final approval of the Rules to States Parties".[49]

45. In conclusion, the existence of fixed rules is essential in order to establish foreseeability and certainty in criminal proceedings in accordance with the legality principle.[50] Hence, the Pre-Trial Chamber erred in extending by analogy the provisions of article 64 of the Statute and rule 136 of the RPE to the pre-trial phase and circumventing the specific rules (namely, the regime provided for under article 51(3) of the Statute) applicable in the matter[51] and thus violated the principle of legality.

**5. Prejudice caused to Mr Ngudjolo and the legality principle**

46. Mr Ngudjolo's Defence draws the attention of this Court to the highly prejudicial effect such joinder with Mr Katanga's case could have on his Defence. As Leipold and Abbasi have rightly pointed out: "An accused who sits at the defense table with other suspects risks being found guilty by association, especially if his co-defendants have stronger evidence offered against them. In a joint trial, the jury will be exposed to "spillover evidence," which might consist not only of information about the co-defendants' crimes (which is bad enough), but also evidence of the defendant's own other bad acts, which now come to the jury's attention through the case against the co-defendants. In addition, joinder of multiple defendants introduces the risk of confusing jurors as to which evidence applies against which suspect, a risk that grows worse as the number of defendants increases. Co-defendants may present antagonistic defenses or make different decisions about

[49] B. Broomhall, *op. cit*., p. 689.

[50] At 572: "The rules are important in that the establishment of judicial norms, procedures and jurisprudence at the ad hoc international criminal tribunals develops principally through its rules and case-law." At 588: "The principle of legality requires rules to be fixed, clear and certain." In Mia Swart, '*Ad Hoc* Rules for *Ad Hoc* Tribunals? The Rule-Making Power of the Judges of the ICTY and ICTR' (2002) 18 *S. Afr. J. on Hum. Rts.* 570.

[51] Indeed, it is clear from the decision that the Pre-Trial Chamber did not take into consideration article 51 of the Statute. See page 5 of the impugned decision: "NOTING articles 21, 61, 57, 58, 60, 61 64(5), 67 and 68 of the Rome Statute ("the Statute") and rules 86, 121, 122, 123, 124 and 136 of the Rules of Procedure and Evidence ("the Rules")".

whether to testify, making distinctions among the defendants stark. Co-defendants who take the stand are often sorely tempted to point the fingers at others, confronting a defendant with an additional layer of accusation he would not have faced had he been tried separately."[52] And "[T]here is almost no advantage to the accused in being tried jointly. The ability of the joined defendants to pool their resources and hire common counsel may provide a slight benefit, but even here, the risk of creating a problematic conflict of interest is great. In short, if given the choice between a trial with other defendants and being tried alone, it appears that a high percentage of suspects would choose the latter".[53] While Charles Alan Wright makes the point: "[It] seems strange that one presumably innocent may be made to undergo something less than a fair trial, or that he may be prejudiced in his defense if the prejudice is not 'substantial,' merely to serve the convenience of the prosecution and the efficiency of the judicial system."[54]

47. It should furthermore be pointed out that, as a result of the decision to join the cases, Mr Mathieu Ngudjolo's Defence does not have equality of arms with Mr Katanga's Defence, which has been working on the case for several months; this is not the case for Mr Ngudjolo's newly constituted Defence team. It is only at the trial stage and not at the pre-trial stage that a decision may be taken to join proceedings, when it may then be necessary for the proper administration of justice. At this stage of the proceedings, the interests of justice require that the cases of Germain Katanga and Mathieu Ngudjolo be severed.

48. Lastly, the Defence submits that the issue of joinder is, on account of its potential prejudicial impact on Mr Ngudjolo, a substantive rule subject to the principle of legality, and hence cannot be ordered at the whim of the Pre-Trial Chamber.

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[52] Andrew D. Leipold, Hossein A. Abbasi, 'The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study' (2006) 59 *V and L. Rev.*, p.357-358.
[53] Andrew D. Leipold, Hossein A. Abbasi, *op. cit*., p.359.
[54] Andrew D. Leipold, Hossein A. Abbasi, *op. cit.*, p.361.

**Closing Remarks**

49. Concurrently with this appeal, Mr Mathieu Ngudjolo's Defence further requests that the Appeals Chamber apply article 82(3) of the Statute and rule 156(5) of the RPE regarding the suspensive effect of an appeal.

50. Such suspension is required in respect of the joinder of the proceedings against Mr Ngudjolo and Mr Katanga, inasmuch as a review of the joinder challenged by Mr Ngudjolo's Defence raises significant issues, both in relation to the safeguarding of Mr Ngudjolo's rights as a suspect and on account of the impact that a severance of the proceedings may have on the subsequent proceedings in his case.

51. The basis for a suspension of the joinder of proceedings pursuant to article 82(3) of the Statute and rule 156(5) of the RPE is entirely consistent with the reasoning set out in the various grounds submitted by Mr Ngudjolo's Defence in this appeal. Accordingly, such suspension is warranted in order to guarantee the effectiveness of the appeals procedure.

**FOR THESE REASONS,**

The Defence respectfully requests the Appeals Chamber to:

– declare that this appeal has suspensive effect on the ongoing proceedings,

– rule that the first ground of appeal raised by the Defence is well-founded, in that the presumption for joint proceedings in the cases of Germain Katanga and Mathieu Ngudjolo, inferred by the Pre-Trial Chamber from Article 31(1) of the Vienna Convention, violates the principle of legality, being inconsistent with articles 64(5) and 51(3) of the Statute and rule 136 of the RPE; and

– reverse the decision to join the cases of Mr Ngudjolo and Mr Katanga and order that their cases be severed.

And justice shall be done.

**[signed]**

**Mr Jean-Pierre Kilenda Kakengi Basila**

**Permanent Counsel for the Defence of Mr Mathieu Ngudjolo**

Dated this 21 April 2008

At Brussels, Belgium