Case Comment

Decision on the Defence Request Concerning Languages, Prosecutor v. Katanga, Case No. ICC-01/04-01/07, P-T. Ch., 21 December 2007,

Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", Prosecutor v. Katanga, Case No. ICC-01/04-01/07 (OA 3), A. Ch., 27 May 2008,

Decision Implementing the Appeal Chamber Judgment concerning Languages, Prosecutor v. Katanga and Ngudjolo Chui, Case No. ICC-01/04-01/07, P-T. Ch., 2 June 2008.

The right to a fair trial can only be fully guaranteed if the accused is able to follow and understand the written and oral parts of the proceedings. Thus, the right to an interpreter and translation, in cases where the accused's competency of the court language is not sufficient, is absolute central to the right to a fair trial. Indeed, as the Appeal Chamber states, it is the *sine qua non* of the trial, even if the accused is legally represented. This is especially true for the ICC which, unlike criminal courts in many civil law countries, does not allow for a trial *in absentia*. Considering the complexity of the cases, it will often be difficult even for a native speaker to understand all aspects of the various substantive and procedural issues. To expect an accused to follow in a second or third language rather than their mother tongue, particularly in light of the gravity of the accusations, has to be the exception.

It is, therefore, not surprising that the drafters of the ICCStatute, if not granting the right to choose an interpreter, at least set the language competency below which such request should be granted, at a level higher than in other international legal instruments. The Appeal Chamber was therefore right to require a very high standard of language competency.

Considering the importance and centrality of this right, it is astonishing that the Pre-trial Chamber initially rejected the request. Even if there was good evidence that Germain Katanga had a sound knowledge of French, one has to ask whether he would have asked for an interpreter if he had not genuinely believed that he needed one. The only possible explanation for an unnecessary request would be intention to abuse the procedure, of which there was no indication in this case. Furthermore, the extent of the ability to understand and speak a language is very difficult to determine objectively and, as the Appeal Chamber stated, the accused is in the best position to evaluate his own language competency. If the accused strongly feels that he does not have a full understanding of the language, it is questionable as to whether a fair trial could be guaranteed, even if the chamber did not agree with this evaluation. Therefore it is to be welcomed that the Appeal Chamber clarified that, if there is doubt about the accused's language competency, the court should decide in the accused's favour.

The Appeal Chamber went too far, however, in setting out a negative three-tiered test, according to which a request should be granted, unless it is absolutely clear on the record that;

1) the person *fully* understands
2) *and* speaks one of the working languages of the court

3) and is abusing his or her right under Article 67 of the Statute.[1]

There is no legal basis in the ICC Statute for this "good faith" requirement of absence of abuse. The Appeal Chamber relied instead on a footnote of the Working Group on Procedural Matters, which had not been incorporated in the final text. Likewise, the proposal to include a right to free interpreting in the ICC Statute had been rejected at the Rome conference. According to Articles 67(1)(a) and (f), it is the court who has to determine whether the accused's language capabilities are sufficient to secure their right to a fair trial. Even though the accused should be given the benefit of doubt, they do not have a right to request this service, whether there is suspicion of abuse or not. It seems that the Appeal Chamber has given too much consideration to the fact that these proposals were made, rather than to the fact they have later been rejected.

Furthermore, it is debatable whether such an additional good faith element is preferable. It assumes that there might be cases where the accused's competency is not sufficient, but because the accused is not acting in good faith, their request should not be granted. On the one hand, it is difficult to imagine a case where abuse of this right can be proven, as long as the accused claims he does not feel sufficiently competent in the language in question. Furthermore, the only possible scenario of abuse is where the accused makes such a request in order to cause extra cost, and more likely, further delay. Considering, however, the importance of the right to interpretation, it has to be asked whether the ICC could reject such a request where the accused falls below the required language competency, even if abuse of procedure is suspected. The accused who tries to abuse his defendant's rights still needs to be granted all essential procedural safeguards.

By the time the case was referred back to the Pre-Trial Chamber, the Single Judge had no real choice but to grant the request, without any further thorough determination of the language capacity of the accused. A new examination of the evidence would have risked depriving Katanga and the co-accused, Mathieu Ngudjolo Chiu, of their right according to Article 61(1) ICC Statute to have the confirmation hearing held within a reasonable period after their surrender to the court. As a result, eight months after his initial appearance, in which Katanga explained "I do not speak French fluently, and sometimes it is difficult for me to understand and […] difficult for me to express myself", it was finally decided that the provisional facilities for interpreting into Lingala would be maintained until the end of the proceedings. The question of interpreting from French into Lingala proved to be a long and costly procedure, which could have been avoided if the Pre-Trial Chamber had given more weight to the fact that this right is one of the cornerstones of any trial that takes place in a foreign country. Nevertheless, the clarification of the definition of the required standard of the Appeal Chamber is welcome, as this question is likely to be relevant in many future cases.

In an interesting postscript, on 26 September 2011 the Registrar issued an observation to the court and voiced her "total surprise" after the defence had confirmed via email on 22 September

[1] ICC, Judgment on the Appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07 (OA 3), A. Ch., 27 May 2008, in this volume PAGINA, par 61.

2011 that Katanga would testify in French after all.[2] She expressed her dismay about the resource implications of providing interpretation services into Lingala. The difficult and lengthy recruitment and training process of the interpreters brought the costs for interpretation for Katanga to a total amount of €750,000, which seems in hindsight to justify the Pre-trial Chamber's initial rejection of the request.

In the end however, the defence is correct in asserting that "inconvenience arguments" should not play a role when the appellant's fundamental rights are at stake. The Appeal Chamber therefore correctly reiterated the Pre-Trial Chamber's prime responsibility of ensuring the accused's procedural safeguards, rather than keeping the costs down.

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[2] ICC, Registrar's observation on the language used by Germain Katanga for testimony, Case No. ICC-01/04-01/07, 26 September 2011.