Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/07**
Date: **27 March 2009**

TRIAL CHAMBER II

Before: **Judge Bruno Cotte, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI

Public Document

Prosecution's Observations on the Possibility to Examine Matters of Relevance and Admissibility before the Start of the Evidential Hearings

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga
Mr David Hooper
Mr Andreas O'Shea

Counsel for the Defence of Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims
Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Vincent Lurquin
Mr Jean Chrysostome Mulamba Nsokoloni
Ms Flora Mbuyu Anjelani
Mr Fidel Nsita Luvengika

Mr Joseph Keta
Mr Jean-Louis Gilissen

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Background

1. In its *Order Concerning the Presentation of Evidence and the E-Court Protocol* of 13 March 2009 (the "Order"),[1] Trial Chamber II ("the Chamber") invited the Prosecution and the Defence to submit their observations on the possibility of the Court "examining all issues of relevance and admissibility, which are already known to the parties, before the start of the trial on the merits."[2] For the reasons set forth below, the Prosecution agrees that some issues of admissibility can be considered before the start of trial. It submits however that there is no statutory rule that all issues of relevance can or should be determined before trial.

2. The Prosecution has disclosed to the Defence all of the incriminatory evidence that can currently be disclosed and on which it intends to rely at trial. Even without receipt of the Table of Incriminating Evidence, the Defence is thus well-positioned at this stage to articulate objections to at least some of the evidence.

3. The Prosecution further submits that the Chamber has the authority to resolve some admissibility challenges prior to trial, but not necessarily for the reasons that the Chamber suggests. In particular, the Prosecution disagrees that the Chamber's authority is triggered by the filing of anticipated evidence with the Chamber in connection with the analytical table.[3] As the Chamber explained, the filing of the materials is designed to help the Chamber and the Defence prepare before trial begins; the Chamber stated that the requirement of advance filing is designed to enable the

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[1] ICC-01/04-01/07-956.
[2] *Ibid.* at para. 37.
[3] The Prosecution respectfully reminds the Chamber that it has applied for leave to appeal the Order, on the issue of the timing of a chart analyzing its incriminatory evidence and the required analytical content. See ICC-01/04-01/07-982. But because it is the Prosecution's view that evidence need not be "submitted" before the Chamber may consider challenges to admissibility, the pending appeal does not affect the Prosecution's position with respect to this issue.

Chamber to "fulfil[] its responsibilities and obligations regarding the preparation of the trial." (see Order, para. 24).

4. In the Prosecution's view, evidence is "submitted" when it is offered at trial, not when it is provided before trial to the opposing party or the Chamber. Accordingly, Rule 64(1)'s requirement that objections be raised at the time evidence is submitted applies at trial, when evidence is offered, not before trial when materials are preliminarily disclosed to the Defence and filed with the Chamber.

5. However, Rule 64(1) does not *bar* earlier consideration of evidentiary questions. The Rule merely requires the parties to make timely objections when evidence is submitted. Nothing in its language or purpose, however, appears to prohibit the Chamber from entertaining earlier evidentiary challenges, where feasible, before the evidence is formally submitted.[4]

6. Trial Chamber I, in *Prosecutor v. Thomas Lubanga Dyilo*, addressed this issue and concluded:

> "As regards timing when an issue concerns relevance or admissibility, Rule 64 of the Rules stipulates it "must be raised at the time when the evidence is submitted to a Chamber" and, unless otherwise ordered, it is to be set out in writing. Given this requirement for written notice and the need for the court to set a timetable that will secure a fair and expeditious trial, the Chamber is unpersuaded that issues relating to relevance or admissibility shall only be raised at the moment the evidence is presented. This is the last moment at which these points should

[4] In some systems this is referred to as a «motion in limine», which is defined as «a pretrial request that certain inadmissible evidence not be referred to or offered at trial». Black's Law Dictionary, 791 (7th ed. 1999).

be raised, but the Chamber is entitled to set a timetable requiring earlier identification of any contentious matters."[5]

7. Thus, the Prosecution has no objection to the possibility of pre-trial determination of some admissibility issues. In its Order the Chamber noted some legal issues with respect to admissibility of evidence that were raised before Pre-Trial Chamber I (see Order, para. 31), many of which are the sorts of claims that may appropriately be considered before the start of trial: for example, the admissibility of (a) evidence obtained during a search, (b) uncorroborated statements from anonymous witnesses, or (c) statements from minors, are purely legal issues or issues dependent on uncontested and uncontestable facts, and thus could be capable of pre-trial resolution. At the same time, however, preliminary rulings on the admissibility of evidence should be only regarded as that – preliminary rulings – that can be subject to reconsideration at trial on the presentation of additional facts.[6]

8. Not all questions may be adequately considered before trial. Challenges to authenticity, reliability, probative value, or relevance of evidence, for example, appropriately should be considered against the backdrop of an adequate factual record at the trial.

[5] ICC-01/04-01/06-1235 at para. 36.

[6] For example, assume hypothetically that the Chamber would rule information originating from a prospective witness, now deceased, is inadmissible as a matter of law since its reliability cannot be established. At trial a witness testifies that he was present during the event about which the deceased gave information, substantiates the information, and also establishes that person's unblemished reputation for veracity. The Chamber may then be obliged to reconsider the exclusion of the deceased person's evidence, in light of the new information corroborating its reliability.

9. As some admissibility challenges may be capable of pre-trial resolution, the Prosecution agrees that the Chamber may consider setting a schedule for the identification of known and knowable evidentiary challenges. If the challenges are suitable for resolution before trial, the Court may appropriately consider them.

Luis Moreno-Ocampo, Prosecutor

Dated this 27th day of March 2009

At The Hague, The Netherlands