



Original: English

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

Public Document

Defence Response to the Prosecution's Application for Leave to Appeal the "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol"

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain Katanga

Mr David Hooper
Ms Caroline Buisman

Counsel for the Defence for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Ambuyu Andjelani

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

A. Introduction

1. On the 13th March 2009, the Trial Chamber issued its Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol.¹ This order required the Prosecution to produce a table containing the charges as well as the factual underpinning of those charges and in the same table to link to incriminating evidence to these charges. On the 19th March 2009, the Prosecution applied for an extension of time for this exercise, while informing the Trial Chamber in a footnote to that request that it was in fundamental disagreement with its Order and would be seeking leave to appeal the Order.² On 23rd March 2009, the Prosecution filed the Prosecution's Application for Leave to Appeal the "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol" (« Prosecution Application for Leave to Appeal »).³ In this motion the Prosecution seeks leave to appeal the Chamber's Order of 13th March 2009, arguing that the issues raised by it fulfil the criteria as set out in Article 82(1)(d).
2. The Defence for Mr Germain Katanga (« Defence ») opposes the said application. The Defence concedes that the issues involved are ones which significantly affect the fair and expeditious conduct of the trial, but suggests that the Trial Chamber should not be of the opinion that an immediate resolution by the Appeals Chamber may materially advance the proceedings, as required by Article 82(1)(d) of the Statute.

B. The issues raised for determination by the Appeals Chamber

3. The Prosecution seeks leave to appeal two issues arising out of the Trial Chamber's decision. The first issue is articulated as being 'whether the Prosecution may be required to present all its incriminating evidence and its list of witnesses many months in advance of the trial and without reasonable certainty as to the actual trial date'. The second issue is stated to be 'whether the Prosecution may be required to create and provide to the Chamber and the Defence a detailed element-by-element

¹ ICC-01/04-01/07-956.

² ICC-01/04-01/07-969, Prosecution's Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", footnote 3.

³ ICC-01/04-01/07-982.

analytical chart for all the evidence it intends to use during the trial.’ These issues are addressed cumulatively for the purpose of the Prosecution’s argument on whether immediate resolution may materially advance the proceedings.

C. Arguments on whether an appeal at this stage will materially advance the proceedings

Prosecution arguments

4. As to the Prosecution’s case for saying that an appeal will materially advance the proceedings, the Prosecution advances three arguments under its subheading in this respect. First, it submits that the error and the risk of ensuing prejudice should be cured before it affects the integrity of the upcoming proceedings. Second, it submits that it is important that the Trial Chamber’s errors be remedied before preparations go permanently off course. The third argument consists of saying that there will be inconsistency between the practice of this Trial Chamber and that in the *Lubanga* case.
5. The Defence does not consider that the Prosecution has demonstrated how the third argument goes to the material advancement of proceedings in this case. The mere fact that an issue is of general interest, or that given its overall importance, could be raised in or affect future proceedings is not sufficient to warrant leave to appeal.⁴ The novelty of an issue is not a justification for granting leave to appeal.⁵
6. It appears to the Defence that the first two arguments are essentially the same in that they address the prejudice caused by an incorrect procedure being adopted.
7. The Prosecution has not identified what prejudice it will suffer if what it considers to be the wrong procedure is followed. However, it does indicate in its introduction that it feels that the balance between the Prosecution and Defence has been disturbed⁶. It

⁴ *Situation in Uganda*, No. ICC-02/04, *Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58* (19 August 2005) at para. 21

⁵ *Situation in Uganda*, No. ICC-02/04, *Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58* (19 August 2005) at para. 55

⁶ Prosecution Application for Leave to Appeal, para 3

further indicates in its summary of the issues that the Chamber cannot restrict its right to add evidence excessively in advance of trial and before a concrete trial date has been set.⁷

8. In the Defence submission the Prosecution suffers no prejudice from reserving its complaint about the procedure adopted by the Trial Chamber to a later time. Its argument concerning the balance between the Prosecution and the Defence is misconceived. The Chamber's order addresses the issue of notice to the Defence of incriminating evidence; this is not a question of balance at all. There is no accused on the side of the Prosecution and the table requested by the Trial Chamber addresses the issue of notice to the accused.
9. To the extent that the Prosecution has invited the Trial Chamber to consider the question of balance, it should not be forgotten that, while the Defence counsel was appointed in November 2003, the Prosecution has been investigating the situation in Ituri at least since 19th April 2004 and the accused alleged involvement in Bogoro since 25th June 2007 when it sought a warrant of arrest, or before. More importantly, it is the Prosecution itself which accepts that it is ready for trial, and there is no legitimate reason to hold back giving proper notice to the accused of the nature and scope of the Prosecution case against him.
10. The Prosecution's point about restriction of its freedom to add evidence is also misconceived in so far as it is designed to assert prejudice and in particular in so far as determining whether it is appropriate to have an immediate resolution of the issues at hand by the Appeals Chamber.
11. The Prosecution must understand that it is expected to know its case well before the commencement of trial and it should not think that it can shape its case as the evidence unfolds. That notwithstanding, the Chamber has not in fact restricted the Prosecution's ability to find new evidence or to seek its admission. The Prosecution must only seek leave to add such evidence into the trial. This is simply a means of monitoring the fairness of the introduction of evidence late and without the Defence having prior notice. If the Prosecution can satisfy the Chamber that the evidence falls within the charges, that it has acted diligently, that the Defence has adequate

⁷ Prosecution Application for Leave to Appeal, para 4

notice and will not be prejudiced then such leave will not be arbitrarily refused. If it is refused in a manner which is unfair then the Prosecution can seek leave to appeal at that time, and it is not necessary at this stage to deprive the defence of a document containing a concise exposition of the Prosecution's case simply because the Prosecution does not like the form in which this is being requested. There is accordingly neither justification nor urgency relating to this assertion of a restriction on the Prosecution's freedom.

12. The collateral issue about the alleged excessive length of time prior to trial and the non-fixing of a trial date are red herrings. By the Prosecution's own admission it is ready for trial. Therefore, there can be no prejudice in providing the Defence an analysis of the results of its investigations. The Defence should be provided with as much facility as possible to prepare its defence. In any event, even if a specific date has not been fixed, the accused remains in detention and it is obvious that this decision cannot over-stretch. Even if a date has not been fixed, it is clear to all that a date will be fixed imminently and will fall within the scope of discussions already conducted between the parties and the Chamber, that is at the very least within a reasonable time following the end of the judicial recess.
13. The Defence submits that Prosecution raises no serious issues of prejudice demonstrating that an appeal will materially advance the proceedings. An interlocutory decision can only be appealed in exceptional circumstances and to avoid irreparable prejudice to the appellant.⁸ No prejudice has matured in this case and therefore the application is premature. As and when the Chamber wrongly refuses leave, leave to appeal may be sought.

An Appeal now may be an Impediment to the advancement of proceedings

14. In the Defence submission, to allow the Prosecution to appeal the production of the document which is going to form the basis of the Defence notice of the prosecution's case, may, far from advancing the proceedings, slow them down while the Prosecution seeks the resolution of this issue before the Appeals Chamber. In the

⁸ *Prosecutor v Lubanga Dyilo*, No. ICC-01/04-01/06, *Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges* (24 May 2007) at para. 28

event that the Appeals Chamber feels that the Trial Chamber has adopted an incorrect procedure then the date for the commencement of the trial will inevitably have to be postponed to ensure that the Defence is given notice of the prosecution's case in another form.

15. It is not necessary to have this question resolved immediately because the Prosecution can continue to investigate its case and the Defence can be given proper notice of its case so far. The issues raised by the Prosecution to challenge this procedure do not in the Defence submission raise any questions of imminent prejudice, but to use them with the effect of delay in providing the Defence with a finalised and comprehensive document containing the nature and scope of the Prosecution case may cause imminent prejudice to the Defence and the accused right to a right without undue delay.

Link between issues for appeal and the material advancement of proceedings

16. The Prosecution is ready for its case and in a position to provide the table requested. Furthermore, nobody is preventing it from pursuing its investigations. Thus, its first issue of appeal raising questions over being required to do things in the absence long before the time from trial and without certainty over trial date have theoretical and not material implications for the advancement of the trial. If it has difficulty with completing the task in the time allotted its remedy is to ask for an extension of time which it has done. The issue of the trial date will in any event soon become moot.
17. In any event, it should be noted that the first issue as expressed is not an issue in this case since it must be evident to all parties that we are not 'many months' before trial. Therefore, such ground as stated does not even form a proper basis for a request for leave to appeal and its determination cannot therefore have any material impact on the advancement of the trial.
18. The second issue about whether a Prosecutor can be required to provide a detailed analytical chart goes to *form* rather than *substance* and therefore cannot have material implications for the advancement of trial. It is trite law that the Defence

must have proper notice of the case against it and this is essentially what is being requested from the Prosecution.

19. Issues of form with respect to well-established issues of substance would not normally, in the Defence submission, lead to serious debate over the form and prejudice resulting there from. The issue of whether resolution by the Appeals Chamber may materially advance the proceedings requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Trial Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue.⁹

ACCORDINGLY:

The Defence invites the Trial Chamber to accept that an appeal in terms expressed by the Prosecution on the form of notice to the Defence as outlined in its decision of 13th March 2009 would not materially advance the proceedings and therefore to dismiss the Prosecution application for leave to appeal the said decision.

Respectfully submitted,



David HOOPER

Dated this 27 March 2009

At The Hague

⁹ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO* (11 December 2003) at para. 6; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Application for Certification Concerning Defence Cross Examination After Prosecution Cross Examination* (2 December 2005)