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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 Observations on the possibility to examine all matters of relevance and
admissibility before the start of the trial on the merits**

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

Introduction

1. Pursuant to the Trial Chamber's *Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol*,¹ the parties are invited to submit their observations on "the possibility to examine all matters of relevance and admissibility before the start of the trial on the merits". The Defence hereby presents its observations on this issue. The Defence opposes the admissibility scheme proposed by the Trial Chamber for the reasons set forthwith.

Threshold of admissibility

2. The Defence agrees with the Chamber that it must evaluate each challenge to admissibility of proposed evidence "on its individual merits, taking into account the specific characteristics and provenance of the item of evidence that is being challenged".² However, the Defence does not agree that the Chamber may only rule evidence inadmissible where a party challenging the evidence has established "specific and substantial grounds that could reasonably lead the Chamber to find that the item of evidence in question is epistemologically unsound³ or that its admission would be prejudicial to the fairness or integrity of the proceedings in the sense of article 69(4) or (7)".⁴
3. On this interpretation of the Statute and Rules, there is a presumption in favour of admissibility which can be rebutted only where a party seeking to challenge the admissibility of a particular item provides the Chamber with cogent arguments against its admissibility because such would be 'epistemologically unsound' or prejudice the fairness or integrity of the proceedings. This contrasts the approach taken by ICC Chambers which have previously dealt with matters of admissibility.
4. It is clear from Rule 64 itself that the evidence can be challenged on lack of relevance. Indeed, in *Lubanga*, the Trial Chamber held that it "must ensure that evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused".⁵ It

¹ ICC-01/04-01/07-956, p. 19, issued publicly on 13 March 2009.

² *Ibid*, para. 35.

³ The Defence confesses to not understanding the meaning of the phrase 'epistemologically unsound'.

⁴ ICC-01/04-01/07-956, para. 35.

⁵ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June, 2008, ICC-01/04-01/06-1399, para 27.

further held that, in order to be admissible, the evidence sought to be introduced must have probative value,⁶ and be reliable.⁷

5. In addition to being satisfied of the relevance and probative value of the evidence, the Chamber in Lubanga has held that it “must, where relevant, weigh the probative value of the evidence against its prejudicial effect.” In doing so, “the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber’s fair assessment of the issues in the case.”⁸
6. This approach is consistent with the practice that has been adopted in all ad hoc International Criminal Tribunals, pursuant to which a party seeking to admit evidence must demonstrate, on an individual basis but in the context of the proceedings, that the evidence has indicia of relevance, probative value and reliability.⁹
7. The fact that evidence must be relevant, probative and reliability in order to be admissible, demonstrates that the ICTY and ICTR have higher demands of evidence for it to be admitted than those proposed by this Chamber being that, for it to be admitted, evidence must not be epistemologically unsound or prejudicial to the fairness or integrity of the proceedings.
8. The Defence respectfully submits that there is good cause for following the practice of the ICTY and ICTR in respect of admissibility of evidence. If a vast amount of evidence is admitted that is barely relevant to the charges against the accused, the Defence case will become larger as a result, as it may be considered negligent for the Defence not to address matters introduced in the Prosecution case, no matter how irrelevant. The Defence cannot predict with certainty that the Chamber will not rely on

⁶ *Ibid*, paras 29, 37-38.

⁷ *Ibid*, paras. 39-40; also see Prosecutor v. Katanga & Ngudjolo, Decision on the confirmation of charges, 30 September, 2008, ICC-01/04-01/07-717, paras.112, 165.

⁸ Prosecutor v. Lubanga, Decision on the admissibility of four documents, 13 June, 2008, ICC-01/04-01/06-1399, para 31; also para. 41; also see Prosecutor v. Katanga & Ngudjolo, Decision on the confirmation of charges, 30 September, 2008, ICC-01/04-01/07-717, para. 165.

⁹ See Rule 89(C) of the ICTY and ICTR Rules of Procedure and Evidence. Rule 89(C) does not specifically mention the requirement of reliability, but jurisprudence has made it clear that indicia of reliability must be demonstrated at the admissibility stage. See, *inter alia*: Prosecutor v Milutinovic et al, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September, 2006, para. 9; Nyiramasuhuko v Prosecutor, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October, 2004, para. 7; Prosecutor v Ntagerura et al, Appeal Judgement, 7 July, 2006, para. 273).

irrelevant or unreliable evidence, and a failure of the Defence to challenge such evidence may result in a waiver of appeal.

9. The Chamber is further not assisted by deferring the questions of relevance, probative value and reliability almost in their entirety to the deliberation stage when it is to determine the weight of the evidence in context of the totality of the evidence. Cases before international criminal courts tend to be voluminous and rely on a massive amount of evidence. If there is no minimum test of relevance, probative value and reliability, the Chamber risks losing its focus on the central issues in the case and getting side tracked into the overwhelming amount of side issues that are barely relevant to the specific allegations in the document containing the charges. For the Chamber not to lose its overview of the case, a threshold to admissibility of evidence should be welcomed.
10. Indeed, even if the Chamber seeks to avoid a congestion of the trial proceedings by having lengthy discussions on admissibility as the trial proceeds, giving matters of admissibility appropriate consideration during the proceedings and allowing admission of evidence only which has indicia of relevance, probative value and reliability would save a lot of time at the deliberation stage. Hence, any delay that may be caused by considering challenges to admissibility of evidence at trial will be ultimately fully compensated at the end of trial.
11. The Defence requests that the Trial Chamber adopt these principles of admissibility and consider with appropriate care whether evidentiary items should be admitted.

Timing of challenging admissibility

12. Pursuant to Rule 64, “an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber”. The Chamber has interpreted this to mean that such admissibility challenge must be brought “within a reasonable delay” when an item of evidence is included in the Table of Incriminating Evidence to be submitted by the Prosecution on 3 April 2009¹⁰ because that is when the evidence is being ‘submitted’ to the Chamber.¹¹

¹⁰ ICC-01/04-01/07-956, p. 17. It should, however, be noted that the Prosecution has filed an application for leave to appeal this Decision (ICC-01/04-01/07-982, Prosecution’s Application for Leave to Appeal the “Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol”, 23 March 2009). If its Application and subsequent appeal are granted, this position may be altered.

¹¹ ICC-01/04-01/07-956, para. 36.

13. The Defence respectfully disagrees with the Trial Chamber's interpretation of "when the evidence is submitted to a Chamber". Such an interpretation would result in a submission, prior to trial, of the entirety of the evidence the Prosecution intends to rely upon during trial, and its whole-sale pre-trial admission unless it is demonstrated that one or more of the evidentiary items are epistemologically unsound or prejudicial to the fairness or integrity of the proceedings.
14. The Defence objects to such a whole-sale and blanket admission of the Prosecution evidence prior to trial. The Defence submits that this approach is inconsistent with the Chamber's own observation that the admissibility of evidence must be considered "on its individual merits, taking into account the specific characteristics and provenance of the item of evidence that is being challenged".¹² To give full effect to this observation, the admissibility of each item sought to be admitted must be considered individually on its merits and relevance to the case. It is respectfully submitted that matters such as relevance, probative value and reliability cannot be considered in the abstract but can often only be adequately tested contextually in the course of the trial when introduced at an appropriate and relevant time. It will be difficult, if not impossible, for the Chamber to properly assess the requirements of at least indicia of relevance, probative value and reliability of all the proposed paper evidence now before having heard a single witness on the relevant matters.
15. Indeed, although not an absolute requirement that evidence be admitted through a witness,¹³ in certain situations evidentiary items may not be admissible in the absence of a witness who can properly explain their relevance or reliability to the Chamber.¹⁴ For instance, a piece of paper with scruffy notes may, on its surface, not have one bit of relevance or probative value, but if the author of the notes is called to testify to explain its meaning in the context of the case, the piece of paper must be regarded in a different light. Even if the admissibility is not affected by the absence of any explanation of the author of the evidentiary item or another person who is familiar

¹² *Ibid*, para. 35.

¹³ Prosecutor v Hadzihasanovic & Kubura, Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic, 22 June, 2005, paras. 33-35; Prosecutor v Oric, Trial Judgement, June 30, 2006, para. 29.

¹⁴ See, for instance, Prosecutor v Mrskic et al, Decision on Motion to Reopen Prosecution Case, 23 February, 2007; Prosecutor v Delic, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January, 2008, para. 14.

with its content, the weight of the item in question cannot be properly assessed in the abstract without an opportunity to question such a person.¹⁵

16. At present, there is no guarantee that the witnesses scheduled to testify in relation to whom the Prosecution intends to tender its evidentiary items will in fact testify. Witnesses often change their minds about testifying in the course of time. This may occur at the ICC with particular frequency given that the Court has no power of subpoena. Thus, evidentiary items that may presently be submitted and admitted may appear to have no value if the relevant witnesses never show. The Defence therefore submits that the proposed submission and admission of the entirety of the evidence prior to trial would be premature.
17. It may not be possible for the Defence to determine its position on the admissibility of evidentiary items at such an early stage when it cannot place it in the context of witness testimony. The Defence maintains that, in many situations, it cannot determine the relevance and importance of a particular evidentiary item prior to being given an opportunity to question the relevant witness(es) on this item.
18. The Defence may further lack the information to challenge the admissibility of evidence at this stage. For instance, elements which raise question marks regarding the reliability of a particular evidentiary item may only come to light in the course of the trial.
19. There may also be strategic reasons not to challenge challengeable evidence or not at this moment. Such strategic reasons may change over time depending on the conduct of the parties and proceedings. Objections are contextual depending on all circumstances of the case.
20. The Defence is not in a position and does not have the resources to go through each and every item of evidence which the Prosecution may or may not use and evaluate its admissibility prior to trial. This would be an overwhelming task which would substantially interfere with the preparations for trial.

¹⁵ As recognised in *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, September 30, 2008, ICC-01/04-01/07-717, para. 109 & para. 194, the weight of evidence may be affected by a lack of opportunity to cross-examine the relevant witness. Also see: *Prosecutor v Hadzihasanovic & Kubura*, Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic, 22 June, 2005, paras. 33-35; *Prosecutor v Oric*, Trial Judgement, 30 June, 2006, para. 29, where it was stated that documents introduced without authentication by a witness will generally be accredited less probative value than documents introduced through a witness.

21. For all of those reasons, the Defence does not wish to be held to a position it has taken in the absence of any knowledge of how the trial proceedings will be conducted and how the case against Germain Katanga will develop.
22. The Defence is further of the view that the wholesale admission of such a large number of evidentiary items prior to trial is not a time-saving exercise. This submission is in line with the ICTR Chamber's view expressed in *Karemera et al*, which held that the wholesale admission of lengthy documents on the basis of general pleadings as to their relevance would normally impede the expeditiousness of the proceedings and impose a heavy burden on the Chamber and opposing parties.¹⁶ Experience has shown that the quantity of evidence actually used and forming part of the record for the purposes of reaching judgment is often substantially smaller than the quantity of evidence originally disclosed to the Defence.
23. In light of the above arguments, it is respectfully submitted that the appropriate time to consider those matters is not now in a wholesale fashion but rather in the course of the trial when the particular evidentiary items are being addressed and their relevance to the case becomes apparent. It is simply not possible to give admissibility matters the attention they deserve in one submission prior to trial.
24. Accordingly, the Defence submits that the Chamber's interpretation of "the time when the evidence is submitted to a Chamber" under Rule 64 as referring to the time of including the items in the Table of Incriminating Evidence is incorrect. To do justice to the Chamber's overall responsibility to ensure that the proceedings are fair and expeditious in accordance with Article 64(2) of the ICC Statute, it would be reasonable and appropriate for the Chamber to interpret "the time when the evidence is submitted" as referring to the moment in trial that particular evidence is being tendered by a party for consideration.
25. The Defence wish to make clear that it has no objection to dealing with some particular admissibility issues prior to trial. These could include, for example, the admissibility issues raised at the confirmation hearing such as the issue of dead witnesses. The Defence is concerned by the views expressed by the Trial Chamber in

¹⁶ Prosecutor v Karemera et al, Interim Order for the Prosecution to Identify Relevant and Probative Passages of Certain Materials it Intends to Tender into Evidence Under Rule 89(C) of the Rules of Procedure and Evidence, 8 August, 2007, para. 12.

paragraph 34 that seeks to limit admissibility arguments in respect of matters previously raised before the Pre-Trial Chamber. It was not the understanding of the Defence, nor the Defence believes the intention of the Pre-Trial Chamber, to limit the Defence's opportunity to have these matters fully reviewed by the Trial Chamber.

Conclusion

26. On the grounds set forth in these observations, the Defence prays the trial Chamber to adopt a careful approach to admissibility, thereby applying the principles set out in Lubanga, and to consider questions of admissibility in the course of the trial proceedings when that particular evidence is being tendered by a party for consideration.

Respectfully submitted,



David HOOPER

Dated this 27 March 2009

At The Hague