

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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 THE CONGO

***IN THE CASE OF
THE PROSECUTOR***

v. Germain KATANGA and Mathieu NGUDJOLO CHUI

**Public Redacted Version
URGENT**

***Prosecution Response to the “Defence Application for Leave to Reply
to the Prosecution Response to Motion Challenging the Admissibility of the
Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)”***

Source: Office of the Prosecutor

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

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Introduction

1. On 10 February 2009, the Defence for Germain Katanga (“the Defence”) submitted its motion (“the Motion”) challenging the admissibility of the case pursuant to Article 19(2) of the Rome Statute (“the Statute”).¹ The Motion was notified to the Prosecution on 25 February 2009.²
2. On 19 March 2009, the Prosecution filed its Response to the Motion, arguing that the case is admissible under the relevant provisions of the Statute.³
3. On 26 March 2009, the Defence filed an Application for Leave to Reply to the Prosecution’s Response.⁴
4. The Prosecution hereby responds to the Application for Leave to Reply. The majority of the Application goes beyond the proper scope of a reply, and in effect seeks leave to supplement the original Motion. However in respect of some of the items annexed to the Prosecution Response which raise new facts regarding the scope of the DRC investigation, the Prosecution does not oppose granting leave to reply.
5. The Prosecution is filing this response on a confidential basis as some of the submissions from the Defence Motion and annexes from the Prosecution Response which it discusses are classified as confidential.

Submissions

6. The Defence first requests leave to reply on the basis that it would “be grateful if it is given an opportunity to clarify its position”, as it considers that “it appears that the Prosecution has misunderstood the arguments of the Defence.”⁵ Nevertheless, the Defence does not provide any indication of such alleged misunderstanding. The Prosecution submits that this broad statement does not entail a proper ground for granting leave to reply.

¹ ICC-01/04-01/07-891-Conf-Exp.

² Reclassified as available to Prosecution and both defence teams by oral decision on Trial Chamber II dated 24 February 2009. A public redacted version of the Motion was filed on 11 March 2009 – ICC-01/04-01/07-949.

³ ICC-01/04-01/07-968-Conf-Exp. A public redacted version of the Response is currently being prepared.

⁴ ICC-01/04-01/07-994.

⁵ Application for Leave to Reply, para. 3.

7. The primary purpose of a reply is to allow a party to address new arguments which have been raised in a response. A party bringing a motion or application before a Chamber is expected to present its argument fully in the first instance. A reply cannot be used by a party to provide additional arguments and clarifications to its original submissions. This would effectively grant the party an open-ended right to supplement its submissions. Finally, the Defence has provided no evidence or examples of the Prosecution's alleged misunderstanding of its arguments and, in any event, whether the Prosecution has properly understood the Defence submissions is a matter for the Chamber to determine.
8. The Defence also seeks leave to reply on the basis that "the Annexes to the Prosecution Response contain documents which have not been disclosed to the Defence earlier", namely documents which "complete the picture of what transpired in the DRC investigations and between the DRC authorities and the ICC Prosecution."⁶ The Prosecution submits that merely because a party brings evidence in rebuttal of that adduced by the opposing party does not automatically lead to a right to reply. Rather, a party seeking leave to reply must demonstrate how the evidence in question raises a new issue (or a new component of an issue), or that the nature of the evidence means that the interests of justice or the proper disposition of the matter require that the party be granted leave to reply.
9. The Defence has failed to make such a showing in this case. Nonetheless, certain documents adduced in the Response – included in annexes I and J - may potentially raise new facts or arguments relevant to the issue in dispute. Despite the Defence's failure to draw any distinction between the relevant annexes or indicate any new matter raised, the Prosecution does not oppose that in respect of these documents only, and the specific submissions of the Prosecution based on these documents,⁷ the Defence should be granted leave to reply.
10. In contrast, the other annexes do not relate to any issue in dispute, and in large part corroborate facts already on the record.⁸ In the absence of any demonstration by the Defence on how these documents raise issues for which a reply is necessary, in the

⁶ Application for Leave to Reply, para. 4.

⁷ See Prosecution Response, paras. 38-39, 42, 48, 50, 94, 109 and 110.

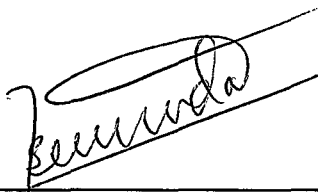
⁸ [REDACTED].

interests of justice or to allow the proper disposition of the matter, the Prosecution submits that leave to reply in respect of these other annexes must be denied.

11. The Defence finally seeks leave to reply on the basis that the Prosecution's Response "engages in new collateral points." The sole new issue which the Defence identified is that the Response "addresses in detail what is the meaning of 'case' under Article 17 of the ICC Statute."⁹ However the question of the proper interpretation of "case" for the purposes of Article 17 was not a new issue: the Defence explicitly raised this matter in its Motion ("The question then, the Defence submits, is what is an appropriate interpretation of 'case'"¹⁰) and discussed it in some detail therein.¹¹ The fact that the Defence failed to present its argument fully, or that the Prosecution has responded to its arguments in more detail than the Defence anticipated, cannot justify granting leave to reply. To grant the Defence leave to reply on this point would impermissibly allow it to supplement its prior submissions.

Conclusion

12. For the reasons set out above, the Prosecution respectfully requests that the Chamber limit the scope of any reply filed by the Defence to annexes I and J of the Prosecution's Response, and that the Chamber deny the Application for Leave to Reply in all other respects.



Fatou Bensouda, Deputy Prosecutor
On behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 27th day of March 2009

At The Hague, The Netherlands

⁹ Application for Leave to Reply, para. 5.

¹⁰ Motion, para. 45.

¹¹ See in particular Motion, para. 43; see also paras. 37 and 42.