



Original: **English**

No.: ICC-01/04-01/07

Date: 25 May 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Prosecution's Response to Defence Request to review or, in the alternative, for
leave to appeal, the Decision on a number of procedural issues raised by the
Registry**

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 for Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for the Defence for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

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. On 14 May 2009, the Trial Chamber issued a “Decision on a number of procedural issues raised by the Registry” (“Decision”),¹ which deals, among other things, with the issue of Lingala interpretation.²
2. On 20 May 2009 the Defence filed a request to review or, in the alternative, for leave to appeal the Decision (“Defence Challenge”),³ in which it challenges the Chamber’s findings with respect to the issue of Lingala interpretation. In particular, the Defence challenges the Trial Chamber’ orders to appoint an expert a) to independently assess Mr Katanga’s level of French and Lingala;⁴ b) to propose an appropriate test to that end;⁵ and c) to report on the accuracy of the interpretation of court proceedings into Lingala.⁶
3. The Defence seeks various remedies against the Decision. It requests the Trial Chamber to clarify matters raised in the Decision; to review its decision in light of the information contained in the Defence Challenge; and, in the alternative, to grant leave to appeal the Decision.⁷
4. The Prosecution submits that for the reasons below, the Defence Challenge should be dismissed in its entirety.

Request for clarification

5. The Prosecution submits that the Decision does not require any clarification. In particular, at this stage there is no need to clarify “whether [the orders contained in the Decision] are to the effect that Mr Katanga subjects himself to such tests as the expert devises, or whether the Court is, at this stage, merely seeking tests to be devised in order for the Chamber then to consider any proposed test before determining whether Mr Katanga be requested or ordered to undergo such

¹ ICC-01/04-01/07-1134.

² Decision, paras. 38-48.

³ ICC-01/04-01/07-1161-Corr.

⁴ Decision, para. 45.

⁵ Decision, para. 48.

⁶ Decision, para. 48.

⁷ Defence Challenge, para. 29.

tests”.⁸ The Registry has clearly been instructed to compile lists of independent and neutral experts who “can assist the chamber in assessing Mr. Katanga’s level in the French language” and who can “advise the Chamber on the quality of interpretation into Lingala and who can assess Mr. Katanga’s command of that language”.⁹ During the process of implementation of the Decision, the Chamber may provide any specification to facilitate that process if the Chamber deems such measure to be necessary. The Defence’s request for clarification should therefore be dismissed.

Request for review

6. The Defence requests that the Trial Chamber review its decision that Mr Katanga submit to tests for French and Lingala and instead order that Mr Katanga receives interpretation in Lingala.¹⁰ The Defence bases this request primarily on factual arguments that purportedly demonstrate that there is no reason to believe that Mr Katanga is “completely fluent” in French.¹¹
7. The Prosecution submits that the Defence’s request for review is premature. The Decision does not constitute a finding on the issue of whether or not Mr Katanga should be provided with Lingala interpretation. With this Decision, the Trial Chamber merely starts the process of obtaining relevant expert information, which will allow it to make an informed decision as to Mr Katanga’s language abilities. This process is fully consistent with the jurisprudence of the Appeals Chamber, according to which “the Chamber must assess, on the facts on a case-by-case basis, whether [...] the accused fully understands and speaks the language of the Court”.¹² The Defence request for review should therefore be dismissed.

⁸ Defence Challenge, para. 4.

⁹ Decision, page 22.

¹⁰ Defence Challenge, para. 29(b).

¹¹ Defence Challenge, para. 29(b), referring to paras. 13-16. On this basis, the Defence argues that the standard set forth by the Appeals Chamber is not met (Defence Challenge, paras. 7-9 and 12).

¹² ICC-01/04-01/07-522 OA3, 27 May 2008, para. 60.

Application for leave to appeal

8. The Defence seeks leave to appeal the Trial Chamber's decision to devise and order tests in French and Lingala, rather than make an immediate order for interpretation of the trial proceedings into Lingala.¹³
9. The Prosecution submits that the Defence application fails to establish the existence of an appealable issue stemming from the Decision and that the identified issue does not meet the criteria under Article 82(1)(d). The Trial Chamber has not made any finding as to whether or not Mr Katanga shall be provided with Lingala interpretation, and accordingly does not affect the accused's right to interpretation.¹⁴ Rather, it has merely taken steps for the purposes of gathering information, which the Chamber deems necessary for the purposes of a proper determination.¹⁵ For the same reasons, the Decision does not deviate from the jurisprudence of the Appeals Chamber,¹⁶ which sets out the criteria to be applied for a decision on a request for interpretation.¹⁷
10. Moreover, to be subjected to language tests does not affect the right of Mr Katanga against self-incrimination or reverse the burden of proof.¹⁸ A determination on whether a person should be granted interpretation in the language that he or she has requested, or a procedural decision leading up to that determination, does not affect the question of guilt or innocence of the accused.
11. Finally, unfairness does not arise from a purported uncertainty as to whether the Trial Chamber may draw adverse inferences in the event that the accused declines to be tested,¹⁹ since the Defence has already stated that it "will of course comply with that order and provide its full cooperation, subject to its duty of

¹³ Defence Challenge, paras. 26 and 29(c).

¹⁴ Defence Challenge, para. 27.

¹⁵ The Prosecution notes that if and when the Trial Chamber makes a determination on use of languages, the Defence will be entitled to seek leave to appeal that decision under Article 82(1)(b) if it considers that the decision is in error.

¹⁶ Defence Challenge, paras. 24 and 27.

¹⁷ ICC-01/04-01/07-522 OA3, 27 May 2008, paras. 1-3.

¹⁸ Defence Challenge, para. 3.

¹⁹ Defence Challenge, para. 25.

confidentiality to the accused".²⁰ The Defence's application for leave to appeal should therefore be dismissed.

Relief sought

12. For the reasons set out above, the Prosecution requests that the Trial Chamber dismiss the Defence Challenge in its entirety.



Luis Moreno-Ocampo, Prosecutor

Dated this 25th day of May, 2009
At The Hague, The Netherlands

²⁰ Defence Challenge, para. 3.