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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Prosecution's application for leave to appeal Trial Chamber II's "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412, and 1456)" of 7 October 2009

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

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Introduction

1. In its 7 October “Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009”,¹ Trial Chamber II considered that, according to Regulation 35, the Prosecution was required to apply for authorization to conduct an investigative mission after the deadline set by the Chamber for final disclosure. Primarily on this basis, the Decision rejected the Prosecution’s request to include in its List of Evidence a number of items obtained in a forensic expert mission to the “*Institut de Bogoro*” on 28, 29 and 31 March 2009.
2. The Prosecution hereby seeks leave to appeal this particular aspect of the Decision, which involves an issue affecting the fair and expeditious conduct of the proceedings and the outcome of trial, within the terms of Article 82 (1) (d).
3. As a matter of policy the Prosecution aims to be ready for trial as soon as the charges are confirmed in order to facilitate fair and expeditious proceedings. However, in accordance with applicable Appeal Chamber’s jurisprudence, as a matter of law there is no legal constraint to conducting investigative missions after the confirmation hearing. As the Prosecution will demonstrate before the Appeals Chamber, the Decision misconstrues the Chamber’s authority under Regulation 35 and intrudes into the Prosecution’s autonomy in relation to investigative matters. The Chamber’s powers are confined to authorizing the additional presentation of evidence by the parties once the list of evidence has been completed; they do not extend to the conduct of additional investigative activities by the Prosecution which the Chamber cannot authorize or otherwise regulate.²
4. The Chamber’s error directly impacts on the Prosecution’s rights, and thereby on the fairness of the proceedings, by subjecting the Prosecution’s investigative authority to the Trial Chamber’s approval. It also affects the expeditious conduct of the proceedings, including by opening the door for future litigation in the case arising from the exclusion of the evidence in question. At the same time, the Decision can impact on the outcome of trial since it removes relevant and probative material from the body of evidence that the Chamber will evaluate at the conclusion of the proceedings for the purposes of its decision under Article 74.

¹ ICC-01/04-01/07-1515 (hereinafter, the “Decision”).

² The Appeals Chamber has upheld the authority of the Prosecution to conduct investigative activities independently. It stated *inter alia* that “[A]rticle 61 (9) [...] provides *inter alia* for a possibility to add further charges until the trial has begun. Thus, it must be possible for the Prosecutor to continue his investigation in respect of crimes that are not covered by the document containing the charges.” *Prosecutor v. Lubanga*, [Judgment on Disclosure Restriction pursuant to Rule 81 \(2\) and \(4\)](#), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 51.

Procedural Background

5. On 28, 29 and 31 March 2009, the Prosecution conducted forensic examinations at the *Institut de Bogoro*, the site of some of the crimes which are alleged to form the basis of this case.
6. Between 15 July and 21 August 2009, the Prosecution filed five requests for extension of time in order to disclose evidence which was gathered and generated as a result of these examinations.³
7. On 7 October 2009, the Chamber issued its “Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412, and 1456)” (“the Decision”). In the Decision the Chamber rejected the applications for extension of time. As a result, with the exception of a 360 degree visual representation of the *Institut*, the Chamber rejected the Prosecution’s request to add the evidence to its List of Incriminating Evidence and to add the related expert witnesses to its witness list.
8. The Prosecution hereby seeks leave to appeal the Decision under Article 82(1)(d) and Rule 155.

The issue for which leave to appeal is sought fulfil the criteria in Article 82(1)(d)

9. The issue that the Prosecution submits should be certified for appeal is the following: Whether the Prosecution is required by Regulation 35 to request authorization from the Trial Chamber to carry out fact-finding missions after the deadline imposed by a Chamber for disclosure of all incriminating evidence has expired.
10. The Prosecution submits that all requirements for granting leave to appeal are met in the present case: (a) the issue identified in this Application clearly arises from the Decision; (b) the issue affects the fair and expeditious conduct of the proceedings or the outcome of trial; and (c) timely intervention by the Appeals Chamber will materially advance the proceedings. Each requirement will be addressed separately below.

³ These requests are set out at p. 3 of the Decision, and the evidence to which they relate is summarised at pp. 4-9. In addition to the five requests, the Prosecution also filed an addendum and corrigendum on 4 September 2009 – see Decision, p. 4.

11. As established by the jurisprudence of the Court the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.⁴ The Prosecution submits that the issue identified above clearly arises out of the Decision.⁵ Reference to any errors contained in the Decision will only be made if necessary to demonstrate the appellability of the Decision.

(a) The issue arises from the Decision

12. The issue undoubtedly arises from the Decision: at para. 27, the Trial Chamber “agrees with the Defence of Mr. Ngudjolo that the prosecution does not satisfactorily explain why it did not apply for an extension of the time limit before it expired [...]”. The Chamber further states that the parties must “keep the Chamber informed of ongoing or planned fact-finding missions, before the expiration of the deadline, when it is reasonable to think that they might lead to a request for additional disclosure after the set time limit, based on regulation 35 of the Regulations”.⁶ After noting the security situation in the region and recognizing that it could constitute “good cause” for an extension of time to be granted under Regulation 35, the Chamber rejects that such situation could constitute a justification “for not making an application for extension of time limit before the expiration thereof”.⁷ Finally, the Chamber stresses that “by not applying for an extension before the expiration of the time limit, the Prosecution also circumvented a key provision of regulation 35 (2), which allows for the other participants to be heard on the matter *before* the deadline is violated”.⁸

13. Under the Chamber’s reasoning, the Chamber does not just authorize, under Regulation 35(2), the disclosure of additional incriminating evidence after the deadline set by the Chamber; rather, its permission should have been obtained, in advance, before carrying

⁴ *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp 19 August 2005, para. 22.

⁵ The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.” *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, paras. 9-10. See also *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, ICC-01/04-01/06-1433 OA11, 11 July 2008, Diss. Op., para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

⁶ Decision, para. 27.

⁷ Decision, para. 28.

⁸ Decision, para. 31 (emphasis in the original).

out the investigative mission to gather forensic evidence.⁹ Further, the other participants in the proceedings were entitled to react to the Prosecution's decision to conduct an investigative mission after the deadline for disclosure set by the Chamber had expired, in the form of a response to the request for an extension of time.

14. The Prosecution considers that the Chamber's reasoning is flawed, as it will demonstrate before the Appeals Chamber if and when leave to appeal is granted. It suffices to say here that the Decision rests on a defective interpretation of the Chamber's powers under Regulation 35, in particular vis-à-vis the Prosecution's investigative authority under the Statute. Whereas there is no dispute that the disclosure of incriminating evidence after expiry of the deadline set by the Trial Chamber requires approval by the Chamber under Regulation 35, the same does not hold true in relation to "ongoing or planned fact-finding missions". For these, the Prosecution does not need the Trial Chamber's permission, since these are activities that fall within the exclusive domain of the Prosecution. It is the province of the Prosecution to determine whether it is adequate and justified to carry out particular investigative steps. Not all the missions carried out will produce new evidence. They can corroborate existing information, pursue an exonerating lead, verify the credibility of Prosecution witnesses or attain any other valid objective under the Statute and the Rules.¹⁰ Much less should the Prosecution be required to submit for discussion with the other participants its intentions to conduct specific investigative steps under the guise of a Regulation 35 application, a requirement that would not only run afoul the independence of the Prosecution under the Statute, but can also effectively frustrate the intended investigation, lead to the destruction of evidence or endanger the persons involved.

15. The Prosecution also notes that the Chamber should not make "good cause" determinations in a vacuum, but only if and when it is presented with a request for belated disclosure of *specific* items of evidence, considering, *inter alia*, the relevance and probative value of that evidence. Similarly, the Prosecution should not be forced to

⁹ The issue arising from this Decision is distinct from the questions that have arisen in other decisions of the Chamber regarding variations of the time limit to disclose evidence. The other decisions had related to evidence which existed and was in the possession of the Prosecution prior to the deadline of 30 January 2009; and the delays in disclosure had generally related to the implementation of protective measures or authorisation of redactions, for which the Chamber had prescribed an explicit system (see e.g. ICC-01/04-01/07-1364, 13 August 2009, paras. 1-2, 13). In contrast, the present Decision relates to an investigative mission which was only conducted after the deadline, and therefore evidence which only came into the possession of the Prosecution (and largely only came into existence) once that deadline had expired.

¹⁰ "to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence" – *Prosecutor v. Lubanga*, [Judgment on Disclosure Restriction pursuant to Rule 81 \(2\) and \(4\)](#), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 54.

request authorization for belated disclosure of items of evidence it has not yet collected, when it may well be the case that after completion of the mission the Prosecution concludes that the evidence obtained does not justify its use at trial. In this sense, the Prosecution emphasizes that it never intended to present the Chamber with a “*fait accompli*”;¹¹ rather, the Prosecution was properly submitting to the Chamber’s consideration the fruits of the conducted investigative steps, which the Prosecution sought to disclose to the defence as incriminating material.

(b) The issue affects the fair conduct of the proceedings

16. The Appeals Chamber has ruled that “[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights”.¹² It further stated that “[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime, a fact directly borne out by the provisions of articles 54(1)(c) and 55 of the Statute”,¹³ and that “[p]urging the pre-trial process for errors consequential to unfairness is designed as a safeguard of the integrity of the proceedings. This is at the core of article 82(1)(d) of the Statute”.¹⁴

17. The Prosecution submits that fairness requires that the procedural and substantive rights and obligations of all participants be respected,¹⁵ which has been held to include fairness to the Prosecution.¹⁶ Fairness has also been linked to the ability of a party to present its case.¹⁷

18. The issue identified in this Application affects the fairness of the proceedings vis-à-vis the Prosecutor in multiple ways. First, the Decision effectively renders the Prosecution’s exercise of its investigative powers subject to the Trial Chamber’s approval through a

¹¹ As stated in para. 30 of the Decision.

¹² *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 11.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See further *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11. This has been held to include respect for the norms of a fair trial (*Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 11), equality and the principle of adversarial proceedings (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38)

¹⁶ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

¹⁷ *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

Regulation 35 decision, once the Chamber has established a deadline for the disclosure of incriminating evidence. Under the terms of the Decision, the Prosecution is effectively required to seek a variation of the time-limit under Regulation 35 before undertaking any supplementary investigative efforts, and to share with other participants the objectives and nature of its ongoing or planned investigations, or to forego the possibility of relying on any evidence obtained after expiry of the deadline for disclosure of incriminating material, if it decides not to do so. Thus, the Prosecution no longer enjoys autonomy to decide, once a Trial Chamber has established a deadline for disclosure of incriminating evidence, whether specific circumstances justify conducting supplementary investigative efforts. Instead, the Prosecution must litigate the issue with the other participants and persuade the Chamber that its determination is well-founded. Such an interference with the autonomous investigative powers of the Prosecution, unsupported by the Statute or the Rules, contradicts the jurisprudence of this Court¹⁸ and necessarily affects the fairness of the proceedings vis-à-vis the Prosecution.

19. This issue also affects the fair conduct of the proceedings to the extent that it means that any applications to use the fruits of investigative steps must be made, and ruled upon, prematurely. The Prosecution must seek to substantiate the need for the subsequent investigation before it even knows of the results of that investigative activity. And the Chamber could reject an application by the Prosecution before the Prosecution has an opportunity to gather and put before it all of the necessary and relevant information. To force the Prosecution into a procedural pathway that denies it the ability to make a full and properly substantiated application, and where its core rights to investigate and present its case could be limited prematurely, also impacts on the fair conduct of the proceedings.
 20. The fairness of the proceedings is further affected by the Decision's specific impact on the Prosecution's right and ability to efficiently present its case in this instance. The automatic rejection of a substantial body of relevant and probative evidence that the Prosecution considers important for the full presentation of its case at trial, without analyzing its merit, affects the fair conduct of the proceedings vis-à-vis the Prosecution.¹⁹
- Whether the Chamber's determination is correct is a matter that only the Appeals

¹⁸ See, *Prosecutor v Lubanga*, ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 49-57.

¹⁹ For examples of decisions granting leave to appeal in relation to the exclusion of Prosecution evidence, see *Prosecutor v. Slobodan Milosevic*, Case No.: IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73(B) Concerning the Evidence of an Investigator, 20 June 2002 (ICTY); *Prosecutor v. Bagosora et al*, Decision on Prosecution's Request for Certification of Appeal on Admission of Testimony of Witness DBY, 2 October 2003 (ICTR).

Chamber can determine. For the purposes of granting leave to appeal, it suffices to demonstrate that it can be reasonably argued that the legitimate exercise of a party's right has been adversely affected by the challenged decision.

(c) The issue affects the expeditious conduct of the proceedings

21. The Prosecution notes that it has in previous filings expressed its view that once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).²⁰ The Appeals Chamber also stated that “[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”.²¹ Nonetheless, the Prosecution submits that the issues in this Decision do affect the expeditious conduct of the proceedings.
22. Pre-Trial Chamber II considered that one aspect of expeditiousness is if an issue “would entail the risk that lengthy and costly trial activities are nullified at a later stage.”²² In this case, the issue affects the expeditious conduct of the proceedings as it excludes an important body of evidence corroborating the Prosecution's case regarding the events at the *Institut de Bogoro* during the attack on 24 February 2003. If the Trial Chamber were to consider the Prosecution's other evidence was insufficient, and thus acquit the accused in relation to these events, then the Prosecution would be forced to appeal the erroneous and premature exclusion of this expert evidence. Such an appeal could result in the case

²⁰ Similarly, if a party had demonstrated that the issue does affect the expeditious conduct of the proceedings, then any showing that it also affected the fair conduct of the proceedings would likewise be superfluous. See in particular *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see further *Situation in the DRC*, ICC-01/04-103, footnote 5; *Prosecutor v Lubanga*, ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair, or no longer expeditious, they are no longer “fair and expeditious”; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the “fair and expeditious conduct of the proceedings”. The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition. In both tribunals, Chambers have often granted leave to appeal solely on the basis that the issue affects the fair conduct of the proceedings - see authorities set out in *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see subsequently *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

²¹ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para.11. For a wider discussion on this matter, see also *Interlocutory Appellate Review of Early Decisions by the International Criminal Court*, American University, War Crimes Research Office, January 2008, p. 66-67, *inter alia*.

²² *Prosecutor v Kony et al*, ICC-02/04-01/05-20, 19 August 2005 (unsealed pursuant to ICC-02/04-01/05-52, 13 October 2005), para. 36. The Prosecution notes that this can also be properly viewed as an element relevant to whether the immediate resolution of the issue will materially advance the proceedings – see e.g. *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 16.

being remanded to a different Trial Chamber to consider the totality of the evidence,²³ severely impacting on the expeditious resolution of this case. Excluding this evidence from the outset, and fragmenting the consideration of the case rather than considering all relevant evidence as a whole, therefore affects the expeditious conduct of the proceedings.

23. The underlying issue will also affect the expeditious conduct of proceedings in other cases. It will force the Prosecution to make repeated applications for an extension of time every time that it is contemplating an investigative step after a deadline has been set for disclosure of evidence. Many of those applications may be unnecessary, as the evidence gathered is not to be used at trial. On the other hand, such applications will often lack necessary information, and given the necessarily incomplete nature of the Prosecution's information at the time it is forced to make the application, many will require second, third or more applications to further extend the time – as the Decision itself recognises.²⁴ An issue capable of leading to unnecessary and repetitive procedural applications impacts on the expeditious conduct of the proceedings.

(d) The issue affects the outcome of the trial

24. The impossibility to bring before the Court relevant and probative evidence, capable of assisting the Chamber in establishing the truth about the crimes committed in Bogoro, has a bearing on the outcome of the trial: the Chamber will not have the benefit of relevant and probative expert evidence which, in the Prosecution's assessment, is conducive for the establishment of the truth. In this sense, it should be beyond dispute that excluding from the material that a Trial Chamber will consider at the conclusion of trial proceedings important items of evidence going to the heart of the incidents being prosecuted, on procedural grounds, must necessarily affect the outcome of trial.
25. The Decision also affects the outcome of the case in other related ways. Under the terms of the Decision, the Chamber will have to authorize every investigative mission and the gathering of potential relevant evidence once a deadline for disclosure has been set. If the Chamber does not grant an extension of such deadline there will be no mission, which means that the Prosecution and other participants may not even learn of the existence of additional relevant evidence, either incriminatory or exculpatory. Thus, the *system* created

²³ Article 83(2)(b).

²⁴ Decision, para. 31.

by the Decision, seriously compromising the Prosecution's ability to secure relevant evidence, also has potential consequences for the outcome of the trial.²⁵

Immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings

26. Immediate resolution of these issues will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'move forward'; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings."²⁶ The Appeals Chamber has also confirmed that proceedings are "not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto."²⁷
27. The Decision establishes a system that, the Prosecution submits, infringes upon the autonomy of the Prosecution to conduct investigative steps. The Decision can effectively lead to the substitution of the Trial Chamber's discretion for that of the Prosecution for the purposes of determining the need and adequacy of specific investigative steps. The matters at stake go to the heart of the balance of powers between the Prosecution and Trial Chamber. Timely intervention by the Appeals Chamber will allow for a proper assessment of the Decision, its implications and its legal correctness, and ensure that the trial proceedings continue on a proper basis.

²⁵ Trial Chamber I in the *Lubanga* Case has granted leave on numerous occasions based on the significant impact on the outcome of the trial that the issues may have. See "Decision on the prosecution and the defence applications for leave to appeal the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", ICC-01/04-01/06-2107, 3 September 09, paras. 29 and 33; "Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application to Lift the Stay of the Proceedings'", ICC-01/04-01/06-1473, 24 September 2008, paras. 31-32 and paras. 35-8; Public Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, ICC-01/04-01/06-1224-Anx1 (reclassified as ICC-01/04-01/06-1210-Corr-Anx, 6 March 2008. See para. 14; Public Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008. See paras. 32 and 42.

²⁶ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

²⁷ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 12, see also para. 17.

Relief sought

28. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the specific aspects of the Decision identified above.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is centered on the page. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Luis Moreno-Ocampo,
Prosecutor

Dated this 13th day of October 2009
At The Hague, The Netherlands