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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 Response to «Defence Request for Leave to Appeal the Trial Chamber's Oral Decision of 23 November 2009 on the Defence Request for Clarification of the Charges»

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Introduction

1. On 23 November 2009, Trial Chamber II issued an Oral Decision dismissing the request of the Defence for Germain Katanga for adding additional information to the Prosecution's Document Summarising the Charges Confirmed by the Pre-Trial Chamber ("the Summary").¹ The Chamber considered "the framework of this case [to be] well defined"; however, it encouraged the Prosecution and Defence to hold consultations to clarify the specific questions raised by the Defence, based on the information contained in the Decision on Confirmation of Charges and the Table of Incriminating Evidence.² Trial commenced with opening statements the next day.
2. The Defence for Germain Katanga seeks leave to appeal the Oral Decision ("the Application").³ The Defence appears to argue that the Oral Decision contains an error as "the existing documents (the Decision on Confirmation of Charges and the Table of Incriminating Evidence) are inadequate in providing precision as to the material facts underlying the charges".⁴ The issue is whether specific facts, highlighted by the Defence, have been pleaded with sufficient precision or require further clarification.⁵
3. The Prosecution notes that the material facts pleaded by the Prosecution were exhaustively presented by a set of documents: the original Document Containing the Charges, the Pre-Trial Chamber I's Confirmation Decision, the Prosecution's Table of Incriminating Evidence, the Prosecution's Summary. Additionally, and following a suggestion of the Trial Chamber, on 3 December 2009, the Prosecution filed a document of over 50 pages responding to the specific requests for clarification presented by the Defence.

¹ ICC-01/04-01/07-T-79-Red-ENG WT 23-11-2009, p.1 ("Oral Decision").

² Oral Decision, pp. 2-3.

³ ICC-01/04-01/07-1690, 30 November 2009.

⁴ Application, para. 2. The paragraph continues: "The Summary of Charges itself creates or reinforces existing ambiguities that are not cured by the Table of Incriminating Evidence or by the Confirmation Decisions".

⁵ ICC-01/04-01/07-1653, 19 November 2009, paras. 19-36 ("Katanga Observations").

4. The Prosecution submits that the Application should be dismissed as it does not meet the criteria set out in Article 82(1)(d). The issue does not arise from the Decision⁶. First, the Defence submissions before the Trial Chamber do not constitute a challenge to the adequacy of the existing documents to provide notice. If in the view of the Defence the Confirmation Decision was inadequate to provide notice of the material facts underlying the allegations against the Accused, it was obligated to seek leave to appeal the Chamber's decision. The Defence did not do so.
5. Second, while the Oral Decision did not grant the relief requested by the Accused, it proposed a separate remedy – that the parties consult and the Prosecution give the specific details that the Defence requests. Far from objecting to this procedure, the Defence expressed its intention to exhaust this remedy provided by the Chamber.⁷ On 3 December 2009, the Prosecution provided answers in a document identifying the pertinent information in the Confirmation Decision. That submission addresses the factual complaints underlying the Defence Application.
6. Should the Chamber rule however that the issue arises from the Decision, it does not meet the criteria for leave to appeal pursuant to Article 82(1)(d).

⁶ 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.”

⁷ See Application, para. 10.

Arguments

The Issue does not satisfy the test under Article 82(1)(d)

7. 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.⁸ Reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of Article 82(1)(d).

The Issue does not arise from the Decision

8. The issue as framed – whether the various documents (the Confirmation Decision, the Prosecution’s Table of Incriminating Evidence, the Prosecution’s Summary, and its original Document Containing the Charges) collectively fail to provide the Defence with sufficient and succinct notice of the material facts pleaded -- does not arise from the Decision.⁹ First, the Defence submissions before the Trial Chamber do not constitute a challenge to the adequacy of the existing documents to provide notice. They have been confined to specific facts that, in the Defence view, require further clarification.¹⁰ The only issue is whether specific facts, highlighted by the Defence, have been pleaded with sufficient precision. In relation to this, the

⁸ *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp 19 August 2005, para. 22.

⁹ 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.”

¹⁰ Katanga’s Observations, paras. 19-36. In this filing, the Defence recognised that “While the Document Containing a Summary of the Charges must be read in light of the Confirmation Decision, it remains part of the documentation upon which notice to the accused must be judged” (para. 14).

Prosecution submits that while the Oral Decision did not grant the relief requested by the Accused, it proposed a separate remedy – that the parties consult and the Prosecution give the specific details that the Defence requests. The Defence, when requesting an extension of time to file the Application, stated that it wished to exhaust the remedy which the Chamber provided.¹¹ On 3 December 2009, the Prosecution provided to the Defence a document of over 50 pages setting out in detail most of the requested clarifications within the parameters of the Confirmation Decision, thereby resolving the issue without involving the Appeals Chamber.¹²

9. As mentioned in paragraph 4, above, if in the view of the Defence the Confirmation Decision was inadequate to provide notice of the material facts underlying the allegations against the Accused, it was obligated to seek leave to appeal the Chamber's decision. The Defence did not do so.

The Issue also does not meet any of the requirements under Article 82(1)(d)

10. Additionally, the Prosecution submits that the Application does not fulfil the requirements for leave to appeal. The Defence fails to demonstrate that the purported issue meets either of the requirements in the two prongs of Article 82(1)(d): it does not show how the fair and expeditious conduct of the proceedings¹³ or the outcome the trial is significantly affected.¹⁴ In addition,

¹¹ Application, para. 10.

¹² The Prosecution further notes that nothing prevents the Defence from seeking further relief from the Trial Chamber if, after careful examination of the document provided by the Prosecution they still consider that their concerns have not been sufficiently addressed.

¹³ 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). 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. Nonetheless, the issue in this Decision does not affect neither the fairness nor the expeditious conduct of the proceedings.

¹⁴ The requirement that an issue affects the outcome of the trial is an alternative basis for granting under Article 82(1)(d) to the issue impacting on the fair and expeditious conduct of the proceedings. *Situation in Uganda*,

it does not establish that an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁵

11. The Defence argues that fairness is affected because the accused has a right to a fair trial and to be informed “promptly and in detail” of the charges under Article 67.¹⁶ Regarding the expeditiousness and the outcome of the trial, the Defence states that it is deprived of fundamental information which will impair its ability to prepare the accused’s defence and cross-examination of witnesses who may have to be recalled.¹⁷ The Defence repeats these arguments when dealing with the second “materially advance” prong of Article 82(1)(d).¹⁸
12. First and as already stated, the Decision does not deprive the accused of notice of the material facts underlying the charges against him. Rather, and as explained above, “the framework of this case is well defined today”.¹⁹
13. The Defence also has had ample notice of the factual allegations through the different court filings: the Document Containing the Charges was originally filed against Katanga on 29 January 2008²⁰ and then jointly against Katanga and Ngudjolo on 21 April 2008²¹; the Defence complained about certain ambiguities, which the Pre-Trial Chamber ordered the Prosecution to rectify

ICC-02/04-112, 20 December 2007, para. 17; *Prosecutor v Lubanga*, ICC-01/04-01/06-1417, 2 July 2008, paras. 17-18; *Prosecutor v Lubanga*, ICC-01/04-01/06-1473, 24 September 2008, paras. 21-22.

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

¹⁶ Application, paras. 21-24.

¹⁷ *Ibid.*, paras. 25-28.

¹⁸ Application, para. 29.

¹⁹ Oral Decision, p.2.

²⁰ *Prosecutor v. Katanga*, ICC-01/04-01/07-170, Submission of the Document Containing the Charges and of the List of Evidence, 29 January 2008.

²¹ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-422, Prosecution's Submission of the Document Containing the Charges and List of Evidence, 21 April 2008. The Prosecution subsequently filed two Amended Documents Containing the Charges: *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-584, Prosecution's Submission of Amended Document Containing the Charges and Additional List of Evidence, 12 June 2008; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-649, Submission of Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648, 26 June 2008.

where appropriate on 25 June 2008;²² the Decision on the Confirmation of Charges was issued on 30 September 2008²³; an “exhaustive”²⁴ Table of Incriminating Evidence was filed on 27 May 2009 (a document that was produced *inter alia* for the benefit of the Defence²⁵), and a second version of the table on 16 November 2009.²⁶ Finally, a Document Summarizing the Charges Confirmed by the Pre-Trial Chamber was filed on 3 November 2009.²⁷ The Prosecution also notes that the Summary is based on the Confirmation Decision, and did not alter the scheme of the charges or factual information. And the Confirmation Decision itself confirmed charges previously specified in the Document Containing the Charges.

14. In this context, it cannot be argued that this is a case of lack of notice impacting on the fair and expeditious conduct of the proceedings or the outcome of trial even assuming that the Defence has a few remaining doubts confined to discreet factual components. Every material fact in the possession of the Prosecution has been disclosed to the Defence repeatedly, in the Document Containing the Charges, a filing of supplementary details, the Confirmation Decision, and the Summary. Pursuant to the Chamber’s suggestion that the Prosecution answer the Defence requests for more particular information, on 3 December the Prosecution provided yet another document to the Defence. And the evidence as to every material fact has

²² *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-574, Defence Motion seeking the Amendment of the Document containing the Charges, 9 June 2008; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-648, Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document, 25 June 2008.

²³ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008.

²⁴ Oral Decision, p. 2, line 19.

²⁵ ICC-01/04-01/07-956 13 March 2009, para. 6.

²⁶ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1774 and ICC-01/04-01/07-1774 -Corr, Table of Incriminating Evidence, 27 May 2009, and *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1643, Prosecution’s Amended Table of Incriminating Evidence and Amended List of Evidence, 16 November 2009, respectively.

²⁷ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1588-Anx1, Document Summarising the Charges, 3 November 2009.

been linked to every element of every charge in the Table of Incriminating Evidence and again in a second version of the Table.

15. In addition to the documents provided to the Defence before trial, it now has the benefit of the Prosecution's Opening Statement, which reiterated the theory of its case against the Accused, and a recent document addressing particular factual matters the Accused complained were not sufficiently alleged. It is inconceivable to consider that without an interlocutory review, the Accused will be unfairly tried without sufficient notice and the ability to prepare its defence.
16. An appellate resolution of the issue will not materially advance the proceedings. First, pursuant to the Decision, and as already stated, the Prosecution has provided a comprehensive document providing clarification of the bulk of the issues. This rules out that an *immediate* resolution of the issue by the Appeals Chamber at this stage is required to materially advance the proceedings. The Prosecution further notes that trial proceedings have already started. If it occurs during the trial that the Prosecution's charges are based on "crucial information" that had been withheld from the Defence,²⁸ the Chamber may take appropriate remedial action tailored to the specificity of the information and the prejudice at that stage²⁹ – a course which will more expeditiously resolve the issues and ensure the proper outcome of the trial.

²⁸ See Application, para. 28.

²⁹ Including but not limited to allowance of extra time for investigation, exclusion of evidence, or dismissal of the relevant charge.

Relief sought

17. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



Luis Moreno-Ocampo,
Prosecutor

Dated this 4th day of December 2009

At The Hague, The Netherlands