



Original: English

No.: ICC-01/04-01/07
Date: 11 February 2010

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 Document

**Decision on the "Defence Application for Leave to Appeal the Trial Chamber's
*Décision relative à la requête de la Défense de Germain Katanga en illégalité de la
détention et en suspension de la procédure*"**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika
Mr Jean-Louis Gilissen

Legal Representatives of the 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

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to article 82(1)(d) of the Rome Statute of the International Criminal Court ("Statute"), issues the following decision on the "Defence Application for Leave to Appeal the Trial Chamber's *Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure*", filed on 30 November 2009 ("Application")¹.

I. BACKGROUND

1. On 30 June 2009, the Defence for Germain Katanga ("Defence") filed a motion for a declaration on unlawful detention and stay of proceedings ("Defence Motion").²
2. On 20 November 2009, the Chamber issued a decision denying the Defence Motion ("impugned decision").³
3. On 30 November 2009, the Defence filed its Application, seeking leave to appeal the impugned decision, pursuant to article 82(1)(d) of the Statute, Rule 155 of the Rules of Procedure and Evidence ("Rules") and to Regulations 65 of the Regulations of the Court ("Regulations").⁴
4. The Prosecution did not file a response to the Application.

¹ ICC-01/04-01/07-1691-Conf-Exp (the request was reclassified as "public" on 1 February 2010, ICC-01/04-01/07-1691) ("Application").

² ICC-01/04-01/07-1258-Conf-Exp (a public redacted version was filed on 2 July 2009, ICC-01/04-01/07-1263).

³ *Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure*, 20 November 2009, ICC-01/04-01/07-1666-Conf-Exp (a public redacted version was filed on 3 December 2009, ICC-01/04-01/07-1666-Red).

⁴ ICC-01/04-01/07-1691.

5. On 1 February 2010, the Chamber authorized the reclassification of the Application as public,⁵ as requested by the Defence of Katanga in a message addressed to the Registry on 29 January 2010.

6. On 4 February 2010, the Chamber invited counsels for Mathieu Ngudjolo and the Legal Representatives of the Victims to file, if they wished so, any observations on the Application by 10 February 2010.⁶ None of them submitted any observations.

A. Defence's arguments

7. In its Application, the Defence submits that the Trial Chamber erred in dismissing the Defence Motion in its entirety, without considering the merits of the motion, on the grounds that it was filed too late.⁷ It is argued that in doing so, the Chamber made the following three identifiable errors. First, the Defence Motion was not filed out of time, as the Statute, Rules and Regulations do not impose a deadline to file an application challenging the lawfulness of the detention of an accused. Second, the Defence had justifiable grounds for submitting the Defence Motion at the time that it did; and third, imposing a deadline not explicitly provided for in the Statute, Rules and Regulations, creates unfairness to the accused, particularly in respect of the fundamental matters raised, irrespective of the diligence of counsel.⁸

8. The Defence therefore considers the following matters as issues of appeal within the meaning of article 82(1)(d) of the Statute:

⁵ E-mail communication from a Legal Officer of the Chamber to the Registry dated 1 February 2010.

⁶ E-mail communication from a Legal Officer of the Chamber to counsels for Mathieu Ngudjolo, Me Luvengika Nsita and Me Gilissen, dated 4 February 2010.

⁷ Ibid., par. 2.

⁸ Ibid., par. 2.

1. the absence in the Statute, Rules or Regulations of a deadline to file an application challenging the lawfulness of the detention of an accused;⁹
2. the fact that, even if it is not a condition, good cause for the delay had been shown;¹⁰ and
3. the unfairness to the Accused if he is precluded from raising issues pertaining to the lawfulness of his arrest and detention because of a possible mistake made by his counsel.¹¹

9. The Defence argues that the impugned decision directly impacts on the fairness of the proceedings. It is alleged that this is apparent from the third issue of appeal. It is further submitted that the matters raised are so fundamental, and the consequences so severe, that the question whether the Accused is unfairly deprived of an opportunity to challenge the lawfulness of his arrest impacts the fairness of the proceedings.¹² Furthermore, in the Defence's view, if the Accused must wait until the appeal stage before raising these matters before the Appeals Chamber, the trial may have gone on when it should have been stayed and the Accused would have spent time in detention unnecessarily.¹³

10. The Defence further submits that, if the request for stay of the proceedings is accepted, the outcome of the trial would undoubtedly be impacted; the Accused could be released.¹⁴

⁹ Ibid., par. 4 -21.

¹⁰ Ibid., par. 22 -27.

¹¹ Ibid., par. 28-31. The issues at stake, it is submitted, are so fundamental that the Accused should never be deprived of an opportunity to raise such matters. Ibid., par. 29. It is further submitted that even if the Chamber considers that an application for stay of the proceedings is too late, it should still consider the other requests, namely the request for a determination of the illegality of the Accused's arrest and detention in the DRC, and the requests for financial compensation and/or for his sentence, if any, to be mitigated. Ibid., par. 31.

¹² Ibid., par. 33.

¹³ Ibid., par. 34.

¹⁴ Ibid., par. 35.

11. Finally, the Defence states that it is evident that an immediate resolution by the Appeals Chamber would materially advance the proceedings and that if the Appeals Chamber is not given the opportunity to review this matter until an eventual appeal against the Chamber's final judgement, "avoidable damage would have been done".¹⁵

II. ANALYSIS AND CONCLUSION

12. In reaching its decision on the Defence's Application, the Trial Chamber has considered Article 82(1)(d) of the Statute and the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006.¹⁶ It has accordingly examined the issues raised in the Application in light of the following criteria:

- a) Whether the matter is an "appealable issue";
- b) Whether the issue at hand could significantly affect:
 - (i) The fair and expeditious conduct of the proceedings; or
 - (ii) The outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

13. The requirements set out in Article 82(1)(d) of the Statute are cumulative. The failure to fulfil one or more of them is fatal to an application for leave to appeal.¹⁷

¹⁵ Ibid., par. 36.

¹⁶ ICC-01/04-168, par. 9-20

¹⁷ See for example, Trial Chamber I, "Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application to Lift the Stay of the Proceedings'", 24 September 2008, ICC-01/04-01/06-1473, par. 22.

14. As the Chamber has previously stated¹⁸, basing itself on the jurisprudence of the Appeals Chamber,¹⁹ an issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.²⁰

15. The Chamber recalls that where the arguments raised by a party, relate to the merits of a substantive issue rather than to whether the matter meets the test for leave to appeal, the substantive arguments will not be addressed; instead, a determination will be made solely as to whether the matter raised meets the test to grant leave to appeal.²¹

16. The Chamber notes that the Defence, while defining the three issues of appeal, mainly made submissions challenging the merits of the impugned decision.²² As mentioned above, challenges to the merits of the impugned decision are not relevant to the Application for leave to appeal. The Chamber therefore, has not considered the substantive arguments, and instead solely focused on the submissions dealing with the criteria prescribed in Article 82(1)(d) of the Statute.

17. The impugned decision dealt with the Accused's challenges to the lawfulness of his arrest and detention in the Democratic Republic of Congo. In the decision, the Chamber stated that a motion challenging the lawfulness of the arrest and detention of an accused, especially if accompanied by a request for stay or termination of the proceedings, should be filed at an early stage of the proceedings, during the pre-trial

¹⁸ See for example, Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", 1 May 2009, ICC-01/04-01/07-1088, par. 17.

¹⁹ ICC-01/04-168, par. 9.

²⁰ *Idem*.

²¹ See, for example, Trial Chamber I, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, par. 19.

²² Application, par. 4-32.

phase. The Chamber considered the many occasions on which the Defence had the opportunity to make submissions on the lawfulness of the Accused's arrest and detention before the Trial Chamber but failed to do so. Given the absence of convincing reasons for this failure, it declared the motion inadmissible.

18. The Chamber believes that the issue of challenges to the lawfulness of the Accused's arrest and detention is an important one, that clearly has a bearing on the fairness of the proceedings. The issue at stake may involve a number of rights guaranteed to the Accused by virtue of Article 21 (3) of the Statute, which makes the interpretation and application of law subject to internationally recognized human rights. The Chamber finds that the impugned decision involves an issue which could significantly affect the fair and expeditious conduct of the proceedings. The first requirement of Article 82(1)(d) of the Statute is therefore met.

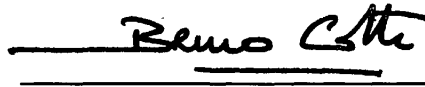
19. Concerning the second requirement of Article 82(1)(d), the Chamber has to consider whether a prompt reference of the issue to the Appeals Chamber will ensure that the proceedings follow the right course, pre-empting any repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.²³ The Chamber considers that given the nature of the issue and the repercussion an erroneous decision on this matter would have on the overall fairness of the proceedings, an immediate decision from the Appeals Chamber is necessary. The Chamber therefore believes that a resolution of this matter by the Appeals Chamber at this stage would materially advance the proceedings, and is satisfied that the second requirement of Article 82(1)(d) of the Statute is also met.

²³ ICC-01/04-168, par. 14-19. See also, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, par. 26.

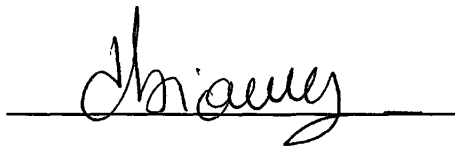
**FOR THESE REASONS,
THE CHAMBER**

GRANTS the Defence Application.

Done in both English and French, the English version being authoritative.



**Judge Bruno Cotte
Presiding Judge**



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this eleventh day of February 2010

At The Hague, the Netherlands