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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
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public

**Prosecution's Application for Leave to Appeal Oral Rulings on Clarifying
Inconsistencies in Prior Statements and Partial Hostility**

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Introduction

1. On 20 November 2009, Trial Chamber II issued a decision broadly providing directions for the conduct of the proceedings and testimony (“Rule 140 Decision”).¹ On 8 February 2010, the Chamber addressed the issue of a witness whose testimony is consistent with his prior statements in some respects but who provides contradictory evidence on other matters. It indicated that after a showing and declaration that the witness is partially hostile on specific issues, the Prosecution could cross-examine the witness on discrete discrepancies between his in-court testimony and his prior statements. However, it did not allow the Prosecution to “refresh the witness’ memory” within the terms of paragraph 109 of the Rule 140 Decision.² A second oral ruling on 9 February 2009 determined that, contrary to the Chamber’s prior position, the witness could only be declared hostile “as a whole”, rather than with regard to specific or limited inconsistencies. Furthermore, once declared hostile the witness could only be cross-examined and the Prosecution could no longer lead evidence in chief on other issues. The Chamber also ruled that though the witness provided evasive or incomplete answers and testimony that did not totally agree with his prior statements, that was insufficient to declare the witness to be hostile.³
2. Thus, under the combined effect of the 8 and 9 February rulings (hereinafter, the “Oral Rulings”), a party cannot show a witness his or her prior statement when specific inconsistencies arise during that witness’ testimony, unless that party is ready to take the extraordinary step of having the witness declared completely hostile, or the Chamber considers that the witness lacks memory.
3. The Prosecution hereby seeks leave to appeal both Oral Rulings pursuant to Article 82(1)(d) and Rule 155,⁴ which together bar a party from showing a witness his prior statements during direct questioning or asking leading questions on particular matters about which the witness’ in-court testimony is unexpected and significantly at odds with the prior statements. The Prosecution submits that all requirements of Article 82(1)(d) for interlocutory appeals are met in this case: the Rulings affect the fair and

¹ “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, ICC-01/04-01/07-1665-Corr, 1 December 2009.

² ICC-01/04-01/07-T-97-CONF-ENG ET, 8 February 2010, pp. 63-68. The Chamber requested the Prosecution to indicate in what issues it wanted to declare the witness hostile in order to make a final determination within the parameters of paragraph 67 of the Rule 140 Decision.

³ ICC-01/04-01/07-T-98-CONF-ENG ET, 9 February 2010, pp. 19-21.

⁴ The Prosecution is filing this application as public given that the rulings in question were delivered in open session. Although reference is made to portions of confidential transcripts, no disclosure of any sensitive information that would justify a confidential filing is made.

expeditious conduct of the proceedings as well as the outcome of trial. Moreover, timely intervention by the Appeals Chamber will materially advance the proceedings by removing any doubts as to how to treat situations of inconsistencies incurred by witnesses during their testimony in court.

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

4. The Prosecution seeks leave to appeal the following issue from the Oral Rulings, namely:
 - Whether the Trial Chamber erred in concluding that the party calling a witness may not show a statement to a witness in the event of inconsistencies;⁵ or ask leading questions on discrete matters unless the witness is first declared overall to be a hostile witness (the “Issue”).
5. 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 issue involved in the Rulings meets the criteria set out in that provision.⁶ Reference to any errors contained in the Rulings will only be made when necessary to demonstrate their appellability.

(a) The Issue arises from the Decision

6. The Issue arises out of the Oral Rulings.⁷ The Chamber rejected the possibility of showing the witness his prior statements to clarify evidence given in court which contradicted those statements unless the witness is either unable to remember or is hostile, the only two categories that, according to the Chamber, allow for such possibility. Nor will the Chamber allow a party to ask leading questions of a witness

⁵ In the absence of a finding from the Chamber that the witness lacked memory.

⁶ *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp 19 August 2005, para. 22; *Prosecutor v Lubanga*, ICC-01/04-01/06-1191, 26 February 2008, para. 19; *Prosecutor v Katanga*, ICC-01/04-01/07-1859, 12 February 2010, para. 15.

⁷ 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.”

even when the witness is wholly unresponsive on discrete issues. The Chamber's Ruling will attach throughout the proceedings to all upcoming witnesses.⁸

7. First, the Chamber rejected the Prosecution's request to put to the witness his prior statements through a *mutatis mutandis* application of paragraph 109 of its Rule 140 Decision.⁹ The Chamber determined that a prior statement can be shown to a witness only to refresh his or her memory. This was not permitted in this instance as the Chamber considered that the witness "expresses himself clearly"; "when he wants to answer in a precise way [...] he answers in a precise way, and sometimes he chooses another type of answer, but the Chamber does have the feeling that the modalities with which he answers aren't due to a lack of memory but a concern which is personal to him to express himself in a particular manner."¹⁰
8. Second, the Chamber did not allow the Prosecution to ask leading questions on the concrete issues on which the witness had contradicted himself since, according to the Chamber, the witness cannot "be described as hostile".¹¹ The Chamber stated, *inter alia*, that the witness had answered with precision a great majority of the questions and evasive answers or answers minimizing previous statements did not justify a declaration of hostility.¹²
9. The Chamber appears to have considered that only these two extremes (lack of memory and complete hostility) allow a party to show a prior statement to a witness or to pose leading questions (a technique of questioning witnesses frequently used in, but not restricted to, cross-examination) for the limited purpose of resolving inconsistencies between that statement and unexpectedly contrary in-court testimony.¹³ As a result, unless a witness is unable to recall the facts (based on a subjective assessment of the Chamber) or is actively hostile, the party calling the witness will have no effective means to resolve or clarify those inconsistencies,

⁸ The Presiding Judge has noted the impact of the Rulings in the proceedings. See ICC-01/04-01/07-T-97-CONF-ENG ET, 8 February 2010, p. 63.

⁹ ICC-01/04-01/07-T-96-CONF-ENG ET, p. 48, lines 11-17.

¹⁰ ICC-01/04-01/07-T-97-CONF-ENG ET, pp. 63-64.

¹¹ ICC-01/04-01/07-T-98-CONF-ENG ET, p. 19.

¹² *Ibid.*, p. 20.

¹³ From the outset, the Prosecution was seeking an intermediate option that did not immediately involve cross-examination of the asking of leading questions: see e.g. ICC-01/04-01/07-T-96-CONF-ENG ET, 4 February 2010, p. 34 lines 14-17, p. 48, lines 11-17. This was also understood and reinforced by the legal representative of victims: see ICC-01/04-01/07-T-97-CONF-ENG ET, 8 February 2010, p. 56, lines 5-12; p. 59, lines 6-17.

respond to surprising new evidence, or establish which account the witness finally adopts.¹⁴

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

10. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.¹⁵ In particular, that “means that the Prosecutor must be able to exercise the powers and fulfill the duties listed in Article 54”.¹⁶ Fairness has also been linked to the ability of a party to present its case.¹⁷
11. The Issue impacts on the fairness of the proceedings because it impacts on the Prosecution’s ability to fulfill its statutory obligations, in particular the obligation under Article 54(1)(a) to establish the truth and under Article 54(1)(b) to ensure the effective prosecution of crimes within the jurisdiction of the Court. Consistent with this Court’s interpretation of “fairness” in Article 82(1)(d), denying a party the ability to explore inconsistencies in the statements of its own witness affects that party’s ability to properly and fully present its case.¹⁸
12. Equality of arms (an essential component of fairness) requires that each party not be placed at a disadvantage to the other in presenting its case.¹⁹ Yet under the Chamber’s ruling, the party calling a witness will be effectively unable to explore the reasons for the inconsistencies between its witness’ testimony and prior statements in all but the most extreme cases. That party will be disadvantaged because a critical aspect of its own witness’ evidence will be off-limits to it, and available only to the opposing parties (under cross-examination) and the Chamber. The Prosecution recognizes that different parties may properly be accorded different tools to explore those inconsistencies, and that the party calling a witness would not ordinarily be able

¹⁴ ICC-01/04-01/07-T-97-CONF-ENG ET, pp. 63-64 ; ICC-01/04-01/07-T-98-CONF-ENG ET, 9 February 2010, pp. 19-21.

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; *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; *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

¹⁶ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39.

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.

¹⁸ *Ibid.*

¹⁹ See *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38 and footnote 50.

to explore them through leading questions without the specific permission of the Chamber. However, by denying the Prosecution the ability to even draw the inconsistencies to the attention of the witness and allow the witness a chance to explain them, the Prosecution has been denied the ability to examine critical issues prior to any other further step being taken, including having that witness declared hostile. Creating a situation where one party cannot discuss the inconsistencies in the statement of a witness – or at least, not without the extraordinary step of having that witness declared completely hostile – violates the balance between the parties in relation to the examination of the instant witness, and therefore affects the fair conduct of the proceedings.

13. The Rulings further impact on the fairness of the proceedings – including vis-à-vis victims - as it impacts on the ability of the Prosecution and the Court to establish the truth. The party calling a witness may often have specific information which will allow it to fully explore the reasons for any apparent inconsistencies, which may not be available to the other parties or to the Chamber, such as personal circumstances of the witness (including security issues) and the context in which the statement was taken. To create a situation in which that relevant knowledge is excluded from the debate will preclude a full and accurate accounting for any inconsistencies. Indeed, those inconsistencies may be left entirely unexplored and unexplained if they are not raised by the other parties or the Chamber.²⁰ All this will thus impact on the ability of the Court to establish the truth and the fairness of the proceedings.

14. The rulings create a system where there is no means for a party to allow its witness to consider and explain inconsistencies between his or her testimony and their prior statements, absent a full declaration of hostility.²¹ This further impacts on the fairness of the proceedings vis-à-vis both the Prosecution (or any other party calling a witness) and the witness. Rather than vesting the party and the witness with a continuum of tools available to explore and explain the nature and reason for any inconsistency, under the Rulings only the most severe and intrusive ones are available. There may be many reasons for an inconsistency between a witness' testimony and his or her

²⁰ In addition, for the purpose of exploring the inconsistencies, the Rulings place the party with the primary interest in the testimony of the witness in the hands of the other parties (who may have no interest in exploring the inconsistent testimony) or the Chamber (who may not be in a position to fully explore inconsistencies, for example because of concerns regarding any appearance of impartiality or prejudgment on issues such as credibility).

²¹ According to the Rulings, showing the statement to a witness is only possible in the event that the witness cannot recall (based on the subjective assessment of the Chamber); and not where the witness' recollection differs from those previously recounted.

prior statement which do not justify as extraordinary a step as having the witness declared hostile.²² Some will be quite readily explicable by the witness, and will assist the Court.²³ In this sense, it should be stressed that the party calling the witness, the Chamber and the witness himself or herself have an interest in the evidence being fairly evaluated by the least intrusive means available.²⁴ This will allow the maximum amount of evidence to be led in the most natural manner (promoting the determination of the truth) and in the manner which is least distressing to the witness.²⁵

15. The Prosecution submits that, as it will demonstrate before the Appeals Chamber should this Chamber grant leave, a number of jurisdictions from various legal traditions allow a party to show a prior statement to a witness in order to enable him or her to explain any apparent inconsistencies without requiring that the witness first be declared hostile.²⁶

²² Similarly, those reasons may also not fall within the criteria which the Chamber considers appropriate for refreshing the witness' memory under paragraph 109 of its Rule 140 Decision.

²³ The manner in which a witness explains the inconsistency (or fails to acknowledge it) may on the other hand form a basis for the calling party to request that a witness be declared hostile.

²⁴ Statute recognizes that the Court must promote the fair evaluation of the testimony of witnesses. See Article 69(4), in which the impact of an item of evidence on the fair evaluation of the testimony of a witness is a factor to be considered in determining the admissibility of an item of evidence.

²⁵ Under Article 68(1), the Court has an obligation to protect *inter alia* the "psychological well-being [and] dignity" of witnesses.

²⁶ See for instance the decision of the Cour de Cassation: Crim., 24 Juin 1998, No.97-84-657, Bull. Crim. No. 205, p.584. See also *Prosecutor v Slobodan Milosevic*, Separate Opinion of Judge O-Gon Kwon on Trial Chamber Confidential Decision Issued 28 January 2004, IT-02-54-T, 29 April 2004, para. 7: "I do not see the purposes and practical benefits of strictly classifying witnesses into three categories - court witness, prosecution witness and defense witness - as in the common law system. Rather *I believe that there is merit in viewing all witnesses as means of ascertaining the truth, allowing the tool of cross-examination as a method to do so*. In this sense, *I strongly endorse the civil law system*, which views all witnesses as the court's witnesses in the ascertainment of the truth." (emphasis added). In the same line, Judge May noted that the ICTY is not bound by common law rules and allowed the Prosecution to ask questions to clarify the witness' evidence on contradictory issues enclosed in his prior statement as "we believe, would be important in the Tribunal's duty to determine the truth and to find the truth". See *Prosecutor v Krajisnik*, IT-00-39-T, T. 8558-8559, 23 November 2004. See also ICTY *Prosecutor v Popovic et al.*, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, IT-05-88-AR73.3, 1 February 2008, para. 28, where the Chamber noted that the interests of justice dictate a certain measure of flexibility, thus, "the Trial Chamber [may] allow a calling party to put a prior inconsistent statement in order to clarify a particular contradiction without declaring the witness hostile". In the *Halilovic* Case, the Trial Chamber conceded that the party calling the witness may challenge the witness' credibility on portions of his testimony without declaring him hostile by confronting him with specific passages of his prior statement, so that the witness can explain the alleged discrepancies and these explanations can be tested by cross-examination. The Chamber considered that "confronting a witness with material passages of his or her prior statement allows the witness to explain, comment or elucidate on the existence of the alleged inconsistencies and therefore it is respectful of the witness' integrity and enhances the reliability of the testimony." See *Prosecutor v Halilovic*, Decision on Admission into Evidence of Prior Statement of a Witness, IT-01/48-T, 5 July 2005, p. 3. Finally, even in entirely common law systems, there may be greater flexibility. For example, in the United States, a common law system, Rule 607 of the Federal Rules of Evidence expressly states that "the credibility of a witness may be attacked by any party, including the party calling the witness".

16. The Issue further impacts on the ability of the Court to establish the truth, a component of fairness, as it forces a party to choose between either (a) making an application to have the witness declared hostile in their entirety, an application which may be unfair, artificial and inaccurate; or (b) allowing a discrete portion of testimony to stand unchallenged, despite the fact that that portion raises questions of credibility and accuracy which need to be explored. Neither of these options fairly represents the evidence of the witness or the witness' credibility, and either will be detrimental to the establishment of the truth and the fairness of the proceedings. To establish the truth, the parties must be able to both lead the majority of the evidence of a witness in the ordinary fashion, and to seek leave of the Chamber to explore inconsistencies and examine specific instances of hostility. .

17. This impact of the Issue is exacerbated by the way in which it addresses the timing of any request that a witness be declared hostile or adverse. The Chamber stated that parties must be quick to make any request that a witness be declared hostile;²⁷ but also that once a witness has been declared hostile, it is no longer permissible to continue with the examination-in-chief.²⁸ As a result, as soon as any discrete issue arises on which the witness appears hostile to the calling party, the party must choose whether to either let that adverse and potentially non-credible evidence stand or forgo the opportunity to continue to elicit further evidence in the normal manner. This creates an unduly and unnecessarily interventionist system which will prematurely terminate the ordinary course of witness testimony to the detriment of the smooth and fair conduct of proceedings.

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

18. In its recent decision on a defence application for leave to appeal,²⁹ the Trial Chamber granted leave to appeal after finding only that the issue "clearly has a bearing on the

²⁷ ICC-01/04-01/07-T-98-CONF-ENG, p. 20, lines 13-19 ("The Chamber notes that it is late, after several days of examination-in-chief, that the Prosecutor has mentioned the possible hostility of the witness; and at this level in a general way it asks each and all of the participants to be extremely attentive in the future to the need to be much quicker if any of them consider that it -- that it is right to submit to the Chamber the possible hostility of a witness.")

²⁸ ICC-01/04-01/07-T-98-CONF-ENG, p. 21, lines 15-19 ("It considers that once the hostility of a witness has been declared, this hostility is indivisible and this witness is hostile - if one can use this expression - hostile as a whole. And this does not make it possible to continue with the examination-in-chief with the witness being, if you like, cloaked in this hostility.")

²⁹ 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", ICC-01/04-01/07-1859, 12 February 2010.

fairness of the proceedings”, and therefore “[t]he first requirement of Article 82(1)(d) of the Statute is met.”³⁰ The Prosecution agrees with this interpretation of the Statute, and has consistently expressed a 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).³¹

19. Nevertheless, the Prosecution submits that the Issue arising from these Rulings also impacts on the expeditiousness of the proceedings. The expeditious conduct of proceedings concerns the timely and efficient conduct of proceedings³² and requires that decisions do not unnecessarily delay the overall determination of the accused person’s responsibility.³³ Any decision which compromises the efficient conduct of the ongoing proceedings, or which delays the prompt determination of responsibility, affects the expeditious conduct of the proceedings.³⁴

³⁰ ICC-01/04-01/07-1859, 12 February 2010, para. 18.

³¹ 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, fn 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. Indeed, 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” - *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, especially pp. 66-67.

³² Expeditious proceedings is intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: “the Court’s obligation to do justice expeditiously and effectively, as well as fairly.” (para. 6); “we can only do justice that is expeditious, fair and efficient” (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue “will significantly affect the efficient and expeditious conduct of the proceedings”; Jones and Powles, *International Criminal Practice* at para. 8.5.60.

³³ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

³⁴ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, at para. 8; and Terrier, “Powers of the Trial Chamber” in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65. For examples of delay to trial impacting on the expeditious conduct of the proceedings, see e.g. *Prosecutor v Milosevic*, IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, at paras 56, 64-65 and 70; *Prosecution v Brima, Kamaru and Kanu*, SCSL-2004-16-T, Decision on Joint Defence Application for Leave to Appeal against the ruling of Trial Chamber II of 5 April

20. This Issue affects the expeditious conduct of the proceedings because it prevents the totality of a witness' evidence being heard as a coherent whole. The system created by the Rulings will fragment the presentation of that evidence. It deprives the party calling a witness of the ability to explore any particular inconsistency between witness testimony and prior statements while the witness is testifying on a particular issue. Inconsistencies regarding a certain point can only be addressed after the witness has completed his or her testimony in chief – and only if they are addressed at the instance of the other participants or *proprio motu* by the Chamber – rather than allowing the witness to respond in context and as part of that testimony.
21. In addition, precluding the party calling a witness from clarifying inconsistencies during the examination-in-chief, during which the inconsistencies may well be easily resolved, could necessitate more extensive re-examination. And to the extent that the inconsistencies cannot be effectively addressed by the party calling the relevant witness, then a party may need to address them through other witnesses or may even need to apply to bring additional evidence to provide clarity or to address any resulting lacunae or deficiency in its case.
22. The Rulings also may force a party to declare a witness hostile and thus effectively deny it the ability to continue eliciting evidence – in the form of open or non-leading questions – on any issue as soon as a witness demonstrates hostility or provides evidence which the party considers to be inaccurate on a discrete point. This again may force that party to resort to proof of those facts which would have been covered by the lost testimony through other means; and potentially denies the Chamber the most probative and relevant evidence on an issue. Alternatively, a party may be forced to forego the opportunity to elicit the full truth on a particular point during the testimony, if doing so will require it to declare the witness hostile and lose other relevant testimony. Sacrificing the opportunity to explore and expose inconsistent, hostile or inaccurate testimony from one of its witnesses, the party may seek to remedy this through additional questioning of other witnesses or presentation of other evidence. Whichever course is taken, the inability to treat a witness as hostile only on

2005, 15 June 2005 at paras. 21-22; *Prosecutor v Kallon*, SCSL-2003-07-PT, Decision on the Defence Application for Leave to Appeal, 10 December 2003 at para. 34. A Trial Chamber may "limit the amount of time that each party has to present evidence in the interests of an expeditious trial and the efficient administration of justice" - Jones and Powles, *International Criminal Practice* (2003: OUP) at para. 8.5.60.

a particular issue – if that reflects the reality of the situation – will unnecessarily fragment and complicate the presentation of evidence to the detriment of the efficient and expeditious conduct of the proceedings.

(d) The Issue affects the outcome of the trial

23. The requirement that an issue affects the outcome of the trial is an alternative basis for granting leave to appeal under Article 82(1)(d).³⁵ In other words, an issue only needs to impact on the fair and expeditious conduct of the proceedings or on the outcome of the trial.³⁶
24. In assessing whether an issue may affect the outcome of the trial, the “Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.”³⁷
25. In this case, the Issue is capable of affecting the outcome of the trial. The Rulings in this case impose an absolute rule that a party calling a witness cannot impeach the witness on discrete matters or even attempt to pursue the truth through controlled leading question after the witness gives surprising about-face testimony on key issues.
26. This can result in the exclusion of information relevant to the truth-seeking function of the Court. The Defence cannot be expected to address the witness’ prior incriminating evidence during their cross-examination: its strategy will be to ignore previous statements pointing to the accuseds’ guilt, not to highlight them through questioning. Other parties or the Chamber itself can examine the witness more intensely, but they may be less familiar with the prior statements and less able to identify and probe the specific inconsistencies. It may mean that critical evidence will not be presented at trial or inaccuracies will not be corrected. Alternatively, if the Prosecution is forced through a declaration of hostility to either impugn the evidence of a witness who has given largely reliable testimony (or prematurely impugn the testimony of a witness, preventing that witness from providing further testimony in

³⁵ *Situation in Uganda*, 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.

³⁶ *Prosecutor v Bemba*, ICC-01/05-01/08-75, 25 August 2008, para. 8.

³⁷ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 13.

examination-in-chief), this too can adversely impact on the evidence and affect the outcome of the trial.³⁸

(e) Immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings

27. Immediate resolution of the issue 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.”³⁹ 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.”⁴⁰
28. The Issue arising from the Oral Rulings is systemic. The Chamber has laid down categorical rules that can be expected to apply to all witnesses, regardless of the party calling them, and will thus have a substantial and ongoing impact on the conduct of the trial.⁴¹
29. It is therefore important that the Appeals Chamber be given an opportunity to ensure that the correct principles are applied, from the outset and throughout the trial, if a witness provides a surprising new account inconsistent with prior statements or appears hostile but only in relation to a particular issue. An error in this regard could have severe repercussions across the entire trial proceedings.
30. The Issue raised in this application thus must be resolved now. It governs the manner in which a party may question its witnesses or utilize their prior statements under particular circumstances and cannot, in and of themselves, be properly addressed and considered as part of any final appeal.
31. Furthermore, although the trial is underway, granting leave to appeal need not delay the proceedings. The Prosecution will not ask for a stay or suspension of proceedings

³⁸ Amongst the factors that have led Chambers to consider that an issue may affect the outcome of the trial, Trial Chamber I noted that an issue may, *inter alia*, “materially affect the content and the substance of the evidence introduced during the trial” – *Prosecutor v Lubanga*, ICC-01/04-01/06-1191, 26 February 2008, para. 42.

³⁹ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

⁴⁰ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 12; see also para. 17: “The term ‘proceedings’ in the second part of article 82(1)(d) of the Statute can have no different meaning from the one ascribed to it in the first part of the paragraph, encompassing the proceedings in their entirety.”

⁴¹ See ICC-01/04-01/07-T-97-CONF-ENG ET, 8 February 2010, p. 63; see also ICC-01/04-01/07-T-99-CONF-ENG ET, 10 February 2010, p. 12, lines 24-25 and p. 13, lines 1-4.

pending the outcome of this appeal. Rather, the prompt resolution of this Issue by an immediate appeal would promote the efficient conduct of the proceedings as it would minimise the number of witnesses whose testimony may have been taken under and affected by these principles if they are ultimately found not to be correct.⁴²

32. In addition to the direct impact on the present proceedings, the prompt resolution of this Issue will also assist to advance all other proceedings before this Court.⁴³ The challenges which gave rise to the Issue are not limited to the present case. Authoritative guidance from the Appeals Chamber on the options available to the parties and the Chamber to address these challenges, to present their cases fairly, and to establish the truth will promote consistency and benefit this and future cases.

Relief sought

33. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal pursuant to Article 82(1)(d).



Luis Moreno-Ocampo, Prosecutor

Dated this 15th day of February, 2010

At The Hague, The Netherlands

⁴² The Issue raised in this Application, regarding in particular inconsistencies in statements, is likely to arise again in the course of the proceedings, for much the same reasons as the Trial Chamber itself recognized in the context of refreshing the memory of a witness (see Decision on Rule 140, para. 109).

⁴³ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See *Situation in Uganda*, ICC-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *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, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.