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No.: ICC-01/04-01/07
Date: 15 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 CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

Defence Reply to Réponse conjointe des Représentants légaux des victimes à la demande de la Défense de Germain Katanga d'être autorisée à interjeter appel de la décision de la Chambre relative aux modalités de participation des victimes

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for the Defence for Mathieu Ngudjolo Chui

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

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Defence for Mr. Katanga (“Defence”) hereby replies to *Réponse conjointe des Représentants légaux des victimes à la demande de la Défense de Germain Katanga d’être autorisée à interjeter appel de la décision de la Chambre relative aux modalités de participation des victimes*,¹ which was filed by the victim representatives on 4 February 2010. The Defence is aware that this Reply is filed while its request for leave to file this reply is still pending.² It appears, however, that the deadline to file this Reply is today. Therefore, the Defence cannot await the Chamber’s decision on the request for leave to reply. The Defence regrets that it has given the Chamber little time to decide on this request. This request is filed only now due to the Defence focus on the testimony of witness 250.

Argument of legal representatives

2. The Legal Representatives of Victims argue that the Defence is barred from appealing because it did not appeal Decision 1665: Directions for the conduct of the proceedings and testimony in accordance with rule 140, of 20 November 2009, as corrected on 1st December 2009.

Problems with the assertion of a procedural bar as outlined by the legal representatives

3. The requirements for leave to appeal are set out in Rule 155, and do not include the fact that a previous decision of the Chamber could have been appealed. It must be borne in mind that Decision 1665 incorporated directions on the conduct of the trial on a wide range of procedural issues. In so far as such directions were fairly and generally expressed the Defence cannot be reasonably expected to speculate on the concrete application of every direction at the time of the issuance of that decision. Later decisions made in a more specific manner in response to specific requests or concrete situations cannot be without the possibility of appeal simply because they develop upon existing directions. A general direction may be fair on its face but may be applied, extended or developed unfairly in later decisions.

¹ ICC-01/04-01/07-1841.

² This Request for Leave to Reply was filed earlier today.

4. Even if one is to view the Directions in Decision 1665 as a comprehensive code, one is entitled to challenge subsequent interpretations of or applications of that code, in the same way that one could appeal an erroneous application or interpretation of a provision of the founding documents of the Court.
5. In any event, in the instant application for leave to appeal the grounds of appeal as raised by the Defence address specific findings in the impugned decision which, while connected to findings in the Decision 1665, go beyond or develop upon those previous findings. Accordingly, the Defence cannot be barred from raising a challenge to these new findings. The Defence cannot be expected to speculate when considering whether to appeal a decision. The Decision 1665, on its face did not reveal any specific difficulty for the Defence in the way it was expressed. The Defence therefore cannot be reasonably criticised for deciding not to appeal that decision.
6. With respect to the first ground of appeal the finding which is challenged is that the legal representatives of victims may *clarify or complete elements of proof*. The use of the word ‘complete’ or ‘completer’ in French in association with the word clarify may be interpreted as allowing questions, the answers to which give force to the evidence elicited by the prosecution, or alternatively fill in gaps in the prosecution case. The more neutral expression employed in the first decision, i.e. *clarify or complement*, requires questions to be relevant but does not necessarily imply that such questions could be asked to complete the prosecution case against the accused for the purposes of conviction. For this reason the Defence did not see it as necessary to seek leave to appeal on the basis of that first expression used.
7. The second ground of appeal addresses the calling of evidence or witnesses on the crimes of the accused which is of an incriminating nature. This is an issue which does not arise from the Decision 1665 because that decision does not make such a specific finding. As expressed, Decision 1665 did not raise any alarm bells for the Defence.
8. Likewise, with respect to the third ground of appeal, nowhere in the Decision 1665 is it suggested that the victim witnesses may address matters including the *role of the accused*. It merely states the general principal that in considering whether witnesses

may be called it should be considered whether the issues on which they are to testify are sufficiently closely related to issue which the Chamber must consider. Expressed as a general principle, the Defence did not feel able to reasonably criticize the Decision 1665 in the general manner in which it was expressed.

Relief Sought

The Defence prays that the Trial Chamber:

- (i) not to follow the reasoning of the *Réponse conjointe des Représentants légaux des victimes à la demande de la Défense de Germain Katanga d'être autorisée à interjeter appel de la décision de la Chambre relative aux modalités de participation des victimes*;
- (ii) grant leave to appeal the *Décision relative aux modalités de participation des victimes au stade des débats sur le fond (ICC-01/04-01/07-1788)*.

Respectfully submitted,



David HOOPER

Dated this 15th February 2010

At The Hague, Netherlands