



Original: **French**

No.: **ICC-01/04-01/07**
Date: **4 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

**Joint Response of the Legal Representatives of the Victims to the Request of the
Defence for Germain Katanga for Leave to Appeal the Chamber's Decision on the
Modalities of Victim Participation**

Source: The Legal Representatives of the Victims

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

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**The Office of Public Counsel for
Victims**

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Defence**

Registrar

Ms Silvana Arbia

1. Pursuant to regulation 65 of the Regulations of the Court, the two legal representatives of the victims hereby file a joint response to the request of the Defence for Germain Katanga for leave to appeal the Chamber's decision on the modalities of victim participation at trial of 22 January 2010.¹

2. In its request, the Defence sets out five grounds of appeal. The legal representatives consider that the Chamber must reject the request for leave to appeal on its first, second and third grounds, because the first ground is not admissible

¹ ICC-01/04-01/07-1788.

under rule 155 of the Rules of Procedure and Evidence ("the Rules") and because all three grounds do not satisfy the provisions of article 82 (1) (d) of the Statute.

1. Inadmissibility of the first ground of appeal

3. In the view of the Defence for Germain Katanga, the Chamber erred in authorizing the legal representatives to question the witnesses, experts and the accused persons on points which could clarify or complete the evidence already provided by the witness.

4. The request for leave to appeal on this ground was filed late.

5. Under rule 155 of the Rules, the party wishing to appeal a decision under article 82 of the Statute must do so within 5 days of being notified of that decision.

6. In this case, the Chamber's decision granting the legal representatives leave to question witnesses, experts and the accused persons on points which could clarify or complete the evidence already provided by the witness, was issued on 20 November 2009.²

7. Although the document of 20 November 2009 is entitled *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, the Chamber has adjudicated an issue in dispute between the parties, and thereby issued a "decision".

8. Indeed, the first paragraph states the following:

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 articles 64, 67 and 68 of the Rome Statute of the International Criminal Court ("Statute"), rule 140 of the Rules of Procedure and Evidence ("Rules") and regulations 43 and 54 of the Regulations of the Court ("Regulations"), issues the following decision.³

² *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, ICC-01/04-01/07-1665 and corrigendum filed on 1 December 2009.

³ Emphasis added.

Moreover, the disposition also refers to a “decision” through its use of the verb “DECIDES”.

9. It should be pointed out that the decision of 22 January 2010, which the Defence is seeking to appeal, refers back to the decision of 20 November 2009 in that it reiterates its exact words.⁴ Moreover, the Defence does not demonstrate that the decision of 22 January 2010 introduced any new and/or additional information in this regard to justify the time limit for appeal running only from this date and not from 20 November 2009.

10. The Defence request for leave to appeal the Chamber’s decision permitting the legal representatives to question the witnesses, experts and accused persons on points which could clarify or complete the evidence already provided by the witness is therefore inadmissible, as it was out of time.

2. First, second and third grounds of appeal: failure to comply with the conditions of article 82 of the Statute

11. The first, second and third grounds of appeal do not meet the cumulative conditions of article 82 (1) (d) of the Statute in that they do not entail issues “for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

First ground of appeal

12. Supposing that the Chamber were to consider the request for leave to appeal on the first ground admissible – quod non – it should nevertheless consider that it does not meet the conditions of article 82 (1) (d) of the Statute.

13. In the view of the Defence for Germain Katanga, the Chamber erred in authorizing the legal representatives to question the witnesses, experts and accused

⁴ See paragraph 78 of the Decision of 22 January 2010.

persons on points which could clarify or complete the evidence already provided by the witness.

14. The Appeals Chamber has, however, already ruled on this issue in the *Lubanga* case. It held that it cannot be ruled out that questions put by the legal representatives to the witnesses or the production of documents by these representatives “may pertain to the guilt or innocence of the accused (...) in so far as it may affect their interests earlier identified and subject to the confines of their right to participate.”⁵

15. The Appeals Chamber found that, provided that the Trial Chamber incorporates certain safeguards into its decision (including consistency with the rights of the accused and a fair trial), “the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused (...) **is [not] inconsistent** with the onus of the Prosecutor to prove the guilt of the accused ...**nor is it inconsistent with the rights of the accused and a fair trial.**”⁶

16. In this case, in its decision, Trial Chamber II has not exceeded the scope set by the Appeals Chamber. It emphasized that the questions put by the legal representatives must contribute to the determination of the truth with respect for the rights of the accused persons. It further recalled that the legal representatives do not act as supplementary Prosecutors.⁷

17. Furthermore, we fail to see how granting the legal representatives the possibility to put questions on points which which could clarify or complete the evidence already provided by a witness would exceed the principle defined by the

⁵ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008*, 11 July 2008, ICC-01/04-01/06-1432 (hereinafter “*Lubanga case*”), para. 102.

⁶ *Ibid.*, para. 104, emphasis added.

⁷ *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, ICC-01/04-01/07-1665 and corrigendum filed on 1 December 2009, particularly paras. 82 and 88; confirmed by the Chamber’s decision on the modalities of victim participation at trial, 22 January 2010, ICC-01/04-01/07-1788, para. 65).

Appeals Chamber according to which it cannot be ruled out that the legal representatives' questions may pertain to the guilt or innocence of the accused.

18. Contrary to the Defence assertion, questions pertaining to the crimes with which the accused persons have been charged or their actions and behaviour necessarily fall within the scope of questions pertaining to the guilt or innocence of the accused.

19. Accordingly, it is appropriate to reject the Defence request to appeal on this point.

Second ground of appeal

20. In the view of the Defence for Germain Katanga, the Chamber erred in granting the legal representatives leave to present evidence, particularly to call victims to testify, whereas the trial had already commenced.

21. In so doing, the Defence considers that the Chamber has made any disclosure of such evidence with adequate notice before the commencement of the trial impossible. The Defence compares the current situation to that of the *Lubanga* case, in which the decision of the Trial Chamber and the decision on appeal were issued respectively 1 year and 6 months before the commencement of the trial.

22. However, this is an issue which cannot be immediately resolved by the Appeals Chamber since the issue is premature and based on a hypothetical scenario.

23. The prejudice referred to by the Defence is in fact hypothetical as opposed to real. As matters now stand, the legal representatives have not yet made use of the option granted to them by the Chamber to present evidence. Only if the legal representatives were actually to produce evidence would it be appropriate to define the necessary measures to ensure a fair trial, taking into account the rights of the accused persons.

24. Moreover, in the *Lubanga* case, the Appeals Chamber held that:

If the Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence.

25. It is therefore appropriate to reject the Defence request to appeal on this point.

Third ground of appeal

26. In the view of the Defence for Germain Katanga, the Chamber erred in deciding that the legal representatives may call witnesses on matters including the role of the accused persons in the crimes with which they are charged. It considers that this effectively turns the legal representatives into supplementary prosecutors.

27. The Appeals Chamber, however, already ruled on this issue in the *Lubanga* case. As previously mentioned, it in effect held that “the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused (...) **is [not] inconsistent** with the onus of the Prosecutor to prove the guilt of the accused nor **is it inconsistent with the rights of the accused and a fair trial.**”⁸

28. The production of evidence by a party includes the calling of witnesses by that party.

29. It is therefore appropriate to reject the Defence request to appeal on this point.

FOR THESE REASONS,

MAY IT PLEASE THE CHAMBER

With respect to the first ground

⁸ *Lubanga* Judgment, para. 104 (emphasis added).

1. **TO FIND** inadmissible the application for leave to appeal on the first ground set out by the Defence in its request;
2. **TO FIND**, in the alternative, without merit the Defence request for leave to appeal on the first ground set out by the Defence in its request;

With respect to the second and third grounds

3. **TO FIND** without merit the Defence request for leave to appeal on the second and third grounds set out by the Defence in its request.

[signed]
Mr Fidel Nsita Luvengika

[signed]
Mr Jean-Louis Gilissen

Legal Representative of the
main group of victims

Legal Representative of the
group of child soldiers

Dated this 4 February 2010
At The Hague