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No.: ICC-01/04-01/07
Date: 17 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 Response to the Prosecutor's
Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in
Prior Statements and Partial Hostility**

Source: Defence for Mr Germain Katanga

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

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Introduction

1. On 8 and 9 February 2010, the Chamber ruled orally that witnesses can only be shown their prior statements if necessary to refresh their memory in case they have a memory gap; or where they are declared hostile.¹ The Chamber rejected the notion of partial hostility.² If witnesses are not declared hostile, they cannot be asked leading questions by the party having called them.³
2. On 15 February 2010, the Prosecutor filed an *Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility*.⁴ The Prosecutor submits that the Chamber erred in not allowing a party to show its witnesses their prior statements when specific inconsistencies arise during their testimony, unless they are declared completely hostile or lack memory.⁵
3. The Defence for Germain Katanga (“Defence”) hereby responds to this Prosecutor’s Application. The Defence requests the Chamber to decline to grant the Prosecutor leave to appeal the Chamber’s oral rulings issued on 8 and 9 February 2010 (“impugned oral rulings”).
4. The Defence accepts that the Prosecutor has raised an issue which might under different circumstances be appealable. The Defence contests, however, that the immediate resolution of this issue could reasonably be perceived as materially advancing the proceedings.

The requirement of material advancement of the proceedings: the ability to permit cross-examination of W-250 in the event of a successful appeal

5. The impugned oral rulings relate to W-250. The second oral ruling was based on the Chamber’s discretion and was premised on various factors, only one of which was the indivisibility of the evidence. The Chamber also relied on the fact that the Prosecutor

¹ ICC-01/04-01/07-T-97-CONF-ENG ET, 8 February 2010, pp. 63-68.

² ICC-01/04-01/07-T-98-CONF-ENG ET, 9 February 2010, pp. 19-21.

³ *Supra* 1 and 2.

⁴ ICC-01/04-01/07-1872.

⁵ ICC-01/04-01/07-1872, paras. 2, 4.

had not been diligent in raising the issue.⁶ This had an independent effect such that the question of indivisibility may not have made a difference to the outcome, had the Chamber decided in favour of the concept of partial hostility. In order for the immediate resolution by the Appeals Chamber to materially advance the proceedings, it is submitted that the issue as it pertains to W-250 must be capable of being revisited by the Trial Chamber without prejudicing the accused. In this instance, if leave were granted to appeal and the Appeals Chamber were to find in favour of the Prosecutor, the issue as it pertains to witness 250 could not be revisited without causing undue prejudice to the accused.

6. The Defence has now cross-examined the witness. It is no longer possible to look at the question in the same light. In the event that there are legal grounds to cross-examine the witness, this should have been done at the time the issue arose and certainly before cross-examination by counsel for the accused. Whatever the correctness of the Prosecutor's submission on the merits, any review of his ability to cross-examine his own witness can no longer be considered in the same way. Any partial cross-examination of his witness after he has exhausted all avenues of examination-in chief and the Defence has cross-examined the witness would be grossly unfair to the accused. Accordingly, it is submitted that this would be an independent bar within the discretion of the Chamber against the cross-examination of 250 by the Prosecutor, regardless of the outcome of the appeal on the issue raised.
7. Moreover, this is a situation which could and should have been foreseen and avoided by the Prosecutor. The issue of the adverse nature of the witness, in part or in whole, in relation to the areas of evidence identified by the prosecution was perceptible as an issue on the first or second day of the testimony of the witness. The Prosecutor chose to wait until two weeks into the evidence and when he had substantially completed his examination-in-chief to raise the issue. The issue was argued and decided. The Prosecutor could either have immediately requested leave to appeal, or alternatively given notice of its intention to seek leave to appeal so as to give the Defence and the Chamber the option of postponing the Defence cross-examination of this witness until the question of leave to appeal and where appropriate the appeal itself had been resolved. Instead, the Prosecutor gave no such notice and the cross-examination of the

⁶ ICC-01/04-01/07-T-98-CONF-ENG ET, 9 February 2010, pg. 20 lines 11-19.

witness proceeded and is close to completion with respect to the Defence for Mr Katanga.

8. At this stage it is unclear whether such an issue will arise again in these proceedings. In the event that a similar issue does arise in circumstances where an immediate resolution may materially advance the proceedings, since the Prosecutor has sought leave to appeal on this occasion, it will not be held against him that he has not appealed the issue he now raises.
9. Accordingly, it cannot be reasonably asserted that the resolution of the issue could materially advance the proceedings. On the contrary, it is likely to complicate and lengthen the proceedings.

Relief sought

10. On this ground, the Defence requests that the Chamber dismiss the Prosecutor's *Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility*.

Respectfully submitted,



David Hooper, Lead Counsel

Dated this 17th February 2010

At The Hague, Netherlands