

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07
Date: 11 March 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

**Decision on the “Prosecution’s Application for Leave to Appeal Oral
Rulings on Clarifying Inconsistencies in Prior Statements and Partial
Hostility”**

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Victims**

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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"), rule 155 of the Rules of Procedure and Evidence ("Rules")), issues the following decision:

I. BACKGROUND

1. On 27 January 2010, the Chamber started hearing the testimony of witness P-250 ("P-250"). On 4 February 2010, the Prosecution requested permission to cross-examine P-250 on certain parts of his testimony and confront him with contradictions with his previous statements, without asking for P-250 to be declared hostile.¹

2. On 8 February 2010, after having heard the submissions of the parties and participants, the Chamber denied the Prosecution's request and invited the Prosecution to decide whether to continue with the examination-in-chief or to formally ask the Chamber to declare P-250 hostile.²

3. The next day, on 9 February 2010, the Prosecution requested the Chamber to declare P-250 hostile on five different points of his testimony.³ After the recess, the Chamber issued its decision on this request, declining to declare P-250 hostile.⁴ The Chamber also clarified that once a witness has been declared hostile, this applies to his or her entire testimony. It is therefore not possible for the party calling the

¹ ICC-01/04-01/07-T-96-CONF-ENG CT 04-02-2010, page 34, line 4 et seq

² ICC-01/04-01/07-T-97-CONF-ENG-ET 08-04-2010, page 62, line 1 et seq

³ ICC-01/04-01/07-T-98-CONF-ENG-ET 09-04-2010, page 1, line 22 et seq

⁴ ICC-01/04-01/07-T-98-CONF-ENG-ET 09-04-2010, page 19, line 4 et seq

witness to cross-examine him or her only on discrete parts of his testimony and also retain the right to conduct a normal examination-in-chief on other matters.⁵

4. On 15 February 2010, the Prosecution filed an application for leave to appeal the combined oral decisions of 8 and 9 February 2010.⁶ The Prosecution defined the appealable issue as follows:

“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 [in the absence of a finding from the Chamber that the witness lacked memory]; or ask leading questions on discrete matters unless the witness is first declared overall to be a hostile witness”⁷

5. The Prosecution argues that, although the Chamber’s decisions were rendered in the context of one particular witness, P-250, they “will attach throughout the proceedings to all upcoming witnesses.”⁸ Moreover, the Prosecution submits that this issue satisfies all limbs of the test for interlocutory appeals.⁹

6. The Defence for Mr. Katanga filed its response to the Prosecution’s application on 17 February 2010.¹⁰ The Defence accepts that there is an issue which might under different circumstances be appealable, but it argues that under the specific circumstances of this application, the immediate resolution of the issue would not materially advance the

⁵ ICC-01/04-01/07-T-98-CONF-ENG-ET 09-04-2010, page 21, line 15 et seq

⁶ “Prosecution’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility”, 15 February 2010, ICC-01/04-01/07-1872

⁷ ICC-01/04-01/07-1872, par. 4

⁸ ICC-01/04-01/07-1872, par. 6

⁹ Ibid., par. 6-32

¹⁰ “Defence Response to the Prosecutor’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility”, 17 February 2010, ICC-01/04-01/07-1882

proceedings.¹¹ The Defence points out that P-250 has now given his full testimony and has been cross-examined and re-examined by the parties. Even if the Appeals Chamber were to find in favour of the Prosecution, it would still be impossible to recall P-250 without causing undue prejudice to the accused.¹² The Defence also draws attention to the fact that “at this stage it is unclear whether such an issue will arise again in these proceedings.”¹³

7. On 18 February 2010, the Defence for Mr. Ngudjolo also filed a response to the Prosecution’s application.¹⁴ The Defence argues that the decision whether to allow the party calling a witness to cross-examine that witness is at the sole discretion of the Trial Chamber, and that it would unduly burden the Appeals Chamber to go through the transcripts of several weeks of hearings during which P-250 testified.¹⁵

8. With regard to the test for interlocutory appeals, the Defence submits that the appealable issue, as defined by the Prosecution, does not arise from the two oral decisions rendered by the Chamber on 8 and 9 February 2010, but rather from the Presiding Judge’s “Directions for the conduct of proceedings and testimony in accordance with rule 140”, of 1 December 2009 (“Rule 140 Directions”).¹⁶ The Defence is of the view that in its oral decisions the Chamber did nothing more than apply these Directions, and that the issue identified by the Prosecution simply reflects

¹¹ Ibid., par. 4

¹² Ibid., par. 5-6

¹³ Ibid., par. 8

¹⁴ “Réponse de la Défense de Mathieu Ngudjolo Chui à la Requête ‘Prosecution’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility’ ICC-01/04-01/07-1872”, 18 February 2010, ICC-01/04-01/07-1887

¹⁵ Ibid., par. 19

¹⁶ ICC-01/04-01/07-1665

the Prosecution's disagreement with how the Chamber has applied the existing rules.¹⁷

9. Moreover, the Defence argues that the impugned decisions do not significantly affect the fairness of the proceedings¹⁸, and that an immediate resolution by the Appeals Chamber would not advance the proceedings, but in fact cause additional delay.¹⁹

II. ANALYSIS

10. In reaching its decision on the Prosecution's application seeking leave to appeal, the Trial Chamber has followed the criteria laid down by the Appeals Chamber in its judgment of 13 July 2006²⁰, and considers the issues raised by the Prosecution 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.

¹⁷ ICC-01/04-01/07-1887, par. 27

¹⁸ Ibid., par. 29-34

¹⁹ Ibid., par. 35-37

²⁰ "Judgement on the Prosecutor's Application for Evidentiary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, par. 9-20

11. The requirements set out in a), b) and c) above are cumulative. The failure to fulfil one or more of them is fatal to an application for leave to appeal.²¹

A. Is there an appealable issue?

12. As the Chamber has previously stated²², basing itself on the jurisprudence of the Appeals Chamber,²³ 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.²⁴

13. In analysing whether an application for appeal raises an 'appealable issue', the Chamber must first ascertain whether the issue, as formulated by the party requesting leave, veritably arises from the impugned decision or order. If the impugned decision does not contain the alleged issue as defined by the party seeking leave to appeal, the Chamber cannot grant the leave requested.

14. The Chamber observes, in this respect, that the alleged issue as defined by the Prosecution consists of two limbs. First, there is the question as to 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 [in the absence of a finding from the Chamber

²¹ Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, "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

²² 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 to 18

²³ "Judgment on the Prosecutor's Application for Evidentiary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, par. 9

²⁴ *Idem*.

that the witness lacked memory]". Second, there is the question as to whether the Chamber erred in concluding that a party calling a witness may not "ask leading questions on discrete matters unless the witness is first declared overall to be a hostile witness".

15. With regard to the first question, the Chamber stresses that it did not make a general legal ruling, as suggested by the Prosecution²⁵, that a witness whose testimony is inconsistent with a previous statement, can only be shown their previous statement if the Chamber considers he/she lacks memory or declares him/her hostile. In fact, the Chamber merely addressed the request by the Prosecution to show the witness a previous statement, made by reference to paragraph 109 of the Rule 140 Decision. The Chamber decided that, having regard to the precise circumstances of P-250's testimony and especially his demeanour over several weeks of testimony, it did not consider that it was necessary to refresh P-250's memory by showing him his previous statements.²⁶ In coming to this conclusion, the Chamber specifically took into consideration the fact that P-250 sometimes provided seemingly inconsistent answers as compared to his prior statements. On the facts, the Chamber considered that the witness did not lack memory and thus paragraph 109 was not applicable.

16. The first limb of the issue, as defined by the Prosecution, therefore does not arise from the impugned oral decision.

17. The second limb of the issue pertains to a request by the Prosecution for the Chamber to 'interpret' paragraph 67 of the Rule 140 Directions in such a manner that it would allow a party calling a witness to cross-

²⁵ ICC-01/04-01/07-1882, par. 9: "The Chamber appears to have considered that only these two extremes (lack of memory and incomplete hostility) allow a party to show a prior statement to a witness or to pose leading questions...for the limited purpose of resolving inconsistencies between the statement and unexpectedly contrary in-court testimony."

²⁶ ICC-01/04-01/07-T-97-CONF-ENG ET 08-02-2010, page 63, line 18 et seq

examine that witness on certain topics of his or her testimony only, without (or prior to) the witness being declared hostile.

18. It is true that this second limb arises from the impugned oral decision of 9 February 2010 insofar as the Chamber did not declare P-250 to be hostile and did not allow the Prosecution to cross-examine him on certain topics. In reaching this conclusion, the Chamber ruled out the possibility of declaring a witness hostile only in part.²⁷

19. The Chamber therefore accepts that the second limb of the issue as defined by the Prosecution is an appealable issue.

B. Whether the issue at hand would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

20. In relation to the second part of the test, the Chamber emphasises that article 82(1)(d) of the Statute makes plain that the impact of the issue on the conduct of the proceedings or the outcome of the trial must be actual and significant. Accordingly, it does not suffice for an issue to have merely a hypothetical impact on the fairness/expeditiousness of proceedings or the outcome of the trial. Nor does a minor or inconsequential effect on the proceedings or their outcome meet the requirements of article 82(1)(d) of the Statute.

21. The Chamber is not convinced by the arguments of the Prosecution that the impugned decision would have such an actual and significant impact on the proceedings or the outcome of the trial. It bears repeating in this regard that the impugned decision was taken in the specific and rather unusual circumstances of the testimony of P-250. The Prosecution

²⁷ ICC-01/04-01/07-T-98-CONF-ENG-ET 09-04-2010, page 21, lin 15 et seq

does not appear to allege that the Chamber's interdiction to cross-examine P-250 has significantly altered the outcome of the proceedings or made the proceedings unfair vis-à-vis the Prosecution. In terms of the immediate impact of the impugned decision, the threshold has therefore clearly not been met.

22. As for the potential effect of the impugned decision on the rest of the proceedings, it is impossible to predict whether similar circumstances, which gave rise to the Prosecution's request for the Chamber to re-interpret paragraph 67 of its Rule 140 Directions, will repeat themselves in the future. Unless the Prosecution is suggesting that it should be allowed to systematically cross-examine its own witnesses whenever there are inconsistencies, however small, between prior statements and the testimony at trial, it is wholly uncertain whether the issue will ever arise again.

23. The Chamber therefore considers that this criterion of article 82(1)(d) has not been met.

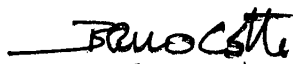
24. Given that the requirements for obtaining leave to appeal are cumulative, there is no need for the Chamber to consider the matter any further.

FOR THESE REASONS,

THE CHAMBER,

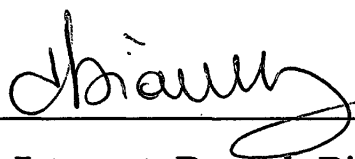
REJECTS the Prosecution request for leave to appeal the impugned decisions.

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 11 March 2010

At The Hague, the Netherlands