

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07

Date: 26 April 2012

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***

Confidential

Urgent Defence Request for Leave to Reply

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

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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

Request for Leave to File a Reply

1. On 30 March 2012, the Defence for Mr. Katanga (the “Defence”) filed its Defence Closing Brief,¹ by which it requested, *inter alia*, that the portions of the *Lubanga* judgment that address the two intermediaries P-143 and P-316 be admitted as evidence in this case (para. 467), or, in the alternative, that the Chamber may have regard to these findings as the findings of another Chamber on a question of fact relevant to this case (para. 469). The Defence did not develop this request extensively being limited by the page limit of the final brief which contained numerous other issues and in the belief that, in any event, it would have the opportunity to submit further observations during final oral submissions, given that the Prosecution and the Victims’ Representatives did not have a right to respond in writing to the Defence Brief.

2. However, by email dated 17 April,² the Trial Chamber indicated the following:

La Chambre a pris note de la requête de la Défense de Germain Katanga tendant à l'admission comme élément de preuve des extraits du jugement prononcé dans l'affaire Lubanga consacrés aux intermédiaires 143 et 316 (3266-Conf-Corr, par. 467) et, à titre subsidiaire, tendant à ce que la Chambre prenne acte des conclusions ainsi énoncées par la Chambre de première instance I (par. 469).

Elle a également pris note des arguments formulés par le Bureau du Procureur dans ses observations relatives au jugement Lubanga, anticipant en quelque sorte sur une telle demande (3264-Conf, par. 13 à 34).

La Chambre entend statuer sur cette question avant les plaidoiries prévues le 15 mai prochain. Dès lors, elle enjoint aux parties et aux participants de déposer toutes observations que cette requête appellerait de leur part avant le 20 avril 2012 à 16 heures.

3. The same day, the Defence requested

the chamber to permit the defence to make a written response to any observations that may be submitted by the other parties and participants on the subject of admitting extracts of the Lubanga judgement. The Chamber will be aware that the defence addressed the subject in two and half pages of its closing brief at paragraph 465 to 475. Any observations submitted by the parties and participants will have the benefit of the twenty page allowance for written filings. In those circumstances it will be a fairness to permit the defence for Germain Katanga the opportunity to respond to any such observations. It will also provide the Chamber with further argument and assistance. Should the Chamber accede to this application the defence respectfully requests the Chamber to allow it to file any response by Wednesday, April 25th at 16 00.³

4. The Prosecution objected the same day, considering the Defence request premature.⁴
5. On 20 April 2012, the Prosecution and the victims Representatives filed, respectively, the *Réponse de l'Accusation à la requête de la Défense aux fins de versement au*

¹ ICC-01/04-01/07-3266-Conf. See also its Corrigendum ICC-01/04-01/07-3266-Conf-Corr2.

² Mail from Pauline Baranes, dated 17 April 2012, entitled ‘Requête formulée par la Défense de Germain Katanga aux paragraphes 465 à 475 de son mémoire final’.

³ Mail from Sophie Menegon, dated 17 April 2012.

⁴ Mail from Eric Macdonald, dated 17 April 2012.

*dossier des parties du jugement Lubanga relatives aux intermédiaires P-143 et P-316*⁵ (« Prosecution's Response ») and the *Observations sur la demande de G. Katanga de faire admettre des passages du jugement rendu dans l'affaire Lubanga*⁶ (« Victims Representatives' Response »).

6. Having not heard from the Chamber, on 24th April 2012 the Defence indicated that it proposed to file a response by Friday 27 April 2012.⁷ On the 25th of April 2012, the Prosecution objected to any response from the Defence without the agreement of the Chamber and considered that the Defence had not submitted any grounds justifying that it be granted the right to file a reply.⁸
7. Consequently, the Defence files this more fully reasoned motion formally seeking leave to reply to the Prosecution and Victims Representatives' Responses. The Defence makes this filing confidentially because the previous ones were classified confidential, but it submits that this filing can be reclassified as public; the request contained in the Defence Closing Brief does not require confidentiality.
8. Firstly, the Defence wishes to challenge the Prosecution and Victim Representatives' assertion that the Chamber lacks the power to admit judicial findings as evidence in the case. The Defence has already submitted a basis for this power in its Closing Brief (Articles 74 and 64(2) of the Statute), but in its reply it wishes to address specifically the issue of the relevant provisions, in particular by responding to the Prosecution comments based on article 69(6) of the Statute and on the *travaux préparatoires*, not discussed by the Defence in its Closing Brief. The Defence also wishes to submit observations on the meaning of the phrase 'closing of the case', which would, according to the victims' Representative and the Prosecution, prevent the Chamber from admitting the *Lubanga* findings at this stage. This the Defence vigorously contests and is an issue not discussed in the Defence Closing Brief. The Defence wishes to stress, in particular, that the *Lubanga* findings constitute new evidence that arises after the Trial Chamber's *Déclaration de la clôture de la présentation des moyens de preuve*.⁹ The Trial Chamber, being guardian of the fair trial of the accused, may admit new evidence at any time.
9. Secondly, the Defence proposes to challenge the Prosecution and Victim

⁵ ICC-01/04-01/07-3275-Conf, Réponse de l'Accusation à la requête de la Défense aux fins de versement au dossier des parties du jugement Lubanga relatives aux intermédiaires P-143 et P-316, 20 April 2012.

⁶ ICC-01/04-01/07-3276-Conf, Observations sur la demande de G. Katanga de faire admettre des passages du jugement rendu dans l'affaire Lubanga, 20 April 2012.

⁷ Mail from Sophie Menegon, dated 24 April 2012.

⁸ Mail from Gilles Dutertre, dated 25 April 2012.

⁹ ICC-01/04-01/07-3276-3235, Déclaration de la clôture de la présentation des moyens de preuve, 7 February 2012.

Representatives' assertion that the Defence request would necessarily lead to the reopening of the case. This was not a necessary argument to be addressed in the closing brief. The Defence contests this for several reasons. The issue of intermediaries was addressed extensively during the trial and there is no need to recall witnesses at this stage. The Prosecution was present as a party in the *Lubanga* case and cross examined. In any event, the right to fair trial is a right of the Accused and he does not seek the opportunity to examine witnesses further.

10. Thirdly, and also not dealt with in the Defence Closing Brief, the Defence wishes to address the issue of the probative value of the *Lubanga* findings, disputed both by the Prosecution and the Victim Representatives. The Defence notes that decisions or transcripts of hearings of other jurisdictions have already been admitted as evidence in this case, through the Bar or through witnesses, such as a judgement of the ICJ,¹⁰ or transcripts of DRC proceedings.¹¹ The defence did not therefore anticipate such an objection and a reply by the Defence is warranted at this stage to confirm the admissibility and legitimacy of the Defence request. If requested to do so at this stage the Defence would be willing to identify more specifically the particular references in *Lubanga* that should be admitted as new evidence.
11. Last but not least, the Defence stresses the novelty of the issue raised before this Chamber. Its decision will be the first of its kind before this Court and a full debate, including request, response and reply by the Defence which, in principle, has the last word, is warranted in order to assist the Chamber and the accused. The Defence further underlines the significance of the issue, given that it may affect the final findings of the Trial Chamber on the credibility of prosecution intermediaries and witnesses, and thus lead to the exclusion of incriminating testimony of witnesses against the accused.
12. The Defence further notes that the victims' representatives do not object to a reply by the Defence in principle, so long as it address new issues.¹²
13. Accordingly, given the significance and importance of the issues raised, the recent observations and submissions by the Prosecution and Victim Representatives, as well as the limited space necessarily allocated to the subject in the final brief, the Defence submits that its further submissions are warranted.

¹⁰ EVD-OTP-00229/DRC-OTP-0180-0656, ICJ - Case concerning Armed Activities on the Territory of the Congo.

¹¹ EVD-D03-00135/ DRC-OTP-0039-0409, EVD-D02-00088/DRC-D02-0001-0013.

¹² ICC-01/04-01/07-3276-Conf, para. 45.

Relief sought

14. For these reasons, the Defence prays that the Trial Chamber grant it leave to reply to the Prosecution and Victim Representatives' Responses. The Defence will be able to file its reply by this Friday, 27th of April 2012.

Respectfully submitted,



David HOOPER Q.C.

Dated this 26 April 2012

At The Hague