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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 Application for Leave to Appeal the '*Décision relative à la requête de la
Défense de Germain Katanga tendant à l'admission d'extraits du jugement prononcé
dans l'affaire Lubanga*'**

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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Introduction

1. The Defence for Mr Germain Katanga (“Defence”) requests leave to appeal the Trial Chamber’s *Décision relative à la requête de la Défense de Germain Katanga tendant à l’admission d’extraits du jugement prononcé dans l’affaire Lubanga* (“Impugned Decision”).¹ The Defence submits that this Decision contains two matters warranting the Appeals Chamber’s consideration: (1) the Trial Chamber erred in finding that the admission of new evidence at this stage would necessarily lead to the re-opening of the case; (2) the Trial Chamber erroneously considered that the admission sought of extracts from the *Lubanga* judgment as evidence in the present proceedings does not sufficiently contribute to the manifestation of the truth in the present proceedings to justify the re-opening of the case.

Threshold Criteria for Leave to Appeal

2. The Defence files this *Defence Application for Leave to Appeal the Décision relative à la requête de la Défense de Germain Katanga tendant à l’admission d’extraits du jugement prononcé dans l’affaire Lubanga* (“Defence Application”) pursuant to article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.
3. The Chambers have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets the following two cumulative criteria:
 - a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
 - b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²

¹ ICC-01/04-01/07-3279, 26-04-2012.

² ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

Procedural Background

4. In its Defence Closing Brief, the Defence requested that the portions of the Lubanga judgment which address the common intermediaries 143 and 316 be admitted as evidence in this case.³ Alternatively, the Defence requested the Chamber, as a matter of fairness under article 64(2) of the Statute, to consider these findings from another Chamber in relation to a question of fact relevant to this case.⁴
5. On 17 April 2012, the Chamber requested the parties and participants to respond to this Defence request by 20 April 2012.⁵
6. On that same day, the Defence asked to be given an opportunity to submit further written observations on this issue in response to any observations that may be submitted by the other parties and participants.⁶ The Prosecution objected on the basis that it was premature.⁷
7. On 19 April 2012, the Defence for Ngudjolo joined the Katanga Defence request.⁸
8. On 20 April 2012, the Prosecution and Victims Representatives submitted their observations. They both objected on the grounds that there is no legal basis for a Chamber to admit findings of another Chamber into evidence; that it was too late to introduce new evidence at this stage; and that the findings of another Chamber are not relevant to the present case because the overall circumstances are different.⁹
9. On 24 April, the Defence reiterated its request to submit observations in response to the observations submitted by the Prosecution and Legal Representatives.¹⁰ The Prosecution objected to this request stating that the Defence had not submitted any grounds justifying the granting of a right to file a reply. It also emphasised that the Defence could not file a reply without the Chamber's permission, which until then had not been forthcoming.¹¹

³ Second Corrigendum to the Defence Closing Brief, 23 April 2012, ICC-01/04-01/07-3266-Conf-Corr2, paras. 465 to 475.

⁴ *Ibid*, para. 469.

⁵ Email from the Chamber to the parties and participants entitled 'Requête formulée par la Défense de Germain Katanga aux paragraphes 465 à 475 de son mémoire final'.

⁶ Email from Sophie Menegon, dated 17 April 2012.

⁷ Email from Eric MacDonald, dated 17 April 2012.

⁸ *Confidentiel Adjunction de la Défense de Mathieu Ngudjolo à la Requête formulée par la Défense de Germain Katanga aux paragraphes 465 à 475 de son mémoire final* (ICC-01/04-01/07-3266-Conf), ICC-01/04-01/07-3273, 20-04-2012.

⁹ 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* and ICC-01/04-01/07-3276, *Observations sur la demande de G. Katanga de faire admettre des passages du jugement rendu dans l'affaire Lubanga*.

¹⁰ Email from Sophie Menegon, dated 24 April 2012.

¹¹ Email from Eric MacDonald, dated 25 April 2012.

10. Accordingly, on 26 April 2012, the Defence submitted a formal request for leave to reply.¹²
11. On 26 April 2012, the Chamber issued the impugned decision in which it rejected both the Defence request for leave to reply and the request to admit portions of the Lubanga judgment into evidence.

Issues of Appeal

12. The Defence respectfully agrees with the Chamber that the admission as evidence in the present proceedings of portions of a judgment issued by another Chamber is in principle possible and that there is no reason to treat such evidence differently from other types of documentary evidence. Provided that such evidence meets the admissibility requirements of relevance, probative value, reliability and fairness, the evidence can be admitted.¹³
13. The principal issue is whether such evidence should be admitted at this stage, after the completion of all evidence in accordance with Rule 141 of the Rules of Procedure and Evidence. According to the Chamber, the admission of new evidence now would necessarily require the re-opening of the case. The Chamber stated that the re-opening of the case is justified only if three conditions are met: (i) it concerns new evidence or evidence that could not have been found earlier despite due diligence; (ii) the evidence must meet the admissibility requirements; (iii) its potential contribution to the manifestation of the truth is sufficiently significant to justify the re-opening of the case, with due regard to the consequences it may have on the fairness of the trial and diligence of the proceedings.¹⁴
14. Applying these criteria to the portions of the *Lubanga* judgment sought to be admitted, the Chamber found that the first two conditions were met, but not the third. The Chamber acknowledged that the proposed evidence was new and that it was probative, relevant and reliable.¹⁵ The Chamber, however, stated that its admission does not sufficiently contribute to the manifestation of the truth in the present proceedings to justify the re-opening of the case. The Chamber drew this conclusion principally on the grounds that the credibility of the witnesses is determined on a case-by-case evaluation irrespective of the conduct of their intermediaries; and that the conclusions drawn by the *Lubanga* Trial Chamber have little bearing on the present proceedings unless considered in the context of the entire *Lubanga* case file.¹⁶

¹² ICC-01/04-01/07-3278-Conf, Urgent Defence Request for Leave to Reply.

¹³ Impugned Decision, para. 13.

¹⁴ Impugned Decision, para. 14.

¹⁵ Impugned Decision, para. 15.

¹⁶ Impugned Decision, paras. 16-20.

15. The Defence respectfully disagrees with the Chamber that the admission as evidence of the portions of the *Lubanga* judgment necessarily leads to the re-opening of the case. The Defence reiterates its submission in its *Urgent Defence Request for Leave to Reply* that “[t]he 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.”¹⁷
16. The Defence submits that the trial is not over. The prosecution and defence case may be closed, but the trial phase is still in progress, at least until judgment. The Prosecution suggests that this interpretation forwarded by the Defence undermines the sense of the provision.¹⁸ The provision must be understood within the context of a criminal trial. It would make no sense and may lead to an injustice if the Chamber was deprived of the opportunity to consider fresh evidence after the closure of the defence case, where it is in the interests of justice to do so, simply because of the formal closing of the case. This would be contrary to the right to a fair trial because it would place formal time limits over the interests of justice and the determination of the truth.
17. The Chamber relies on Rule 141 of the Rules of Procedure and Evidence,¹⁹ which states that the presiding judge shall declare when the submission of evidence is closed. This certainly marks the point when that phase of the trial, that is the phase of submission of evidence, is closed. It does not, however, mark the end of the trial, as confirmed by the fact that closing statements also falls under Rule 141, which in turn falls under the heading ‘Trial procedure’. The admission of other items of evidence later in the interests of justice is thus not excluded.
18. This is further supported by the jurisprudence in *Lubanga* which defines the end of the deliberation stage as the end of the trial. In the *Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry*,²⁰ the Chamber confirmed that “the “Trial”, the “Trial Procedure” or the “Trial Proceedings” only comes to an end when the Article 74, 75 and 76 Decisions have been delivered, as appropriate. It is only then that the Trial Chamber will have ceased its substantive work”.²¹ The Chamber also stated that the rights of the accused under Article 67 of the Rome Statute “should not be undermined simply because

¹⁷ Confidential Urgent Defence Request for Leave to Reply, para. 9.

¹⁸ Prosecution observations, para 9

¹⁹ Observations of the legal representatives, para 9

²⁰ ICC-01/04-01/06-2800, 30 August 2011.

²¹ *Ibid*, para. 47.

a particular stage of the trial proceedings (such as the presentation of evidence or the closing statements) has concluded”.²²

19. Accordingly, the Defence submits that there is no need to re-open the case. The Prosecution and Legal Representatives can still make submissions on the proposed new evidence during their oral arguments.
20. If leave were granted, the Defence would submit that, contrary to the Chamber’s finding, the evidence sought to be admitted has a clear impact on the manifestation of the truth. As the Chamber itself acknowledges, the role of the intermediaries used by the Prosecution is a pertinent question in the present case, and their role in the *Lubanga* proceedings cannot be dissociated artificially from their role in the *Katanga* proceedings.²³
21. The purpose of admitting the passages is not to evaluate the evidence upon which the findings have been made, but rather to establish the fact that adverse findings have been made against certain intermediaries and the nature of those findings. The probative value of these findings lies in the fact that there has been a judicial finding as to the character of specific intermediaries and their corruption of witnesses. The Chamber has held that evidence is probative if it has indicia of reliability and it is likely to influence the determination of a particular issue.²⁴ The fact that there has already been a judicial determination of intermediaries having had an adverse affect on the reliability of witnesses in itself helps to determine the issue of whether it is safe to rely on the evidence of witnesses who have been involved with these intermediaries. Judicial determinations have undoubted reliability, as was also acknowledged in the Impugned Decision.²⁵
22. The Defence submits that this new evidence is capable of contributing to the defence submissions as to the unreliability of certain incriminating witnesses and, coupled with the other evidence in this case, to influencing the Chamber in its view of the reliability of such witnesses.²⁶
23. The Defence submits that the two identified matters involve issues that arise directly from the Impugned Decision, and significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial. These issues also warrant an immediate resolution by the Appeals Chamber.

²² *Ibid*, para. 48.

²³ Impugned Decision, para. 15; Oral Decision, 7 June 2010, ICC-01/04-01/07-T-150-CONF-FRA ET, p. 7.

²⁴ ICC-01/04-01/07-2635, para. 20: “Probative value is determined by two factors: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case.”

²⁵ Impugned Decision, para. 15.

²⁶ See also Confidential Urgent Defence Request for Leave to Reply, para. 11.

Impact on the Fairness of the Proceedings

24. The Defence submits that the two identified issues clearly affect the fairness of the proceedings. The proposed evidence relates to the credibility of common intermediaries 143 and 316. Their adverse impact on prosecution testimony has been raised and addressed in both the *Lubanga* and *Katanga* trials. It would be unfair to the accused if the *Lubanga* findings were to be ignored. This is all the more so, given that 143 and 316 have been the intermediaries for witnesses 28, 161, 250, 279, 280, 267, 132, 287, 249, 268, and 166. The credibility and reliability of these witnesses should therefore also be considered in light of the *Lubanga* findings made in respect of those intermediaries who introduced them to the Prosecution.
25. The Defence respectfully agrees with the Chamber that the assessment of the credibility of witnesses is necessarily to be done on a case-by-case evaluation. This does not mean that the *Lubanga* findings relating to these intermediaries are irrelevant to the determination of the credibility and reliability of these witnesses. The Defence submits that in order to assess the credibility and reliability of the witnesses fully the Chamber should have available to it all the evidence relating to the behaviour of those intermediaries that it reasonably can. This is particularly the case in light of the Chamber's own acknowledgement that the findings in *Lubanga* are of significant reliability as they are the outcome of adversarial proceedings and they are fully reasoned.
26. The Defence submits that the fairness of the proceedings, and outcome, is affected by the Chamber's decision not to allow into evidence the relevant portions of the *Lubanga* judgment that relate to the specific intermediaries. The Defence has stressed the importance of the issue of the adverse effect of intermediaries 143 and 316. The Chamber acknowledged the significance of the issue of the role of these intermediaries,²⁷ which has been addressed throughout the trial and in the Defence Closing Brief.²⁸

Impact on the Expeditiousness of the Proceedings

27. The Defence submits that the expeditiousness of the proceedings will be affected by the Chamber's decision not to admit the proposed evidence. If, at a later stage, the Defence were to raise the matter successfully on any appeal then the matter could result in further procedural delays.

²⁷ Impugned Decision, para. 15.

²⁸ ICC-01/04-01/07-3266-Conf. See also its Corrigendum ICC-01/04-01/07-3266-Conf-Corr2, paras. 460-504.

An Immediate Resolution may materially advance the proceedings

28. It is evident that an immediate resolution of the Appeals Chamber would materially advance the proceedings. It would be regrettable if the Defence were not given the opportunity to review this matter at the trial stage but only at an appellate stage. Such later appeal could conceivably result in a re-trial. On the other hand, if the issue is settled now, prejudice to the accused as well as possible but erroneous findings in respect of the said intermediaries and witnesses can be avoided. Accordingly, an immediate resolution on this issue may materially advance the proceedings.

Conclusion

29. On these grounds, the Defence requests the Trial Chamber to grant leave to appeal the Trial Chamber's *Décision relative à la requête de la Défense de Germain Katanga tendant à l'admission d'extraits du jugement prononcé dans l'affaire Lubanga* pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.

Respectfully submitted,



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Lead Counsel for Germain Katanga

Dated this 2nd May 2012

At The Hague