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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

**Prosecution Response to Germain Katanga's "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: Office of the Prosecutor

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INTRODUCTION

1. The Defence for Germain Katanga (“Defence”) requested Trial Chamber II to admit as evidence in this case portions of the judgment from the case of the *Prosecutor v Thomas Lubanga* (“Lubanga case”),¹ which address the two intermediaries 143 and 316 who acted in both the Lubanga and Katanga cases.² Alternatively, the Defence submitted that under Article 64(2) the “*Chamber may have regard to these findings as the findings of another Chamber on a question of fact relevant to this case.*”³ The Chamber rejected this request and the Defence now seeks leave to appeal the Decision. The Prosecution submits that the Defence Application should be rejected. The Defence failed to identify any appealable issue that satisfies the requirements of article 82(1)(d). In addition, the Defence has not demonstrated that the two issues presented meet the criteria for leave to appeal.

PROCEDURAL BACKGROUND

2. On 30 March 2012, the Defence submitted its closing brief, in which it requested the Chamber to admit as evidence in this case portions of the judgment from the Lubanga case addressing the two intermediaries 143 and 316 and, alternatively, submitted that under Article 64(2) the “*Chamber may have regard to these findings as the findings of another Chamber on a question of fact relevant to this case (“Request”).*”⁴ The Defence submitted a corrigendum of its closing brief on 3 April 2012⁵ and second corrigendum on 23 April 2012.⁶

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/07-3266-Conf-Corr2, para.467.

³ ICC-01/04-01/07-3266-Conf-Corr2, para.469.

⁴ ICC-01/04-01/07-3266-Conf, paras. 465-475.

⁵ ICC-01/04-01/07-3266-Conf-Corr.

⁶ ICC-01/04-01/07-3266-Conf-Corr2.

3. On 17 April 2012, the Chamber invited the parties and participants to respond to the Request by 20 April 2012.⁷ The same day the Defence asked to be given an opportunity to submit further written observations on this issue in response to any observations made by the other parties and participants.⁸ The Prosecution objected on the basis that it was premature.⁹
4. On 19 April 2012, the Defence for Mathieu Ngudjolo joined the Katanga Defence Request.¹⁰
5. On 20 April 2012, the Prosecution¹¹ and Legal Representatives of the Victims¹² submitted their separate responses, opposing the Request.
6. On 24 April 2012, the Defence stated its intention to submit observations in response to the observations submitted by the Prosecution and Legal Representatives and referred to its prior request to do so.¹³ The Prosecution objected stating, *inter alia*, that the Defence had not submitted grounds justifying the granting of a right to file a reply and that the Defence could not file a reply without the Chamber's permission.¹⁴
7. On 26 April 2012 the Defence submitted a formal request for leave to reply.¹⁵ The same day the Chamber rejected both the Defence's request for authorization to reply to the responses of the Prosecution and Legal Representatives of the Victims and the substantive Request ("Decision").¹⁶

⁷ Email dated 17 April 2012 transmitted by 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".

⁸ Email from the Katanga Defence, dated 17 April 2012.

⁹ Email from the Prosecution, dated 17 April 2012.

¹⁰ ICC-01/04-01/07-3273-Conf, reclassified as Public on 27 April 2012.

¹¹ ICC-01/04-01/07-3275-Conf.

¹² ICC-01/04-01/07-3276-Conf.

¹³ Email from the Katanga Defence, dated 24 April 2012.

¹⁴ Email from the Prosecution, dated 25 April 2012.

¹⁵ ICC-01/04-01/07-3278-Conf, Urgent Defence Request for Leave to Reply.

¹⁶ ICC-01/04-01/07-3279.

8. On 2 May 2012 the Defence sought to appeal the Decision (“the Application”)¹⁷ on the two following issues, which the Defence alleges arise from the Decision, namely:

- Whether 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” (“First Issue”); and
- Whether the Trial Chamber erred by considering “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” (“Second Issue”).

SUBMISSIONS

The First Issue does not arise from the Decision

9. The Appeals Chamber has held that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”¹⁸

10. This requirement has not been met with the First Issue, for the following reasons.¹⁹

11. The First Issue does not arise from the Decision. The Defence has mischaracterised the reasoning of the Decision, and in particular what the

¹⁷ ICC-01/04-01/07-3282.

¹⁸ ICC-01/04-01/06-168OA3, paras.9-10. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para.4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

¹⁹ Whether 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”.

Trial Chamber meant by the term “case”.²⁰ The Defence’s principal argument is to submit that the “trial” is not over, so that admission of additional items of evidence is not excluded.²¹ However, the Trial Chamber did not state that the “trial” was over. Rather, it stated that the evidence phase of the trial is over, as Defence itself concedes,²² so that introduction of any evidence would require re-opening of “*des débats*” to enable the weight of the evidence to be discussed.²³ Accordingly, the Trial Chamber did not, contrary to what Defence implies,²⁴ decide that as the trial is over, admission of other items of evidence is excluded.²⁵ Rather, the Trial Chamber considered whether the evidence in question met its criteria for admission notwithstanding the late request.²⁶ Therefore, the First Issue is misconceived and does not arise out of the impugned Decision, and, thus does not qualify as an appealable issue within the meaning of Article 82(l)(d) of the Statute.

The Second Issue is not an appealable issue

12. The Second Issue²⁷ also fails to constitute an “issue” within the terms of Article 82(1)(d) for the following reasons.
13. Despite the Defence’s characterisation of the Second Issue as an appealable one, the Application does not present this issue. The Defence again mischaracterises the Decision. Contrary to what the Defence implies, the

²⁰ ICC-01/09-02/11-406, para.46 (In this case the appellant misinterpreted a factual finding - with which it merely disagrees - in order to make it a point of law); ICC-01/04-01/07-15, para.15 (the TC did not make a general ruling and it only addressed the concrete request by the Prosecution); ICC-01/04-01/07-1732, paras.15,17-18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras. 26-29 (OPCD misinterpreted the terms *prima facie* vs. “factual finding” used in the decision); ICC-01/04-01/10-106, p. 6.

²¹ ICC-01/04-01/07-3282, paras. 15-19.

²² ICC-01/04-01/07-3282, para.17.

²³ ICC-01/04-01/07-3279, para. 14.

²⁴ ICC-01/04-01/07-3282, para.17.

²⁵ ICC-01/04-01/07-3279, para.14.

²⁶ ICC-01/04-01/07-3279, para.14.

²⁷ Whether the Trial Chamber erred by considering “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”.

Trial Chamber did not consider that the evidence had no impact on the manifestation of truth²⁸ or was irrelevant to the issue of intermediaries.²⁹ Rather, the Chamber determined that the evidence in question does not justify re-opening the debates now that the evidence phase of the trial has ended.

14. Even if the Second Issue arises from the Decision, it fails to meet the requirements under article 82(1)(d). As presented by the Applicant, the Second Issue is “merely a question over which there is disagreement or conflicting opinion”.³⁰ The Second Issue ultimately presents a disagreement with the Trial Chamber’s discretionary decision that the extracts from the Lubanga judgment would not be “sufficiently significant” in contributing to the manifestation of the truth to justify the re-opening of the debates by allowing its admission as evidence at this late stage. Again, that alone does not constitute an appealable issue.

The two Issues do not meet the criteria for leave to appeal under Article 82(1)(d)

15. The Defence fails to demonstrate that the two Issues affect the fair conduct of the proceedings.³¹ The Defence argues that it would be unfair if the *Lubanga* findings regarding common intermediaries 143 and 316 were to be ignored.³² However, as Trial Chamber II concluded, it is not manifestly unjust that the Request to admit additional evidence be rejected at this late stage, considering the impact that re-opening the case after the evidence phase of

²⁸ ICC-01/04-01/07-3282, para.20. See ICC-01/04-01/07-3279, paras. 16-20.

²⁹ ICC-01/04-01/07-3282, para.25. See ICC-01/04-01/07-3279, para.15.

³⁰ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27; ICC-02/11-01/11-99-Conf, para.21.

³¹ ICC-01/04-168 OA3, para. 11. The Appeals Chamber has ruled that “[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights”.

³² ICC-01/04-01/07-3282, paras.24-26.

the trial has ended could have on the fairness and diligence of the proceedings.³³ The Prosecution submits that any re-opening of the debates after the evidence phase is closed requires a balancing of interests of all the parties and participants. It is also fair that the Chamber applied specific criteria for admitting new evidence after the evidence phase has closed, in addition to the normal criteria for admissibility of evidence (namely relevance, reliability and probative value).³⁴ While ultimately the question of whether the Chamber's balancing exercise was correct is a matter going to the merits of its ruling, the arguments advanced above demonstrate that in and of itself the Decision does not present a significant impact on the fairness of the proceedings.

16. More importantly, and as the Trial Chamber noted in its Decision, the issues regarding the role of intermediaries in the *Lubanga* proceedings had enabled the parties to question witnesses regarding their specific role in the present case,³⁵ there was evidence concerning the intermediaries' role already on the record³⁶ and the Chamber will be considering that evidence in their assessment of the credibility of each witness.³⁷ Thus, the issue of the impact, if any, of the role of the intermediaries on the credibility of the relevant witnesses is one that *will* be subject to determination by the Chamber, regardless of whether the *Lubanga* findings are imported or not. In addition, the Defence had the opportunity to seek admission of further evidence from information disclosed to them from the *Lubanga* proceedings or to call as witnesses the intermediaries themselves, Prosecution investigators or other witnesses, or recall Prosecution witnesses, but chose not to do so.³⁸ Instead, the Defence now seeks to re-open the evidence to admit the findings of

³³ ICC-01/04-01/07-3279, para.14.

³⁴ ICC-01/04-01/07-3279, para.14.

³⁵ ICC-01/04-01/07-3279, para.17.

³⁶ ICC-01/04-01/07-3279, para.17.

³⁷ ICC-01/04-01/07-3279, para.17.

³⁸ ICC-01/04-01/07-3279, para. 19.

another Chamber in relation to separate facts. But as the Defence itself concedes, the assessment of the credibility of the witnesses “is necessarily to be done on a case-by-case evaluation”.³⁹

17. The Application also fails to demonstrate that the Issues significantly affect the expeditious conduct of the proceedings or materially advance the proceedings within the meaning of Article 82(1)(d). The Defence speculates that if they successfully raise the matter at a later stage, it could result in procedural delays,⁴⁰ and that leaving the matter to a later appeal “*could conceivably result in a re-trial*”.⁴¹
18. The Prosecution submits that, on the contrary, an appeal at this stage would only delay the process. Further, intervention by the Appeals Chamber at this stage would not materially advance the proceedings. Rather, the parties should await the Trial Chamber’s final judgment to assess how the Chamber deals with the issue of the role of intermediaries and their impact, if any, on the credibility of the witnesses. Any issues arising out of that determination can be dealt with as part of a final appeal, if warranted. However, and as Trial Chamber I held in the *Lubanga* case: “*it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order materially to advance the proceedings.*”⁴² Similarly: “[a]ny suggested unfairness, at this stage, is wholly speculative. It follows that an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings”.⁴³

³⁹ ICC-01/04-01/07-3282, para.25.

⁴⁰ ICC-01/04-01/07-3282, para. 27.

⁴¹ ICC-01/04-01/07-3282, para.28.

⁴² ICC-01/04-01/06-1557, para.25; ICC-01/04-01/06-1191, para.12; ICC-01/05-01/08-1169, para.25

⁴³ ICC-01/04-01/06-2109, para.22.

CONCLUSION

19. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



Luis Moreno-Ocampo,
Prosecutor

Dated this 7th day of May 2012

At The Hague, The Netherlands