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

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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 THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Decision on the request by the Defence for Germain Katanga seeking to admit
excerpts from the judgment rendered in *Lubanga***

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

Office of the Prosecutor

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Legal Representatives of Applicants

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**Unrepresented Applicants for
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**Victims Participation and Reparations
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Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to articles 64, 69, and 74 of the Rome Statute (“the Statute”), rule 141 of the Rules of Procedure and Evidence (“the Rules”) and regulation 23 *bis* and 24 of the Regulations of the Court, decides the following.

I. Background

1. The Defence for Germain Katanga moves the Chamber to admit as evidence excerpts from the decision rendered pursuant to article 74 in *Lubanga* (“the *Lubanga* judgment”)¹ concerning intermediaries P-143 and P-316, and, in the alternative, to have regard to the relevant findings of Trial Chamber I (“the Request”).² The Defence for Mathieu Ngudjolo concurs with this request.³ The Office of the Prosecutor⁴ (“the Prosecutor”) and the legal representatives of victims⁵ expressed their opposition to the Request within the time limit fixed by the Chamber.⁶

2. The Defence for Germain Katanga submits that article 74(2) of the Statute, pursuant to which the Chamber may base its decision only on evidence submitted and discussed before it at the trial, should be construed as referring to the evidence presented throughout the proceedings, at least up to the point of sentencing, emphasising, in this respect, that article 76 appears in the part of the Statute dealing with the trial. The Defence claims that it is justified in requesting the admission of

¹ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute*, 14 March 2012, ICC-01/04-01/06-2842.

² Defence for Germain Katanga, “Second Corrigendum to the Defence Closing Brief”, 23 April 2012, ICC-01/04-01/07-3266-Conf-Corr2, paras. 465-475.

³ Defence for Mathieu Ngudjolo, “Adjonction 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)”, 20 April 2012, ICC-01/04-01/07-3273.

⁴ Office of the Prosecutor, “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, ICC-01/04-01/07-3275-Conf. See also “Observations de l’Accusation à la suite du prononcé du jugement dans l’affaire *Lubanga* (ICC-01/04-01/06-2842)”, 22 March 2012, ICC-01/04-01/07-3264-Conf, paras. 13-14, which the Prosecutor mentions in paragraph 4 of his Response.

⁵ Legal representatives of victims, “Observations sur la demande de G. Katanga de faire admettre des passages du jugement rendu dans l’affaire *Lubanga*”, 20 April 2012, ICC-01/04-01/07-3276-Conf.

⁶ E-mail to all the parties and participants sent by a legal officer of the Chamber on 17 April 2012, fixing the time limit to respond to the Request at 4 p.m. on 20 April 2012.

evidence which goes to support a reasonable doubt at this stage of the proceedings, even if it concerns an issue which it has never raised before.⁷ It maintains, in the alternative, that the Chamber may consider the factual findings of another chamber on a question of fact relevant to the present case, even in the absence of a statutory or regulatory provision on this issue, since such an action falls under the general power of the Chamber to ensure that the trial is fair under article 64(2) of the Statute.⁸ The Defence for Mathieu Ngudjolo adds that this is a matter of logic and coherence in that the Chamber has already taken account of decisions rendered by Trial Chamber I in *Lubanga* with respect to the intermediaries and has itself requested that parties and participants submit observations engendered by the *Lubanga* judgment.⁹

3. The Prosecutor and the legal representatives contend that the interpretation of article 74(2) of the Statute referred to in the Request disregards the closure of the presentation of evidence declared on 7 February 2012, in accordance with rule 141 of the Regulations, as well as the adversarial principle contained in the aforementioned article.¹⁰ They further argue that there is no legal basis for taking judicial notice of facts established in another case – the Prosecutor asserts that this possibility had been ruled out during the preparatory work on the Rules of Procedure and Evidence – and, in any event, even if that were the case, this proceeding could not be applied with regard to the credibility of witnesses or evidence which is the subject of dispute between the parties or under appeal.¹¹

4. Both Defence teams emphasise the relevance of the findings of Trial Chamber I in *Lubanga* with regard to Intermediaries P-316 and P-143 in that they played an active role involving many of the witnesses in the present case, casting

⁷ ICC-01/04-01/07-3266-Conf-Corr2, para. 472.

⁸ ICC-01/04-01/07-3266-Conf-Corr2, para. 469.

⁹ ICC-01/04-01/07-3273-Conf, paras. 8 and 12.

¹⁰ ICC-01/04-01/07-3275-Conf, paras. 8-9; see also ICC-01/04-01/07-3264-Conf, paras. 14-16; ICC-01/04-01/07-3276-Conf, paras. 7-10.

¹¹ ICC-01/04-01/07-3275-Conf, paras. 6-7; ICC-01/04-01/07-3276-Conf, paras. 11-14 and 25-28.

doubt on their credibility and thereby contributing to the determination of truth.¹² Both Defence teams further emphasise the probative value of findings of professional judges of the Court who have heard the testimonies of these Intermediaries and conducted an in-depth and rigorous analysis of their activities.¹³ The Defence teams recall that the Chamber itself has held that the role of intermediary P-143 in *Lubanga* could not be artificially dissociated from the role he has been called upon to play in the present case.¹⁴ The Defence for Germain Katanga adds that the fairness of the trial is thereby affected because treating the intermediaries with a different degree of circumspection than afforded to them by Trial Chamber I would constitute a manifest injustice.¹⁵ For its part, the Defence for Mathieu Ngudjolo believes that the judicial origin of the aforementioned findings, and the fact that the Prosecutor had informed Trial Chamber I that he had reason to believe that Intermediary P-316 may have committed offences falling under article 70 of the Statute “[TRANSLATION] obviates any risk of prejudice to the fairness of the trial”.¹⁶ The Defence argues that there should be a consistency in the jurisprudence of the Court with regard to the “[TRANSLATION] principal nexus” between the two cases, the conduct of the intermediaries.¹⁷

5. The Prosecutor and the legal representatives of victims note that filing the findings of the *Lubanga* judgment in the record would contravene the adversarial principle and orality of the proceedings.¹⁸ In this regard, the legal representatives assert that this would be tantamount to admitting the testimonies of witnesses who have not been examined before the Chamber.¹⁹ They further argue that the approach of the Request is in contradiction to the one adopted by Trial Chamber I in *Lubanga*,

¹² ICC-01/04-01/07-3266-Conf-Corr2, para. 468; ICC-01/04-01/07-3273-Conf, paras. 10 and 11.

¹³ ICC-01/04-01/07-3266-Conf-Corr2, para. 468; ICC-01/04-01/07-3273-Conf, para. 10.

¹⁴ ICC-01/04-01/07-3266-Conf-Corr2, para. 468; ICC-01/04-01/07-3273-Conf, para. 8.

¹⁵ ICC-01/04-01/07-3266-Conf-Corr2, para. 468.

¹⁶ ICC-01/04-01/07-3273-Conf, para. 10.

¹⁷ ICC-01/04-01/07-3273-Conf, para. 12.

¹⁸ ICC-01/04-01/07-3275-Conf, para. 8; see also ICC-01/04-01/07-3264-Conf, paras. 14-17; ICC-01/04-01/07-3276-Conf, paras. 15-24.

¹⁹ ICC-01/04-01/07-3276-Conf, para. 29.

whereby Trial Chamber I was at pains to draw conclusions with regard to intermediaries only on the basis of a case-by-case evaluation of the unique situation of each intermediary and the testimony of each relevant witness.²⁰ Emphasising that assessing the credibility of a witness is a subjective exercise, the Prosecutor adds that the Chamber is not in the position to judge the factual findings of the *Lubanga* judgment because they are based on evidence which is not part of the record of the present case and, as such, cannot be easily transposed to it.²¹

6. The Prosecutor and the legal representatives of victims argue that granting the Request would mean, by virtue of the adversarial principle, that the proceedings would have to be reconvened.²² They take the view that there are no grounds for doing so in view of the information that was available to the Defence, the opportunity that it had to broach the issue of the role of intermediaries during the proceedings and the strategy that it then consciously chose to adopt.²³ The Prosecutor especially contests²⁴ the argument put forth by the Defence for Germain Katanga that the information it had in its possession over the course of the proceedings was insufficient to address this important issue, in particular because it became privy to the identity of Intermediary P-143 too late and was thus prevented from conducting an effective cross-examination of the Prosecution witnesses who testified prior to the disclosure of their identity.²⁵ The Defence for Germain Katanga challenges²⁶ the Prosecutor's assertion that it intentionally opted out of a further examination of the role of the intermediaries in the present case.²⁷

²⁰ ICC-01/04-01/07-3276-Conf, paras. 36-38.

²¹ ICC-01/04-01/07-3275-Conf, paras. 19-21.

²² ICC-01/04-01/07-3275-Conf, paras. 3 and 10; ICC-01/04-01/07-3276-Conf, paras. 10 and 42-44.

²³ ICC-01/04-01/07-3264-Conf, paras. 19-24, 29 and 30-31; ICC-01/04-01/07-3275-Conf, paras. 11-18; ICC-01/04-01/07-3276-Conf, paras. 32-33 and 41.

²⁴ ICC-01/04-01/07-3275-Conf, paras. 16 and 17.

²⁵ ICC-01/04-01/07-3266-Conf-Corr2, para. 474.

²⁶ ICC-01/04-01/07-3266-Conf-Corr2, paras. 471-473.

²⁷ ICC-01/04-01/07-3264-Conf, para. 19; ICC-01/04-01/07-3275-Conf, para. 18.

7. The Defence explains that it did not seek the admission of the *Lubanga* transcripts, which were in any event extensively redacted, because it would have been difficult to draw any meaningful conclusions from them without appreciating the full context of the case.²⁸ Whilst the legal representatives emphasise that this supports the argument that the present Chamber cannot transpose the findings of the *Lubanga* judgment without examining the evidence on which Trial Chamber I based its decision,²⁹ the Prosecutor maintains that it was not necessary to wait for the *Lubanga* judgment to make an informed decision in regard to the evidence which was brought to the attention of the Defence, which it did not tender into evidence.³⁰

8. On 17 April 2012, the Defence for Germain Katanga requested, by e-mail, authorisation to file a response to the observations of the parties which had been requested by the Chamber. The Prosecutor³¹ and the legal representatives of victims³² expressed their opposition to what they interpreted as a request for leave to reply. The Defence for Germain Katanga reiterated its request by e-mail on 24 April 2012, indicating that it considered itself to be in a position to file a response and declaring its intention to do so. It ultimately filed a request for leave to reply on 26 April 2012.³³

II. Discussion

A. The request for leave to reply

9. The Chamber considers the request for leave to reply to the observations of the parties and participants submitted by the Defence for Germain Katanga to be a request for leave to reply. The Chamber analysed the request in paragraph 467 of the

²⁸ ICC-01/04-01/07-3266-Conf-Corr2, para. 470.

²⁹ ICC-01/04-01/07-3276-Conf, paras. 33-34.

³⁰ ICC-01/04-01/07-3275-Conf, paras. 13-14.

³¹ E-mails to the Chamber and all the parties and participants by the Office of the Prosecutor on 17 April 2012 and on 25 April 2012.

³² ICC-01/04-01/07-3276-Conf, paras. 4-5 and 45-46.

³³ Defence for Germain Katanga, "Urgent Defence Request for Leave to Reply", 26 April 2012, ICC-01/04-01/07-3278-Conf.

Defence's closing brief as a request, as evidenced by its phrasing ("the defence hereby requests" ...).

10. The Chamber takes the view that the submission of a reply by the Defence for Germain Katanga is neither appropriate nor justified. Thus, the argument, based on the fairness of the trial, that the Defence for Germain Katanga was not allowed the same number of pages as the other parties and participants is unfounded, since the Chamber had granted the Defence a further 20 pages to include, in its closing brief, observations it might wish to make on the *Lubanga* judgment.

11. Furthermore, the submissions of the parties and participants in their responses do not raise any new issues which would justify leave to reply. Moreover, the Defence for Germain Katanga was already aware of the Prosecutor's position on this point, given that the Prosecutor had somehow anticipated the Request in his observations on the *Lubanga* judgment³⁴ and the Defence was in a position to respond to it.³⁵ What is more, the Chamber considers itself sufficiently informed on the issue raised in the Request. Accordingly, the request is rejected.

B. The Request

12. The Chamber notes that there is no express legal basis for taking judicial notice of facts tried in other cases brought before the Court which are related to matters at issue in the current proceedings. The Chamber is of the view that, contrary to the claim of the Defence for Germain Katanga,³⁶ the fairness of the trial cannot form the basis for such a measure, which basically falls under judicial economy and the interest in conducting effective and expeditious proceedings.

13. The Request must therefore be analysed on the basis of article 69 of the Statute. The Chamber is of the view that, in principle, there is no impediment to the

³⁴ ICC-01/04-01/07-3264-Conf, paras. 13-34.

³⁵ ICC-01/04-01/07-3266-Conf-Corr2, paras. 471-474.

³⁶ ICC-01/04-01/07-3266-Conf-Corr2, para. 469.

admission of a court decision as evidence. The Chamber recalls that this is the case for the 19 December 2005 judgment of the International Court of Justice,³⁷ whose admission into evidence, it notes, the parties did not challenge.³⁸ Contrary to the submissions of the Prosecutor and the legal representatives of victims, the Chamber does not consider that the admission of such a document will in and of itself, above all other documentary evidence containing factual findings, violate the principles of adversariality and orality of the proceedings.

14. In this case, the question that arises is whether such a request may be entertained after the closure of the presentation of evidence pursuant to rule 141 of the Rules. The Chamber considers that the admission of fresh evidence at this stage automatically entails the reopening of oral proceedings to hear adversarial submissions as to the appropriate weight to be attached in the light of the whole case file, in accordance with article 74(2) of the Statute. The Chamber considers that, in certain circumstances, the determination of the truth can justify the reopening of the oral proceedings. This would apply, *inter alia* (i) where the evidence in question is fresh or when the party requesting fresh hearings was unable, despite the use of reasonable diligence, to identify and produce the evidence beforehand, (ii) where the conditions for admissibility of evidence are satisfied³⁹ and (iii) where the potential contribution of the evidence to the determination of the truth is sufficiently significant to justify fresh hearings, with the possible implications for the fairness of the trial or the integrity of the proceedings.

15. In this instance, the Chamber notes that the *Lubanga* judgment constitutes new material in the sense that it was rendered after the conclusion of the presentation of evidence. In addition, as the Chamber has previously stated, it considers that the role

³⁷ EVD-OTP-00229.

³⁸ *Decision on the Prosecutor's Bar Table Motions*, 17 December 2010, ICC-01/04-01/07-2635, paras. 7-8.

³⁹ See ICC-01/04-01/07-2635, in particular, paras. 11-40.

of intermediaries of the Office of the Prosecutor is a pertinent issue in this case⁴⁰ and that this role in the *Lubanga* case cannot be artificially dissociated from that which they were led to play in the case before the present Chamber.⁴¹ Regarding the probative value of the findings in the *Lubanga* judgment, the Chamber considers that they are highly reliable given that they are a result of adversarial judicial proceedings.

16. Nonetheless, it is worth considering whether the admission of the findings on the role of Intermediaries P-143 and P-316 in the *Lubanga* judgment would significantly affect the determination of the truth in this case and, more specifically, the Chamber's assessment of the credibility of the Prosecution witnesses who were contacted by or in the care of the said intermediaries. In this regard, the Chamber would emphasise that the credibility of witnesses is assessed on a case-by-case basis and that, as the Defence for Germain Katanga acknowledges, mere contact between a witness and an intermediary cannot *ipso facto* exclude the testimony of the witness.⁴² This is indeed the approach adopted in the *Lubanga* judgment, which analysed the credibility of witnesses irrespective of the intermediaries' role, before making findings on the impact of this role.

17. However, discussions on the behaviour of intermediaries of the Office of the Prosecutor in the *Lubanga* case raised a question, which the Chamber found relevant, on the specific role the intermediaries concerned might have played in regard to each Prosecution witness in the present case and how this role might have impinged on the content of their testimony. Evidence on this specific role was thus admitted into the record of the case and the Chamber will determine its scope when assessing the credibility of each witness. In this wise, the admission of findings in the *Lubanga* judgment on the behaviour of intermediaries towards witnesses not involved in the

⁴⁰ See, for instance, the oral decision rendered on 8 November 2011, ICC-01/04-01/07-T-330-CONF-FRA CT, para. 10.

⁴¹ Oral decision of 7 June 2010, ICC-01/04-01/07-T-150-CONF-FRA ET, p. 7.

⁴² ICC-01/04-01/07-3266-Conf-Corr2, para. 463.

case will only fuel fresh questions on the issue, which has already been raised by the parties by way of certain general evidence bearing on the behaviour of Intermediaries P-143 and P-316, without, however, having an appreciably more significant impact on the assessment, in practice, of the credibility of the witnesses concerned.

18. Furthermore, even were the Chamber to consider the findings of Trial Chamber I reliable, scrutinising them in the light of the evidence adduced in this case will be difficult in the absence of the entire *Lubanga* record. For all these reasons, the Chamber considers that the admission of the relevant excerpts of the *Lubanga* judgment as evidence will not make such a significant contribution to the determination of the truth as to warrant fresh hearings.

19. Moreover, the Chamber notes that after the Defence for Germain Katanga acquired the information necessary for its preparation, following the disclosure of the relevant elements of records in the *Lubanga* case, it was able, as it notes itself,⁴³ to secure the admission into evidence of the materials it considered useful for its case. If the Defence for Germain Katanga considered that tendering transcripts of the *Lubanga* hearing as evidence could fail to enlighten the Chamber, it was, in any case, in a position to determine, on the basis of these transcripts, the usefulness of calling the intermediaries in question, the investigators of the Office of the Prosecutor or other witnesses who had been in contact with these intermediaries, or recalling the Prosecution witnesses. Contrary to the Defence assertion,⁴⁴ the Chamber is therefore not persuaded that it would be a “manifest injustice” to reject the Request at this stage of the proceedings.

20. In the light of all these elements, the Chamber is of the view that fresh hearings are not warranted.

⁴³ ICC-01/04-01/07-3266-Conf-Corr2, para. 473.

⁴⁴ ICC-01/04-01/07-3266-Conf-Corr2, para. 468.

C. Classification of the written submissions

21. Finally, the Chamber notes that the above-mentioned submissions were filed as confidential, due to the classification of the closing brief of the Defence for Germain Katanga in which the Request⁴⁵ was made. The Chamber, however, is of the view that the content of these filings does not justify the chosen classification, apart from the Prosecutor's filing, of which a public redacted version should be produced as the Prosecutor himself proposes.⁴⁶ Consequently, in view of regulation 23 *bis*(3) of the Regulations of the Court, the Chamber decides to reclassify these filings as public documents.

FOR THESE REASONS, the Chamber hereby

DENIES the Defence request for leave to file a reply;

DISMISSES the Request;

INSTRUCTS the Prosecutor to file a public redacted version of submissions ICC-01/04-01/07-3264-Conf and ICC-01/04-01/07-3275-Conf as soon as possible; and

ORDERS the Registry to reclassify submissions ICC-01/04-01/07-3273-Conf, ICC-01/04-01/07-3276-Conf and ICC-01/04-01/07-3278-Conf as public documents.

⁴⁵ ICC-01/04-01/07-3273-Conf, para. 7; ICC-01/04-01/07-3275-Conf, para. 5; ICC-01/04-01/07-3276-Conf, para. 6; ICC-01/04-01/07-3278-Conf, para. 7.

⁴⁶ ICC-01/04-01/07-3264-Conf, para. 4; ICC-01/04-01/07-3275-Conf, para. 5.

Done in English and French, the French version being authoritative.

[signed]

Judge Bruno Cotte

Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Done this 26 April 2012

At The Hague, The Netherlands