

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 14 May 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 THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJÓLO CHUI***

Public

**Decision on the 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’’**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

States Representatives

The Office of Public Counsel for the Defence

REGISTRY

Registrar

Ms Silvana Arbia

Mr Marc Dubuisson

Victims and Witnesses Unit

Counsel Support Section

Mr Esteban Peralta Losilla

Others

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to Article 82(1)(d) of the Rome Statute of the International Criminal Court (“Statute”), and Rule 155 of the Rules of Procedure and Evidence (“Rules”), decides as follows:

I. PROCEDURAL HISTORY

1. On 7 February 2012 the Presiding Judge declared that the submission of evidence was closed in accordance with Rule 141(1) of the Rules.¹
2. On 14 February 2012, the Chamber determined that the deadlines for final written submissions were 24 February 2012 as far as the Office of the Prosecutor (“Prosecution”) and the Legal Representatives of the Victims were concerned, and 30 March 2012 for the Defence.²
3. On 24 and 27 February 2012, respectively, the Prosecutor and the Legal Representatives submitted their final briefs.³
4. On 2 March 2012, the Chamber decided to grant the Prosecution and the Legal Representatives the opportunity to submit written observations on the judgment in the case of *the Prosecutor v. Thomas Lubanga Dyilo*. The Chamber also extended the page limit for the Defence final briefs with 20 pages in order to develop their observations in relation to the said judgment.
5. On 14 March 2012, Trial Chamber I rendered its “Judgment pursuant to Article 74 of the Statute” (“Lubanga Judgment”).⁴

¹ “Déclaration de la clôture de la présentation des moyens de preuve”, 7 February 2012, ICC-01/04-01/07-3235

² “Décision modifiant les modalités de présentation des conclusions écrites”, 14 February 2012, ICC-01/04-01/07-3238

³ Office of the Prosecutor, “Mémoire final”, 24 February 2012, ICC-01/04-01/07-3251-Conf; Common Legal Representative of the principal group of victims, “Conclusions Finales”, 27 February 2012, ICC-01/04-01/07-3253-Conf; Legal Representative of Child Soldier Victims, “Conclusions finales du Représentant légal des victimes enfants soldats”, 24 February 2012, ICC-01/04-01/07-3250-Conf

6. On 22 March 2012, the Prosecution and the Legal Representatives submitted their additional observations about the Lubanga Judgment.⁵

7. On 30 March 2012, both the Defence for Mr. Katanga and the Defence for Mr. Ngudjolo submitted their final briefs.⁶ In its final brief, the Defence for Mr. Katanga asked the Chamber to admit into evidence those portions of the Lubanga Judgment that address intermediaries DRC-OTP-P-143 and 316.⁷ In the alternative, the Defence for Mr. Katanga submitted that the Chamber “may have regard to these findings as the findings of another Chamber on a question of fact relevant to this case.”⁸

8. On 19 April 2012, the Defence for Mr. Ngudjolo adhered to the Defence Request.⁹

9. On 20 April 2012, the Prosecution responded to the Defence Request, asking the Chamber to reject it.¹⁰ On the same day the Legal Representatives submitted their observations as well, equally asking the Chamber to reject it.¹¹

⁴ ICC-01/04-01/06-2842

⁵ Office of the Prosecutor, “Observations de l’Accusation à la suite du prononcé du jugement dans l’affaire *Lubanga*”, 22 March 2012, ICC-01/04-01/07-3264-Conf; Common Legal Representative of the principal group of victims, “Observations additionnelles aux conclusions finales du représentant légal suite au jugement rendu dans l’affaire *Lubanga*”, 22 March 2012, ICC-01/04-01/07-3263; Legal Representative of Child Soldier Victims, “Conclusions additionnelles du Représentant légal des victimes enfants soldats”, 22 March 2012, ICC-01/04-01/07-3262

⁶ Defence for Mr. Katanga, “Defence Closing Brief”, 30 March 2012, ICC-01/04-01/07-3266-Conf; Defence for Mr. Ngudjolo, “Conclusions finales de Mathieu Ngudjolo”, 30 March 2012, ICC-01/04-01/07-3265-Conf

⁷ ICC-01/04-01/07-3266-Conf-Corr., para. 467 (“Defence Request”)

⁸ *Idem.*, para. 469

⁹ “Adjonction de la Défense de Mathieu Ngudjolo à la Requête formulée par la Défense de Germain Katanga aux paragraphes 265 à 475 de son mémoire final”, 19 April 2012, ICC-01/04-01/07-3273-Conf

¹⁰ “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

¹¹ Legal Representatives of the 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

10. On 26 April 2012, the Chamber rejected the Defence Request ("Impugned Decision").¹²

11. On 2 May 2012, the Defence for Mr. Katanga submitted a request for leave to appeal the Impugned Decision.¹³ In its request for leave to appeal, the Defence argues that the Chamber erred in holding that the admission into evidence inevitably required the reopening of the evidentiary phase of the proceedings ("First Issue").¹⁴ The Defence also disagrees with Chamber's assessment of the potential of the relevant portions of the Lubanga Judgment to contribute significantly to the manifestation of the truth ("Second Issue").¹⁵ The Defence further argues that the Impugned Decision clearly affects the fairness of the proceedings, because "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 as it reasonably can."¹⁶ The Defence also submits that the expeditiousness of the proceedings will be affected by the Impugned Decision because, if the Defence were able to raise the matter successfully before the Appeals Chamber at a later stage, this could result in further procedural delays.¹⁷ Finally, the Defence states that an immediate resolution of the contested issues would materially advance the proceedings and potentially avoid a re-trial.¹⁸

¹² "Décision relative à la requête de la Défense de Germain Katanga tendant à l'admission d'extraits du jugement prononcé dans l'affaire *Lubanga*", 26 April 2012, ICC-01/04-01/07-3279

¹³ "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*'", 2 May 2012, ICC-01/04-01/07-3282

¹⁴ ICC-01/04-01/07-3282, paras. 15-19

¹⁵ *Idem.*, paras. 20-23

¹⁶ *Idem.*, para. 25

¹⁷ *Idem.*, para. 27

¹⁸ *Idem.*, para. 28

12. On 7 May 2012, the Prosecutor responded to the Application for Leave to Appeal.¹⁹

II. ANALYSIS

13. The Chamber has examined the application for leave to appeal against the following criteria:

- a. Whether the matter is an "appealable issue" as defined by the Appeals Chamber;
- 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.

A. Is there an appealable issue?

1. First Issue

14. The Defence does not explicitly define the issues for which it seeks leave to appeal. However, from a combined reading of paragraphs 15, 17 and 19 of the Application, the Chamber understands that the Defence takes issue with the following part of paragraph 14 of the Impugned Decision:

Pour la Chambre, l'admission d'un nouvel élément de preuve à ce stade entraîne nécessairement la réouverture des débats pour permettre [...] que

¹⁹ "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'", 7 May 2012, ICC-01/04-01/07-3283

le poids qu'il convient de lui accorder au vu de l'ensemble du dossier soit débattu contradictoirement.

15. The Defence therefore does not take issue with the test laid down by the Chamber for determining whether the re-opening of the evidentiary phase of the proceedings is warranted. Rather, it raises the question as to whether it is necessary for the evidentiary proceedings to be re-opened for parties to be able to present additional evidence.

16. The Chamber notes that the Defence does not claim to have an unfettered right to present additional evidence after the evidentiary phase of the trial has been closed in accordance with Rule 141(1) of the Rules. Moreover, the Defence does not claim that, since the Chamber has closed the evidentiary phase, the deadlines which the Chamber imposed for the addition of evidence to the Defence Evidence List²⁰ have ceased to have effect. It must be observed, in this regard, that the Defence did not apply for a variation of time limit in accordance with Regulation 35 of the Regulations.

17. The Chamber also observes that it is not suggested that its decision of 2 march 2012, inviting the parties to present their observations in relation to the Lubanga Judgment,²¹ can be interpreted as authorising the parties to rely on the said judgment for evidentiary purposes.

18. Accordingly, even if the Chamber has erred on the first issue, this would not imply that the parties automatically have the right to present portions of the Lubanga Judgment as evidence. Therefore, even if the Chamber were to be overruled by the Appeals Chamber, this would not change anything in

²⁰ "Decision on the 'Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)'", 14 September 2010, ICC-01/04-01/07-2388; E-mail message by Trial Chamber II of 25 October 2011 at 14h51

²¹ ICC-01/04-01/07-3255

regard to what the Defence itself defines as the principal issue of this appeal, namely whether “such evidence should be admitted at this stage.”²²

19. It follows that the first issue, as identified by the Defence, does not require resolution for the determination of the matter arising in the judicial cause under examination.²³

2. Second Issue

20. The second issue, according to the Defence, is that the Chamber erred in holding that the relevant portions of the Lubanga Judgment do not have the potential to contribute significantly to the manifestation of the truth. The Chamber agrees with the Prosecution that this is not an appealable issue. The evaluation by the Chamber of the evidentiary significance of exhibits falls fully within its discretion. The fact that the Defence disagrees with the Chamber’s assessment does not constitute an appealable issue in the sense defined by the Appeals Chamber.²⁴

B. Other criteria

21. As the Chamber finds that there are no appealable issues, it must not consider whether they meet any of the other criteria.

²² ICC-01/04-01/07-3282, para. 13

²³ ICC-01/04-168, para. 9

²⁴ ICC-01/04-168, para. 9

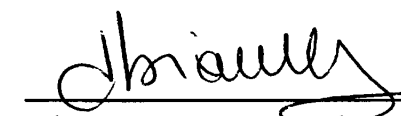
**FOR THESE REASONS,
THE CHAMBER,**

REJECTS the request for leave to appeal.

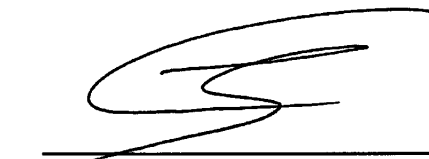
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 14 May 2012

At The Hague, The Netherlands