

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 14 July 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**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 “Defence Request to review or, in the alternative, for leave to appeal, the Decision on a number of procedural issues raised by the Registry”

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

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Other

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to article 82(1)(d) of the Rome Statute of the International Criminal Court ("Statute"), issues the following decision on the "Defence Request to review or, in the alternative, for leave to appeal, the Decision on a number of procedural issues raised by the Registry" of 20 May 2009 ("Request").¹

I. BACKGROUND

1. On 14 May 2009, the Chamber rendered its "Decision on a number of procedural issues raised by the Registry"² ("impugned Decision"). One of the issues dealt with in this decision was the question of whether interpretation into Lingala should be continued to be provided to Mr. Germain Katanga. Both the Office of the Prosecutor ("Prosecution") and the Registry argued that Mr. Katanga's command of the French language was such that it satisfied the standard of article 67(1)(f) and that he should therefore no longer benefit from interpretation into Lingala. However, before ruling on the issue, the Chamber decided to seek the opinion of experts on two issues; first, to instruct an expert to independently assess Mr. Katanga's level of French and second, to instruct an expert to independently advise the Chamber on the quality of interpretation into Lingala as well as Mr. Katanga's command of that language.³ To this end, the impugned Decision asked the Registry to identify a number of suitable experts.

2. On 20 May 2009, the Defence for Germain Katanga filed the "Defence request to review, or in the alternative, for leave to appeal, the Decision on a number of procedural issues raised by the Registry"⁴ ("Application"). In its Application, the Defence asks the Chamber to clarify, review or in the alternative,

¹ ICC-01/04-01/07-1161-Corr

² ICC-01/04-01/07-1134

³ *Ibid*, par. 49

⁴ ICC-01/04-01/07-1161-Corr

grant leave to appeal the impugned decision under article 82(1)(d) of the Statute in relation to:

The Trial Chamber's decision to devise and order tests in French and Lingala, when the Trial Chamber should have made an immediate order for interpretation of the trial proceedings into Lingala.⁵

3. In seeking review of the order within the impugned Decision, or in the alternative leave to appeal under article 82(1)(d) of the Statute, the Defence advances a number of distinct arguments. The Defence argues that:

- (i) the impugned Decision makes an unnecessary and unlawful demand of the accused;
- (ii) the impugned Decision introduces a further, relative criterion absent from the clear instructions of the Appeals Chamber;
- (iii) the decision of the Trial Chamber is a significant deviation from the Appeals Chamber's decision;
- (iv) the impugned Decision involves an issue that falls within the criteria of article 82(1)(d) of the Rome Statute;
- (v) the issue touches on a significant fair trial issue that would or may significantly affect the fair and expeditious conduct of the proceedings.⁶

4. On 25 May 2009, Prosecution filed the "Prosecution's Response to Defence Request to review or, in the alternative, for leave to appeal, the Decision on a number of procedural issues raised by the Registry"⁷, requesting the Chamber to dismiss the Defence's challenge in its entirety.⁸

⁵ ICC-01/04-01/07-1161-Corr, par. 26

⁶ Ibid, par. 27

⁷ ICC-01/04-01/07-1169

⁸ Ibid, par. 12

II. ANALYSIS AND CONCLUSION

A. Clarification of the Impugned Decision

5. The Defence asks the Chamber to clarify whether the order was “to the effect that Mr Katanga subjects himself to such [a language] test, as the expert devises, or whether the Court is [...] merely seeking tests to be devised in order for the Chamber then to consider any proposed test before determining whether Mr Katanga be requested or ordered to undergo such tests.”⁹

6. At this stage, it is not yet foreseeable whether the independent experts appointed by the Chamber may require Mr. Katanga to take a test, as this will depend on their chosen method of assessment. Indeed, the Chamber ordered the Defence to provide full cooperation with the experts instructed by the Chamber¹⁰; this does, however, not necessarily imply that Mr. Katanga will personally be asked to undergo any formal language tests.

B. Review of the impugned Decision

7. With regard to the Defence’s request for ‘review’ of the impugned Decision, the Chamber notes that the Defence has not indicated on which legal basis such a request for revision is based. Moreover, the Defence has not provided the Chamber with any new elements in its Application, which were unknown to it at the time submissions on the issue of Lingala interpretation were made, that could justify a request for revision.¹¹

8. Furthermore the Chamber recalls that in its *Décision sur la requête de la Défense de Germain Katanga concernant le témoin 353*¹² of 19 June 2009, it reminded

⁹ ICC-01/04-01/07-1161-Corr, par. 4

¹⁰ ICC-01/04-01/07-1134, par. 49

¹¹ “*Décision sur la requête de la Défense de Germain Katanga concernant le témoin 353*”, 19 June 2009, ICC-01/04-01/07-1222, par. 8

¹² ICC-01/04-01/07-1222

the Defence that the appropriate procedure for challenging its decisions is the appeals procedure as provided for in the statutory framework of the Court.¹³

C. Request for leave to appeal

9. In reaching its decision on the Defence's application seeking leave to appeal, the Trial Chamber has followed the criteria laid down by the Appeals Chamber in its "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006¹⁴ and considers the issues raised by the Defence in light of the following criteria:

- a) Whether the matter is an "appealable issue";
- 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.

10. The requirements set out in a), b) and c) above are cumulative. The failure to fulfil one or more of them is fatal to an application for leave to appeal.¹⁵

Whether the matter is an appealable issue

11. With regard to the first criterion laid down by the Appeals Chamber, the Chamber notes that "an issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is

¹³ ICC-01/04-01/07-1222, par. 9

¹⁴ "Judgment on the Prosecutor's Application for Evidentiary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, par. 9-20

¹⁵ Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application to Lift the Stay of the Proceedings", 24 September 2008, ICC-01/04-01/06-1473, par. 22

disagreement or 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. The issue may be legal or factual or a mixed one.”¹⁶

12. As the Chamber has previously held, it is an inherent requirement that the appealable issue must arise from the impugned order or decision.¹⁷ It is thus incumbent upon the party seeking leave to appeal to precisely and unequivocally identify the relevant part of an order or a decision which, in its view, gives rise to an appealable issue. In its request for leave to appeal, a party must further precisely formulate a) what it believes to be the appealable issue, b) how, in its estimation, the issue significantly affects the fair and expeditious conduct of the proceedings or outcome of the trial, and c) how, in its estimation, an immediate resolution by the Appeals Chamber would materially advance the proceedings.

13. The present Application falls short of these essential requirements. The Defence has failed to clearly and unequivocally set out what constitutes the appealable issue or from which part of the impugned Decision it arises. General disagreement with the procedure adopted by the Chamber, or indeed the opinion that the Chamber should already have decided the issue in favour of the applicant, are not appealable issues in the sense of article 82(1)(d).

14. The Chamber emphasises, in this regard, that the impugned Decision did not determine whether or not Mr. Katanga is entitled to interpretation into Lingala. To the contrary, the whole purpose of the impugned Decision is to allow the Chamber to make an informed final assessment of Mr. Katanga’s level of comprehension of the French language and the question of whether providing

¹⁶ “Judgment on the Prosecutor’s Application for Evidentiary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, par. 9

¹⁷ “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Order concerning Presentation of Incriminating Evidence and the E-Court Protocol’ and the ‘Prosecution’s Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’”, 1 May 2009, ICC-01/04-01/07-1088, par. 18

Lingala interpretation will significantly enhance his comprehension of the court proceedings. No conclusion on either of these points has yet been reached.

15. The only decision made in the impugned Decision was to order the Registry to identify potential experts who could (a) assist the Chamber in assessing Mr. Katanga's level of French, and (b) report to it on the degree of accuracy of the interpretation of the court proceedings into Lingala and devise a test in order to assess Mr. Katanga's level of understanding in Lingala.¹⁸

16. The Chamber considers that such a purely administrative measure cannot, even in the broadest interpretation, constitute an appealable issue within the meaning of article 82 (1)(d) of the Statute.

17. Accordingly, the impugned Decision does not give rise to an appealable issue, requiring the immediate resolution by the Appeals Chamber, within the meaning of criterion a) set out in paragraph 9 above.

18. Furthermore, given that the criteria laid down by the Appeals Chamber are to be treated as being cumulative¹⁹, the Chamber will thus not consider any of the subsequent criteria; the issue falls at the first hurdle.

¹⁸ ICC-01/04-01/07-1134, par. 48

¹⁹ See par. 10


FOR THESE REASONS,

THE CHAMBER

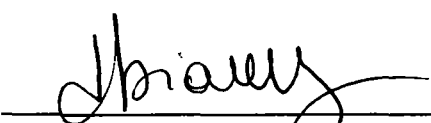
DISMISSES the request for review;

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 Hans-Peter Kaul

Dated this 14 July 2009

At The Hague, the Netherlands