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**International
Criminal
Court**

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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 "Prosecution's Application for Leave to Appeal the 'Order concerning the 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'"

Decision/Order/Judgment 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

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Ambuyu Andjelani

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber II ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, issues the following Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'"¹ of 23 March 2009. It also decides on 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'" of 28 April 2009.²

I. BACKGROUND

1. On 13 March 2009 the Chamber issued the "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol"³ (the "impugned order"). By virtue of this order, the Office of the Prosecutor ("the Prosecution") was instructed to submit a Table of Incriminating Evidence according to the guidelines set out by the Chamber as well as those contained within Annex A of the said decision, no later than Friday 3 April 2009 at 4 p.m.

2. By virtue of the same order, the Prosecution was instructed to file all the items of evidence listed in the said table with the Registry no later than Friday 3 April, at 4 p.m.

3. The Chamber, in the impugned order, further decided that the Prosecution shall seek leave of the Chamber before adding any new item of evidence to the Table of Incriminating Evidence after the lapse of the deadline.⁴

¹ ICC-01/04-01-07-982

² ICC-01/04-01/07-1080

³ ICC-01/04-01-07-956

⁴ *Ibid.*, par. 30

In the event of leave being granted, the Prosecution would have to submit an updated version of the table.

4. On 19 March 2009 the Prosecution filed an urgent “Application for Extension of Time Limit Pursuant to regulation 35 of the Regulations of the Court (“the Regulations”) 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.’”⁵ On 23 March 2009 both Defence teams filed their observations with regard to this request for extension of time limit.⁶

5. On 23 March 2009 the Prosecution filed the “Prosecution’s Application for Leave to Appeal the ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’”.

6. On 27 March 2009 the Defence for Germain Katanga filed the “Defence Response to the Prosecution’s Application for Leave to Appeal the ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’”⁸ opposing the Prosecution’s application for leave to appeal.

7. In its “Decision on the Prosecution’s Application for Extension of Time Limit to Submit a Table of Incriminating Evidence and Related Material”⁹ of 1 April 2009, Trial Chamber II granted the Prosecution an extension of time limit for submitting the Table of Incriminating Evidence until 4 May 2009 4 p.m.

⁵ ICC-01/04-01/07-969

⁶ The Defence for Mathieu Ngudjolo “Réponse de la Défense de Mr Ngudjolo à la demande d’extension de temps soumise par le Bureau du Procureur en date du 19 mars 2009 en vertu de la Norme 35 du Règlement de la Cour”, 23 March 2009, ICC-01/04-01/07-976; Defence for Germain Katanga, “Defence Response to Prosecution’s Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material”, 23 March 2009, ICC-01/04-01/07-980

⁷ ICC-01/04-01/07-982

⁸ ICC-01/04-01/07-1000

⁹ ICC-01/04-01/07-1017

8. On 28 April 2009 the Prosecution filed an additional application for extension of time limit for submitting the Table of Incriminating Evidence.¹⁰ In this application, the Prosecution requests the Chamber to vacate the time limit of 4 May 2009 and to defer setting a new date “until such time as it can reasonably determine when trial is likely to start”.¹¹

9. The Defence of Mr. Katanga responded to this application on 29 April 2009.¹² In its observations, the Defence opposed the request by the Prosecution but agreed that the time limit be extended until 25 May 2009.

10. Considering the immediate link between the application for leave to appeal and the second application for extension of time limit, the Chamber considers it opportune to deal with them in one decision.

¹⁰ “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’”, 28 April 2009, ICC-01/04-01/07-1080

¹¹ *Ibid.*, par. 18

¹² “Defence Observation on 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’”, 29 April 2009, ICC-01/04-01/07-1085

II. ISSUES FOR WHICH LEAVE TO APPEAL IS SOUGHT

11. In seeking leave to appeal under article 82(1)(d) of the Statute, the Prosecution formulates two issues that, in its view, merit the determination by the Appeals Chamber. The issues are defined as follows:

The First Issue

Whether the Prosecution may be required to present all its incriminating evidence and its list of witnesses many months in advance of the trial and without reasonable certainty as to the actual trial date (“First Issue”).¹³

The Second Issue

Whether the Prosecution may be required to create and provide to the Chamber and the Defence a detailed element-by-element analytical chart for all the evidence it intends to use during the trial (“Second Issue”).¹⁴

12. With regard to the First Issue, the Prosecution argues that the deadline for the submission of the Table of Incriminating Evidence, imposed by the Chamber in its order of 13 March 2009, is “excessively in advance of the trial.”¹⁵ In its submission, the deadline unreasonably limits the Prosecution’s discretion to gather and analyze its evidence and present its case at trial.¹⁶

13. With regard to the Second Issue, the Prosecution contends that the degree of the analysis of its evidence, ostensibly required by the order of 13 March 2009, goes far beyond what is authorized under the Statute or the Rules of Procedure and Evidence (“the Rules”).¹⁷ It maintains that the scope of the “precisely charted, detailed, and subjective analysis [...] falls squarely within the

¹³ ICC-01/04-01-07-982, par. 5

¹⁴ Ibid., par. 5

¹⁵ Ibid., p. 3

¹⁶ Ibid., introductory paragraph

¹⁷ Ibid., introductory paragraph

category of work product that cannot be disclosed”¹⁸, thereby relying on rule 81(1) of the Rules.

14. The Prosecution further submits that an authoritative determination of these two issues will materially advance the proceedings. In its estimation, a determination of the issues by the Appeals Chamber will further aid other proceedings by providing guidance for future cases, given the different systems put in place by various Pre-Trial Chambers and Trial Chambers.¹⁹

III. ANALYSIS AND CONCLUSION

15. In reaching its decision on the Prosecution’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 2006²⁰ and considered both issues raised by the Prosecution in the 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.

¹⁸ Ibid., par. 25

¹⁹ Ibid., par. 41

²⁰ “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

16. 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.²¹

A. Whether the matter is an appealable issue

17. According to the jurisprudence of the Appeals Chamber²² an issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.²³ Further, “a right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber.”²⁴

18. In its analysis of whether an issue raised for appeal amounts to an “appealable issue”, the Chamber must first ascertain whether the issue, as formulated by the party requesting leave, veritably arises from the impugned decision or order. If the Chamber concludes that the impugned decision does not contain the putative issues for which leave to appeal is sought, an issue for determination on appeal does not exist.

1. *The First Issue*

19. In analysing the First Issue, as defined by the Prosecution, the Chamber considers it to be composed of two elements:

- a. The argument that the impugned order limits the Prosecution’s right to produce additional evidence after the submission of the Table of Incriminating Evidence, and
- b. The argument that the Chamber cannot limit this right excessively in advance of the trial.

²¹ 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

²² “ 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

²³ *Ibid.*, par. 9

²⁴ *Ibid.*, par. 20

20. With regard to the first component, in formulating the First Issue, the Prosecution appears to have misconstrued the true object of the impugned order. In its application for leave to appeal, the Prosecution argues that “the Chamber cannot restrict [the Prosecution’s] right to add prospective evidence or witnesses excessively in advance of the trial and before a concrete trial date is set.”²⁵ According to the Prosecution, the impugned order gives rise to the question “whether the Chamber may, before the trial date is set and many months in advance of the trial, order the Prosecution to compile, analyze, and produce all its evidence, with no right later to offer additional evidence at trial without judicial approval”.²⁶ The Prosecution therefore seems to interpret the impugned order as limiting its right to “offer additional evidence” after the deadline for submitting the Table of Incriminating Evidence.

21. The Chamber recalls that on 23 January 2009, it ordered the Prosecution to disclose all the incriminating evidence it intended to rely upon during trial by 30 January 2009, subject to any pending requests for redaction.²⁷ The Chamber explicitly stated that on 31 January 2009, it and the parties should be informed of the total number of items of evidence which the Prosecutor intends to use during trial.²⁸ In other words, the Prosecution was already barred from “offering additional evidence”, beyond what had been disclosed by the end of January, by virtue of the order of 23 January 2009.

22. The Chamber emphasises that this date was initially proposed in writing by the Prosecution²⁹ and subsequently confirmed during a status conference, held on 27 November 2008.³⁰ The Chamber further notes that no

²⁵ ICC-01/04-01/07-982, par. 8

²⁶ *Ibid.*, par. 10

²⁷ “Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d’une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)”, 23 January 2009, ICC-01/04-01/07-846

²⁸ ICC-01/04-01/07-846, par. 5

²⁹ “Réponse de l’Accusation à l’« Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut) du 13 novembre 2008”, 24 November 2008, ICC-01/04-01/07-764, p. 3

³⁰ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 46, line 23-24

request for leave to appeal was received with regard to the order of 23 January 2009 and that no application for extension of time limit was made by the Prosecution.

23. The Chamber also draws attention to the fact that, in the order of 23 January 2009, it stressed the importance of the Prosecution presenting its evidence in an organised and systematic manner.³¹ The impugned order had the limited object of implementing this requirement, by determining the precise format of how the items of evidence, already disclosed by 30 January 2009, should be presented.

24. When setting the 30 January 2009 deadline for disclosure of all incriminating evidence, the Chamber was well aware of the fact that the Prosecution was still in the process of making its final selection of evidence it intended to use in support of each charge. In light of the Prosecution's own submissions, the Chamber considered it likely that the Prosecution may have disclosed a number of incriminating items of evidence during the pre-trial phase, or indeed before the 30 January 2009 deadline, that it would no longer wish to use for trial.³² The Table of Incriminating Evidence must reflect those final choices. For this reason the Chamber asked the Prosecution to "only enter into the Table those items of evidence which it has decided to use during the trial."³³ As the Chamber stressed in the impugned order, the Table of Incriminating Evidence is nothing more than a procedural tool to make clear and accessible to the Defence and the Chamber the exact evidentiary basis of the Prosecution's case. Accordingly, the deadline of 4 April (now 4 May), imposed by the impugned order, pertains strictly to adding evidence to the Table of Incriminating Evidence and not to the disclosure of new evidence.

25. In other words, to the extent that the Prosecution wishes to challenge on appeal an allegedly unwarranted early "cut-off date for the Prosecution's

³¹ ICC-01/04-01/07-846, par. 7

³² ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 44, line 5-7

³³ ICC-01/04-01/07-956, par. 12

investigation”³⁴, the Chamber considers that such putative restriction is a consequence of its order of 23 January 2009, rather than of the impugned order. It follows that the First Issue does not arise from the impugned order and it appears that the Prosecution is attempting to re-open a question that has already been decided.

26. Moreover, even if the First Issue could be interpreted as relating solely to the alleged right of the Prosecution “to offer additional evidence” in the Table of Incriminating Evidence, the Chamber is of the view that the Prosecution misconstrues the instructions of the impugned order. Paragraph 30 of the impugned order, reads as follows:

After the Table of Incriminating Evidence has been filed and notified to the Defence, the Prosecution shall not add new prosecution witnesses or other incriminating evidence to the table, except with leave of the Chamber.³⁵

27. It is thus not accurate to say that the Chamber obliged the Prosecution to present “all its incriminating evidence [emphasis added]”, without there being any possibility to add or distract items of evidence. The Prosecution, in its submissions, seems to discount this possibility entirely and appears to assume that the Chamber will systematically refuse to grant leave to add evidence. The Prosecution cannot point to any indication, in its request for leave to appeal, that the Chamber will not exercise its discretion in a fair and balanced manner, or would not take into consideration the Prosecution’s rights.

28. Accordingly, even if the Chamber were to interpret the First Issue contrary to its direct wording, it would still not be an appealable issue, as the impugned order in no way predetermines the Chamber’s future decisions. Leave to appeal cannot be granted on the basis of speculation about how a Chamber will exercise its discretion in the future.

³⁴ ICC-01/04-01/07-982, par. 14

³⁵ ICC-01/04-01/07-956, par. 30

29. As pertains to the second component of the First Issue³⁶, this is premised on the fact that, when the Chamber issued its order, the trial date had not yet been set. However, since then the Chamber has determined a starting date for the trial, namely 24 September 2009.³⁷ In addition, on 1 April 2009 the Chamber granted the Prosecution an extension of time limit until 4 May 2009 to file the Table of Incriminating Evidence.³⁸ These two factors considerably diminish the pertinence of the Prosecution's argument that the impugned order restricts the Prosecution's right to add prospective evidence or witnesses excessively in advance of the trial and before a concrete trial date is set.³⁹ At the very least, the circumstances that gave rise to the second aspect of the First Issue have changed substantially and the Chamber therefore considers it to have been rendered moot.

30. As a consequence of the aforementioned, the Chamber is of the view that the impugned order does not give rise to an appealable issue requiring immediate resolution by the Appeals Chamber, within the meaning of criterion a) set out in paragraph 15 above, in that it is based on an incorrect reading of the impugned order and premised on an outdated factual situation.

31. Given that the criteria laid down by the Appeals Chamber are to be treated as being cumulative⁴⁰, there is thus no need for the Chamber to consider any of the subsequent criteria in any depth; the issue falls at the first hurdle.

2. *The Second Issue*

32. In supporting its request for leave to appeal on the Second Issue, the Prosecution relies on two unrelated arguments.

³⁶ See above, par. 11

³⁷ "Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve) ", 27 March 2009, ICC-01/04-01/07-999

³⁸ ICC-01/04-01/07-1017

³⁹ ICC-01/04-01/07-982, par. 8

⁴⁰ See par. 16

- a. First, that the impugned order obliges the Prosecution to disclose its internal work product, which is protected under rule 81(1) of the Rules.
- b. Second, that the impugned order imposes an unfair administrative burden on the Prosecution, which finds no basis in the Statute or the Rules.

33. With regard to the first argument, the Chamber is of the view that it is based on a mistaken reading of the impugned order. The Prosecution's argument, that the impugned order's requirements for filling in the Table of Incriminating Evidence obliges the Prosecution to disclose its internal work product, which would be protected under rule 81(1) of the Rules⁴¹, does not find any basis in the order. The order does not compel the Prosecution to provide a subjective analysis of the evidence contained within the Table of Incriminating Evidence. The impugned order directs the Prosecution to list its incriminating evidence and requires that "[w]ithin each item of evidence, the Prosecution shall *identify* the pertinent passage(s), which are directly relevant to the specific factual allegation [emphasis added]."⁴² Accordingly, the impugned order does not oblige the Prosecution to provide the Chamber or the Defence with any internal work product relating to the internal analysis by the Prosecution of the evidence listed in the Table.

34. The burden of proof in relation to the guilt of the accused lies with the Prosecution⁴³ and the Defence is entitled to know the exact case against it, sufficiently in advance of the trial. Therefore, it is incumbent upon the Prosecution to transparently present its case against the accused, which is the sole purpose of the Table. The fact that the Prosecution is ordered to identify the relevant passages within the items of evidence relied upon cannot be considered to entail the kind of internal analysis that would be protected by rule 81(1) of the Rules.

⁴¹ ICC-01/04-01/07-982, par. 25

⁴² ICC-01/04-01-07-956, par.13

⁴³ Article 66(2) of the Statute

35. Accordingly, the Chamber considers that the first aspect of the Second Issue, as identified by the Prosecution, is based on a mischaracterisation of the impugned order and the Chamber thus does not need to consider whether it amounts to an appealable issue in accordance with article 82(1)(d).

36. As regards the second aspect, that the impugned order imposes an additional administrative burden, which is unfair on the Prosecution and has no basis in the Statute or the Rules⁴⁴, the Chamber is of the view that this cannot be construed as an appealable issue. Without wishing to minimise the additional work that the production of the Table of Incriminating Evidence entails, the Chamber considers that workload, which is a consequence of the Chamber's normal exercise of its judicial powers and responsibilities under article 64 of the Statute, rule 134 of the Rules and regulation 54 of the Regulations, cannot be the legal basis for granting leave to appeal. The appropriate procedural avenue for raising such issues is by applying for a variation of time limit, as indeed the Prosecution has had occasion to do.⁴⁵

37. As there is no appealable issue, there is thus no need for further analysis of the subsequent limbs of the test laid down by the Appeals Chamber⁴⁶.

IV. SECOND APPLICATION FOR EXTENSION OF TIME LIMIT

38. In its submissions supporting the application for a second extension of time limit, the Prosecution argues that the Chamber should vacate the time limit, but wait with fixing a new deadline until after it has decided on the Prosecution's application for leave to appeal.⁴⁷ However, in the 'conclusion' of the application,

⁴⁴ ICC-01/04-01/07-982, par. 26 and 33

⁴⁵ ICC-01/04-01/07-969 and ICC-01/04-01/07-1080

⁴⁶ ICC-01/04-168, par. 9-20

⁴⁷ ICC-01/04-01/07-1080, par. 2

the Prosecution requests the Chamber to defer setting a new date until such time as it can reasonably determine when trial is likely to start.⁴⁸

39. In accordance with regulation 35 of the Regulations, the Chamber may extend a time limit only if good cause has been shown. It is incumbent upon the party applying for a variation of time limit to explain why it cannot meet the original time limit and to propose and justify a specific new date. The Chamber cannot entertain applications for extension of time limit that are not sufficiently precise and specific and it must therefore reject open-ended applications for extension of time limit that are based on hypothetical arguments.

40. The Prosecution motivates its application for extension of time limit in part on the basis of the alleged “unfeasibility” for the Chamber to provide a decision on the application for leave to appeal before the expiration of the current time limit.⁴⁹ However, as the Chamber rules on this application in the present decision, this argument has become moot.

41. As regards the Prosecution’s other argument, that the date of 24 September 2009 for the start of the trial on the merits may not be tenable as a consequence of the pending motion challenging the admissibility of the case against Mr. Katanga⁵⁰ and the possible appeal that may follow the Chamber’s decision on this motion⁵¹, the Chamber stresses that it cannot entertain speculative arguments. Although it is of course true that there is no absolute certainty that nothing will intervene that might necessitate the postponement of the start of the trial, this eventuality alone cannot be a justification for the variation of a time limit, especially considering that it was already extended once by one month.⁵²

⁴⁸ Ibid., par. 18

⁴⁹ Ibid., par. 4

⁵⁰ Defence for Mr. Germain Katanga, “Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2) of the Statute”, 10 February 2009, ICC-01/04-01/07-891-Conf-Exp

⁵¹ ICC-01/04-01/07-1080, par. 14

⁵² ICC-01/04-01/07-1017

FOR THESE REASONS,

The Chamber

- 1) **REJECTS** the request for leave to appeal in relation to the First Issue;
- 2) **REJECTS** the request for leave to appeal in relation to the Second Issue; and
- 3) **REJECTS** the application for a second extension of time limit.

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



Judge Bruno Cotte,
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Hans-Peter Kaul

Dated this 1st of May 2009

At The Hague, The Netherlands