

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

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

Date: **13 January 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte (Presiding Judge)
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

**Application to Determine the Modalities of the Participation
of Victims at the Trial Stage**

Source: Defence Team of Mr Mathieu Ngudjolo

Document to be served in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr Eric MacDonald

Counsel for the Defence of Germain Katanga
Mr David Hooper

Counsel for the Defence of Mathieu Ngudjolo
Mr Jean-Pierre Kilenda Kakengi Basila
Professor Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims
Mr Joseph Keta
Ms Carine Bapita Buyangandu
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Massida

The Office of Public Counsel for the Defence
Mr Keita

States' representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section
Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. OBJECT AND BACKGROUND

1. The participation of victims at the trial stage was addressed by a judgment of the Appeals Chamber of 11 July 2008.¹ Accordingly, Trial Chamber II (hereinafter “the Chamber”) considered, at paragraph 6 of its 13 November 2008 order, that it was not necessary to readdress the issue.² In its submission of 24 November 2008, Mr Ngudjolo’s Defence (hereinafter “the Defence”) nevertheless argued that a series of factual and legal circumstances justified the Chamber reconsidering the issue.³

2. Pursuant to rule 132(1) of the *Rules of Procedure and Evidence* (“the RPE”), a status conference was held on 27 and 28 November 2008.⁴ The Defence was able to orally confirm its application seeking a reconsideration of the issue of victim participation in this trial. Following the status conference, on 10 December 2008, the Chamber ordered the participants and the Registry to file additional documents.⁵ The Defence was invited to file an application with the Chamber on the issue of the participation of victims at the trial stage no later than 15 January 2009. This application is filed in response to that invitation.

II. SCOPE OF THE APPLICATION FOR THE RECONSIDERATION SOUGHT

3. The Defence wishes to underscore at the outset that the participation of victims in proceedings before the International Criminal Court is unquestionably a

¹ Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008*, ICC-01/04-01/06-1432, hereinafter referred to as *Judgment 1432*.

² Trial Chamber II, *Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute)*, 13 November 2008, ICC-01/04-01/07-747.

³ *Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance II en vue de la conférence de mise en état du 27 Novembre 2008 (article 64-3-a du Statut)*, 24 November 2008, ICC-01/04-01/07-758, para. 21 et seq.

⁴ Trial Chamber II, *Ordonnance fixant la date d’une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 6 November 2008, ICC-01/04-01/07-739.

⁵ ICC-01/04-01/07-788.

step forward for international criminal law and international criminal justice. It has no intention of calling this into question. However, it considers that such participation should be implemented in accordance with statutory and regulatory provisions and in a manner that is neither prejudicial to nor inconsistent with the rights of the Defence.

4. In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, the Appeals Chamber rendered a judgment on 11 July 2008 pertaining to victim participation.⁶ The Defence does not quarrel with the authority of that judgment. It does not intend to revisit the fact that the harm suffered by victims need not have been direct nor that the harm must necessarily be personal. Nor does it intend to quarrel with the fact that the harm alleged by a victim and the personal interest under article 68 of the Statute must be connected with the charges confirmed.

5. The Defence is however concerned by statements made by the Legal Representatives of the Victims who plan to lead evidence pertaining to the guilt of the accused.⁷ With a view to obtaining precise directions from the Chamber on this issue, the Defence sets forth below the applicable legal provisions, and their initial interpretation in the *Thomas Lubanga* case, the unique circumstances of the *Ngudjolo* case, all of which deserve to be taken into consideration, and, alternatively, a question yet to be settled by the Appeals Chamber: that of investigations.

III. LEGAL FRAMEWORK

6. The International Criminal Court is, in fact, governed by a specific body of rules at the apex of which is the *Rome Statute*. The Statute is divided into 13 parts, including part 6 entitled: The Trial. Part 6, which is perfectly consistent with the

⁶ *Judgment 1432, supra*, footnote 1.

⁷ See Docs. ICC-01/04-01/07-759, p. 3, para. I; ICC-01/04-01/07-761, p. 3, para. I-I); ICC-01/04-01/07-762, p. 4, para. 6; ICC-01/04-01/07-767, p. 4, II-I); *Réponses des Représentants des victimes à l'ordonnance de la Chambre de première instance II*, No. ICC-01/04-01/07-747 of 13 November 2008.

Statute as a whole, sets down the rules governing trial proceedings, the powers of the Trial Chamber, the rights of the parties, participants and victims, the principles governing evidentiary matters, etc. On the specific issue of submitting evidence pertaining to guilt or innocence, this prerogative is granted solely to the parties, i.e. the Prosecutor and the Defence. This is the import of articles 64(8)(b), 66(2), and 67(2), amongst others, of the Statute.

7. Article 64(8) (b) states: *“At the trial, the Presiding Judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the Presiding Judge, **the parties may submit evidence in accordance with the provisions of this Statute**”*.⁸ Article 66(2) adds that *“The onus is on the Prosecutor to prove the guilt of the accused”*.

8. Disclosure of evidence is limited to the two parties at trial entitled thereto: the Prosecutor and the Defence. The requirements of article 67(2) are clear in this regard.⁹ Nowhere does the Statute refer to the disclosure of incriminating or exonerating evidence by the Legal Representatives of the Victims because it does not empower the latter to submit evidence pertaining to the guilt or innocence of the accused.

9. Rules 76, 77 and 78 of the RPE provide further particulars on this issue. They provide, *inter alia*, that disclosure of information relating to witnesses is between the

⁸ Emphasis added.

⁹ *“In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the Defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”*

two parties to the trial: the Prosecutor and the Defence.¹⁰ The same applies to the inspection of evidentiary material.¹¹ The Legal Representatives of the Victims do not come within these provisions and play no part in this exchange because they have no standing, *proprio motu*, to submit incriminating or exonerating evidence.

10. The Defence notes that the criteria for victim participation are set out in article 68(3) of the Statute which states: *“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”*.

11. As the Prosecutor so aptly put it in his Response to the Observations of the Victims: *“nothing in the ordinary meaning of “views and concerns”, or in the context or object and purpose of article 68(3), indicates that this must be read so as to include the right to submit evidence pertaining to guilt or innocence”*.¹²

¹⁰ Thus, under its heading *“Pre-trial disclosure relating to prosecution witnesses”*, rule 76 provides: *“1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence. 2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.”*...

¹¹ Regarding the *“Inspection of material in possession or control of the Prosecutor”*, rule 77 provides that *“The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in possession or control of the Prosecutor which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person”*. On the other hand, *“the defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial”*. Such is the requirement of rule 78.

¹² ICC-01/04-01/06-1361, para. 23, cited in Judgment ICC-01/04-01/06-1432, para. 84. Specifically, by relying on the argument *a rubrica*, i.e. by taking into account the internal structure of Part 6 of the Statute governing *“the trial”*, one notes that this article 68 deals with the protection and participation of victims and witnesses at trial. In fact, that is precisely what its heading says. This article 68 sets

12. In matters of evidence, the framework for the participation of victims in the trial results from the combined effect of this article 68(3) and rule 85 which provides the “*Definition of victims*”¹³ and upon which depends the operation of the ensuing rules, i.e. rules 86 to 99, which govern, *inter alia*, victim protective measures, victim applications to participate in the proceedings, their legal representation and the reparation of harm suffered as a result of the commission of crimes within the jurisdiction of the Court.

13. Evidence which may or must be submitted by the Legal Representatives of the Victims must be restricted to establishing that the persons whom they represent come within this definition, that they have suffered harm, and that this harm resulted from the commission of a crime within the jurisdiction of the Court and was contained in the charges against the accused. The Legal Representatives of the Victims also ensure that rules 86, 87 and 88 of the *Rules of Procedure and Evidence* are complied with. They may submit evidence pertaining to the danger faced by victims in seeking and obtaining special protective measures from the Chamber.

14. With respect to the examination of witnesses called by the Prosecution, or the Defence, rule 91, which deals with the “*Participation of legal representatives in the proceedings*”, strictly circumscribes their power. It is apparent from a careful reading of the rule that paragraph 3 sets out a strictly defined exception,¹⁴ whereas

forth the rights of victims and witnesses, after article 67 which deals with rights of the accused, including the right “*To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her*”. Had the legislative intended had been to grant victims the same right, it could have been clearly expressed in article 68.

¹³ Rule 85 thus provides: “*Definition of victims*

For the purposes of the Statute and the Rules of Procedure and Evidence:

- a) “*Victims*” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- b) *Victims may include organisations or institutions which have sustained direct harm to any of their property which is dedicated to religion, education, art or science, or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.*”

¹⁴ Rule 91(3) provides:

paragraph 4 sets out the normal bounds within which a legal representative can act in the case of a hearing limited solely to reparations.¹⁵ The Defence submits that this power granted to legal representatives by both rule 91(3) and rule 91(4) consists in the right to examine witnesses called by the two parties to the trial, i.e. the Prosecutor and the Defence, but does not confer on legal representatives the right to call witnesses for the prosecution let alone witnesses for the defence. This is why, under paragraph 3, their questions may be communicated in advance to the Prosecutor and the Defence for their observations.

15. Chapter 6 of the RPE governs the “*Trial procedure*”. Rules 140 and 141, which are part of this chapter, limit to the Prosecutor and the Defence the right to lead incriminating and/or exonerating evidence, as this power is not granted to the Legal Representatives of the Victims.¹⁶ In the directions under the rules pertaining to the

a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim’s legal representative.

¹⁵ Rule 91(4) states: “For a hearing limited to reparations under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned”.

¹⁶ Rule 140(1) grants to the two parties at trial, the Prosecution and the Defence, the power to agree as to the order and manner in which the evidence shall be submitted. It states: “If the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.” This provision does not refer to the Legal Representatives of the victims.

Under rule 140(2), only the parties, the Prosecution and Defence, and the Chamber, are entitled to examine witnesses who appear. It provides: “In all cases, subject to article 64, paragraphs 8 (b) and 9, article 69, paragraph 4, and rule 88, sub-rule 5, a witness may be questioned as follows::

a) A party that submits evidence in accordance with article 69, paragraph 3, by way of a witness, has the right to question that witness;;

b) The prosecution and the defence have the right to question that witness about relevant matters related to the witness’s testimony and its reliability, the credibility of the witness and other relevant matters;

calling of witnesses, their testimony and the conduct of proceedings pertaining to the guilt or innocence of the accused, as well as the closure of evidence, there is no provision for the intervention of the Legal Representatives of the Victims.

IV. DECISIONS RENDERED IN THE THOMAS LUBANGA CASE

16. Two important decisions pertaining to victim participation have been rendered in the *Thomas Lubanga* case: the decision of Trial Chamber I No. ICC-01/04-01/06-1119 rendered on 18 January 2008 (hereinafter referred to as “Decision 1119”) and the judgment of the Appeals Chamber on the appeals filed by the Prosecution and the Defence against Decision 1119, Judgment No. ICC-01/04-01/06-1432 of 11 July 2008 (hereinafter referred to as “Judgment 1432”). Neither the decision nor the judgment grants legal representatives a separate power to lead evidence pertaining to guilt or innocence.

17. In fact, at paragraph 96 of Decision 1119, the judges state: “*Following an initial determination by the Trial Chamber that a victim shall be allowed to participate in the proceedings, thereafter in order to participate at any specific stage in the proceedings, e.g. during the examination of a particular witness or the discussion of a particular legal issue or type of evidence, a victim will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek. A general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient. These applications will necessarily be examined on a case-by-case basis, since the question of whether “personal interests” are affected is necessarily fact-dependent....*”.

c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2 (a) or (b);;

d) The defence shall have the right to be the last to examine a witness..

The “closure of evidence and closing statements” is governed by rule 141 which *inter alia* organises the order of presentation of closing statements. It reads as follows: “1. The Presiding Judge shall declare when the submission of evidence is closed. 2. The Presiding Judge shall invite the Prosecutor and the defence to make their closing statements. The defence shall always have the opportunity to speak last.”

18. At paragraph 101, the judges conclude from their analysis “*that participation is not a once-and-for-all event, but rather should be decided on the basis of the evidence or issue under consideration at any particular point in time*”. At paragraph 108, they state that the opportunity for participating victims to lead and examine evidence is subject to leave of the Chamber, if in its view it is necessary for the determination of the truth, pursuant to article 69(3) of the Statute.

19. In its *Judgment 1432*, the Appeals Chamber upheld Decision 1119 “*to the extent that the Trial Chamber decided that participating victims may possibly lead evidence pertaining to the guilt or innocence of the accused when requested, and challenge the admissibility or relevance of evidence in the trial proceedings*”¹⁷. The adverb possibly means that this eventuality is contingent upon the circumstances. The principle therefore is that participating victims or their legal representatives do not have the right to lead evidence pertaining to the guilt or innocence of the accused. They may only do so under certain circumstances assessed by the Chamber further to application by the latter pursuant to articles 64(6)(d) or 69(3) of the Statute.

20. The Appeals Chamber specifically refers to this in its key findings at paragraphs 3 and 4:

“3. The right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lies primarily with the parties, namely, the Prosecutor and the Defence. However, the Appeals Chamber does not consider these provisions to preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.

“4. The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is not inconsistent with the onus on the Prosecutor to prove the

¹⁷ Emphasis added.

guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial. In so doing the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.”¹⁸

VI. UNIQUE CIRCUMSTANCES OF THE MATHIEU NGUDJOLO CASE

21. *Judgment 1432* cannot automatically apply in the *Mathieu Ngudjolo* case for two fundamental reasons: first, because it does not impose a positive obligation on the Chamber; second, because there are significant differences between the facts in the *Lubanga* case and those in the *Ngudjolo* case.

A. Absence of a positive obligation and necessary verifications of conditions for participation

22. The Defence submits that your Chamber may reconsider the issue, without infringing the authority of this judgment. In fact, by upholding the decision of Trial Chamber I on the issue of the right to lead and challenge evidence, the Appeals Chamber only noted the lack of any error in the impugned decision, but in no way set out a future positive obligation that would be binding upon the Chamber.

23. Trial Chamber I had in fact specified that: *“Once the Trial Chamber has determined that the interests of a victim or a group of victims are affected at a certain stage of the proceedings, the Chamber will determine if participation in the matter requested is appropriate and consistent with the rights of the Defence to a fair and expeditious trial”*.¹⁹ Before granting the victims the right to lead and/or challenge evidence, the Trial Chamber reviewed the circumstances of the case. It is appropriate to conduct an identical review beforehand in this case.

¹⁸ See also *Judgment 1432*, Conclusion of the Appeals Chamber, paras. 93, 95 and 99.

¹⁹ *Decision 1119*, para. 104.

24. In fact, the role of victims can neither be homogenous nor permanent. Each victim or his or her legal representative must, in each case, show that he or she has a personal interest to act, as well as its appropriateness and that it is not prejudicial to the rights of the Defence to a fair and impartial trial.²⁰ For example, it would be inappropriate for a victim of sexual violence to be allowed to lead and/or challenge evidence on the command structure of the FRPI or on the recruitment of child soldiers. Accordingly, the Defence considers that the type and modalities of participation should be assessed on a case-by-case basis in light of the facts of the case so that a fair balance can be achieved between the participation of victims and the rights of the Defence.

B. Significant differences between the facts in the *Lubanga* case and those in the *Ngudjolo* case

25. These concern, *inter alia*, the number of victims and legal representatives (a), the number of charges confirmed and the complexity of the case (b), the joinder of the case against Mr Ngudjolo and the case against Mr Germain Katanga (c), and the foreseeable impact of expanding victim participation on the rights of the Defence (d).

a) The number of victims and legal representatives

26. As of the date of both Decision 1119 and *Judgment 1432*, only **four victims** had been authorised to participate in the proceedings in the *Lubanga* case. The workload pertaining to dealing with the evidence submitted or challenged, as the case may be, by the Legal Representatives of these four victims is undoubtedly substantially less

²⁰ See Appeals Chamber, *Decision of the Appeals chamber on the OPCV's request for clarification and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the responses thereto by the OPCD and the Prosecutor*, 28 February 2008. In this judgment, the Appeals Chamber ordered the legal representatives to submit information in relation to whether and how the personal interests of the victims concerned were affected by the appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at that stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence. See also, *Decision 1119*, para. 103.

than what would be involved in the event the 57 victims authorised to date in the *Ngudjolo* case were to intervene, not forgetting that other applications have already been announced.²¹

27. Certainly, the workload *per se* is insufficient argument to prohibit victims from leading and/or challenging evidence. On the other hand, the consequences which that implies for the Defence are such that if these rights, which under the statute and rules are set aside for the parties, were granted to the victims, a flagrant imbalance would *de facto* ensue between the means earmarked for the defence and those earmarked for the legal representatives, in addition to a decidedly adverse impact on the rights of the defence. It has been recalled on several occasions that victims cannot be equated to a second prosecution. The Defence submits that the prospect of facing 57 victims, if not more, leading and/or challenging evidence would cause irreparable harm with regard to the principle of equality of arms. The number of legal representatives which now stands at 5 could increase if the issue of common legal representation were not resolved.²² In any event, the Defence doubts that common legal representation would in any manner assist in restoring a balance which would safeguard the rights of the Defence.

b) The charges and complexity of the case

28. The number and nature of the charges laid against Mr Lubanga are clearly distinguishable from those laid against Mr Ngudjolo. Mr Lubanga was committed for trial on two charges only, both pertaining to enlisting, conscripting and using child soldiers to actively participate in hostilities.²³ Mr Ngudjolo is charged with 10

²¹ See, in particular, Trial Chamber II, *Rapport complémentaire du Greffe sur diverses questions liées au traitement des demandes de participation conformément à l'ordonnance du 10 décembre 200*, 16 December 2008, ICC-01/04-01/07-796-Conf.

²² *Idem*, para. 79: Two additional legal representatives have been chosen by the new applicants.

²³ More specifically, it should be recalled that Mr Thomas Lubanga Dyilo was committed to the Trial Chamber for trial on charges of enlisting and conscripting children under the age of 15 years into the

counts of a different nature consisting of war crimes and crimes against humanity. It is clear that although the context is similar, the case against Mr Ngudjolo is unquestionably more momentous and complex than the case against Mr Lubanga.

c) The joinder of the cases against Mr Ngudjolo and Mr Katanga

29. The case against Mr Ngudjolo having been joined with the case against Mr Katanga,²⁴ the defence teams face an increase in workload and in the complexity of the work to be accomplished to ensure a quality defence for the accused. It goes without saying that each defence team cannot, for example, be satisfied solely with assessing the merits of the evidence tendered against their client, its admissibility and/or relevance, but is faced with a doubling of its workload because it has to determine how, in what way, and why such evidence is to be considered for each of the accused. This workload is further compounded by the very broad mode of responsibility held against the accused in the decision confirming the charges.²⁵ To authorise the victims to lead and/or challenge evidence pertaining to the guilt and/or innocence of the two accused will rapidly become unmanageable for the defence teams.

d) The foreseeable impact that expanding the group of victims will have on the rights of the defence

30. The participation of victims is governed by the aforementioned article 68(3) of the Statute and which constitutes a procedural safeguard, both with respect to the participation of victims in the criminal trial and the protection of the right of the accused.

FPLC and using them to actively participate in hostilities within the meaning of articles 8(2) (e) (vii) and 25(3)(a) of the Statute, between 2 June and 13 August 2003. See Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 29 January 2007, ICC-01/04-01/06-803-tENG, p. 133.

²⁴ Pre-Trial Chamber I, *Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI*, 10 March 2008, ICC-01/04-01/07-257.

²⁵ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/07-716.

31. The Defence submits that to authorise no less than 57 victims to lead and challenge evidence pertaining to the guilt or innocence of Mr Ngudjolo cannot be envisaged without jeopardizing a whole series of rights enshrined both by the Statute and regional and international human rights instruments. In fact, any such authorisation can only be inconsistent with the fairness of a trial which must be conducted with full equality of arms (article 67(1) of the Statute), and more specifically with the right to have adequate time and facilities for the preparation of the defence (article 67(1)(b) of the Statute), with the right to be tried without undue delay (article 67(1)(c) of the Statute). These foreseeable infringements are unacceptable and inconsistent with article 68(3) of the Statute which insists on a limited participation for victims, in a manner which is not prejudicial to or inconsistent with the rights of the defence.

32. The Defence considers that the principle of equality of arms must be fully taken into account in the matter under consideration. While the law in several *civil law* systems allows victims to participate in criminal trials, the fact is that such participation is always circumscribed and strictly regulated, and can never be confused with prosecutorial action.

33. For example, in *Berger v. France*, the plaintiff alleged that there had been an infringement of article 6(1) of the ECHR and the principle of equality of arms on account of the Court of Cassation's decision to declare her appeal inadmissible. The ECHR accepted this argument and stated: “(...) *the Court agrees with the Government that a civil party cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.*”²⁶ In *Perez v. France*, the ECHR ruled: “(...) *the Court of Cassation accepts the principle of civil proceedings for purely punitive purposes, which may explain why legal theory refers*

²⁶ ECHR, *Berger v. France*, Judgment, 3 December 2002, Application no. 48221/99, para. 38, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=BERGER%20%7C%20FRANCE&sessionid=21358790&skin=hudoc-en> (Last accessed on 24 December 2008).

indiscriminately to “civil proceedings for punitive purposes” or to “civil-party complaints for punitive purposes”. The Court considers that in such cases the applicability of Article 6 has reached its limits. It notes that the Convention does not confer any right, as demanded by the applicant, to “private revenge” or to an actio popularis.”²⁷ Thus, the Court noted that the right of victims to participate is a civil right which is independent of the jurisdiction of criminal courts.²⁸ Accordingly, the Defence considers that if the Chamber were to grant victims a right which exceeds the right under article 68, i.e. the right to express their views and concerns where their personal interest is affected, there is a great risk that, due to the flagrant imbalance between the time and financial and human resources available to the defence, justice will not be fairly rendered.

34. In fact, the Defence is a team comprised of one counsel, one co-counsel, a legal assistant and a case manager. At this stage, the Defence is already encountering organisational difficulties due to the workload which is too heavy for a team of only four members. This workload includes, *inter alia*, the factual and legal analysis of the prosecution case, challenging evidence, monitoring case-related procedural issues, preparation for and participation in hearings, legal research, drafting of legal submissions, case-related factual and contextual research, the management of problems encountered by Mr Ngudjolo at the detention centre, among other things, with respect to family visits, working meetings with Mr Ngudjolo, organisation and control of investigations in the field, etc. *A fortiori*, the Defence team, which is already submerged, would be overwhelmed by having to respond to the submission and challenging of evidence by the Legal Representatives of the victims. This

²⁷ ECHR, *Perez v. France*, Judgment, 12 February 2004. Application no. 47287/99, para. 70, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=PEREZ%20%7C%20FRANCE&sessionid=21358790&skin=hudoc-en> (Last accessed on 24 December 2008.) See also S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, pp. 36-37.

²⁸ See in particular ECHR, *Moreira de Azevedo v. Portugal*, Judgment, 23 October 1990, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=MOREIRA%20%7C%20PORTUGAL&sessionid=21358790&skin=hudoc-en> (Last accessed on 24 December 2008).

evidence would require numerous verifications, including some which, would, where necessary, have to be conducted in the field. Due to the particular circumstances of the case, the Defence has neither the time nor the necessary resources to guarantee equality of arms between its action and that of the numerous victims granted victim status (and others soon to be granted victim status) in the proceedings.

35. In any event, if the victims were to be granted rights which go beyond expressing their views and concerns, the Defence is of the view that the risk of delaying the trial is such that it would most certainly violate the right of Mr Ngudjolo to be tried fairly without undue delay. Undue delay would in itself entail adverse consequences which would unavoidably rebound on the victims themselves.

VII. AN UNRESOLVED ISSUE: INVESTIGATIONS

36. This issue precedes that of the submission and challenging of evidence. The Defence is particularly concerned by comments made at the status conference of 27 and 28 November 2008 by one of the legal representatives who stated that she wanted to carry out investigations in the field in Bunia and in Kinshasa.²⁹ The Office of the Prosecutor appears to share this concern insofar as it raised the issue of the role of legal representatives with respect to investigations and supported the idea of our team that it was necessary to discuss the issue of victim participation in the trial.³⁰

37. The Defence respectfully submits that the power to investigate and call witnesses to appear or to testify cannot be granted to the victims. It considers that these are prerogatives strictly reserved to the parties to the trial. To grant them to

²⁹ Transcript, 28 November 2008, p. 3, lines 6 *et seq.*

³⁰ Transcript, 28 November 2008, p. 83, lines 18 *et seq.*

victims would change the role of participant granted to them by the Rome Statute, which is patently contrary to the spirit and the letter of the legal provisions which govern the Court.

38. The Defence submits that *Judgment 1432* does not in any way imply that the victims are entitled to conduct investigations pertaining to the guilt of the accused. By setting out a framework for the exercise of the right of victims participating in the trial to lead evidence and to challenge the admissibility or relevance of evidence, the Chamber ruled at paragraph 108 of Decision 1119 that “*victims participating in the proceedings may be permitted to tender and examine evidence if, in the view of the Chamber, it will assist in the determination of the truth and if, in this sense, the Court has “requested” the evidence*”³¹. The Defence therefore respectfully submits that the power to lead evidence on the basis of article 69(3) of the Statute is reactive rather than proactive and, consequently, in no way encompasses any investigatory power. This would mean producing material in the possession of the victim (for example a death certificate or a birth certificate issued *in personae* by the national authorities), and not conducting an investigation pertaining to the guilt or innocence of the accused, a role which is reserved to the parties.³² This reasoning is supported, *inter alia*, by the duty to investigate-related obligations and, more specifically, the disclosure obligation incumbent upon the parties.³³

39. In addition to the legal impossibility for legal representatives to conduct investigations, a considerable number of practical arguments fall to be taken into account. The main arguments are related to the interference with investigations

³¹ ICC-01/04/-01/06-1432, *op. cit.*, para. 86.

³² Articles 54(3)(a), 54(2), 55(1) a), 55(2), 56, 57(3)(b), and 57(3)(d) in particular, which are closely linked with the rights and obligations concerning investigations, in no way contemplate victims or their legal representatives.

³³ See, in particular, Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 21 October 2008*, ICC-01/04-01/06-1486.

conducted by the Prosecutor and the Defence. In fact, the presence of multiple victims in the field carrying out investigations, even through their legal representatives, could only result in a confusion of roles, in a possible collusion with third parties, and a high risk of tampering with and damaging evidence.

40. The Defence submits that it is particularly important that the core provisions of the Statute and the RPE governing the taking and disclosure of witness statements for the purposes of the trial be specifically reserved to the parties to the trial if not to the national authorities. For example, article 55(2) of the Statute presumes that potential suspects shall be questioned by the Prosecutor or by national authorities. Pursuant to rule 76 of the RPE, the duty to disclose witness statements lies exclusively with the Prosecutor. In fact, the Appeals Chamber has recognised in this regard that the Court should actively ensure that the role of victims does not usurp and/or duplicate the role assigned to the Prosecutor.³⁴ Thus, with the sole exception of the Defence, only the Prosecutor who defends the public interest by investigating incriminating and exonerating evidence equally³⁵ has the power to question and call witnesses. The underlying objective is clearly not to exclude victims but, on the contrary, to guarantee a fair trial and to safeguard the interests of justice.

41. With the exception of regulation 86(2)(e) of the *Regulations of the Court*, no legal provision provides for the disclosure of evidence to the Defence. No provision governs the harm that may be caused to the administration of justice by a legal representative.³⁶ The risk also exists, in the event that the right to investigate were to be granted to victims, of breaking the mandatory conditional connection with the

³⁴ Appeals Chamber, *Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007*, 13 June 2007, ICC-01/04-01/06-925, para. 28: "More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor."

³⁵ Article 54(1)(a) of the Statute.

³⁶ See the English version of article 70(1)(b) which refers to evidence "that the party knows is false or forged".

personal interest of a victim in favour of a general interest to which the victim has no entitlement.³⁷

42. Like the arguments advanced by Mr Lubanga's Defence and the Prosecution, the Defence is of the view that anonymous victims should not be authorised to participate actively in the proceedings.³⁸ In fact, the participation of anonymous victims is *per se* inconsistent with the rights of the defence, with the fairness of the proceedings and, more particularly, with the principle of equality of arms. This is manifested particularly by the fact that the Prosecution has full knowledge of the claims of the victims, whereas the Defence has only received redacted versions. Clearly, since the Prosecution has access to all the information about anonymous victims, from a procedural standpoint, it unquestionably enjoys an advantage over the Defence. Consequently, in the event these victims were to be granted the right to participate in the proceedings, the Defence, as opposed to the Prosecution, would not, for example, have any possibility of assessing the relevance or effect of the link between the evidence, if any, submitted and the direct interest of the victim concerned in tendering such evidence. This is completely contrary to the principle of equality of arms and is therefore prejudicial to the rights of the defence.³⁹

³⁷ ICC-01/04 -01/06-1432, *op. cit.*, para. 96.

³⁸ See Trial Chamber I, Prosecution's public filing of the "Prosecution's submissions of the role of victims in the proceedings leading up to, and during, the trial", 23 October 2007, ICC-01/04-01/06-996-AnxI, para. 25: "*The Prosecution submits that once victims have been admitted as participants at the trial, their identity must be known by the Defence. Anonymous victims cannot be permitted to participate in the trial proceedings and the proceedings leading up to trial in any manner. Basic considerations of fairness vis-à-vis the accused person requires that they are informed of the identity of individuals who have been granted the procedural status of participants and who may raise issues prejudicial to their interests, in order to allow for a proper response by the Defence.*" Annex I to the Prosecution's public filing of the "Prosecution's submissions of the role of victims in the proceedings leading up to, and during, the trial".

³⁹ See Pre-Trial Chamber, *Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06*, 1 February 2007, ICC-02/04-01/05-134, para. 25. In this regard, Mr David Donat-Cattin emphasised in his commentary on article 68 of the Statute: "*Non-disclosure of identity to the public or to the media is one thing; anonymity of witnesses/victims to the defence is another. The latter is unacceptable, in the light of the right of the defence [...] in fact, it is not*

VIII. CONCLUSION

43. The Defence recalls that criminal matters are governed by the principle of legality: *nullum crimen, nulla poena, nullum iudicium, sine lege*.⁴⁰ This fundamental rule governs not only crimes and sentencing, but also procedure. Its corollary is the principle of strict interpretation of criminal laws and prohibition against interpretation by analogy. In procedural matters, the consequence of the principle of legality is that no action may be undertaken unless it is grounded in law.

44. There is no provision in the ICC Statute nor in its RPE which directly grants Legal Representatives of victims an inherent power to submit incriminating or exonerating evidence. The sole basis upon which it may act is set out in articles 69(3) and 64(6)(d) of the Statute.⁴¹

45. To ensure fairness and the integrity of the proceedings, and to comply with the principle of legality, the Defence respectfully proposes to the Chamber that, if the Legal Representatives of the victims are in possession of incriminating evidence, they may disclose it to the party who bears the burden to prove the guilt of the person charged, i.e. the Prosecutor, who could then present it to the Chamber subject to his disclosure obligation to the Defence. The purpose of the Defence in this regard is not to challenge the production of evidence that may be in the possession of the Legal

possible to respond to arguments presented by someone 'without identity'". In Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court Observers' Notes, Article by Article, 'Article 68'*, p. 878.

⁴⁰ See Roger Merle and André Vitu, *Traité de droit criminel*, T.1, Ed. Cujas, 6th ed., Paris 1988, No. 155; Jean Pradel, *Droit pénal général*, 8th edition, Cujas, Paris, 1992, No. 130; Thierry Garé and Catherine Ginestet, *Droit pénal. Procédure pénale*, 3rd Edition, Dalloz, Paris 2004, pp. 16 to 22.

⁴¹ Article 69(3): "The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth".

Article 64(6)(d) of the Statute: "In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties."

Representatives of the victims. The purpose here is to ensure the fairness and integrity of the proceedings while ensuring respect for the rights of the accused.

46. If, and only if the Prosecutor were to refuse to tender such evidence offered by the Legal Representatives would the Chamber then exercise its power under articles 64(6)(d) or 69(3) of the Statute, by asking the latter to produce such evidence, which it deems necessary for the determination of the truth. This approach, which in no way infringes the discretion of the Chamber, would allow proceedings to be conducted within the strictly framework strictly defined by the legal texts, i.e. the Statute and the RPE. This would avoid giving the impression that the Defence has to face several prosecutors.

47. In enacting clear and unambiguous provisions governing trials, the drafters showed considerable foresight,⁴² as it was recognized that allowing incriminating evidence to be led by victims or their legal representatives would be inevitably tantamount to making them prosecutors *bis*. One can easily imagine the lengthy proceedings which would ensue as a consequence. For example, in our case, the Defence would not be responding to a single prosecutor, but to 5 (1 Prosecutor and 4 Legal Representatives), and possibly more, as other victim applications for

⁴² These clear legal provisions are outlined in para. 93 of *Judgment 1432* which states: “*The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence. The first sentence of article 69 (3) is categorical: “[t]he parties may submit evidence relevant to the case, in accordance with article 64.” It does not say “parties and victims may.” The language of article 69 (3) cited above, and article 64 (6) (d) which provides that the Court shall have the authority to “[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties” clearly envisions that evidence presented during the trial would be presented by the parties. The Rome Statute framework contains numerous provisions which support this interpretation such as those pertaining to the role assigned specifically to the Prosecutor in, inter alia, investigating the crimes, formulating the charges and determining what evidence should be brought in relation to the charges (articles 15, 53, 54, 58 and 61 (5) of the Statute). Article 66 (2) of the Statute provides: “[t]he onus is on the Prosecutor to prove the guilt of the accused”. Presumptively, it is the Prosecutor’s function to lead evidence of the guilt of the accused. In addition, the regime for disclosure contained in rules 76 to 84 of the Rules which sets out the specific obligations of the parties in this regard is a further indicator that the scheme is directed towards the parties and not victims.”*

participation have been announced.⁴³ This, undoubtedly, would violate the principles of equality of arms and fairness of the trial.

48. Since there are no legal or procedural or disclosure safeguards as far as legal representatives are concerned, the Defence considers that granting them the right to investigate would not only be inconsistent with the right to a fair and impartial trial, but would also be contrary to the interests of justice. The ECHR and the Inter-American Court of Human Rights have both underscored the right of victims to obtain reparation effectively, but also emphasize that investigations related to complaints should be conducted by the competent national authorities and not, for example, by the family of the deceased.⁴⁴ *Mutatis mutandis*, before the Court, this role is assigned to the Office of the Prosecutor.⁴⁵

⁴³ At the Status Conference of 28 November 2008, the Registry stated that it had registered approximately 650 applications for participation by new Congolese victims. 110 applications related to charges confirmed by the Pre-Trial Chamber have reportedly already been received. See ICC-01-04/01-07-T-53-FRA and WT 28-11-2008, p. 21, lines 16 to 22; p. 22, lines 18 to 21, p. 23, lines 9 to 12; p. 24, lines 2 to 4.

⁴⁴ See for example, ECHR, *Kilic v. Turkey*, Judgment (Application no. 22492/93), 28 March 2000, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=KILIC%20%7C%20TURKEY&sessionid=21361536&skin=hudoc-en> (last accessed on 24 December 2008). At para. 93: "The authorities thus had an obligation to carry out an effective investigation into the circumstances of the killing of the applicant's brother." IACHR, *Blake v. Guatemala*, Judgment, 24 January 1998, at http://www.corteidh.or.cr/docs/casos/articulos/seriec_36_ing.pdf (last accessed on 24 December 2008). At para. 92, the Court stated: "The Commission argued that, as had been decided in the Velasquez Rodriguez Case, it is the responsibility of the State to conduct serious judicial investigations into human rights violations committed on its territory and not the responsibility of private persons" and at para. 97: "Consequently, Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death to effectively investigated by the Guatemalan authorities to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained."

⁴⁵ Professor Bassiouni had in fact specified in this regard that: "If the victim is a 'participant', then the victim has only those procedural rights specified in the Statute. As a 'participant', a victim does not have the right to present evidence or to examine and cross-examine witnesses for the prosecution and for the defence. As a 'party', it may by implication have such rights, although there is nothing in the legislative history of the ICC Statute to assume that the victim was to be anything more than a participant. [...] An expanded procedural role for the victim may be in contradiction with the role and prerogatives of the Office of the Prosecutor. It should be noted that the ICC Statute's provisions and the Rules of Procedure are very detailed as to the role of the Office of the Prosecutor, and it would be highly inconsistent with the goals and purposes of these provisions to allow the victim a parallel role or one that could be in conflict with the Office of the Prosecutor". C. BASSIOUNI, *International Recognition of Victims' Rights*, 6 *Hum. Rts. L. Rev.* 203, p. 18.

49. What applies to victims generally is *a fortiori* applicable to anonymous victims whose participation in proceedings is frowned upon under numerous legal systems. The application of article 68(3) of the Statute should comply with internationally recognised human rights standards and largely discourage the use of anonymous witnesses and complainants.⁴⁶

FOR THESE REASONS,

The Defence for Mr Mathieu Ngudjolo respectfully requests the Chamber:

1 MAIN RELIEF SOUGHT

To reconsider the principle of allowing the legal representatives of victims to lead evidence.

2 IN THE ALTERNATIVE

In the very unlikely event that the Chamber were to recognise the value of the principle that the legal representatives of victims can lead evidence,

To subject such a process to strict judicial supervision in order to secure a fair trial and equality of arms between the parties.

And let justice be done.

[Signed]
Mr Jean-Pierre Kilenda Kakengi Basila
Lead Counsel

⁴⁶ See, in particular, The Law Society of England and Wales, *Study of the laws of evidence in criminal proceedings throughout the European Union*, Summary Report October 2004, pp. 43-45. Document available at: <http://www.sq3.it/enlsc/docs/materials/LawEvidenceEU.pdf> (last accessed 24 December 2008).

Dated this 13 January 2009

At Brussels

M. Guerrin, “Le témoignage anonyme au regard de la jurisprudence de la Cour européenne des droits de l’homme”, in *Revue trimestrielle des droits de l’homme*, 2002, pp. 65-66.