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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

**Response of the Legal Representatives of Victims a/0333/07 and a/0110/08 to the
“*Requête en vue de fixer les modalités de participation des victimes au stade du
procès*” of the Defence for M. Ngudjolo and to the “Defence Observations
regarding victims’ participation and scope thereof” of the Defence for G. Katanga**

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

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Procedural Background

By way of its responses to the questions of Trial Chamber II for the purpose of the status conference of 27 November 2008,¹ the Defence for Mathieu Ngudjolo stated, *inter alia*, that it considered that, because of several factual and legal circumstances, Trial Chamber II (“the Chamber”) should reconsider the issue of the participation of victims at the trial stage, despite the Chamber’s having considered in its order of 13 November 2008 that this issue had already been resolved in the context of the present case and in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.²

The Defence for Mathieu Ngudjolo subsequently confirmed its wish orally at the status conference held on 27 and 28 November 2008.

By order of 15 December 2008, the Chamber instructed the participants and the Registry to file supplementary documents. The Chamber stated that it would note that the Defence for Mathieu Ngudjolo intended to submit to the Chamber a written application on the issue of victim participation “[TRANSLATION] while drawing the Defence’s particular attention to the need to set forth all of the arguments in favour of a reassessment of the issue”.³

The Defence for Mathieu Ngudjolo was granted until 15 January to file an application, which it did.⁴

On 29 January 2008, the Defence for Germain Katanga filed its own observations on the scope of victim participation.⁵

¹ ICC-01/04-01/07-758, paras. 21 and 22.

² ICC-01/04-01/07-747-tENG, paras. 5 and 6.

³ ICC-01/04-01/07-788, para. 10.

⁴ ICC-01/04-01/07-824.

⁵ ICC-01/04-01/07-858.

In accordance with the aforementioned order of 15 December 2008, the legal representatives submit the following observations in response to the documents filed by the Defence for M. Ngudjolo and G. Katanga respectively.

I. LEGAL REPRESENTATIVES LEADING EVIDENCE

Defence submissions

The Defence for M. Ngudjolo indicates that it does not want to call into question the principles set by the decision of 11 July 2008 concerning the fact that it is not necessary for harm suffered by victims to be direct, that the harm must be personal and that the alleged harm and the personal interest referred to in article 68 of the Statute must be linked to the charges.

In its application, the Defence for M. Ngudjolo states that it intends only to revisit “[TRANSLATION] statements made by the legal representatives of the victims planning to lead evidence pertaining to the guilt of the accused”.⁶

The Defence for M. Ngudjolo considers that:

- under the legal framework governing the Court, the prerogative of leading evidence of guilt or innocence is granted to the parties only, thereby excluding the legal representatives of the victims;
- neither the Trial Chamber I’s 18 January 2008 *Decision on victims’ participation* (Decision no. 1119) nor the Appeals Chamber’s *Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008* (Judgment no. 1432) grants victims the autonomous power to lead incriminating or exculpatory evidence;

⁶ ICC-01/04-01/07-824, para. 5.

– the aforementioned judgment cannot automatically apply here, since it places no positive obligation on the Chamber and considering that there are considerable differences between the circumstances of the Lubanga case and the Ngudjolo case.

The Defence for M. Ngudjolo draws the following conclusion:

[TRANSLATION] 45. To ensure the fairness and the integrity of the proceedings, and to comply with the principle of legality, the Defence respectfully submits to the Chamber that, where the legal representatives of victims are in possession of incriminating evidence, they may disclose it to the party who must satisfy the burden of proving the guilt of the person charged, which in the present case would be the Prosecutor, who could then submit it to the Chamber after having made proper disclosure to the Defence. It is therefore not for the Defence to challenge production of evidence held by legal representatives of victims. This is more an issue of ensuring the fairness and integrity of the proceedings while ensuring respect for the rights of the accused.

46. It is only where the Prosecutor refuses to tender such evidence proposed by the legal representatives that the Chamber may exercise the power provided for under article 64(6)(d) or article 69(3) of the Statute, by asking them to produce such evidence which it deems necessary for the determination of the truth. This manner of proceeding, which in no way infringes the sovereign power of the Chamber, would allow the proceedings to be conducted within the framework strictly circumscribed by the legal provisions, i.e. the Statute and the RPE. This would avoid giving the impression that the Defence has to deal with several prosecutors.⁷

The Defence for G. Katanga itself states that it does not seek to re-open the matter of victim participation as adjudicated in Judgment 1432, but rather to have the scope and modalities of that participation defined in accordance with the criteria set out in the Judgment.

To this end, it proposes that:

- the evidence led by victims should not have the effect of expanding or modifying the nature or scope of the Prosecution case (“Evidence limited to Prosecution case”);
- a number of conditions should be placed on victims leading evidence.⁸

⁷ *Ibidem*, paras. 45 and 46.

⁸ The Defence seeks the following guarantees: “(i) Timely notice: To preserve the fundamental right of the accused to adequate time and facilities to prepare (and the right to confrontation) as form part of

Response of the legal representatives

First of all, we should recall the fundamental principles set forth in Judgment 1432 ruling on the appeal against Decision 119 on the right of victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence.⁹

In the Appeals Chamber's view, this right lies primarily with the parties, as clearly established by article 69(3) and confirmed by article 64(6)(d). This interpretation is borne out by the framework established by the Rome Statute.¹⁰

It goes on to state that it "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".¹¹

Although the burden of proof lies with the Prosecutor, the Court retains statutory powers allowing it to give the victims the opportunity to apply to the Chamber to

the fair trial guarantee, the victim participants should give timely and detailed notice of the evidence that it wishes to call at trial. Victim participants would have to detail each document that it will seek to produce at trial and provide a detailed notice of the alleged relevance of that document to their position. The same must be required if and where the victim participants seek to produce a witness statement, the admissibility of which will be subject to the general requirements set out in the Statute and the Rules. (ii) Leave of the Chamber: Evidence could only be presented by a victim participant where he or she has sought and obtained leave to do so from the Chamber (see, e.g. Article 68(1) and (3) of the Statute). The same is true where legal representatives of victims wish to ask a question of a witness. In each case, i.e., in relation to each question, leave of the Chamber would have to be sought and obtained. (iii) Disclosure: A victim participant should give timely notice – to the Chamber, Defence and Prosecution – of its intention to seek to produce a particular document or to call a particular witness (where permitted to do so). The Defence submits that the Trial Chamber should set a deadline, well in advance of the start of the trial, for the victim participants to do so. (iv) Admissibility: Admissibility is subject to the general requirements and conditions pertaining to material tendered by the Defence or the Prosecution. Unless the same requirements of diligence apply to the victim participants in eliciting, obtaining and disclosing evidence, attention will have to be paid in that context to the authenticity and reliability of the material produced". ICC-01/04-01/07-858, para. 17.

⁹ The legal representatives note that the issue of the admissibility or relevance of evidence is not the subject of the application filed by the Defence.

¹⁰ ICC-01/04-01/06-1432, para. 93.

¹¹ *Ibidem*, para. 94.

request the submission of evidence it considers necessary for the determination of the truth, pursuant to article 69(3).

This provision must be viewed in conjunction with article 68(3) and rule 91(3) enabling the Chamber to authorise the victims to question witnesses or to produce documents so long as certain guarantees are respected.

The legal representatives consider that, although it is understood that victims cannot assume the Prosecutor's role and that their intervention must in no way result in their taking the Prosecutor's place, like the Court, they nevertheless have an interest in determining the truth.

Furthermore, it seems clear that one cannot rule out that in a certain number of cases evidence, documents or statements submitted by the victims in order to support their interest in the proceedings or to prove that they have suffered harm may pertain to guilt or will have consequences for the discussion of that matter, sometimes irrespective even of what the victims want. In any event, those materials will have been tendered in accordance with strict modalities and including the safeguards set by the Chamber.

Judgment 1432 cites a number of examples in this respect¹² and considers that, given the limits and procedure strictly set by Decision 1119 for victims leading evidence pertaining to guilt, the right thus accorded is not inconsistent with the Prosecutor's obligation to prove guilt or with the rights of the accused and a fair trial.¹³

In light of the above, the legal representatives consider that the proposal made by the Defence for M. Ngudjolo is without merit and is not even relevant.

¹² *Ibidem*, para. 102.

¹³ *Ibidem*, para. 104.

In fact, it appears already that the framework in which evidence will be led provides all the safeguards, since the proposed mechanism is now of little interest and will also have the effect of slowing down the proceedings.

Under Decision 1119, confirmed by Judgment 1432 on this point, the procedure and confined limits within which the Chamber will exercise its powers to permit victims to tender and examine evidence are as follows: “(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”.¹⁴

Furthermore, the mechanism proposed by the Defence for M. Ngudjolo seems neither realistic nor practicable, in particular, in respect of all possibilities in which the repercussions of a piece of evidence on the discussion of guilt might not immediately be obvious, regardless of what the victim wants.

Moreover, the proposed solution would blur the roles: it is for the victims to tender evidence related to the defence of their interests, even if it incidentally pertains to the guilt or innocence of the accused.

Finally, it would indirectly give the Prosecutor the power to decide on the relevance or admissibility of the evidence led by the victims – a power not granted to it by the Court’s statutory and regulatory framework.

In respect of the conditions proposed by the Defence for G. Katanga, the legal representatives are of the view that the conditions and the framework defined by Decision 1119 are sufficient to address the concerns expressed by the Defence in its observations.

¹⁴ ICC-01/04-01/0-1432, para. 104.

As to the argument of the Defence for M. Ngudjolo regarding the specific nature of this case, the legal representatives fail to see how the higher number of victims and charges would warrant a departure from the framework and principles established in the Lubanga case.

Moreover, this argument is no longer relevant, since several dozen victims have been admitted in this case and it does not seem that this factor is likely to influence the proceedings in this respect.

Furthermore, it is clear that not all victims will wish to and be able to lead evidence systematically.

The legal representatives will, of course, be limited in this respect by their own material and human resources, especially once the common legal representation is organised.

Considering the fact that the adoption of joint documents from the teams of legal representatives will be repeated and in light of the above, the Defence's fear of being inundated by the legal representatives of victims leading and challenging evidence is unfounded.

Furthermore, the legal representatives submit that the procedure put forward by the Defence for M. Ngudjolo in its application is unlikely to overcome this alleged risk, but, on the contrary, is likely to slow down the proceedings.

II. POSSIBILITY OF THE LEGAL REPRESENTATIVES CONDUCTING INVESTIGATIONS

Both the Defence for M. Ngudjolo and the Defence for G. Katanga object to the possibility of the legal representatives conducting investigations.

The Defence's observations stem from the statements made at the status conference of 28 November 2008 by one of the legal representatives, who expressed a desire to conduct investigations in the field.

The terms of this statement must be partially restated here in order for their scope to be understood:

[TRANSLATION] [...] I have not had an opportunity to discuss the additional point, but on thinking about it yesterday, following the others, we thought that there was an important point that must be underlined; that is, we are also thinking about conducting investigations in the field in Bunia and Kinshasa, since this is provided for in the Court's budget and it proves to be important, if we are able, throughout these proceedings, to associate the application of article 56 to lead certain evidence which we will have to gather in the field during these investigation missions [...].¹⁵

The legal representatives believe that, without risking distorting the words of their colleague or misunderstanding her intentions, they may state that her desire to conduct investigations in Bunia and Kinshasa falls within the framework of gathering evidence to establish the harm suffered by her clients and not with the aim of 'investigating the guilt of the accused', as the Defence believes or would have us believe.

The legal representative is actually referring to regulation 56 of the *Regulations of the Court*, responding to the question put by this Chamber in its abovementioned order of 13 November as to the legal representatives' intention to lead evidence relating to reparations within the framework of the trial.

Hence, the legal representatives see no ground for denying the victims who will be required to establish their harm and request reparations the ability to carry out in advance the work required to gather evidence on these two issues.

If it subsequently appears that the evidence collected also relates to the discussion of guilt, it will be for the parties to challenge it, where applicable, and for the Chamber

¹⁵ ICC-01/04-01/07-T-53-FRA, p. 3.

to ensure that the evidence is tendered in accordance with the abovementioned conditions.

III. ANONYMITY

In its application, the Defence for M. Ngudjolo challenges the right of anonymous victims to participate in the proceedings.

On this matter, the legal representatives indicate that the anonymity of the two victims they represent will be removed shortly and, in any event, within a reasonable time before the commencement of the proceedings.

IV. DUAL STATUS OF VICTIM AND WITNESS

In its observations, the Defence for G. Katanga (the Defence) raises the issue of the dual status of witness and victim. It states that:

- victims may be witnesses for only one of the parties (the Prosecutor, the Defence or the Court). Failing that, allowing legal representatives to present as witnesses victims they are representing would extend the scope of their participation beyond what is permitted by the statutory provisions and the previous decisions of the Appeals Chambers.
- victims who have been granted access to Prosecution evidence could no longer testify thereafter as Prosecution witnesses because of the risk of their testimony being modelled on the Prosecution evidence.

The legal representatives are of the view that these arguments are without merit.

Firstly, in relation to the second point, it should be recalled that this issue was already raised by the Defence for G. Katanga on 4 June 2008¹⁶ and that the Single

¹⁶ ICC-01/04-01/07-550-Conf-Exp.

Judge ruled in relation thereto, setting down principles which are still applicable at this stage of the proceedings.¹⁷

In her decision of 23 June 2008, the Single Judge recalls that the legal texts applicable before the Court do not prohibit the admission of evidence from individuals admitted as victims in the same case.¹⁸

She cites, *inter alia*, the aforementioned decision of 18 January 2008 (Decision 1119) which sets the following principles:

133. Furthermore, the Chamber is satisfied that the victims of crimes are often able to give direct evidence about the alleged offences, and as a result a general ban on their participation in the proceedings if they may be called as witnesses would be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber's obligation to establish the truth.

134. However, when the Trial Chamber considers an application by victims who have this dual status, it will establish whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case. The Trial Chamber will take into consideration the modalities of participation by victims with dual status, the need for their participation and the rights of the accused to a fair and expeditious trial.

Furthermore, as the Single Judge again observes, on the basis of no legal document can a victim with a dual status be granted less of a right to participate in the proceedings, nor can lesser value be given to the testimony of a victim admitted to participate in the said proceedings.

Thus, there is nothing to say that the applicable legal texts would prevent a victim from being called as a witness by the legal representative he or she has appointed – from reading the observations of the Defence, it seems that he or she could still be called by another legal representative – or, in other words, that a victim with dual status would be stripped of the right to be called by his or her legal representative to give evidence.

The Defence does not indicate how such a situation “would extend the scope of their participatory role beyond what was envisaged by either the statutory provisions and

¹⁷ ICC-01/04-01/07-63.

¹⁸ *Ibidem*, para. 18.

Rules of the ICC or the Appeals Chamber”¹⁹ since the victim’s intervention would, moreover, be within the framework defined by the Chamber.

Furthermore, if one takes account of the two restrictions on the victims’ testimonies raised by the Defence, only those victims who have not yet gained access to the Prosecutor’s case file would be able to testify, but would be able to do so only for the parties and, going by the Defence argument, for the other legal representatives.

Once again, such a restrictive approach is not stipulated in the legal texts or in the decisions on these issues rendered by the Trial Chamber or the Appeals Chamber.

For these reasons, may it please the Chamber to take account of the observations of the legal representatives and to deny the applications formulated by the Defence.

[signed]

[signed]

Mr Joseph Keta

Jean-Louis Gilissen and Joseph Keta
Legal Representatives of Victims 0333/07 and 0110/08

Dated this 5 February 2009
 At Brussels

¹⁹ ICC-01/04-01/07-858, para. 24.