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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra, Judge
Judge Fumiko Saiga, Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Germain Katanga and Mathieu Ngudjolo Chui***

Public Document

**Response to the Defence Application "for a determination on the modalities of
victim participation at the trial stage"**

Source: Legal Representatives of the Victims

Mr Hervé Diakiese

Ms Carine Bapita Buyangandu

Mr Jean-Chrysostome Mulamba Nsokoloni

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Mr Eric Mac Donald, Senior Trial Lawyer

Counsel for the Defence

Mr David Hooper
Ms Caroline Buisman
Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Jean-Louis Gilissen
Mr Joseph Keta
Mr Hervé Diakiese
Mr Jean-Chrysostome Mulamba
Nsokoloni

Legal Representatives of Applicants

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

Response of the Legal Representatives to the Defence application “for a determination on the modalities of victim participation at the trial stage”

1. Noting the Appeals Chamber judgment of 11 July 2008;¹
2. Noting the order of 10 December 2008 instructing the participants and the Registry to file additional materials;²
3. Noting the application from Mr Ngudjolo’s Defence entitled “*Requête en vue de fixer les modalités de participation des victimes au stade du procès*” of 13 January;³
4. Noting the observation of Mr Katanga’s Defence entitled “Defence observation regarding victims’ participation and scope thereof” of 29 January 2009.⁴

Background

5. At the status conference of 28 November 2008, Mr Ngudjolo’s Defence requested, *inter alia*, that the Chamber “review” victim participation by placing it in the specific context of the proceedings against Mr Ngudjolo.
6. In its view, there are aspects of this judgment which are inconsistent with this case and which, accordingly, belong with the Lubanga case (number of legal representatives, number of victims and number of charges against Mr Ngudjolo).
7. It considered that the Appeals Chamber judgment of 11 July 2008 does not result in any positive obligation on the Trial Chamber which may, depending on the

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

² ICC-01/04-01/07-788, *Ordonnance enjoignant aux participants et au Greffe de déposer des documents Complémentaires*, 10 December 2008.

³ ICC-01/04-01/07-824, “*Requête en vue de fixer les modalités de la participation des victimes au stade du procès*” of 13 January 2009, filed by Mr Ngudjolo’s Defence.

⁴ ICC-01/04-01/07-858.

circumstances and an adequate balance between the rights of the Defence and those of victim participation, revisit that which was decided.

[TRANSLATION:] There is no positive obligation on the Trial Chamber which may, depending on the circumstances of the case and a proper balance between the rights of the Defence and those of victim participation, perfectly well revisit what was already decided.⁵

8. In its above-mentioned order of 10 December, the Chamber directed Mr Ngudjolo's Defence to file its application before 15 January 2009. It also directed Mr Katanga's Defence to make its observations by no later than 29 January 2009, and the Legal Representatives and the Prosecutor to respond to this application by no later than 5 February 2009.

9. Pursuant to this order, Mr Ngudjolo's Defence submitted its above-mentioned application on 13 January 2009, Mr Katanga's Defence submitted its observations on 29 January 2009 and the Legal Representatives intend to hereby respond to those two submissions.

10. **Legal Issue**

11. From all the submissions of both Defence teams, it would appear that neither intends to challenge the victims' right to participate in proceedings before the Court but that their intention is to ensure that this right is restricted by the strict framework of the Statute, the Rules of Procedure and Evidence and the scope of the judgment of 11 July 2008.

12. The Defence for Mr Ngudjolo limited its concern to the victims' claim to have the right to present evidence pertaining to the guilt of the accused persons.⁶

With respect to the leading of evidence of guilt or innocence, only the parties, namely the Prosecutor and the Defence, have this right. This is particularly apparent from articles 64(8)(b), 66(2) and 67(2) of the Statute.

⁵ ICC-01/04-01/07-T-53-FRA Transcript of 11/28/2009 p. 70 lines 13 to 16.

⁶ Cf. *infra* 3, p. 4, para. 6.

13. The Defence for Mr Katanga, whilst acknowledging that it does not intend to re-open the debate on victim participation, merely seeks to set the modalities of such participation in this case:⁷

The Defence does not seek to re-open matters of victim participation decided by the Appeals Chamber in Lubanga in its judgement on the appeals of the Prosecutor and the Defence against Trial chamber I's Decision on victims' participation of 18 January 2008, issued on July 11, 2008 ("appeals Chamber Judgement on victim Participation"), but seeks to define the scope and modalities of victim participation within the parameters set out in this Judgement.

14. The Legal Representatives consider that these applications and observations raise the following legal issues:

15. **The exact nature of the Defence submissions: review of the judgment of 11 July 2008 or a request for new implementation modalities?**

16. **Binding nature of the judgment of 11 July 2008 in the context of the current proceedings.**

17. **Do the victims intend to exercise more rights than those contemplated by that judgment and by the Statute and the *Rules of Procedure and Evidence* etc?**

Some preliminary considerations with respect to the Defence concerns

18. The Legal Representatives consider that, by means of an application seeking a determination on the modalities of victim participation at trial, Mr Ngundjolo's Defence is in fact lodging a **second "appeal"** against the Appeals Chamber judgment by almost suggesting that Trial Chamber II review and therefore amend the provisions of the judgment of 11 July 2008.

19. The Legal Representatives wish to submit as proof thereof, that despite the usual caveats, Mr Ngudjolo's Defence is requesting in its conclusion that the Chamber be able "[TRANSLATION:] **to review the principle on the leading of**

⁷ Cf. *infra* 4, p. 3, para. 2.

incriminating evidence by legal representatives or, in the unlikely event that it is upheld, to subject it to close judicial supervision".⁸

20. Mr Katanga's Defence objects to the Legal Representatives' right to dual victim-witness status⁹ and advocates prohibiting victims who have had access to Prosecution evidence from being witnesses".

The Defence submits that victim participants may only be witnesses for one of the parties, that is the Prosecution or Defence, or the Court, but cannot be presented by their own legal representatives...

The Defence submits that victims who have been granted access to Prosecution evidence should be prohibited from testifying thereafter as Prosecution witnesses...

... The Prosecution should be offered to disclose to the Defence the non-redacted version of the applications of victims which have dual victim-witness status.

21. Before considering some aspects which touch on the merits of these submissions, the Legal Representatives consider that this **application is inadmissible on three grounds:**

- the Trial Chamber's lack of jurisdiction to review an Appeals Chamber judgment;
- the violation of the principle of *non bis in idem*;
- the absence of any interest.

Inadmissibility of the application from Mr Ngudjolo's Defence because Trial Chamber II does not have jurisdiction here

22. In the conclusion to his application, the main submission put forward by Mr Ngudjolo's Defence is that the Trial Chamber *may review the principle concerning the leading of incriminating evidence by the Legal Representatives of the Victims.*

⁸ Cf. *infra* 3, p. 21.

⁹ Cf. *infra* 4, paras. 24, 25 and 27.

23. The Legal Representatives note that to date, the initial decision determining the modalities of victim participation before the International Criminal Court was issued by Trial Chamber I on 18 January 2007 in the Lubanga case. Following an appeal against that decision, on 11 July 2008 the Appeals Chamber issued a judgment¹⁰ on the matter which determined and set out the content and modalities of victim participation.

24. By asserting that the Trial Chamber is able to review this issue, Mr ngundjolo's Defence application violates the principle of jurisdiction *ratione materiae* in that the Trial Chamber should not review a judgment issued by the Appeals Chamber. The Appeals Chamber alone may revisit its judgment: a Trial Chamber decision cannot review the provisions of a judgment, since only a judgment can amend or review another judgment (**principle of parallelism of form and competences**).

Inadmissibility of the application from Mr Ngudjolo's Defence due to the violation of the principle of non bis in idem

25. Even if Trial Chamber II were to consider this issue, this application would force it to adjudicate an issue which has already been adjudicated, thus violating the principle of *non bis in idem*. The Appeals Chamber judgment unequivocally set the modalities for victim participation by responding to the same submissions which are currently being put forward by Mr Ngudjolo's Defence.

Inadmissibility of the application from Mr Ngudjolo's Defence due to an absence of any legitimate interest

26. Furthermore, there is no legitimate interest in presenting submissions on this issue to Trial Chamber II; to date, the Legal Representatives of the victims have essentially not submitted or offered to submit any applications which exceed the

¹⁰ Cf. *infra* 1.

limited scope of the modalities of victim participation as set by the judgment of 11 July 2008.

27. Mr Ngudjolo's Defence, which maintains that it does not wish to revisit victims' rights, makes an alternative submission that the principle concerning the leading of incriminating evidence by the Legal Representatives should be subject to strict judicial supervision, which neither the judgment at issue, Trial Chamber II nor the Legal Representatives dispute.

MERITS

28. On reading the various submissions of the two Defence teams, the Legal Representatives consider that:

- their right to lead incriminating evidence and their right to discuss it are being challenged.¹¹
- their right to conduct investigations is also being challenged.

Whilst the Appeals Chamber has held that the legal representatives of victims may in principle, and in exceptional circumstances, tender evidence which is linked to their personal interest in the proceedings, this right does not in itself translate to a right to conduct investigations to find witnesses or other evidence. In this regard, the Defence notes that the ICC Statute and Rules do not grant any legal right to conduct investigations to victim participants or their legal representatives, but, instead, only refer to national authorities of the territorial State, the Prosecutor and Defence.¹²

[TRANSLATION] The Defence respectfully submits that the power to investigate and call witnesses to give evidence cannot be granted to victims. It is of the view that those are the prerogatives strictly reserved for the parties to the trial. Granting them to the victims would change their role of participant under the Rome Statute, which is obviously contrary to the spirit and the letter of the legal provisions governing the Court.¹³

- Furthermore, the right of the victims to be called as witnesses is also being challenged.¹⁴

¹¹ Cf. *infra* 3 page 4, para. 5 *in fine* and para. 6.

¹² Cf. *infra* 4, para. 20.

¹³ Cf. *infra* 3, para. 37.

¹⁴ Cf. *infra* 9.

29. The Legal Representatives intend to address these three arguments before responding to any consideration of the facts raised by the Defence for Mr Ngudjolo in respect of the additional workload the Defence will have because of the number of victims and legal representatives.

[TRANSLATION] As of the date of both Decision 1119 and Judgment 1432, only four victims had been granted leave to participate in the proceeding in the Lubanga case. The workload related to handling evidence submitted or disputed, where applicable, by the legal representatives of these four victims is without a doubt substantially less than what would be foreseeable in the event of the possible intervention of 57 victims admitted to date in the Ngudjolo case, other applications also having been announced.

Admittedly, the workload *per se* is an insufficient argument for prohibiting the victims from filing and/or challenging evidence. On the other hand, the consequences which it would have for the Defence are such that if these rights, which under the Statute and Rules are reserved for the parties, were granted to the victims, there would result a *de facto* flagrant imbalance between the resources set aside for the Defence and those given to the legal representatives, all of which would clearly impact negatively on the rights of the Defence. It was recalled on several occasions that the victims could not be likened to a second prosecution. [...]

The victims' right to lead incriminating evidence and to discuss the admissibility or relevance of evidence

30. The Legal Representatives refer both Defence teams to paragraph 97 of the Judgment, which reads:

To give effect to the spirit and intention of article 68 (3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful. Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant. If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.¹⁵

31. In light of the foregoing, on the basis of the principles of "*res judicata pro veritate habetur*", "*ubi lex claris interpretatio cessat*" and "*ubi lex non distinguere non distinguere debemus*", the Legal Representatives do not intend to discuss this provision of the judgment at length as it is sufficiently clear.

¹⁵ ICC-01/04-01/07-T-53-FRA transcript of 11/28/2009, p. 69, lines 13 to 19.

Victims' right to conduct investigations

32. The Legal Representatives submit that the Defence teams do not state which provisions of the Statute or the *Rules of Procedure and Evidence* expressly prohibit the victims from conducting investigations.

33. On the contrary, on the basis of a teleological interpretation, they submit that, since they have been given the latitude to lead evidence which is often the fruit or the result of an investigation, it is logical that they may conduct those investigations.

34. In addition to the above is the fact that their right to discuss the admissibility and relevance of other evidentiary materials has as a consequence their ability to be able to conduct autonomous investigations likely to enable them to possess evidence which may help them challenge the relevance or admissibility of evidence while always doing so within the circumscribed framework of their personal right.

Dual status of victim and witness

35. The Defence for Mr Katanga has energetically challenged the possibility that victims could also be witnesses, referring *inter alia* to French case law.¹⁶

36. From the outset, the Legal Representatives note the paradoxical nature of some of the Defence arguments: on the one hand, they state with great conviction that the victims are not parties and that the parties to the trial are the Prosecutor and the accused exclusively, but at the same consider that the status of witness and victim is incompatible because they are simultaneously witnesses and ... **parties to the trial**.

37. However, referring to the judgment of the European Court of Human Rights in *Berger v. France*, the Defence for Mr Ngudjolo pertinently stated:

¹⁶ Cf. *infra* 9

[T]he 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.¹⁷

38. This, precisely, calls into question the theory of a dual prosecution which the Defence would purportedly have to face, **since the victims are participants in the trial, not parties, and they therefore have a role and objectives which are different from those of the Prosecution.**

39. It is logical that something cannot both be and not be at the same time. Hence, *one cannot, on the one hand, challenge certain rights of victims precisely because they are not parties to the trial and, on the other hand, present them with incompatibilities which affect parties to the trial, such as testifying.*

40. The victims submit that testimony is one of the aspects of the administration of evidence. Hence, if they are granted the right to lead evidence and challenge the admissibility and relevance of other evidence, calling witnesses should not be different from the other forms of producing evidence.

41. Furthermore, regarding the particular nature of the crimes being tried, it must be recognised that, by their nature, the first witnesses of these types of crimes are the victims themselves, along with the perpetrators.

42. Thus, nothing should prevent anything which may help to determine the truth from allowing the Court to form its own opinion on the facts at issue.

The fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that “must be convinced of the guilt of the accused beyond reasonable doubt” (article 66 (3) of the Statute).¹⁸

¹⁷ Cf. *infra* 3, para. 33, quotation.

¹⁸ ICC-01/04-01706-1432, para. 95, Transcript of 27 August 2008.

Considerations linked to the large number of victims and the additional workload for the Defence for Mr Ngudjolo

43. Once a victim is admitted to the proceedings, the modalities of his or her participation must still be determined, which the Chamber does on a case-by-case basis.

44. In the context of a particular case, a specific assessment of the personal interests of the victims must be carried out on the basis of the applications submitted by them and for each of the said applications.

45. Thus, the large number of victims participating in the Katanga and Ngudjolo case at this stage of the proceedings is a consequence of the crimes and offences alleged to have been committed by the accused. Indeed, for war crimes and crimes against humanity it is impossible not to have a large number of victims, in the wake of massacres and killings.

46. Allowing them to enjoy the right to participate at each stage of the proceedings is also taking into account the needs of the victims, and only the Chamber can authorise and set out the modalities of their participation.

47. It is not surprising to note a great need amongst the survivors to apply and to participate in the proceedings to make their views and concerns known.

48. The Defence must not complain about the volume of work or the number of victims participating in the proceedings...

49. In order to harmonise and coordinate work, rule 90(2) of the *Rules of Procedure and Evidence* proposes using one or more common legal representatives with a view to facilitating the coordination of victim representation.

50. Thus the Defence will not have to deal with submissions equal to the number of victims, but on the basis of agreements made with the Registry, with those presented by the legal representatives of victims organised into three groups.

51. Article 68(3) of the *Rome Statute* does not restrict the participation of victims, but seeks to safeguard their personal interests by permitting them to express their views and concerns beyond the four categories recognised by rule 85 of the *Rules of Procedure and Evidence*.

IN LIGHT OF THE FOREGOING, MAY IT PLEASE THE COURT:

- TO TAKE FORMAL NOTE OF THE POSITION OF THE LEGAL REPRESENTATIVES.
- Accordingly, to declare the application of the Defence for Mr Ngudjolo inadmissible, for the reasons set forth above or, in any event, without merit.

Done at The Hague,
5 February 2009

By the Legal Representatives:

Mr Hervé Diakiese

[signed]

Ms Carine Bapita Buyangandu

[signed]

Mr Jean-Chrysostome Mulamba Nsokoloni

[absent when signed]