



Original: **French**

No.: **ICC-01/04-01/07**
Date: **6 February 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 Redacted Version

**Prosecution Response to the Defence Observations on the Modalities of
Victim Participation at the Trial Stage**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga

Mr David Hooper

Counsel for the Defence of Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kasengi Basila
Professor Jean-Pierre Fofé Djofia

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba Nsokoloni
Mr Vincent Lurquin
Mr Fidel Nsita Luvengika
Ms Flora Mbuyu Anjelani

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

Introduction

1. The Office of the Prosecutor (hereinafter “the Prosecution”) hereby submits its response to the “Application to Determine the Modalities of the Participation of Victims at the Trial Stage” and to the “Defence Observations Regarding Victims’ Participation and Scope Thereof”,¹ respectively filed by the Defence for Mathieu Ngudjolo on 13 January 2009² and by the Defence for Germain Katanga on 29 January 2009.³
2. These two briefs address the undertaking of investigations by victims and refer to their role at trial, particularly as concerns dual status victims.
3. The present response is filed on a confidential basis [REDACTED].⁴ A public redacted version of the response has also been filed.

The possibility for victims to conduct investigations

4. Both the Defence for Mathieu Ngudjolo⁵ and the Defence for Germain Katanga⁶ request that victims should not be granted investigative powers.
5. In its Decision of 25 April 2008, Pre-Trial Chamber I previously held that “granting investigative powers, independent from those of the Prosecution, to those granted the procedural status of victim would not be consistent with the procedural system embraced by the Statute and the Rules.”⁷

¹ ICC-01/04-01/07-824-tENG and ICC-01/04-01/07-858.

² ICC-01/04-01/07-824-tENG.

³ ICC-01/04-01/07-858.

⁴ See *infra*.

⁵ ICC-01/04-01/07-824-tENG, paras. 36-42.

⁶ ICC-01/04-01/07-858, paras. 20-23.

⁷ *Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case*, ICC-01/04-01/07-474, paras. 82-84. Thus, the same decision states that this “is not only consistent with the procedural framework of the Statute and the Rules, but also corresponds with the manner in which those national systems from the Romano-Germanic tradition which provide for a procedural status of victim at the pre-trial stage of a case operate.”

6. That decision concerns the pre-trial phase of a case. However, the reasons underpinning it may be applied to the period following the confirmation of charges and the trial phase itself.

7. Specifically, “it is the Prosecution who exercises the penal action”.⁸ Neither the Statute nor the Rules afford victims a role in the conduct of investigations.⁹ Under article 54(1)(a), the Prosecution alone may, “[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility ... and, in doing so, investigate incriminating and exonerating circumstances equally”, by ensuring compliance with certain provisions such as those referred to in article 55(2) which inevitably affect the admissibility of evidence and hence the conduct of proceedings in accordance with the rights of the accused.¹⁰ The Prosecution has already stated its position in this regard.¹¹

8. The *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008*¹² does not have the *ultra legem* effect of affording victims the right to investigate an accused’s criminal responsibility.

⁸ Decision ICC-01/04-01/07-428-Corr, para. 29.

⁹ By way of illustration, under article 15(2) of the Statute the Prosecutor alone is entitled to open investigations in light of information on crimes within the Court’s jurisdiction. The information in question includes that provided by victims, without this provision granting them the power to trigger prosecutions. In the same vein, Part V of the Statute - covering investigation and prosecution - specifically vests the Prosecutor with responsibility for “taking appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court” (article 54(1)(b)) through a series of specific rights set out in article 54(3) such as the power to “[r]equest the presence of and question ... witnesses.”⁹ Again, there is no question of a role for victims in this regard.

¹⁰ More recently still, the Appeals Chamber held that: “Manifestly, authority for the conduct of investigations vests in the Prosecutor. Acknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute”, ICC-01-04-556, para. 52.

¹¹ “Prosecution’s Application for Leave to Appeal the Decision on Victims 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”, ICC-02/04-103, 20 August 2007, para. 13; “Prosecution’s Document in Support of Appeal against Trial Chamber I’s 18 January 2008 Decision on Victim Participation”, ICC-01/04-01/06-1219, 10 March 2008, paras. 21, 31-33.

¹² ICC-01/04-01/06-1432.

9. However, in the spirit of that judgment and subject to any future decisions of Trial Chamber II (hereinafter “the Chamber”) on their precise role at hearings, the victims’ representatives could undertake investigations into the existence, nature and scope of harm the victims have suffered for the purpose of producing such evidence in the presence of Prosecution and Defence witnesses, which would, *inter alia*, obviate the need subsequently to recall those witnesses. In particular, the Office of the Prosecutor has no objection to the victims’ referring to an expert to assess the damage in respect of them. Similarly, a victim may legitimately take a statement from a family member as confirmation of the distress that he or she continues to endure.

10. Beyond that, as regards investigating the guilt of the accused, victims’ representatives should transmit any proposals directly to the Prosecution.

The role of victims at hearings

11. The abovementioned *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008* sets the scope of victims’ interventions at hearings. Accordingly, it is appropriate to refer thereto.

12. In this regard, the Prosecution stresses that it should receive all documents disclosed by the victims’ representatives to the Defence.¹³ All of the parties must be on an equal footing in this regard.

The specific case of dual status victims

Appropriateness of dual status witness testimony

13. The Defence for Germain Katanga suggests that those victims to whom access to Prosecution evidence has been granted should not testify for the Office of the

¹³ In this regard, see “Defence Observations Regarding Victims’ Participation and Scope Thereof”, ICC-01/04-01/07-858, para. 17.

Prosecutor. Such access could influence the testimony they give in court. The Defence further invites the Chamber to strike from the list of Prosecution witnesses any victim recently admitted to participate in the proceedings and who had access to the evidence in the case.

14. At this stage, such a scenario would only apply to Witness W-166, since those victims with pending applications for participation have, by definition, not yet had access to the Prosecution evidence.

15. In any event, the Office of the Prosecutor objects to the Defence approach.

16. Moreover, it would be paradoxical if the Pre-Trial Chamber's decision of 10 June 2008 were to have the effect of depriving the Office of the Prosecutor of one or more of its witnesses. This is certainly not the intended effect of the decision in question which was issued at a time when the existence of dual status witnesses in the cases brought by the Prosecution was well-established. Clearly victims should not be put in a situation where they have no choice but to testify "[TRANSLATION] without further consideration" or to set out their views in accordance with article 68(3).

17. Above all, the situation of dual status witnesses who might have discussed Prosecution evidence with their legal representative is, *mutatis mutandis*, fairly comparable to that of any Defence or Prosecution witness who has had the opportunity to follow the proceedings on the internet¹⁴ or television.¹⁵ However, this has not caused any particular difficulties in the numerous past and ongoing cases heard before international courts. No suggestion is being made that public hearings

¹⁴ On condition that pseudonyms are used and closed sessions held.

¹⁵ It is known that certain States subsequently broadcast the proceedings, almost in their entirety, by audiovisual means.

of this type should be abandoned unless, for example, security grounds so dictate.¹⁶
[REDACTED].¹⁷ [REDACTED]¹⁸ [REDACTED].¹⁹

18. In fact, the problem raised by the Germain Katanga's request is not that of the "admissibility" of dual status witness onto the Prosecution's list. The real issue is the assessment of evidence, that is to say the weight that the Chamber will have to attach to testimony from dual status witnesses who might have discussed certain pieces of Prosecution evidence with their lawyers.

19. For its part, the Defence, supported by the previous statements of the witnesses concerned, will have the opportunity to ask any relevant questions during cross-examination so as to contribute to the determination of the truth. It may, *inter alia*, ask whether or not the witness discussed the content of Prosecution evidence with his or her counsel.

20. Returning to the only existing case, that of Witness W-166, it should be noted that his statement was taken long before he applied to participate and that he was granted leave to participate as a victim in the pre-trial phase of the case.²⁰ The Defence therefore has in its possession all the necessary information to provide clarification to the Chamber on any relevant point.

21. Nevertheless, the Prosecution has no objection to the Chamber's facilitating its task of assessing the evidence – and once again admissibility is not at issue – by

¹⁶ The principle of public hearings was defended by the Defence in the Lubanga case (see ICC-01/04-01/06-T-109-ENG WT 27-01-2009 1-59 NB T, pages 20 *et seq.*). This matter was of concern to Presiding Judge Fulford who recently discussed with the parties how to resolve the difficulty posed by the broadcasting of testimony from persons at risk of self-incrimination in public hearings: "The problem, ... is we've all this morning heard the submissions of Maitre Mabilie and Mr. Biju-Duval about the need insofar as possible to make sure that these proceedings are public. This would be -- or this could be another entirely separate reason for effectively holding a private trial, because it would mean, as I understand it, excluding this evidence from the public, whereas we may not have to take that route if advice has been provided under Rule 74(10)." (ICC-01/04-01/06-T-109-ENG WT 27-01-2009 1-59 NB T, p. 38, lines 16 to 23).

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ DRC-OTP-1007-0002, statement taken between 17 and 19 February 2007.

instructing the legal representatives of dual status victims not to discuss the Prosecution evidence in their possession with their clients, with immediate effect for W-166.

22. This would be consistent with the spirit of the recent oral decision on the familiarisation process, in which Chamber I held that:

The party calling the witness should inform the other party and the legal representatives of dual-status witnesses, if relevant in advance of the documents to be provided to the VWU for the purposes of memory refreshing. Any dispute is to be resolved by the Chamber before the material is given to the witness. While the legal representatives of dual-status witnesses are of course entitled to speak with their clients, they must not infringe the Chamber's decision on "Witness Proofing" (see decision of the 30th of November, 2007, document 1049). In essence, they should refrain from holding substantive discussions with the witness about the topics that are to be dealt with in court during their evidence or the exhibits which may be produced. The Chamber will not be assisted if there is a risk that some witnesses in this category have been "coached" or "prepared" for their evidence. If there are exceptional reasons in particular instances for adopting a different approach, the matter can be raised in court.²¹

Transmission of the applications for participation of dual status victims

23. The Defence request seeking transmission of the applications for participation of dual status victims by the Prosecution²² warrants some brief observations.

24. By way of preliminary comment, the Prosecution recalls that, pursuant to the decision of Pre-Trial Chamber I, it receives unredacted versions of applications for redaction whereas the Defence receives only the redacted versions thereof. Accordingly, the Prosecution could proceed with such transmissions only by express order of the Chamber and with full compliance with any other specific protection measure applying to a specific dual status victim after taking into account, in each individual case, of the observations of the VPRS and the relevant legal representative.

²¹ ICC-01/04-01/06-T-104-ENG ET WT 16-01-2009 1-62 SZ T, p. 25 lines 12-25, p. 26 lines 1-3.

²² ICC-01/04-01/07-858, p. 10, para. 27.

25. In particular, as to the merits, it should be noted that the *Decision on Defense Application for Disclosure of Victims Applications*, issued on 21 January 2009 by Chamber I and to which the Defence refers, was the subject of a request for clarification.²³ The resulting clarification was as follows:

We need to turn next to the issue of the request that's been made for clarification as regards the extent to which the victims' applications should be disclosed to the Defence.

Maitre Mabilie, you have kindly put in a filing recently in relation to this issue which I think, consistent with other submissions on related topics, you've objected to anything less than full disclosure, and particularly you've set out your opposition to redactions, and we of course fully understand the nature of your objection. [...]

The view of the Bench is that these application forms should be treated by the Office of the Prosecutor in exactly the same way as all other Article 67(2) and Rule 77 material. They should be looked at to see whether they contain evidence or other material which comes under that statute -- that statutory provision or that rule. If it does, we've set out a procedure whereby the representative of the relevant victim applicant should be consulted to see whether there are objections to disclosure taking place in relation to those portions that have been identified. If disclosure is to take place with redactions, the proposed redactions need to be brought to the attention of the Bench, because it is for us to decide whether or not redactions are appropriate and accord with the interests of justice and, in particular, the accused's rights to a fair trial.²⁴

26. Accordingly, the Prosecution refers to that oral decision.

Conclusion

27. In conclusion, the Prosecution respectfully requests the Chamber to:

- reiterate that the power to investigate matters pertaining to the accused's criminal responsibility is the prerogative of the Prosecution, as set by the Statute and the Appeals Chamber in its aforementioned decision;
- dismiss the request for striking from the list of Prosecution witnesses those dual status victims in relation to whom it has been proven that they discussed Prosecution evidence with their legal representatives; and

²³ ICC-01/04-01/06-1653, dated 26 January 2009.

²⁴ ICC-01/04-01/06-T-109-CONF-ENG ET 27-01-2009 1-59 NB T, p. 44 lines 19-25, p. 45, lines 1-17.

- dismiss the request, as submitted by the Defence, pertaining to applications for participation from dual status victims.

[signed]

Fatou Bensouda, Deputy Prosecutor on behalf of

Luis Moreno-Ocampo, Prosecutor

Dated this 6 February 2009

At The Hague, The Netherlands