



Original: **French**

No.: **ICC-01/04-01/07**
Date: **7 December 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

**Response by the Defence for Mathieu Ngudjolo Chui to the Observations of the
Legal Representatives of the Victims on Access to Certain Documents and the
Preparation of the Examination of Prosecution Witnesses**

Article 68(3) of the Statute

Source: Defence Team for Mathieu Ngudjolo

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
Mr Eric MacDonald

Counsel for the Defence for Mr Katanga

Mr David Hooper
Mr Andreas O'Shea

**Counsel for the Defence for Mr
Ngudjolo**

Mr Jean-Pierre Kilenda Kakengi Basila
Prof Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia
Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I- PREFATORY REMARKS

1. On 2 December 2009, the Legal Representatives of the Victims submitted to Trial Chamber II (hereinafter “the Chamber”), pursuant to article 68(3) of the Statute, a public document entitled “Joint Observations of the Legal Representatives of the Victims on Access to Certain Documents and the Preparation of the Examination of Prosecution Witnesses (Article 68(3) of the Statute)”.¹

2. This report, submitted by the Legal Representatives of the Victims to the Chamber, in fact consisted of a dual-purpose application: its first purpose was to request access to incriminating evidence and to material in relation to which there is agreement between the parties;² the second, to apply for participation in the witness familiarisation process.³

3. This is confirmed by the fact that the Legal Representatives do not confine themselves to making mere observations. They clearly formulate these two requests, as is expressly apparent from point III of their document, which is entitled “SUBMISSIONS”, thereby demonstrating in unequivocal terms their intention to submit an actual application to the Chamber.

4. In the following paragraphs, the Defence for Mathieu Ngudjolo Chui (hereinafter “the Defence”) seeks to formulate a response to this application by addressing these two heads of claim.

¹ ICC-01/04-01/07-1704-tENG.

² Idem, paragraphs 12-29.

³ Idem, paragraphs 30-33.

II- DEFENCE RESPONSE TO THE TWO HEADS OF CLAIM SET OUT BY THE LEGAL REPRESENTATIVES OF THE VICTIMS

A. Concerning the request relating to access to incriminating evidence and to material in relation to which there is agreement between the parties

5. Concerned, as they themselves state, to gain a full understanding of the Prosecutor's case so as properly to follow the proceedings and participate therein,⁴ the Legal Representatives of the Victims submit that "[a]ccordingly, it is in the interests of the proper administration of justice for the Legal Representatives to have a full understanding of the scope of the trial before the Chamber and for them to therefore have access to the material in the record which defines the scope of this trial";⁵ and "[t]o refuse to grant the requested access would *de facto* and *de jure* amount to leaving the Legal Representatives to participate blindly in the trial."⁶

6. In its submission of 13 January 2009,⁷ the terms of which must be considered here to be replicated verbatim and in their entirety and to form an integral part of the present filing, the Defence has already stated its views on the particular role of the victims, who, under the terms of the legal texts governing the International Criminal Court, are only participants in and not parties to the trial before the Court. In that document, more specifically in Part III of its submission, the Defence for Mathieu Ngudjolo thoroughly discussed the legal framework and explained that the prerogative of leading evidence of guilt or innocence is granted to the parties only, namely the Prosecutor and the Defence (see articles 64(8)(b), 66(2), 67(2) of the Statute and rules 76, 77 and 78 of the RPE).

7. Accordingly, the Legal Representatives of the Victims cannot be granted more rights than those granted to them in the texts. If the legal framework of the Court had intended to grant rights to victims such as the right to access incriminating evidence, it would have stated that unequivocally.

⁴ Idem, paragraph 13.

⁵ Idem, paragraph 19.

⁶ Idem, paragraph 20.

⁷ ICC-01/04-01/07-824-tENG "Application to Determine the Modalities of the Participation of Victims at the Trial Stage".

8. The Defence has already conceded that the Chamber may order the Prosecutor to disclose to the Legal Representatives of the Victims the restructured table of charges. During the hearings, from which they are not in any way excluded, the Legal Representatives of the Victims are present at examinations and cross-examinations. The Chamber allows them to intervene, through the Chamber itself, in the cross-examination of witnesses by submitting their questions to the Chamber. When incriminating evidence is presented at a hearing, they can take cognizance of it and express an opinion thereon under the Chamber's supervision. In the Defence's view, that is sufficient. The restructured table of incriminating evidence available to the Representatives, together with the Decision confirming the charges of 26 September 2009 and the Summary of the charges provided by the Prosecution, are amply sufficient to enable the Legal Representatives of the Victims to attend, without being left in the dark, at the trial being conducted before them, in which they have played an active part since the pre-trial phase.

9. Thus the Legal Representatives of the Victims gave their opening statements at both the pre-trial and trial phases on 17 July 2008 and 24 November 2009 respectively. In those statements it was clear that they were following the lead of the Prosecution in relentlessly seeking to establish the guilt of the accused. On 23 November 2009, the Legal Representatives of the Victims were invited to a press conference at which they publicly expressed their views on behalf of their clients. Both inside and outside the courtroom, the Legal Representatives of the Victims have been particularly active in promoting the rights of their clients, and cannot in any way be considered as mere spectators at the hearings before the Chamber.

10. Accessing material in the way in which they seek to do so would result in the Legal Representatives of the Victims being elevated to the status of second Prosecutors against the accused. That would upset the judicial balance by creating a real and manifest inequality of arms; the Defence would then be faced with a team of Prosecutors attacking it on all sides.

11. With regard to the second aspect of this first head of claim, namely access to material in relation to which there is agreement between the parties, the Defence gives the following response.

12. It is correct that the Prosecutor and the Defence teams have agreed on certain specific facts which no longer require to be debated at the trial. Here too, we would immediately make it clear that the two Defence teams have had differing opinions on those agreements. To put it plainly, Mr Ngudjolo's Defence refuses to accept certain facts which Germain Katanga's Defence has agreed, and vice versa.

13. Accordingly, Mathieu Ngudjolo's Defence cannot give its opinion on all of those agreements. However, concerning those on which it did not voice any disagreement with the Prosecution, Mathieu Ngudjolo's Defence does not have any objection to the facts being disclosed to the Legal Representatives of the Victims.

B. Participation of the Legal Representatives of the Victims in the witness familiarisation process

14. Witness familiarisation is a process whereby the parties to the trial before the Court are invited by the Victims and Witnesses Unit to meet witnesses who have come to assist in establishing the truth before the Court.

15. The Defence for Mathieu Ngudjolo admits that it is not aware of the criteria applied by the Victims and Witnesses Unit for organising this familiarisation process. Accordingly, it prefers not to give its opinion on this matter and leaves it to the Chamber, in its wisdom, to decide.

FOR THESE REASONS

MAY IT PLEASE THE CHAMBER

1- Concerning the request relating to access to evidence, to admit it and to declare it **unfounded**;

2- Concerning the agreements as to factual matters, to uphold the position of the Defence, which submits that those which it has concluded with the Prosecution can be disclosed to the Legal Representatives of the Victims;

3- Concerning the participation of the Legal Representatives of the Victims in the witness familiarisation process, to place on record that the Defence leaves it to the Chamber, in its wisdom, to decide the matter.

AND JUSTICE SHALL BE DONE.

[signed]
Mr Jean-Pierre Kilenda Kakengi Basila
Lead Counsel for Mr Mathieu Ngudjolo Chui

Dated this 7 December 2009

At The Hague, The Netherlands