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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

**Joint Observations of the Legal Representatives of the Victims on the Application
by the Defence for Germain Katanga entitled “Defence for Germain Katanga’s
Additional Observations on Victims’ Participation and scope thereof”**

Source: Legal Representatives of the Victims

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

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REGISTRY

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1. On 10 November 2009, the Defence for Germain Katanga (“the Defence”) filed an application asking the Chamber to decide that, in any event, and in particular if given any role in presenting incriminating evidence, participating victims and their representatives have an obligation to disclose to the Defence any evidence in their possession or control which they believe 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 or is material to the defence of the accused.¹

2. According to the Defence, such an obligation of disclosure should be imposed on victims because of the Chamber’s obligation to guarantee a fair trial, to safeguard the rights of the accused and to establish the truth. This obligation is also claimed to arise out of the right of all victims to the truth, including those not participating in the proceedings. In support of these assertions, the Defence refers in particular to the rules of procedure and evidence of other international courts and tribunals.

3. In these Joint Observations, the Legal Representatives of the Victims oppose that application on the following grounds: (1) neither the Statute nor the Rules of Procedure and Evidence contain any such disclosure obligation; (2) the rights of the accused are sufficiently safeguarded with respect to the participation of victims in the proceedings without it being necessary to impose upon them any such general obligation; (3) the participation of victims is not limited to obtaining financial reparation and, regardless of their motivation, that cannot result in a general obligation to “investigate exonerating circumstances” being imposed on them.

¹ “Defence for Germain Katanga’s Additional Observations on Victims’ Participation and scope thereof”, ICC-01/04-01/07-1618, 10 November 2009 (hereafter “Defence’s Additional Observations”), paragraph 30.

4. The Legal Representatives note that, contrary to what the Defence suggests,² they are not seeking to rely on an argument based on “client-counsel privilege” to justify the fact that victims are subject to no disclosure obligation. They are bound, however, to point out that the protection associated with “client-counsel privilege” is no less applicable to victims than to the accused. Under the Statute and the Court’s other legal texts, the legal representatives of the victims are regarded as counsel on the same footing as counsel for the accused. Thus, the provisions of the Code of Professional Conduct for Counsel apply to victims’ representatives.³ Furthermore, the principle of confidentiality and trust that must exist in “client-counsel” relations must be considered to be a general principle of law recognised by all national legal systems and by international texts relating to the organisation of the profession of counsel (their rights and obligations).⁴ In reality, in its observations the Defence confuses, on the one hand, the rights of the accused and the obligations arising therefrom for his or her counsel and, on the other, the “client-counsel” relationship. It is clear that counsel for the accused cannot be required to disclose evidence which would incriminate his or her client. Such an obligation does not arise out of the “client-counsel” relationship, but out of the right of the accused, who is merely represented in legal proceedings by his or her counsel, not to incriminate himself.

1. Victims are not subject to any obligation of disclosure under the Statute or the Rules

5. Under article 21 of the Statute, the Court applies in the first place the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. Secondly, the Court applies treaties and the principles and rules of international law; failing that, it applies

² Defence’s Additional Observations, paragraphs 20 *et seq.*

³ See article 1 thereof, which defines its scope.

⁴ See in particular article 2.3 of the Code of Conduct for European Lawyers, http://www.ccbe.org/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf.

the “general principles of law derived by the Court from national laws of legal systems of the world”.

6. In the instant case, as the Defence indirectly admits, no provision of the Statute or the Rules specifically imposes an obligation on victims participating in the proceedings to disclose evidence that would tend to show the innocence of the accused or which would be material to the preparation of the defence. The unambiguous wording of rules 76 to 84 of the Rules concerning disclosure obligations establishes that these obligations are directed at the parties and not at the victims.⁵ Trial Chamber I has ruled to that effect.⁶ The Defence adduces nothing which would justify any deviation by this Chamber from the findings of Trial Chamber I in the *Lubanga* case. The Defence fails to show that the obligation of disclosure that it seeks to have imposed on victims arises out of a principle of international law or out of a general principle of law.

7. In reality, as explained below, it is because of the status accorded to victims in the proceedings, by the Statute as well as by the Court’s other legal texts, that no obligation of disclosure can be imposed on them of the kind suggested by the Defence.

2. Participation of victims in the proceedings and respect for the rights of the accused

8. According to the Defence, since victims’ participation is conditional on respect for the rights of the accused, the presentation of evidence by victims should be conditioned on prior disclosure to the Defence both of any incriminating evidence that a victim intends to present in the course of the trial and of any evidence tending to

⁵ In this regard, see Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation* of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 (hereafter the “Judgment on Victims’ Participation”), paragraph 93.

⁶ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Defence application for disclosure of victims’ applications*, ICC-01/04-01/06-1637, 21 January 2009, paragraph 10.

exculpate the accused.⁷ According to the Defence, if victims are allowed to present evidence concerning the alleged guilt of the accused, they should also meet the corollary obligation to disclose their material.⁸ To decide otherwise would be inconsistent with the rights of the accused.

9. The Legal Representatives do not dispute that pursuant in particular to article 68(3) of the Statute, victims must participate “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. However, that does not mean that victims should be subject to an obligation to disclose exculpatory evidence to the Defence.

10. As the Defence accepts⁹ and as is apparent from the Court’s legal texts,¹⁰ victims are not considered to be “parties” to the proceedings but “participants”. Because of their status in the proceedings, they are not granted the same rights, nor are they subject to the same obligations. Article 68(3) of the Statute, which establishes in general terms the principle of victims’ participation in the proceedings, thus provides that the latter may be permitted to *present their views and concerns* where their personal interests are affected.

11. Conversely, only the Prosecutor and the Defence are parties to the proceedings. It is a matter for the Prosecutor to decide to initiate an investigation and to determine the charges against the accused.¹¹ The burden of proof is on the Prosecutor, not the

⁷ Defence’s Additional Observations, paragraph 6.

⁸ *Ibid* at paragraph 7.

⁹ Defence’s Additional Observations, paragraph 4.

¹⁰ The Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Regulations of the Registry.

¹¹ See in particular articles 15, 53, 54, 58 and 61(5) of the Statute; Appeals Chamber, Judgment on Victims’ Participation, paragraph 93.

victims.¹² It is clear from articles 64 and 69 of the Statute that evidence is presented by the parties or at the request of the Chamber. As noted by the Appeals Chamber in the *Lubanga* case:

[...] 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.

12. It is by reason of the status enjoyed by the Prosecutor in the proceedings that he is subject to a series of disclosure obligations, including the obligation to disclose any evidence in his possession which tends to show the innocence, or mitigate the guilt, of the accused, or which may affect the credibility of incriminating evidence. It will be recalled that article 67(2) of the Statute, which sets out this obligation, is located under the general title of “Rights of the accused”. The case law of the Appeals Chamber of the International Criminal Tribunal for Rwanda has emphasised this point on a number of occasions in the following terms:

The positive nature of this [obligation to disclose exculpatory material] and its significance stem from the Prosecution’s duty to investigate, which the Appeals Chamber has explained runs conterminously with its duty to prosecute.¹³

13. This analysis of the close link between the role of the parties in the proceedings and their disclosure obligations is reinforced by a reading of all of the relevant provisions of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, to which the Defence refers in its observations.¹⁴ Rule 87(B) of these Rules shows that victims may become parties to the proceedings before the Tribunal: they may call

¹² Article 66(2).

¹³ Appeals Chamber, *The Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations*, 30 June 2006, paragraph 9 (and the case law cited in the footnotes) (emphasis added).

¹⁴ Defence’s Additional Observations, paragraph 26. These rules are available on the Tribunal’s official website: http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/RPE-09-10-30_En.pdf.

witnesses and tender other evidence.¹⁵ The obligation imposed by Rule 113 of the Rules to disclose to the defence any information in the possession of victims which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor's evidence, must thus be understood in this specific context.

14. While it is true, as asserted by the Defence, that the procedural system applicable in civil- or continental-law countries also provides for safeguards that seek to ensure the disclosure of exculpatory evidence, it should be remembered that the obligation to produce incriminatory and exculpatory evidence lies with the investigating judge. That judge may, if he has knowledge of specific facts or documents, order the parties to produce evidence in relation to these facts or documents, but this cannot, however, be seen as making it possible to impose upon a civil complainant a general obligation to produce any potentially exculpatory evidence.

15. The Defence then seeks support for its argument in the texts governing the Inter-American Court of Human Rights ("IACHR") and the European Court of Human Rights ("ECHR"), believing it possible to find therein an obligation of disclosure on the part of victims.

16. It should be noted first of all that the way in which these courts are organised, their procedure and the roles of their various organs renders any comparison with the organisation of the procedure and the roles devolved to the parties and participants before the ICC largely irrelevant.

17. It should be recalled that, in proceedings before the ECHR, the victim is the applicant; the victim initiates the proceedings. That Court's rules thus impose upon the

¹⁵ Article 87(B) of the rules

applicant a general obligation to collaborate in the administration of justice and to furnish any information in support of his or her claim,¹⁶ but certainly not a general obligation to disclose any material that might exculpate the Respondent State.

18. Likewise, the rules of the IACHR contain no provision imposing any such obligation. The provisions and the case law cited by the Defence concern either the matter of admissibility of evidence, or, in the case of Article 47 of the Rules of the IACHR, the investigative measures that the latter may adopt of its own motion with a view to obliging the parties to substantiate their arguments.

19. The ECHR and IACHR rules of procedure and evidence are therefore not relevant in the instant case and cannot justify a general obligation of disclosure on the part of victims.

20. Furthermore, and unlike the rules of the Special Tribunal for Lebanon, article 64 of the ICC Statute does not make provision for victims directly to call a witness to appear. The Appeals Chamber has however recalled that this provision allows the Chamber to order the production of all evidence that it considers to be necessary in order to establish the truth.¹⁷ The Appeals Chamber has accordingly ruled that, with a view to ensuring victims' effective participation in the proceedings, the Trial Chamber could, as appropriate, allow victims to present evidence.¹⁸

21. In such a case, it would be for the Trial Chamber to determine the procedure for the presentation of this evidence and to decide on the measures necessary to ensure a

¹⁶ Articles 44 A and 44 C of the Rules of Court, cited by the Defence.

¹⁷ See also article 64(6)(b) and (d) of the Statute.

¹⁸ Appeals Chamber, Judgment on Victims' Participation, paragraphs 97-99.

fair trial, taking account of the rights of the accused and the interests of the victims. In this regard, the Appeals Chamber noted:

If the Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances, it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence.¹⁹

22. At present, the Legal Representatives of the Victims have not yet asked the Chamber to allow evidence or to hear a witness on the basis of that provision. It is therefore not appropriate to impose on victims a general obligation to disclose any potentially exculpatory evidence, or evidence material to the Defence. To decide otherwise would be tantamount to imposing on victims a more far-reaching obligation than that provided for by the Statute and, in more general terms, one going beyond the victims' merely participatory role.

3. Participation of victims and establishment of the judicial truth

23. According to the Defence, the modalities of victims' participation are also defined by the Chamber's obligation to ascertain the truth and to ensure a fair trial. These twin obligations require that victims disclose all material in their possession that could establish the innocence of the accused.²⁰ The Defence considers that if such evidence were not disclosed to it and, consequently, not brought to the attention of the Chamber, this would not only be unfair to the accused, but also to all victims, in particular those who do not participate in the proceedings, and to the public at large.²¹ The Defence maintains furthermore that, inasmuch as the victims have a monetary interest in the proceedings, they have a vested interest in the outcome of the trial.²² This monetary interest may affect the neutrality of victim participants. The Defence

¹⁹ Appeals Chamber, Judgment on Victims' Participation, paragraph 100.

²⁰ Defence's Additional Observations, paragraph 12.

²¹ Defence's Additional Observations, paragraphs 13-14.

²² Defence's Additional Observations, paragraphs 16-17.

accordingly maintains that, in order to avoid any appearance of unfairness, it would be in everyone's interest and in the interest of justice and fairness to impose an obligation on participating victims to disclose any potentially exonerating material in their possession.

24. As has been recalled above, victims are not in themselves parties to the proceedings. Unlike the Prosecutor, they do not have the burden of proving the guilt of the accused. They participate in the proceedings in order to assert their personal interests. As stated by the Trial Chamber,²³ this interest is not limited to receiving monetary reparation. The victims seek primarily to contribute to ascertaining the judicial truth, to have their status as victim publicly acknowledged. *A fortiori*, in establishing themselves as victims, they clearly have an interest in the outcome of the proceedings. The existence of such an interest in itself cannot be sufficient to impose on victims an obligation of disclosure.

25. In addition, according to the Defence it is not for the Legal Representatives of the Victims to decide whether or not to present such material; the Defence is in a much better position to determine the relevance of such evidence in light of its defence strategy and all other evidence in its possession.²⁴

26. This is tantamount in practice to requiring the Legal Representatives to disclose any document in their possession emanating from the victims so as to enable the Defence to ascertain whether it is able to derive any advantage therefrom for its strategy. That would amount to creating an obligation upon victims which not only largely exceeds the manner in which victim participation was conceived by the Statute

²³ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1119, paragraph 98. See also the separate opinion of Judge Song, ICC-01/04-01/06-925, paragraph 10.

²⁴ Defence's Additional Observations, paragraph 19.

and the Rules, but, furthermore, could prove to be inconsistent with the provisions of article 68(1) of the Statute, which provides that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims. There can therefore be no question of imposing on victims a general obligation to “investigate exonerating circumstances” in the case.

27. In the light of all these elements, the Defence application should be rejected. In the event that the victims should ask the Chamber to be allowed to produce evidence, it would be a matter for the Chamber to establish the appropriate modalities. Finally, in practical terms the Defence’s application is undoubtedly premature and moot, since the Legal Representatives of the Victims have at their disposal no documents other than those that have already been disclosed to the parties, that is to say, those attesting to their status as victims and to the harm they have suffered.

FOR THESE REASONS

MAY IT PLEASE THE TRIAL CHAMBER

TO DISMISS the application by the Defence for Germain Katanga seeking to impose an obligation on victims and their legal representatives to disclose to it any evidence in their possession or control which they believe shows the innocence of the accused or tends to show the innocence of the accused, or to mitigate his guilt, or which is such as to affect the credibility of the evidence against the accused, or which is material to the accused’s defence.

[signed]
Mr Fidel Nsita Luvengika

[signed]
Mr Jean-Louis Gilissen

Legal Representatives of the Victims

Dated this 16 November 2009
At Brussels, Belgium.