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Pénale
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**International
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Court**

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

Confidential

**Defence Response to the REQUÊTE AUX FINS D'AUTORISATION DE
COMPARUTION DES VICTIMES**

Source: Defence for Mr Germain Katanga

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

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Introduction

1. On the 15th September 2003, the common legal representative of the principle group of victims filed a request to call four victims, stated to be a/0381/09, a/0018/09, a/0191/08 and pan/0363/09 acting in the name of a/0363/09.¹ The Defence for Mr Katanga (hereinafter "the Defence") opposes this application.

B. Procedural history

2. The victims who it is proposed will give evidence applied to participate in the proceedings in May and June 2009 respectively.² The Chamber granted them the status of victims for that purpose on 31 July 2009³. By this time the legal right of victims to lead evidence had already been confirmed by the Appeals Chamber since July 2008.⁴ By its Decision 1665 of the 1st December 2009, the Chamber confirmed the possibility for victims to give evidence.⁵ On 22 January 2010, the Chamber rendered its Decision on the Modalities of Victim Participation at Trial.⁶ The Defence appealed this decision, filing its document in support of its appeal on 3 May 2010⁷ and on the 16 July 2010, the Appeals Chamber rendered its Judgment confirming the possibility of victims to call evidence even in circumstances where notice and disclosure has not been made to the Defence prior to the commencement of trial.⁸
3. By the time of the status conference of 9 July 2010,⁹ some seven months after the Decision 1665, the legal representatives had not made any application for the calling of witnesses nor given any clear indication of an intention to do so. In order to

¹ ICC-01/04-01/07-2393-Conf, REQUÊTE AUX FINS D'AUTORISATION DE COMPARUTION DES VICTIMES a/381/09, a/0018/09, a/191/08 et pan/0363/09 agissant au nom de a/363/09.

² Application of a/0018/09 notified on 13.05.09-1131-Conf-Exp-Anx16; application of a/0191/08 notified on 05.05.09 - 1108-Conf-Exp-Anx54; application of a/0363/09 notified on 15.06.09 - 1208-Conf-Exp-Anx43; application of a/0381/09 notified on 15.06.09 - 1208-Conf-Exp-Anx61.

³ ICC-01/04-01/07-1347, Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure.

⁴ 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, 11 July 2008.

⁵ ICC-01/04-01/07-1665-Corr, Directions for the conduct of the proceedings and testimony in accordance with rule 140.

⁶ ICC-01/04-01/07-1788-tENG.

⁷ ICC-01/04-01/07-2063, Defence's Document in Support of Appeal against the Décision relative aux modalités de participation des victimes au stade des débats sur le fond', 3 May 2010.

⁸ ICC-01/04-01/07-2288, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial".

⁹ ICC-01/04-01/07-T-168-ENG ET WT 09-07-2010.

preserve the rights of the Defence, the Chamber set a deadline for such applications as the 15th September 2010. The Chamber recognized the possibility of further applications necessitated by prosecution evidence subsequent to this date.¹⁰ The Defence understands this to mean that the legal representatives could not reasonably have envisaged the calling of this evidence prior to the presentation of such prosecution evidence, which has necessitated the making of a further application on the part of the legal representatives. On 23 August 2010, the Chamber confirmed this deadline of 15th September 2010.¹¹ On 15 September the Chamber indicated that the victims' representative could file a further application about a fifth victim by the 27th of September 2010.¹²

C. Nature of the evidence

4. The four proposed witnesses state that they were all present at the time of the attack on Bogoro. They describe the attack, their reaction and their injuries and losses. In addition each of the four witnesses gives general hearsay assertions of the position and responsibility of the two accused.
5. The Defence concedes that the statements of the four victims are sufficiently closely related to issues which the Chamber must consider in its assessment of the charges.¹³ The Defence however contests that this evidence adequately satisfies the other criteria necessary for its admission at this stage of the proceedings.

D. Applicable law

6. An application of this nature is premised upon the right of victims to participate in proceedings, but must be understood and considered within the context of the rights of the accused. The rights here in issue are the right to a fair trial, the right to adequate

¹⁰ ICC-01/04-01/07-T-168-ENG ET WT 09-07-2010, page 24, l. 9-18.

¹¹ ICC-01/04-01/07-T-175-CONF-ENG ET 23-08-2010.

¹² ICC-01/04-01/07-T-188-CONF-ENG CT 15-09-2010, pages 17-18.

¹³ Cf. ICC-01/04-01/07-1665, para. 30, b).

time and facilities to prepare one's case and the right to be tried without undue delay, as defined in Article 67 of the Statute.

7. Article 69(3) of the Statute provides that the Court has the power to request the submission of all evidence that it considers necessary for the determination of the truth. The right of victims to participate in the proceedings through their legal representative is confirmed in Rule 91 of the Rules of Procedure and Evidence, which confirms that the legal representative is entitled to attend and participate in proceedings. In its decision of 11 July 2008, the Appeals Chamber interpreted Article 69(3) to include the possibility of victims to call evidence in order to give full effect to their rights under Rule 91. This includes the calling of evidence on the guilt or innocence of the accused.
8. The Appeals Chamber went further in its Judgement of 16 July 2010¹⁴, when it confirmed that this possibility of calling incriminating evidence did not necessarily depend upon the provision of notice and disclosure to the Defence prior to the commencement of trial, but it defined certain conditions:

1. It is not incompatible with the Court's legal framework or the accused's right to a fair trial if, during the course of the trial, and after being satisfied that the requirements of article 68 (3) of the Statute are met, the Trial Chamber requests victims to submit evidence that was not previously disclosed to the accused; in such a situation, the Trial Chamber will order disclosure of the evidence to the accused sufficiently in advance of its presentation at the trial, and take any other measures necessary to ensure the accused's right to a fair trial, in particular the right to "have adequate time and facilities for the preparation of the defence".[^]

3. The possibility for victims to testify on matters including the role of the accused in crimes charged against them is grounded in the Trial Chamber's authority to request evidence necessary for the determination of the truth and is not per se inconsistent with the rights of the accused and the concept of a fair trial. Whether a victim will be requested to testify on matters relating to the conduct of the accused will depend on the Trial Chamber's assessment of whether such testimony: (i) affects victim's personal interests, (ii) is relevant to the issues of the case, (iii) is necessary for the determination of the truth, and (iv) whether the testimony would be consistent with the rights of the accused and a fair and impartial trial.

¹⁴ ICC-01/04-01/07-2288.

E. Arguments against the admission of the evidence

Lack of uniqueness

9. The third criterion of the Appeals Chamber's Judgement of 16 July 2010 requires that the evidence is necessary for the ascertainment of the truth. In its Decision 1665, this Chamber stated that the evidence must make a genuine contribution to the ascertainment of the truth.¹⁵ It is submitted that where such evidence address the same event as described by prosecution witnesses, there must be some indicia of uniqueness or further clarification in the evidence which the victims propose to call.
10. The Chamber, in its Decision 1665, has recognized that it must consider whether the evidence in question "relates to matters that were already addressed by the prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties" and whether it "will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges."¹⁶
11. The legal representative has not demonstrated that there is anything unique in the evidence of these four witnesses which makes their evidence complementary as opposed to repetitive. The Prosecutor has called or will call a number of witnesses who claim to have been present at the Bogoro attack, in particular eight civilians – including four women - allegedly victims of the attack (P-268, P-287, P-249, P-132, P-353, P-159, P-161, P-233) and a UPC soldiers who fought during the attack (P-323). These witnesses already provide the details of how the attack took place, in particular regarding the charges identified by Mr Luvengika in support of his motion (attack of Bogoro before 2003, attack of Bogoro of 24 February 2003, attack against the civilians, destruction of properties, pillage).
12. The hearsay assertions relating to the accused, are of such a general and indirect nature that they do not in any way clarify the more detailed and direct evidence in relation to the responsibility of the accused as provided by prosecution witnesses.

¹⁵ ICC-01/04-01/07-1665, para. 20.

¹⁶ ICC-01/04-01/07-1665, para. 30, a) and d).

Late disclosure not justified

13. The Chamber set a deadline of 15th September 2010 for submitting any application to call witness testimony. It is submitted that it is not implied within this that the application will automatically be granted or that it will automatically be accepted as timely. It still remains to examine whether there is reasonable justification for this application being submitted so late. The onus rests upon the applicant to explain why this application could not have been submitted earlier. A cursory but unsatisfactory explanation has been offered. This should be balanced against the prejudice to the accused of calling this evidence after giving such late notice to the Defence.
14. The legal representative submits that it was difficult to select amongst the 354 victims he represents, to conduct interviews and take statements. This comment must in the Defence submission be viewed with some skepticism in the light of the fact that the application forms of the four victims in question were notified to the Defence more than one year ago in May and June 2009, implying possession at an even earlier stage.
15. It is submitted that there is no reasonable justification for the applications not to have been submitted many months ago. The legal representative has been on formal notice from the Chamber of the possibility of victims giving evidence since the beginning of December last year. Even in the absence of such confirmation the application could have been made much earlier. The legal possibility to call evidence has been confirmed by the Appeals Chamber since 11 July 2008. The legal representative and his predecessors have therefore had the opportunity to pursue this matter prior to trial and also between the commencement of trial on 24 November of last year and now. The legal representatives are also offered a reasonable budget to conduct investigations, amounting to more than half the amount that the Defence receives.
16. There is nothing in the statements of these witnesses which indicates that their relevance to the proceedings could not have been identified before the 15th September of 2010. There is also nothing which has been identified in the evidence of recent prosecution witnesses which necessitates calling these witnesses.

Prejudice to the accused

17. The legal representative impliedly suggests that the Defence is not prejudiced because it already has known the names of the four victims for several months. This is an unreasonable position since the Defence is in possession of information relating to 354 victims represented by the legal representative making the current application, not counting those represented by the second legal representative.
18. The prejudice to the accused hinges on three factors. The first is that the witnesses make general hearsay assertions of the responsibility and position of the accused. The very general and hearsay nature of these assertions makes them very difficult to test through cross-examination while being of their very nature unreliable statements.
19. The second factor carrying prejudice is that in the light of these general incriminating assertions the Defence has to be given a fair opportunity, not just a theoretical opportunity, to investigate this evidence. Receiving these statements only now gives the Defence limited and, probably, insufficient time to investigate these witnesses without infringing upon the defendant's right to trial without undue delay.¹⁷ It is envisaged that this evidence would follow immediately the evidence of the Prosecutor. This would be manageable if the witnesses were merely providing details of the attack, but from the moment that they make incriminating statements about the responsibility of the accused, the Defence must carry out comprehensive investigations on the witnesses.
20. The third factor leading to prejudice is the Defence's inability to address this new material through cross examination of the Prosecution witnesses who have given evidence, in particular the presence of these alleged victims and their losses. Had the material been provided in a timely manner the Defence would have been able to take these statements into account and to have put the matters asserted by these proposed witnesses to the earlier prosecution witnesses dealing with the same event, and thereby tested the proposed evidence. So far eight Prosecution witnesses who were allegedly living at Bogoro at the time of the attack have already testified (P-233, P-268, P-161, P-323, P-159, P-287, P-249, P-132); these persons may know the victims Mr Luvengika wishes to call. In the current circumstances, the Defence will not be able to

¹⁷ Cf. Decision 1665, para. 22, a).

question the prosecution witnesses on these four persons, unless the Chamber authorizes that they be recalled. The confrontation of the different stories of the witnesses would have contributed to the ascertainment of the truth.

Conclusion

21. It has been submitted that the timing of this application prejudices the accused in the light of the content of the statements of these witnesses. The Defence submits that, in the absence of a reasonable explanation for not submitting this application at an earlier stage, it would not be fair to permit this evidence. Its usefulness to the proceedings is limited because the details provided are essentially repetitive of evidence already provided and the incriminating elements are so general and indirect as to be more prejudicial than probative. Nor is the Defence in a position to deal with the evidence as effectively as it would have done with timely disclosure.

Respectfully submitted,



David HOOPER Q.C.

Dated this 23 September 2010

At The Hague