

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07

Date: 5 April 2011

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 *Rapport du représentant légal conformément à la décision
ICC-01/04-01/07-2699-Conf et demande de pouvoir mettre fin à son mandat
concernant deux victimes***

Source: Defence for Mr Germain Katanga

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 Macdonald, Senior Trial Lawyer

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper Q.C.
Mr Andreas O'Shea

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

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

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mme Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. The issue

1. On 11th February 2011, the Chamber rendered its *Décision relative a la Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal*.¹ In this decision the Chamber noted the intention of the legal representative to undertake more in-depth investigations into the position of these witnesses and requested that the results of such investigations be reported to it on the 14 March 2011. The Chamber ordered the legal representative to:

‘faire part du résultat de ses enquêtes sur les dossiers de a/0381/09 et de a/0363/09 et de communiquer toute information qui pourrait remettre en cause leur qualité de victime participante à la procédure avant le 14 mars 2011’;²

2. The legal representative was later accorded a request to extend the time to comply with this Decision to the 14th March 2011. On the 18th March 2011, the legal representatives filed its ‘*Rapport*’.³ In fact this so called report constitutes both a report and a motion since the legal representative submits different requests before the Chamber. In particular, it requests leave to withdraw his mandate as counsel and not to reveal himself the information putting the quality of victims of a/0363/09 et a/0381/09 into question.
3. It is in the context of the motion to conceal information requested by the Chamber that the Defence for Mr Katanga hereby responds.
4. This filing is submitted confidentially because the relevant filings on this issue have been filed confidentially, on the basis of Regulation 23 *bis* of the Regulations of the Court. Nevertheless the Defence is of the view that nothing in the present filing prevents it from being classified as public, and indeed requests on the basis of Mr. Katanga's right to a fair and public trial pursuant to Articles 67(1) and 68(3) of the Statute, that the relevant filings all be made available publicly.

¹ ICC-01/04-01/07-2699-Conf.

² See also ICC-01/04-01/07-2714-Conf, *Décision sur la Demande de reconsidération et/ou clarification de la Décision relative à la levée de suppressions et la communication de documents concernant a/0363/09, pan/0363/09, a/0018/09, a/0191/08 et a/0381/09*, 18 February 2011, para. 21.

³ ICC-01/04-01/07-2782-Conf, *Rapport du représentant légal conformément à la décision ICC-01/04-01/07-2699-Conf et demande de pouvoir mettre fin à son mandat concernant deux victimes (article 18 du Code de conduite professionnel)*

B. Procedural point

5. It is an accepted general principal of law that an issued once decided cannot be reopened without the demonstration of a change in circumstances, which could not have reasonably been addressed in the original pleadings relating to the issue.
6. In this instance, the issue of professional secrecy, upon which the legal representative relies, to avoid compliance with the obligation imposed upon him by the Chamber, was a matter known to the legal representative on 11th February and indeed extensively referred to by him in the discussions around a protocol.
7. There is no reasonable basis upon which this issue should not have been addressed earlier. Further it is submitted that the Chamber undoubtedly took this aspect into account in rendering its ruling. On receiving the decision of the Chamber the legal representative had the right to seek leave to appeal the decision but chose not to do so.
8. In these circumstances, it is submitted that the legal representative cannot legitimately reopen the issue.

C. The question of violation of the code of professional conduct

9. Article 4 of the Code of Professional Conduct provides for primacy of the Court's code of conduct over the national code in the event of inconsistency. In such circumstances it is necessary to have recourse to the Court's code.
10. Article 8 of the Code of Professional Conduct provides for the respect for professional secrecy and confidentiality. Articles 8(4) and 8(2) expressly provide for the possibility of disclosure being ordered by the Court. Paragraph 3 is premised on paragraphs 1 and 2, and paragraph 1 expressly provides for a duty to respect professional secrecy 'in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court'. For its part, paragraph 2 refers specifically, *inter alia*, to the rights of the accused, and to his right to a fair trial.

11. It is therefore incorrect to assert an absolute duty of professional secrecy in counsel's dealing's with the Court. It is to be noted that if that were the case, the legal representative, Mr Luvengika, would already be in breach by virtue of his admission before the Court that having re-interviewed the relevant victim he did not receive a satisfactory explanation for the contradiction relating to the photo.
12. The Court must balance the professional duties of counsel in relation to his client with the fact that his client's participation in the proceedings must not compromise the right to a fair trial.
13. It follows that the order of the Chamber was legitimate and must be complied with notwithstanding the view of the Bâtonnier of the Belgian Bar.

D. Registry observations

14. On the 21st March 2011, the Chamber requested by e-mail that the Registry file its observations by 16.00 on the 4th April 2011. This issue of information shedding light on their quality as victims impacts on the fairness of the trial.
15. The Defence has waited to receive the Registry observations before filing its response to the legal representative's requests. These Registry submissions⁴ have not affected the Defence position in respect of the legal representative's filing. Nonetheless, it is noted that in paragraph 6 of the Registry's response, it is recorded that the Registry finds itself in difficulties with respect to conducting an in depth investigation into the information provided by victims. This it says is due to its neutrality. This difficulty does not hamper the Defence, which reinforces the importance of the legal representative revealing the results of its investigations.⁵
16. In so far as these victims were intending to give evidence of an incriminating nature it is in the interests of justice that any attempt to manufacture false evidence against the accused, whether individually or in conspiracy, is fully exposed. The Defence therefore anticipates that in so far as possible the subsequent communication of

⁴ ICC-01/04-01/07-2815-Conf, *Observations du Greffe relatives aux écritures déposées par Maître Nsita les 18 et 25 mars 2011* (ICC-01/04-01/07-2782-Conf et 01/04-01/07-2802-Conf), 4 avril 2011.

⁵ See ICC-01/04-01/07-2714-Conf, *Décision sur la Demande de reconsidération et/ou clarification de la Décision relative à la levée de suppressions et la communication de documents concernant a/0363/09, pan/0363/09, a/0018/09, a/0191/08 et a/0381/09*, 18 February 2011, paras 15, 20-21.

information to the Chamber will accord with the spirit of paragraph 13 of the Chamber's decision and provide sufficient information to the Defence and the public to enable the Defence to conduct its mission.

ACCORDINGLY, it is requested that the legal representative, Mr Fidel Nsita Luvengika, be ordered to comply with the Chamber's original ruling as contained in paragraph 11 and the final disposition of its decision of 11 February 2011.

Respectfully submitted,



David HOOPER Q.C.

Dated this 5 April 2011

At The Hague