



Original: French

No.: ICC-01/04-01/07
Date: 9 November 2010

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

**Decision authorising the appearance of Victims a/0381/09, a/0018/09, a/0191/08, and
pan/0363/09 acting on behalf of a/0363/09**

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

The Office of the Prosecutor

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Legal Representatives of the Applicants

**The Office of Public Counsel for
 Victims**

**The Office of Public Counsel for the
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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Other

**Victims Participation and Reparations
 Section**

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to articles 64(2), 67(1), 68 and 69(3) of the Statute of the Court (“the Statute”), rules 89 to 92 and 140 of the Rules of Procedure and Evidence (“the Rules”) and regulations 43, 56 and 86 of the Regulations of the Court, decides as follows.

I. Background

1. This decision rules on the 15 September 2010 application by the legal representative of the main group of victims (“Legal Representative”) to call Victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09 to testify (“Application”).¹ Whilst the Prosecutor is continuing with his case, the Legal Representative seeks the Chamber’s leave to call four of the 354 participating victims whom he represents, in accordance both with paragraphs 19 to 29 of its *Directions for the conduct of the proceedings and testimony in accordance with rule 140*² (“Decision on Rule 140”) and with paragraphs 86 to 93 of its *Decision on the Modalities of Victim Participation at Trial*³ (“Decision on the Modalities of Participation”), which was upheld by the Appeals Chamber in a judgment rendered on 16 July 2010.⁴ The Legal Representative submits that the additional factual evidence which could be provided by each of these four testimonies can contribute to the determination of the truth, whilst also providing the Chamber with an opportunity to hear the views and concerns of the victims within the meaning of article 68(3) of the Statute, in particular by allowing them to describe the impact which the Bogoro attack has had on their lives.

¹ Legal Representative of the main group of victims, “*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/0363/09*”, 15 September 2010, ICC-01/04-01/07-2393-Conf.

² *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, 1 December 2009, ICC-01/04-01/07-1665-Corr.

³ *Decision on the Modalities of Victim Participation at Trial*, 22 January 2010, ICC-01/04-01/07-1788-tENG.

⁴ Appeals Chamber, *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”*, 16 July 2010, ICC-01/04-01-07-2288, OA11 (“Judgment on the Decision on the Modalities of Participation”).

2. On 23 September 2010, the parties to the case submitted their observations, in accordance with the time limit set by the Chamber in its Decision on Rule 140.⁵ Whilst the Prosecutor wholly supported the Application,⁶ the Defence teams for Mathieu Ngudjolo⁷ and Germain Katanga⁸ opposed it. The Defence for Mathieu Ngudjolo considers that the Legal Representative is overstepping his role and thereby encroaching on the role of the Prosecutor, and maintains that the proposed testimonies are repetitive of the Prosecutor's evidence. The Defence for Germain Katanga, which concurs with this submission, also argues that the late filing of the Application has resulted in three-fold prejudice to the Defence.

3. On 28 September 2010, ruling on an application to this end by the Legal Representative,⁹ the Chamber issued an oral decision¹⁰ granting him leave to reply to both Defence teams, which he did by his filing of 1 October 2010¹¹ ("Reply").

II. Discussion

4. The Chamber recalls, as stated in its Decision on the Modalities of Participation, that "the only legitimate interest the victims may invoke when seeking to establish the facts which are the subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly

⁵ Decision on Rule 140, para. 28.

⁶ Office of the Prosecutor, "Prosecution's Observations on the Legal Representative's *Requête aux fins d'Autorisation de Comparution des Victimes* a/0381/09, a/0018/09, a/0191/09 et pan0363/09 agissant au nom de a/0363/09", 23 September 2010, ICC-01/04-01-07-2401-Conf, ("Prosecutor's Observations on the Application").

⁷ Defence for Mathieu Ngudjolo, "Réponse de la Défense de Mathieu Ngudjolo à « la Requête du Représentant légal commun du groupe principal de victimes aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan0363/09 agissant au nom de a/0363/09 »", 23 September 2010, ICC-01/04-01/07-2405-Conf ("Response of the Defence for Mathieu Ngudjolo to the Application").

⁸ Defence for Germain Katanga, "Defence Response to the *Requête aux fins d'autorisation de comparution des victimes*", 23 September 2010, ICC-01/04-01/07-2407-Conf ("Response of the Defence for Germain Katanga to the Application").

⁹ Legal Representative of the main group of victims, "Requête aux fins de déposer une réplique aux écritures 2405 et 2407 émanant des équipes de Défense", 27 September 2010, ICC-01/04-01/07-2417.

¹⁰ Oral decision of 28 September 2010, ICC-01/04-01/07-T-194-CONF-FRA ET 28-09-2010, p. 1, line 24 to p. 2, line 19.

¹¹ Legal Representative of the main group of victims, "Réplique aux observations des Défenses de Mathieu Ngudjolo et Germain Katanga sur la requête aux fins d'autorisation de comparution de quatre victimes", 1 October 2010, ICC-01/04-01/07-2432, ("Reply to the Observations of the Defence Teams").

happened. They may do so by providing it with their knowledge of the background to the case or by drawing its attention to relevant information of which it was not aware. In the latter case, the Chamber may also deem it appropriate for a particular victim to testify in person.”¹² The Chamber further recalls that it considered that the personal interest of each of the victims authorised to participate in this case had been demonstrated on an individual basis, including a/0381/09, a/0018/09, a/0191/08 and a/0363/09.¹³ In the current issue at stake, the Chamber finds that the victims who are the subject of this application therefore have a personal interest in contributing to the determination of the truth. It further notes that this point is not opposed by any party.¹⁴

5. Before analysing the Application, the Chamber recalls that the Appeals Chamber confirmed that the possibility for victims to lead evidence at trial should be subject to a number of conditions. Such was the view taken in Trial Chamber II’s Decision on Rule 140¹⁵ and Decision on the Modalities of Participation,¹⁶ which imposed a number of stringent conditions: any such application must state its relevance to the issues of the case and how it can help the Chamber to have a better understanding of the facts. The application must be filed prior to the conclusion of the Prosecution’s case and in accordance with the procedure defined in the Decision on Rule 140. Lastly, when considering such an application, the Chamber must pay particular attention to respect for the rights of the accused.¹⁷

¹² Decision on the Modalities of Participation, para. 60.

¹³ *Ibid.*, paras. 61-62. *Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*, 31 July 2009, ICC-01/04-01/07-1347; *Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims*, 23 September 2009, ICC-01/01-01/07-1491-Conf-tENG.

¹⁴ Application, paras. 11-21.

¹⁵ Decision on Rule 140, para. 19.

¹⁶ Decision on the Modalities of Participation, para. 86.

¹⁷ *Ibid.*, para. 87.

A. Conditions as to the form of the application

6. Where a victim wishes to testify at trial, his or her legal representative must file a written application to the Chamber, accompanied by a statement signed by the witness, containing only such redactions as are strictly necessary. The victim must also submit, prior to the completion of the Prosecution case, a comprehensive summary of the testimony to which the application pertains.¹⁸

7. The Prosecutor is of the view that the Application meets these formal conditions and submits that the proposed redactions¹⁹ are consonant with the four victims' security situation. The Defence for Germain Katanga did not make any submissions directly pertaining to these specific conditions and, on this matter, the Defence for Mathieu Ngudjolo simply stated that it had no objections to the Legal Representative's redactions.²⁰

8. The Chamber notes that the Legal Representative has complied with the formal requirements set out in its Decision on Rule 140. It recalls that, in accordance with the requirements of that decision²¹ and its Decision on the Modalities of Participation,²² the identities of the four victims in question are known to the Defence teams. It further recalls that, by e-mail of 14 September 2010, it instructed the Legal Representative to notify the parties of the redacted version of the four victims' statements.²³ The Chamber notes that the Legal Representative's redactions are limited in scope and were intended to ensure the safety of the four victims concerned, for whom an application for protective measures is envisaged. It further notes that the redactions are consistent with the recommendations of the Victims and

¹⁸ Decision on Rule 140, paras. 25-27.

¹⁹ Prosecutor's Observations on the Application, paras. 4, 8-11.

²⁰ Response of the Defence for Mathieu Ngudjolo to the Application, para. 26.

²¹ Decision on Rule 140, para. 22(c).

²² Decision on the Modalities of Participation, paras. 91-92.

²³ See the e-mail exchange between the Legal Representative and the Legal Adviser to the Trial Division of 14 September 2010.

Witnesses Unit (“VWU”).²⁴ Moreover, out of concern to ensure the effectiveness of any protective measures considered necessary, which must be proportionate to the current circumstances of each of the four victims, the Chamber already asked the Legal Representative, by e-mail of 27 September 2010,²⁵ to consult with VWU, without, of course, predetermining the outcome of the Application. Accordingly, at this stage, pursuant to articles 64(2), 64(6)(e) and 67(1) of the Statute, the Chamber authorises the temporary redactions of the statements as proposed, while leaving it for the Legal Representative to consider whether to apply for the authorised redactions to be maintained within two days of the implementation of any protective measures ordered for the victims granted leave to testify by this Decision.

B. The proposed testimonies’ relevance and contribution to the determination of the truth

9. In accordance with paragraphs 20 and 21 of the Decision on Rule 140 and paragraphs 87 and 89 of the Decision on the Modalities of Participation, the Application explains how the four proposed testimonies would elicit additional factual evidence which would be useful in the determination of the truth about the crimes being tried by the Chamber. Accordingly, the Legal Representative considers that these four testimonies may provide the Chamber with additional information about the social context, living conditions and atmosphere in Bogoro both before and after the attack, how the attack unfolded, the reasons why certain residents took refuge in the Bogoro Institute, and about the ethnic nature of the attack and the harm suffered.²⁶ More specifically, the Legal Representative set out, for each victim, the subject areas and information which, in his view, would be significant and useful to the Chamber, and summarised their respective statements.²⁷

²⁴ Application, paras. 67-70.

²⁵ See the e-mail exchange between the Legal Representative and the Legal Adviser to the Trial Division of 27 September 2010.

²⁶ Application, paras. 14-18.

²⁷ *Ibid.*, paras. 30-36, 39-46, 47-52 and 54-61.

10. Noting in particular the practical and emotional impact of the attack on the civilian population, the existence of detailed information about the events which took place, *inter alia*, at the Bogoro Institute in the days preceding the attack, the involvement of the Red Cross after the fighting, and the distinction made between Hemas and non-Hemas by the attackers, the Prosecutor submits that the nexus between the proposed testimonies and the charges in the case is sufficiently close to contribute to the determination of the truth.²⁸

11. The Defence for Germain Katanga does not challenge the fact that the four statements in question pertain to issues sufficiently related to the charges. Instead, it stresses their repetitiveness and submits that the Legal Representative has not shown how any one of the statements would constitute additional or elucidatory evidence, within the meaning of the Decision on Rule 140, since several Prosecution witnesses have already testified about how the Bogoro attack unfolded.²⁹

12. The Defence for Mathieu Ngudjolo also submits that there appears to be no new, relevant evidence warranting the appearance of these four victims, since several Prosecution witnesses, mostly Hema, have already provided information about the same facts and identical issues. It further notes that the harm they allege is also similar to that described by the Prosecution witnesses, stressing that two of the latter also have the status of victim participating in the proceedings.³⁰

13. In his Reply, while recalling that the criteria set out in paragraph 30 of the Decision on Rule 140 are not cumulative, the Legal Representative stresses the independent voice and role of the victims,³¹ who give an entirely different perspective to events similar to those to which the Prosecution witnesses referred.

²⁸ Prosecutor's Observations on the Application, paras. 6 and 7.

²⁹ Response of the Defence for Germain Katanga to the Application, paras. 4 and 9-11.

³⁰ Response of the Defence for Mathieu Ngudjolo to the Application, paras. 21-25.

³¹ Reply of the Legal Representative to the Observations of the Defence Teams, paras. 17-20.

14. The Chamber recalls that it is particularly incumbent upon it to assess whether each proposed victim testimony is related to the charges in the case and is not unnecessarily repetitive of evidence already tendered by the parties³² – it being noted that it is not a matter of rejecting any possible repetitions, only those which do not contribute significantly to the determination of the truth. This is how the Decision on Rule 140 must be read where it instructs a legal representative filing such an application to “explain [...] the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts”.³³

15. The evidence of Victim a/0381/09 covers, according to the Legal Representative, paragraphs 275, 277, 302, 303, 306, 307, 403, 405 and 424 of the Decision on the Confirmation of Charges.³⁴ The Chamber notes that this person is a Hema civilian who was in Bogoro with her family well before the attack, and that she lived in a classroom at the Institute alongside numerous other refugees. Given her links with certain members of the Lendu community and the warnings which they had issued to her Hema husband, the Chamber is of the view that this victim could provide significant clarification about the prevailing atmosphere in Bogoro and the change in mental states prior to the attack, in particular the workings of the interethnic communication channels which might have conveyed information about an impending attack. Moreover, this victim may shed new light on the events which took place inside the Bogoro Institute in the two days prior to the fighting and on the day of the hostilities.

16. As for Victim a/0018/09, whose evidence, the Legal Representative submits, covers paragraphs 275, 277, 306, 307, 322 to 325, 334 to 338, 403, 405 and 422 of the

³² Decision on Rule 140, paras. 20 and 30; Decision on the Modalities of Participation, paras. 87, 89 and 91.

³³ Decision on Rule 140, para. 20.

³⁴ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/07-716-Conf (“Decision on the Confirmation of Charges”); Application, para. 34.

Decision on the Confirmation of Charges,³⁵ the Chamber is of the view that, on account of the occupation she held in 2003, which put her in contact with the residents of Bogoro, she could provide the Chamber with a clearer picture of the existing family, ethnic and social networks there, which could explain why some civilians remained, despite the threats. Furthermore, like Victim a/0381/09, this second victim, as a survivor from the Institute, may also provide a number of further details about the atmosphere and the events of the two days leading up to the attack and the day itself. Since a/0381/09 states that she lost consciousness whilst escaping from the Institute, the Chamber considers that these two testimonies could in fact complement each other effectively. Lastly, the Chamber considers that a description of Bogoro before and after the attack of 24 February 2003 could enable it to assess its significance and impact more accurately.

17. The evidence of Victim a/0191/08 covers, according to the Legal Representative, paragraphs 275, 277, 306, 307, 322 to 325, 334 to 338, 405 and 424 of the Decision on the Confirmation of Charges.³⁶ He states that this victim can provide the Chamber with information about “[TRANSLATION] the methods used by the assailants during the attack”, “[TRANSLATION] the strategy of surrounding the entire locality beyond the UPC camp” and “[TRANSLATION] the attacks to which the civilian population of Bogoro was subjected beyond any military objective”.³⁷ The Chamber accepts that the proposed testimony supports the evidence of many Prosecution witnesses to a great extent, in particular that of P-233, P-287 and P-268. However, it notes that, having been warned by a Lendu pastor of the imminence of an attack, a/0191/08 could provide the Chamber with fresh information as to continuing solidarity between civilians belonging to different ethnic communities. Furthermore, the Chamber considers that this testimony could elucidate the circumstances in which civilian victims fled and how it was impossible for them to protect their family members and, notably, even the youngest of their children.

³⁵ Application, para. 42.

³⁶ *Ibid.*, para. 50.

³⁷ *Ibid.*, paras. 51 and 52.

18. Lastly, the evidence of pan/0363/09 representing minor victim a/0363/09 covers, according to the Legal Representative, paragraphs 275, 277, 282, 306, 307, 322 to 325, 334 to 338 and 405 to 424 of the Decision on the Confirmation of Charges.³⁸ In light of her statement, the Chamber considers that the testimony of pan/0363/09, acting as the representative of Victim a/0363/09, could provide it with new and useful information about possible methods of selecting houses to attack based on ethnicity, in particular with respect to the dwelling of an individual who was neither Hema nor Lendu.³⁹ According to the statement, all of the Hema family members of Victim a/0363/09 – whose father had previously received threats – were killed in their house at the time of the attack, whereas the neighbouring family of pan/0363/09, who herself belongs to a different ethnic group and was asked by the child's mother to look after the child, was spared. The Chamber further notes that only the minor, a/0363/09, has been granted victim status. Accordingly, the statement of the representative, pan/0363/09, should be restricted to issues concerning the personal interest of the child being represented.

19. Nevertheless, in light of the relevant information she may provide, which could contribute significantly to the determination of the truth, the Chamber intends now to call her as a witness of the Chamber regarding any issue extending beyond the personal interest of Victim a/0363/09, to avoid having to recall her.

20. Accordingly, the Chamber is of the view that the appearance of Victims a/0381/09, a/0018/09 and a/0191/08 and Witness pan/0363/09 would contribute significantly and effectively to the search for the truth and the process of establishing the facts. It notes further that these victims' testimonies may be of use in the future if it should need to assess the entirety of the harm suffered by the victims.

³⁸ *Ibid.*, para. 59.

³⁹ *Ibid.*, paras. 60 and 61.

C. Respect of the rights of the Defence

21. In accordance with the principle set out in article 68(3) of the Statute and recalled in the Decision on Rule 140,⁴⁰ and as with any other mode of victim participation in the proceedings before the Court, the appearance of victims as witnesses must in no way be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

22. Desirous of ensuring the effective participation of victims in the proceedings with strict respect for the rights of the Defence, the Chamber has taken care to preserve the balance of the interests and rights of all parties and participants, in accordance with articles 64(2), 68(3) and 67(1) of the Statute, while being mindful of the recent Appeals Chamber judgment upholding its Decision on the Modalities of Participation.⁴¹

(1) Alleged prejudice due to the lateness in the filing of the Application

23. The Defence for Germain Katanga argues that it has suffered prejudice as a result of the late filing of the Application by the Legal Representative, whereas he had long been in possession of all of the information about these four victims and, moreover, has at his disposal a budget amounting to half of its own budget. The Defence submits that, although the identity of the four victims had indeed been disclosed to it several months previously, such is also the case for the 350 other victims assisted by that Legal Representative alone. It contends that respect for the rights of the defence requires that it should be granted time for investigations and preparation prior to the victims' testimony and that they could not therefore testify immediately after the completion of the Prosecution's case without causing prejudice

⁴⁰ Decision on Rule 140, para. 21.

⁴¹ Judgment on the Decision on the Modalities of Participation.

to the Defence, especially given the incriminatory nature of the proposed testimonies.⁴²

24. In reply to these allegations about the late filing of his Application, the Legal Representative recalled that the possibility of calling victims to testify in this case did not come into effect until after the Appeals Chamber's judgment on the appeal against the Decision on the Modalities of Participation. He further submits that the Defence for Germain Katanga did not seek leave to appeal the Trial Chamber's oral decision setting a deadline for the filing of such an application, with which the Legal Representative complied.⁴³

25. The Chamber recalls that, in order to ensure the fairness of the trial, the Decision on Rule 140 explicitly states that victims could appear under oath before the Court only after the Prosecutor had completed his case.⁴⁴ The Chamber decided on that stage of the proceedings – i.e. prior to the case for the Defence – in order to allow the Defence to have the last word, once it is in possession of all of the evidence adduced by the Prosecutor and any victims called to testify as a witness.⁴⁵

26. This same concern, *viz.*, to safeguard the rights of the Defence and the requirements of a fair and impartial trial, led the Chamber, in its order of 2 July 2010 convening a status conference,⁴⁶ to request the legal representatives to indicate whether they intended to avail themselves of the possibility of seeking leave to call certain victims to testify, and to remind them of the stringent conditions set out in the Decision on Rule 140 and the Decision on the Modalities of Participation. During that status conference, held on 9 July 2010, the Chamber indicated to the legal representatives that any such application should not "[TRANSLATION] delay the

⁴² Response of the Defence for Germain Katanga to the Application, paras. 13-15 and 19.

⁴³ Reply, paras. 22-25.

⁴⁴ Decision on Rule 140, paras. 23 and 24.

⁴⁵ Decision on the Modalities of Participation, para. 86.

⁴⁶ *Ordonnance de convocation d'une conférence de mise en état* (Règle 132 du Règlement de procédure et de preuve), 2 July 2010, ICC-01/04-01/07-2236, para. 2 C- a) to d).

proceedings”⁴⁷ and that as a result it was necessary to file any such applications no later than 15 September 2010;⁴⁸ this deadline was confirmed on 23 August 2010.⁴⁹ The Defence for Germain Katanga had stated that, when the time came, it would seek disclosure of each victim-witness’s name and statements well enough in advance of their appearance to enable it to prepare “outside the courtroom”, and considered even mid-September to be an acceptable date for disclosure of the said statements.⁵⁰

27. The Chamber, whilst taking formal note of the submissions of the Defence for Germain Katanga in the event of fresh applications to call victims to testify, recalls that it currently has only the instant Application before it and that it will in any event ensure that the rights of the Defence are respected. Moreover, it was in this spirit that it reminded the Legal Representative of the urgency of his filing the additional application concerning two victims who may provide exculpatory evidence, which it would appear he is contemplating.

28. The Chamber cannot therefore entertain the submission of the Defence for Germain Katanga as to the alleged late filing of the Application or any resultant prejudice to the Defence. In actual fact, not only was the Application filed within the time limit set by the Chamber in its Decision on Rule 140, but it was also filed in accordance with the Decision on the Modalities of Participation, which was upheld by the Appeals Chamber on 16 July 2010. In this regard, it must be recalled that the Appeals Chamber stated that it was not “persuaded that the Impugned Decision inherently violates Mr Katanga’s right to a fair trial [...]”. It also stated that “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

⁴⁷ ICC-01/04-01/07-T-168-FRA ET WT 09-07-2010, p. 16 lines 2 and 3; p. 22, lines 2 and 3 and 10-18; p. 23, line 19 to p. 24, line 2.

⁴⁸ ICC-01/04-01/07-T-168-FRA ET WT 09-07-2010, p. 22, line 25 to p. 23, line 6; p. 23, line 19 to p. 24, line 2.

⁴⁹ ICC-01/04-01/07-T-175-Conf-FRA ET 23-08-2010, p.9, lines 1-10.

⁵⁰ ICC-01/04-01/07-T-168-ENG ET WT 09-07-2010, p. 21, line 12 to p. 22, line 8; p. 30, line 8 to p. 32, line 4; p. 33, lines 2-11.

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'".⁵¹ In this instance, the Defence for Germain Katanga is only arguing hypothetical prejudice, before the Chamber has even been able to issue an order on the timetable for the next hearings and before even asking the Chamber to grant it an appropriate amount of preparatory time.

29. The Chamber notes that, on 15 September 2010, the Defence for Germain Katanga received disclosure of the identity of the four victims who are the subject of the Application,⁵² the subject-matter of their evidence and their statements – the limited, temporary redactions to which the Defence teams registered no objection. The Chamber further notes that the questions likely to be put to the said witnesses are limited in scope, in that they will essentially focus on the points mentioned specifically in relation to each of them in paragraphs 15 to 19 above, which should make a significant contribution to the search for the truth. Being under an obligation to ensure that the trial is conducted expeditiously and that the accused will be tried without undue delay, the Chamber further notes that the number of victims called to appear as witnesses, i.e. four, should in no way delay the trial unreasonably. Accordingly, it considers that the total amount of time taken by the Legal Representative to examine them must not exceed 12 hours,⁵³ and that each party will have a maximum of two hours to examine each witness. The legal representative of the child soldiers, however, must comply with the usual procedure to seek authorisation, as laid down by the Chamber in its Decision on Rule 140.⁵⁴ On the basis of these same considerations, the Chamber is of the view that a period of two weeks after the Prosecutor has rested his case – which will be in addition to the time

⁵¹ Judgment on the Decision on the Modalities of Participation, paras. 54 and 55.

⁵² Response of the Defence for Germain Katanga to the Application, para. 17.

⁵³ It should be noted that the Legal Representative estimated that the victims' testimony would take less than four hours each; see Application, para. 23.

⁵⁴ Decision on Rule 140, paras. 87-91.

soon to be allocated to the Defence teams to finish preparing their own cases – will enable them to prepare the questions to be put to these four witnesses appropriately and with sufficient time. The Chamber must recall that the Defence teams already have the information which their resource persons require in order to conduct any investigations of these new witnesses, and that they have the time from now until the end of the Prosecution case to do so. The testimonies of these four witnesses will therefore take place after the recess at the end of 2010 in any event, and before the first Defence team commences its case. The exact date will be decided after the next status conference, which will focus on the preparation for the Defence case.⁵⁵

2) Distinct roles of the Prosecutor and victims

30. The Defence for Mathieu Ngudjolo submitted that, by arguing the ethnic nature of the Bogoro attack and presenting factual evidence on how the civilian population experienced the attack, the Legal Representative is undertaking a legal characterisation, overstepping his role and encroaching upon that of the Prosecutor, and thereby prejudicing the fairness of the trial and equality of arms between the parties. It also argues that the victims, who are merely participants in the proceedings, must not present evidence pertaining to the guilt of the accused, which is the prerogative of the parties alone.⁵⁶

31. In his Reply, responding firstly to the Defence for Mathieu Ngudjolo's complaint of a conflation of roles, the Legal Representative emphasised the independence of the victims' role in the proceedings before the Court and their right to participate effectively.⁵⁷ He further stated that, in the aforementioned Judgment of 16 July 2010, the Appeals Chamber upheld the positions of Trial Chambers I and II of

⁵⁵ See *inter alia* ICC-01/04-01/07-T-168-FRA ET WT 09-07-2010, p. 27, lines 13-23, announcing the status conference on the presentation of the case for the Defence.

⁵⁶ Response of the Defence for Mathieu Ngudjolo to the Application of the Legal Representative, paras. 8-20.

⁵⁷ Reply, paras. 8-11.

the Court granting victims the right to present evidence pertaining to the guilt of an accused person.⁵⁸

32. Recalling the conditions pertaining to victims' participation in proceedings before this Court, as set out in article 68(3) of the Statute and stipulated by the Chamber in its Decision on the Modalities of Participation, the Chamber is of the view that the Legal Representative did not overstep his mandate. Furthermore, it refers to the previous rulings of the Appeals Chamber, which has, on several occasions, quite clearly found that victims may present evidence pertaining to the guilt of an accused person.⁵⁹

3) Cross-examinations by the Defence

33. The Defence for Germain Katanga submitted that, for various reasons, it is prejudiced because its right to cross-examine any victims who might be authorised to appear and the Prosecution witnesses who have already given evidence has been undermined. It emphasised that the allegations as to the accused persons' responsibility are very difficult to assess and challenge through cross-examination because their general and hearsay nature makes them unreliable. Moreover, it complained that it was unable to use these statements – which it considers as new evidence – when it cross-examined Prosecution Witnesses P-233, P-268, P-161, P-323, P-159, P-287, P-249 and P-132. Since all these witnesses claimed to have been living in Bogoro at the time of the attack, the Defence for Germain Katanga proposes that the Chamber authorise their re-examination.⁶⁰

34. Challenging the prejudice alleged by the Defence for Germain Katanga, the Legal Representative first expressed surprise that the testimonies for which he is

⁵⁸ *Ibid.*, paras. 12-16.

⁵⁹ Judgment on the Decision on the Modalities of Participation, paras. 3, 37, 88 and 110-115; Appeals Chamber, *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-01/04-01/07-1432, OA9 OA10, paras. 67, 71 and 93-105.

⁶⁰ Response of the Defence for Germain Katanga to the Application, paras. 17-20.

seeking authorisation could be considered only indirect hearsay evidence, and expressed the view that it is for the Chamber to assess the probative value of these testimonies in accordance with article 69 of the Statute.⁶¹ As for prejudice arising from the Defence's *de facto* inability to put questions about these four victims to several Prosecution witnesses, the Legal Representative recalled that, as the Defence itself proposed, it can always apply for them to be re-examined if it deems it still necessary.⁶²

35. The Chamber recalls that, in accordance with its Decision on Rule 140,⁶³ both parties and participants may put questions to victims testifying under oath "in a neutral fashion". However, a party or participant wishing to put a leading question must submit a reasoned application to the Chamber. The Chamber further recalls that it has already ruled on the inherent unreliability of hearsay and on the difficulty in cross-examining a witness testifying about information obtained indirectly – issues which, furthermore, have previously been raised by the Defence for Germain Katanga.⁶⁴ It states once more that "[TRANSLATION] this Court's rules for the admissibility of evidence require striking a balance between, *inter alia*, the probative value – which includes the reliability of information obtained by hearsay [...] – and any possible infringement of fair trial rules".⁶⁵ Indirect evidence – whether incriminatory or exculpatory – obtained from hearsay cannot in and of itself be ruled inadmissible although, as has already been stated, the Appeals Chamber confirmed that victims authorised to testify may also "testify on matters including the role of the accused in crimes charged against them".⁶⁶ In the matter at hand, the Chamber, referring to the information included in the Application, notes that Victims a/0381/09, a/0018/09, a/0191/08 and a/0363/09 all personally experienced the Bogoro attack: they

⁶¹ Reply, para. 21.

⁶² *Ibid.*, para. 26.

⁶³ Decision on Rule 140, para. 32.

⁶⁴ Defence for Germain Katanga, "Skeleton Submission on Hearsay Evidence of Witness P-267", 9 July 2010, ICC-01/04/01/07-2253, paras. 10 and 15-17.

⁶⁵ Oral decision of 12 July 2010, ICC-01/04-01/07-T-170-CONF-FRA ET 12-07-2010, p. 3, line 14 to p. 5, line 13.

⁶⁶ Judgment on the Decision on the Modalities of Participation, para. 3.

were there throughout the attack and had all lived there for some time. They stated that there had been several announcements in the village, over some time, of an attack. Accordingly, the Chamber considers that the responses they may provide as to what they know of those responsible for the attack could contribute to the determination of the truth. In any event, the fact remains that the Chamber will not determine the exact weight to be attached to this evidence until a later stage and in light of, *inter alia*, the conditions under which these witnesses came by the information, the questions put to them, and all of the evidence tendered in the case.

36. As regards the prejudice alleged by the Defence as a result of having been unable to use the statements of the victims concerned as part of its cross-examination of Prosecution Witnesses P-233, P-268, P-161, P-323, P-159, P-287, P-249 and P-132 and its request for them potentially to be recalled, the Chamber again states that the Appeals Chamber upheld that “[i]t 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’”.⁶⁷ In this respect, the Chamber refers to paragraphs 28 and 29 of this Decision, and is of the view that it is for the Defence to file a specific, grounded application to this effect if and when it deems it appropriate.

(4) Contact between the Defence teams and the four represented victims

37. In the absence of any provisions governing the modalities of contact between the parties and the victims authorised to testify as witnesses, the Legal Representative seeks, where applicable and as a precautionary measure, the

⁶⁷ *Ibid.*, para. 1.

application of the measures ordered by the Chamber in its *Decision on a number of procedural issues raised by the Registry*.⁶⁸ The Chamber notes that no other party made submissions on this point.

38. The Chamber notes that paragraphs 25 to 31 of its Decision of 14 May 2009 – which it has been asked to apply to the victims authorised to testify and which state, *inter alia*, that the party calling a witness must obtain the witness’s consent and be present at the interviews – must be applied to all witnesses, regardless of any protective measures subsequently adopted. Accordingly, the Chamber decides that these modalities will apply to the four witnesses in question, it being understood that “Legal Representative” should be read instead of “party”. Furthermore, the Chamber invites the Legal Representative to contact VWU if one of the four witnesses enters the ICC Protection Programme.

FOR THESE REASONS, the Chamber

GRANTS the Application, in that it

(1) AUTHORISES the appearance of Victims /0381/09, a/0018/09, a/0191/08, and a/0363/09 via representative pan/0363/09, and that of pan/0363/09 acting on her own behalf, under the conditions set in the present Decision;

(2) INSTRUCTS the Legal Representative to contact VWU immediately so that a decision can be made, as soon as possible and in any event prior to 10 December 2010, on all of the protective measures which may be appropriate to the current, objective circumstances of each of the four victims concerned by the present Decision;

(3) INSTRUCTS VWU to inform the Chamber of any resultant protective measures taken;

⁶⁸ Application, para. 71, referring to the *Decision on a number of procedural issues raised by the Registry*, 14 May 2009, ICC-01/04-01/07-1134, paras. 25-31.

(4) AUTHORISES the proposed temporary redactions; and

(5) REMINDS the Legal Representative that, if necessary, it is for him to request that the redactions be maintained within two days of the implementation of any protective measures for the victims authorised by this Decision to give evidence.

(6) INSTRUCTS the Legal Representative and all of the parties to the case to propose, prior to 16 November 2010, such redactions to their respective filings as appear to them to be strictly necessary.

(7) INSTRUCTS the Defence to ensure that the modalities of contact with victims authorised to give evidence as defined in this Decision are respected.

Done in both English and French, the French version being authoritative.

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Christine Van den Wyngaert

Dated this 9 November 2010
At The Hague, The Netherlands