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No.: **ICC-01/04-01/-07**
Date: **2 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

**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

Source: The Legal Representatives of the Victims

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

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I. INTRODUCTION

1. Through the present observations, the Legal Representatives of the Victims authorized to participate in the proceedings wish to make a positive contribution to – and thereby endeavour to enrich – the complex and sensitive deliberations undertaken by the Chamber and all parties on the modalities of victim participation in this trial. In so doing, the Legal Representatives remain mindful of the need to ensure that victims’ interests are taken into account, whilst safeguarding the rights of the accused, the Prosecution’s prerogatives and the fairness of the proceeding, as well as contributing to the determination of the truth.

2. It has become apparent to the Legal Representatives that their various interventions in court in recent days have risked losing the focus of both their requests and the reasons for them.

3. Accordingly, out of a desire to avoid being responsible for an unfortunate semblance of having cultivated a certain amount of disorder, the Legal Representatives feel that to present their thoughts and requests in the form of observations would enable both the Chamber and the other parties to receive full and “tighter” information conducive to both fair and adversarial hearings and to the consideration and drafting of the forthcoming decision.

II. PROCEDURAL HISTORY

4. On 5 February 2009, pursuant to an order of the Chamber,¹ the Legal Representatives of the Victims respectively submitted observations responding to a series of specific submissions from the Defence for Mathieu Ngudjolo Chui on the modalities of victim participation at the trial stage.²

¹ *Order Instructing the Participants and the Registry to File Additional Documents*, ICC-01/04-01/07-788-tENG, 10-12-2008.

² “Response to the Defence Application ‘for a determination on the modalities of victim participation at the trial stage’”, ICC-01/04-01/07-874-tENG; “Response of the Legal Representatives of Victims a/0333/07 and a/0110/08 to the ‘*Requête en vue de fixer les modalités de participation des victimes au stade du* No. **ICC-01/04-01-07**”

5. Moreover on 6 November 2009, in accordance with the oral decision of the Chamber,³ the Legal Representatives of the Victims filed observations confined to the issue of the modalities for the examination of the witnesses, pursuant to rule 140 of the Rules of Procedure and Evidence of the Court (hereinafter “the Rules”).

6. By decision of 20 November 2009, the Chamber adopted directions for the conduct of the proceedings and examination, pursuant to article 64(8)(b) of the Statute and rule 140 of the Rules, defining, *inter alia*, the modalities for questioning witnesses by the Victims’ representatives.⁴

7. On 27 November, the Chamber further issued an oral decision on Mr Ngudjolo Chui’s aforementioned application.⁵ It stated that it had dealt with a number of issues in its aforementioned decision of 20 November 2009 and further ordered “the parties to disclose to the legal representatives of victims the documents that they intend to use during the examination-in-chief of the witnesses”. In particular, it ordered “the parties to make accessible to the legal representatives of victims, via the Ringtail system, all the documents which are mentioned in the list which is mentioned in paragraph 103 of the decision of 20 November 2009 and at the same time as the list that -- at the same time this list is disclosed.”⁶ The grounds for this decision have yet to be filed.

8. By oral decision of 1 December 2009, and after noting the agreement of all parties to the request of the Legal Representatives, the Chamber granted the latter access to the table of incriminating evidence entitled “Table of Incriminating Evidence and

procès’ of the Defence for M. Ngudjolo and to the ‘Defence Observations regarding victims’ participation and scope thereof’ of the Defence for G. Katanga”, ICC-01/04-01/07-873-tENG.

³ Transcript of the hearing, ICC-01/04-01/07-T-76-CONF-ENG, p. 26 lines 23-25, p. 27 lines 1-8.

⁴ *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, ICC-01/04-01/07-1665.

⁵ Transcript of hearing, ICC-01/04-01/07-T-86-CONF-ENG, pp. 1-2

⁶ *Ibidem*.

Amended List of Evidence”, as amended, and which had been filed on 16 November 2009.⁷

9. It would appear, however, that a certain number of issues relating to the effective participation of victims at trial, as set out in article 68(3) of the Statute, have yet to be addressed by the Chamber.

10. Thus, as stated by the Legal Representatives at the hearings of 27 and 30 November 2009, at issue are the disclosure to victims with leave to participate in the trial of those matters in relation to which there is agreement between parties, as referred to in rule 69 of the Rules, access to incriminating evidence and the participation of the Legal Representatives in the witness familiarisation process.

11. The present observations address each of these issues.

III. SUBMISSIONS

A. Access to incriminating evidence and evidence in relation to which the parties have reached agreement

12. Analysis reveals that the “[TRANSLATION] evidence” and “[TRANSLATION] evidence in relation to which there is agreement between parties as regards the facts” unquestionably constitute further information both in relation to the charges against the accused persons and the trial itself in terms of how it must be conducted before the Chamber.

13. To ensure that the participation of victims admitted to the proceedings is effective in accordance with article 68(3) of the Statute, it is necessary for the victims’ representatives to have a full understanding of the Prosecutor’s case so as to be able to follow properly all the hearings and participate therein, to the extent that they are entitled to do so, in order to effectively represent the victims’ interests.

⁷ Transcript of hearing, ICC-01/04-01/07-T-88-CONF-ENG, p. 2.

14. In this case, experience gained since the start of the trial confirms that this necessary understanding of the Prosecutor's case cannot be achieved without granting access to incriminating evidence and the aforementioned documents.

15. In the absence of access to the aforementioned evidence and information, the situation would not only be prejudicial to the victims' interests but above all would also undermine the fairness of the trial and the right of the accused persons to be tried within a reasonable time.

16. As a result of not having of access to certain information, the victims' representatives will inevitably have to put questions and raise issues which will prove unnecessary.

17. Time will undoubtedly be wasted as a direct result of the hearings that will be necessary to enable the Legal Representatives to understand the reasons for refusing the questions they wished to put and for addressing the issues they wished to highlight.

18. Moreover, this situation will necessarily also entail a waste of everyone's energy and a valiant but utterly pointless effort on the part of the Legal Representatives who, in the belief that they were acting properly, will have worked in vain.

19. Accordingly, 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.

20. To refuse to grant the requested access would *de facto* and *de jure* amount to leaving the Legal Representatives to participate blindly in the trial.

21. Moreover, access to such documents will enable the Legal Representatives of the Victims to be able to better anticipate the questions they wish to put to the witnesses called to testify.

22. It should be noted that solely disclosing the list of documents and the documents themselves that the parties intend to use during the examination of the witnesses (pursuant to the aforementioned oral decision of the Chamber of 27 November 2009) is unlikely to overcome the aforementioned difficulties.

23. In fact, the parties are under the obligation to disclose only the documents they intend to use at hearings.

24. Moreover, these same parties may disclose them only 3 days before the examination of the witness, a situation which, in practice, will necessarily obstruct or even limit thorough scrutiny of the evidence tendered.

25. Moreover, as they have not objected to the disclosure of the table of incriminating evidence, it would be logical for both the Prosecution and the Defence, on the same grounds, not to object to the disclosure of the incriminating evidence and also the matters in relation to which they reached agreement.

26. Such disclosure can only be beneficial to a fair and impartial trial, the rights of the accused, particularly the right to be tried within a reasonable time, whilst safeguarding the victims' interests.

27. The Chamber will note that, out of a desire to avoid any risk of intervention in the process of discussion and negotiation between the parties to the trial, the Legal Representatives do not intend to seek disclosure of that evidence in relation to which

there is agreement and which is the subject of ongoing discussion between the parties.⁸

28. The Legal Representatives note that at the hearing of 30 November 2009, the Chamber recalled that: “[TRANSLATION] the victims are not mere spectators: we are all aware that under the Statute, victims have a place in proceedings at the International Criminal Court. Versed in the law as we are, there is no question of our doing away with the provisions of the Statute and the Rules of Procedure and Evidence. It is necessary to breathe life into them intelligently in a manner which adheres to the balance we referred to earlier and which is not prejudicial to the Defence.”⁹

29. The present request is consistent with this approach.

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

30. In its decision of 30 November 2007 in the *Lubanga* case, Trial Chamber I, defined the goal of the witness familiarisation process as follows:

- a. Assisting the witness to understand fully the Court's proceedings, its participants and their respective roles;
- b. Reassuring witnesses about their role in proceedings before the Court;
- c. Ensuring that witnesses clearly understand that they are under a strict legal obligation to tell the truth when testifying;
- d. Explaining to the witnesses the process of examination;
- e. Discussing matters relating to the security and safety of witnesses in order to determine the necessity of applications for protective measures;
- f. Providing witnesses with an opportunity to acquaint themselves with the people who may examine them in court;
- g. "Walking witnesses through" the courtroom and its procedure prior to the day of their testimony in order to acquaint them with the layout of the court, and particularly where the various participants will be seated; and the technology that will be used in order to minimise any confusion or intimidation.¹⁰

⁸ See the document entitled “Prosecution’s Observations on Agreements as to Evidence”, 6 November 2009, ICC-01/04-01/07-1609.

⁹ pp. 52-53.

¹⁰ *Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial*, 30 November 2007, ICC-01/04-01/06-1049, para. 53.

31. It is apparent from this description of the goal of the witness familiarisation process that the Legal Representatives of those victims with authorisation to participate in the proceedings clearly have their place in this process (points (f) and (g) leave no doubt as to this). Moreover, this is essential to the very purpose and proper understanding of the process, the proceedings and the environment in which they are conducted.

32. Moreover, this is the reason why Trial Chamber I explicitly recognised the Legal Representatives' right to be present during the familiarisation process even where such participation is governed by specific rules.¹¹

33. To date, in the instant case, officials from the Victims and Witnesses Unit have not allowed the Legal Representatives to participate in the familiarisation process of Witness 233, preferring to wait for the Chamber to first define the modalities of such participation.

Yet, it would seem essential to the proper conduct of the proceedings for the Legal Representatives to be able to participate in the familiarisation process of every witness in view of what this actual process is (namely both the *raison d'être* of the proceedings and the means used for them to take place).

FOR THESE REASONS,

MAY IT PLEASE THE TRIAL CHAMBER

1. **TO ORDER** that the actual incriminating evidence as well as the details of evidence in relation to which there is agreement between the parties, including the matters in relation to which the parties concur that there is disagreement, be

¹¹ *Decision regarding the Protocol on the practices to be used to prepare witnesses for trial*, 23 May 2008, ICC-01/04-01/06-1351, para. 39.

disclosed to the Legal Representatives of the Victims or, where appropriate, be made available to them via the e-Court system.

2. **TO ALLOW** the Legal Representatives to participate in the witness familiarisation process.

[signed] [signed]
Mr Fidel Nsita Luvengika Mr Jean-Louis Gilissen

On behalf of the Legal Representatives of the Victims

Dated this 2 December 2009

At The Hague, the Netherlands