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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***

Public Document

Defence Observations on the Complementary Documents concerning a/0390/09

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

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Legal Representatives of Victims

Mr Jean-Louis Gilissen
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Legal Representatives of Applicants

Procedural History

1. The Application of a/0390/09 as victim participant was notified to the Defence for Mr Germain Katanga (“Defence”) on 15 June 2009.¹ Both the Defence for Mr Katanga and the Defence for Mr Ngudjolo objected to the status of victim being granted to a/0390/09.²
2. On 31 July 2009, Trial Chamber II issued the *Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*,³ by which it ordered the Registry to contact the representative of a/0390/09 to obtain more specific information regarding his participation in the attack on Bogoro and any information permitting to establish his degree of invalidity, and in case of non-invalidity, any document regarding his consent given to the person who introduced the application.
3. On 29 September 2009, Mr. Gilissen, legal representative, requested leave to discontinue representing a/0390/09, who introduced his request of participation through an intermediary who Mr. Gilissen could not reach.⁴
4. On 23 October 2009, the Trial Chamber invited Mr. Gilissen to keep it informed of the steps taken by the Registry to help him to contact a/0390/09.⁵
5. On 28 October 2009, the Trial Chamber recalled that a/0390/09 did not submit the complementary documents requested by the Chamber, and ordered the Registry to contact his representative to obtain information regarding the exact date of the attack on Bogoro that he mentions, and any document in relation to his consent given to the person who introduced the application.⁶

¹ ICC-01/04-01/07-1208-Conf + Annexes 1-74, Transmission de 74 demandes de participation de victimes expurgées.

² ICC-01/04-01/07-1245-Conf, Defence Observations on the applications for participation as victims notified in June 2009; ICC-01/04-01/07-1241-Conf-Exp, Observations consolidées de la Défense de Mathieu Ngudjolo relatives aux demandes de participation de victimes candidates au statut de participants à la procédure reçues pendant la période allant du 15 au 19 juin 2009 (Règle 89-1 du Règlement de procédure et de preuve).

³ ICC-01/04-01/07-1347 + Corrigendum.

⁴ ICC-01/04-01/07-1502-Conf, Demande de retrait du représentant légal des victimes 0333/07, 0110/08, 0111/08, 0112/08, 0114/08, 0136/08, 0314/09, 0315/09, 0316/09, 0363/09, 0390/09 de son mandat de représentation des victimes A/0114/08, a/0363/09 et A/0390/09.

⁵ 1554-Conf, Décision relative à la demande introduite par Me Jean-Louis Gilissen aux fins du retrait de son mandat de représentation légale des demandeurs A/0114/08, a/0363/09 et A/0390/09.

⁶ ICC-01/04-01/07-1567, Décision invitant le Procureur et la Défense à présenter leurs observations sur certaines demandes de participation de victimes (règle 89-1 du Règlement de procédure et de preuve).

6. On 23 November 2009⁷ and on 22 December 2009⁸, the Trial Chamber reiterated these requests.
7. On 20 January 2010, the representative of a/0390/09 requested a new deadline of 26 January 2010 to file additional information on a/0390/09.⁹
8. On 16 February 2010¹⁰ and on 27 May 2010¹¹, the Trial Chamber ordered anew the Registry to contact the representative of a/0390/09 to obtain the complementary information already requested in its Decisions of 23 November 2009 and 22 December 2009.
9. On 26 May 2010, the Trial Chamber ordered the Registry to disclose a redacted version of the complementary documents provided by a/0390/09, and asked the Prosecution and the Defence to file their observations by 4 June 2010.¹²
10. On 27 May 2010, the Defence was notified of a redacted version of the complementary documents provided by a/0390/09.¹³
11. The Defence hereby submits the following observations. The Defence files these observations confidentially because it refers to confidential filings from the victim counsel in respect of the representation of a/0390/09. The Defence has no objection to the current filing being reclassified public.

Submissions

12. The Defence notes that the complementary information given does not relate only to the date of the attack and to the applicant's consent that his application be introduced by another person, the sole information sought by the Trial Chamber. Instead, the new information provided goes further than what was in fact requested, and is both highly

⁷ ICC-01/04-01/07-1669, Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure.

⁸ ICC-01/04-01/07-1737, Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure.

⁹ ICC-01/04-01/07-1775, Requête du représentant légal des demandeurs A/0114/08 et A/0390/09 visant à informer la Chambre de la survenance d'un élément nouveau et postulant l'obtention exceptionnelle d'un délai permettant la collecte d'informations concernant la situation des victimes.

¹⁰ ICC-01/04-01/07-1876, Décision invitant le Procureur et la Défense à présenter leurs observations sur certaines demandes de participation de victimes (règle 89-1 du Règlement de procédure et de preuve).

¹¹ ICC-01/04-01/07-1967, Motifs de la troisième décision relative à 8 demandes de participation de victimes à la procédure.

¹² ICC-01/04-01/07-2134, Décision invitant le Procureur et la Défense à présenter leurs observations sur une demande de participation de victime (règle 89-1 du Règlement de procédure et de preuve).

¹³ ICC-01/04-01/07-2139, Transmission des documents supplémentaires expurgés concernant la demande A/0390/09.

incriminating and prejudicial for the Defence. Victim counsel produces a detailed signed statement of a/0390/09, who is now over 18 years of age. The Defence submits that the production of complementary information should not be the occasion for a victims' representative to produce a detailed incriminating statement that may lead to some *préjugés* in the minds of the judges. It is not the appropriate stage to submit such detailed information.

13. An application to participate as victim had a limited goal: to assess whether an applicant can claim to be a victim and thus be represented in a case before the ICC, in order to obtain reparations. It is not the appropriate stage or form to disclose what essentially amounts to incriminating statements of alleged victims. If a representative envisages calling a victim as a witness, the Defence considers that the said representative has the duty to disclose his statement to the parties, but not to the Chamber, unless it files a formal application to call a victim as a witness. In any event, the Defence has previously submitted that the victims' representatives cannot call victims as witnesses on incriminating matters once the trial has started if they have not notified the Defence before the start of the trial.¹⁴

14. The Defence strongly contests the recent victims' representatives submission, in the *Observations conjointes des représentants légaux des victimes sur l'appel de la Défense contre la décision du 22 janvier 2010 relative aux modalités de participation des victimes au stade des débats sur le fond*, that:

‘33. Enfin, le premier motif d’appel de la Défense n’est pas non plus fondé en fait. La Défense dispose en effet déjà de toutes les déclarations des victimes actuellement représentées puisque toutes les demandes de participation des victimes lui ont été communiquées (et pour certaines qui étaient déjà disponibles, avant le début du procès) et que les représentants légaux n’ont d’autres déclarations à leur disposition. Les défenses ont donc déjà à leur disposition des informations concernant des éléments de preuve potentiels que pourraient présenter les représentants légaux.’¹⁵

An application form is not a witness statement or a piece of evidence, will never be a piece of evidence, does not have this purpose, and should not be completed with this purpose.

¹⁴ 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, paras 7-22.

¹⁵ ICC-01/04-01/07-2142, 28 May 2010.

15. In addition, the Defence submits that the complementary information was given too late. The original application of a/0390/09 was notified to the Defence on 15 June 2009 and the complementary information was disclosed to the Defence only on 27 May 2010; that is, approximately one year later. While communication may be difficult in the DRC, it does not justify such a delay in providing complementary information, and certainly not information that is so highly prejudicial.
16. The Defence maintains that there should be a time limit in providing complementary information, for instance three months, after which the application should be found inadmissible. Otherwise, it leads to a waste of the resources of the Chamber, the Registry and the Defence: the Chamber having to reiterate several times its request for information, the Registry having to liaise with the representatives about the applicant, and the Defence having to try to keep on eye on what is happening for each applicant – around 450 so far.
17. The Trial Chamber itself issued a deadline to receive new and/or completed application forms, by 20 April 2009, in its *Décision relative au traitement des demandes de participation* notified on 27 February 2009:

‘INFORME le Greffe et les participants que toute nouvelle demande de participation à la procédure ainsi que toute demande de participation dûment complétée devra être adressée à la Section de la participation le 20 avril 2009 au plus tard ;

ORDONNE à la Section de la participation de lui transmettre le 4 mai 2009 au plus tard toutes les nouvelles demandes de participation.’¹⁶
18. It cannot be expected that any applicant could come back at any time with new information to complete his/her application, especially when the new information is highly prejudicial and was not even requested. Moreover, the victims exchange their views on the field and it is possible that a piece of information such as the date of the attack was unknown by the applicant at the time of its original application, and that he/she learnt it only thereafter, having contacted other persons to obtain the ‘right’ information to complete his application.
19. The Defence contends that these delays not only slow down the proceedings – an original application being the object of numerous posterior filings, as illustrated above

¹⁶ ICC-01/04/01/07-933.

in the procedural history -, but also, can raise questions regarding the weight and/or credibility of the new information provided.

20. Therefore, the Defence submits that the application of a/0390/09 should be dismissed because the complementary information was given too late and in an inappropriate form.

21. In the alternative, the Defence submits that the signed statement provided by victim counsel, should not be admitted as forming part of the application. Instead, victim counsel should be requested to fulfill the complementary form¹⁷ with the relevant information only (the date of the attack and age of the applicant, who is now an adult), as specifically requested by the Chamber. This information alone is sufficient for the Chamber to assess whether a/0390/10 should be granted the status of a victim.

Respectfully submitted,



David HOOPER Q.C.

Dated this 4 June 2010

At The Hague

¹⁷ ICC-01/04-01/07-2139-Conf-Exp-Anx, page 2.