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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

Defence Response to the *Requête aux fins d'obtention d'une déclaration d'une victime participante recueillie par la Défense de Germain Katanga*

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 Participation and Reparations
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Other

Introduction

1. On the 24th September 2010 the legal representative common to the principal group of victims (hereinafter “legal representative”) filed its ‘*Requête aux fins d’obtention d’une déclaration d’une victime participante recueillie par la Défence de Germain Katanga*’, notified on 27th September 2010.¹ This application was filed in reaction to a request from the Chamber the day before to provide certain clarifications in writing on the need for information from the Defence for Germain Katanga (hereinafter “the Defence”) and the capacity to satisfy the legal representative’s concerns through interviewing the victim himself (see below).² The legal representative seeks an order of disclosure on the Defence.

2. By seeking an order for the disclosure of this statement, the legal representative jumps the Chamber’s invitation to approach the Katanga Defence team before seizing the Chamber. He does this simultaneously with the filing of the application. More significantly, he touches upon an issue which is *sub judice*, that is whether there is an obligation to disclose statements taken from participating victims, which has been argued in a motion to adopt a protocol relative to contacts with victims,³ a response to this⁴ and an unauthorized reply,⁵ and is therefore pending imminent decision. The Defence will therefore not repeat all but only highlight certain arguments as set out in its response to the legal representative’s motion to adopt a Protocol.

3. The Defence opposes this application for reasons set out below. It emphasizes that it has the utmost respect and compassion for the victims of the conflict in the Democratic Republic of Congo, and understands the importance of giving proper meaning to the concept of participation of victims in the proceedings. However, it maintains that under no circumstances should a misguided belief in the sanctity of the lawyer-client relationship pertaining between the legal representative and participating victims be used as a premise for undermining the fairness of the trial of the accused.

¹ ICC-01/04-01/07-2416.

² ICC-01/04-01/07-T-191-CONF-ENG ET 23-09-2010.

³ Cf. ICC-01/04-01/07-2202 and its Annexes, Dépôt d’un projet de Protocole relatif aux modalités de contact entre des victimes représentées et les parties, dated 17 June 2010, notified on 18 June 2010.

⁴ ICC-01/04-01/07-2251, Defence Response to the Dépôt d’un projet de Protocole relatif aux modalités de contact entre des victimes représentées et les parties (ICC-01/04-01/07-2202), dated 8 July 2010, notified on 9 July 2010.

⁵ ICC-01/04-01/07-2279, Réponse des représentants légaux des victimes aux observations des parties sur le projet de protocole relatif aux modalités de contacts avec les victimes représentées (ICC-04-01/07-2202-Anx1), dated 13 July 2010, notified on 15 July 2010.

Procedural history

4. This issue first came to the fore on 29th March 2010, when the Defence cross-examined Witness 159 on the basis of information which it had obtained from a person subsequently revealed by the legal representative to be victim a/0010/09.⁶
5. On the 10th May 2010, the Chamber invited the legal representative to approach the victim to obtain any written statement which he may have given. The Chamber indicated that in the event of the legal representative not obtaining a copy from the victim, he could contact the Defence with a view to requesting a copy of the statement.⁷
6. On the 14th May 2010, the counsel for Katanga requested clarification of the Chamber's ruling of 10th May 2010. The Chamber made it clear that it was not addressing the issue of whether there was an obligation of disclosure, but simply suggesting that any statement could be provided as a matter of courtesy between counsel.⁸
7. On the 17th June 2010, a motion was filed by both legal representatives of victims jointly requesting the adoption of a draft Protocol for contact by the Defence with victims.⁹ This process was essentially initiated because of the concerns raised by the legal representatives with respect to the fact that the Defence had been in communication with a participating victim, indeed the participating victim which is the subject of the legal representative's current application.
8. The Defence for the Mr Ngudjolo, the second accused, filed its response to that motion on 8 July 2010,¹⁰ and the Defence for Mr Katanga filed its response the following day on the 9th July 2010.¹¹ Without first obtaining the authorization of the Chamber in terms of Regulation 24(5) of the Regulations of the Court, the legal

⁶ ICC-01/04-01/07-T-125-CONF-ENG CT 29-03-2010, inter alia, page 20.

⁷ ICC-01/04-01/07-T-138-CONF-ENG ET 10-05-2010, page 9.

⁸ ICC-01/04-01/07-T-141-CONF-ENG ET 14-05-2010, page 6.

⁹ ICC-01/04-01/07-2202 and Annexes.

¹⁰ ICC-01/04-01/07-2245, Observations de la Défense de Mathieu Ngudjolo sur l'écriture ICC-01/04-01/07-2202 des Représentants légaux des victimes intitulée « *Dépôt d'un projet de protocole relatif aux modalités de contact entre des victimes représentées et les parties.* », dated 7 July 2010, notified on 8 July 2010.

¹¹ ICC-01/04-01/07-2251.

representatives then filed a reply which it described as '*Réponse des représentants légaux des victimes aux observations des parties sur le projet de protocole relatif aux modalités de contacts avec les victimes représentées*'.¹² Moreover, this document does not demonstrate a proper basis for replying since it does not reveal any reasonably unanticipated issues raised by the Defence. This was filed on 13 July 2010, the last day before the judicial recess. On the same day counsel for the Defence raised the iniquity created by this move.

9. On 23 September 2010,¹³ over four months after being invited to approach the victim, the legal representative informed the Chamber that he was unable to obtain a copy of a statement from the victim a/0010/9. He requested the Chamber to order the Defence to disclose 'the statement' of the victim to him. The Chamber indicated that if the legal representative could not obtain a copy of a statement from the victim, then he should consider whether he really requires it and if he could not get what he wants from the victim himself.

10. The Chamber requested the legal representative to make a written filing by the following day the 24th September 2010, clarifying whether he really needed the results of the Defence investigations and whether he would not obtain what he wanted by interviewing the victim himself. The Defence is not sure that the Chamber anticipated by that a motion for disclosure as such. On the 24th September 2010, the legal representative filed his current application, notified on 27th September 2010.

Application of legal principles

11. In the Defence response to the protocol motion, the Defence relied, *inter alia*, on the fundamental right of the accused as enshrined in Article 67(e) of the Statute to examine witnesses under the same conditions as those witnesses against him.

12. The Appeals Chamber has held that the legal representatives have no general obligation to disclose exculpatory evidence.¹⁴ This finding is based on the absence of

¹² ICC-01/04-01/07-2279.

¹³ ICC-01/04-01/07-T-191-CONF-ENG ET 23-09-2010.

¹⁴ 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", 16 July 2010.

any provision in the Statute requiring such disclosure. The legal representative relies on this ruling as a basis for not disclosing to the Defence information it has obtained from victims he represents which may be of an exculpatory nature, information that he disclosed to the Prosecution and which led the Prosecution to interview two victims represented by him. The Defence has requested the legal representative in open court, on 7 September 2010, to disclose the nature of exculpatory evidence obtained from two victims. The legal representative invited the Defence to refer to the prosecution for the results of its investigations while refusing to disclose the results of its own interviews with its clients. The legal representative for child soldiers strongly protested to this request and suggested that the Defence was ignoring the Appeals Chamber ruling. The Defence has only been accorded the possibility of obtaining the two statements taken by the prosecution, but not the results of interviews conducted with the two victims by the legal representative. The legal representative for child soldiers even suggested that it was none of the business of the Defence.¹⁵

13. One of the two victims which forms the basis of the source of exculpatory evidence is the very same victim in relation to which the legal representative is attempting to force information from the Defence: that is a/0010/09. So while refusing to directly provide the results of any interviews which he has conducted with this victim, he seeks an order that the Defence provide the results of its own interview with this same victim to him.
14. In the same way that there is no provision requiring the disclosure of exculpatory evidence by legal representatives to accused, there is also no provision requiring disclosure the results of investigations, whether incriminating or exculpatory by that accused to a legal representative. The Defence obligations are contained in Rules 78 and 79 of the Rules, and are confined to a limited form of disclosure to the Prosecutor, and only once the Defence has decided to use such material at trial.
15. The legal representative claims that having disclosure is a necessary prerequisite to its decision to call the victim in criminal proceedings against the accused. The Defence may call the victim in question to give evidence, but has not yet made a decision in this regard. So on the basis that the legal representatives should not be placed in a more advantageous position than the accused with respect to the examination of

¹⁵ Cf. ICC-01/04-01/07-T-184-CONF-ENG CT 07-09-2010.

witnesses, it is submitted that the obligation sought cannot be reasonably imposed upon the Defence, especially in light of the fact that the legal representative refuses to provide any statement or information which he has taken from the same victim, even where of an exculpatory nature.

Claim that a decision whether to call the victim depends upon disclosure

16. There are several factors which undermine the claim of the legal representative that disclosure is necessitated to make a decision on whether to call the witness. First, the legal representative has not disclosed to the Chamber that the victim in question, a/0010/09, mentioned during the cross-examination of Witness 159, is the same victim as one of the two witnesses recently interviewed by the Prosecutor, following the disclosure of exculpatory information by the legal representative to the Prosecution. It follows that the legal representative has been less than forthcoming as to the extent of the information he was able to obtain from the victim, since he has a full statement from a/0010/09 taken by the Prosecution in the presence of a member of his team.¹⁶
17. Second, the legal representative only informed the Chamber of the necessity of having disclosure of the results of the Defence interview on 23 September 2010 to decide whether to call victim a/0010/09, while the initial deadline to file an application to call victims as witnesses was the 15th September 2010. Yet the victims' representatives have known of their right to call evidence since at least July 2008, the date of the first Appeals Chamber decision on this issue, and have known of the Defence contact with the victim a/0010/09 since the end of March of this year.
18. Third, the victim appears to be cooperating with the legal representative, so there is no reason to believe that the legal representative cannot obtain all the information about events in 2003 from the victim regardless of whether he remembers what he told the Defence.

¹⁶ Signed statement DRC-OTP-1058-0030 taken on 16 September 2010, disclosed to the Defence on 24 September 2010 by the Prosecution, pursuant to Article 67-2 of the Rome Statute.

The allegation of improper behaviour leveled against the Defence resource person

19. In the absence of reliable and convincing proof to the contrary, or a determination by the Chamber, the Defence stands by the integrity of its person of resource and refutes the unsubstantiated allegations against him. These allegations consist of suggesting that the victim was interviewed without knowing who he was talking to, and did not have the opportunity to review what he had said.
20. It is questionable for the legal representative to adopt and accept without question these unproven allegations in a publicly filed motion. If he has such unwavering confidence in the word of the victim, and such certainty in the lack of integrity and professionalism of the Defence team members, surely he has absolutely no need to know what the witness said to the Defence in order to decide to call the witness.
21. The Defence has its own concerns. It is troubled by the fact that the legal representative appears unwilling to accept the completely reasonable principle that while the legal representative 'should provide his or her client with all appropriate legal advice where sought', that 'under no circumstances should this lead to an attempt to obstruct the administration of justice, or interfere with or undermine the Defence investigations or Defence case'. It is apparently their view that they are completely unfettered in the nature of the advice which they can offer to their clients. In this instance, the Defence notes a change in attitude of the victim towards cooperation with the Defence.
22. The legal representative requests the Chamber to take unsubstantiated allegations into account in its decision in relation to the Protocol. However, the Protocol is designed to set out principles which are not dependant on any particular incident. The Defence entirely accepts that any witness should be informed of the identity of the individual who is interviewing them and that he or she should have the opportunity to read or have read to them the contents of any document which they are asked to sign, in the event that a signed statement is taken. In the Defence submission, the principles settled upon should take into account fair procedure with respect to interviewing victims, but equally, fair procedures to ensure that there is little room for unreasonable interference in the preparation and presentation of the defence case.

ACCORDINGLY, the Defence opposes the legal representative's application, awaits the decision of the Chamber on the principles applicable to contact with victims, which incorporates a determination on the very issue at hand.

The Defence further takes this opportunity to request that the legal representative's unauthorized reply to the Defence responses to its motion for the adoption of a Protocol be disregarded because of the failure to comply with Regulation 24(5) of the Regulations of the Court.

Respectfully submitted,



David HOOPER Q.C.

Dated this 1st October 2010

At London