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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 THE CONGO

IN THE CASE OF

THE PROSECUTOR *v.* GERMAIN KATANGA *and* MATHIEU NGUDJOLO CHUI

Public Document

**Decision on the “Defence Application for Leave to Appeal the Trial Chamber’s
*Décision relative aux modalités de participation des victimes au stade des débats sur
le fond*”**

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

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Mr Fidel Nsita Luvengika
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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Other

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to article 82(1)(d) of the Rome Statute of the International Criminal Court ("Statute"), issues the following decision on the "Defence Request for Leave to Appeal the *Décision relative aux modalités de participation des victimes au stade des débats sur le fond* (ICC-01/04-01/07-1788)", filed on 1 February 2010 ("Application")¹.

I. BACKGROUND

1. On 20 November and 1 December 2009, the Presiding Judge issued the "Directions for the conduct of the proceedings and testimony in accordance with Rule 140" ("Decision on Rule 140").²
2. On 22 January 2010, the Chamber rendered the decision on the modalities of victim participation at trial ("impugned decision").³
3. On 1 February 2010, the Defence for Germain Katanga ("Defence") filed its Application, seeking leave to appeal the impugned decision, pursuant to article 82(1)(d) of the Statute and Rule 155 of the Rules of Procedure and Evidence ("Rules").
4. On 4 February 2010, the Legal Representatives of Victims filed a joint response to the Application ("Joint Response").⁴

¹ ICC-01/04-01/07-1815.

² ICC-01/04-01/07-1665 ; ICC-01/04-01/07-1665-Corr.

³ *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*, 22 January 2010, ICC-01/04-01/07-1788.

⁴ Legal Representatives of Victims, *Réponse conjointe des Représentants légaux des victimes à la demande de la Défense de Germain Katanga d'être autorisée à interjeter appel de la décision de la Chambre relative aux modalités de participation des victimes*, 4 February 2010, ICC-01/04-01/07-1841.

5. On 15 February 2010 the Defence filed a request for leave to reply to the Joint Response.⁵ On the same day, before leave was granted, the Defence filed the reply ("Reply").⁶ By an oral decision of 18 February 2010, the Chamber granted leave to reply and, on exceptional basis, accepted the Reply despite it being filed without leave from the Chamber.⁷

II. SUBMISSIONS OF THE PARTIES AND PARTICIPANTS

A. Defence Application

6. In its Application, the Defence identifies the following five grounds of appeal as issues within the meaning of article 82(1)(d) of the Statute:

1. The Trial Chamber erred in its finding that the Legal Representatives of Victims may question witnesses, experts and the accused in a manner which can "clarify or complete the elements of proof already provided by the witness";⁸
2. The Trial Chamber erred in deciding that the Legal Representatives of Victims may present evidence and call victims to testify on the crimes against the accused, in a manner which includes incriminating evidence and testimony;⁹

⁵ Defence of Germain Katanga, Defence Request for Leave to Reply to *Réponse conjointe des Représentants légaux des victimes à la demande de la Défense de Germain Katanga d'être autorisée à interjeter appel de la décision de la Chambre relative aux modalités de participation des victimes*, 15 February 2010, ICC-01/04-01/07-1870.

⁶ Defence of Germain Katanga, Defence Reply to *Réponse conjointe des Représentants légaux des victimes à la demande de la Défense de Germain Katanga d'être autorisée à interjeter appel de la décision de la Chambre relative aux modalités de participation des victimes*, 15 February 2010, ICC-01/04-01/07-1873.

⁷ ICC-01/04-01/07-T-104-CONF-ENG ET 18-02-2010, p. 6-7.

⁸ Application, par. 1-5, making reference to par. 78 of the impugned decision.

⁹ Ibid., par. 6-8, making reference to par. 81-93 and 98-101 of the impugned decision. In particular, the Defence argues that if there is to be a fair trial, the Defence is entitled to the statements of such witnesses before the commencement of the trial so that their testimony may be taken into account in the cross-examination of Prosecution witnesses. Application, par. 8.

3. The Trial Chamber erred in suggesting that the Legal Representatives of Victims might call witnesses on matters including the role of the accused in crimes charged against them;¹⁰
 4. The Trial Chamber erred in its finding that nothing justifies a general obligation to communicate to the parties every element in the Legal Representatives of Victims's possession, whether incriminating or exculpatory;¹¹
 5. The Trial Chamber erred in its finding that the Legal Representatives of Victims may, with authorisation of the Chamber, give their observations on the relevance or admissibility of items of evidence, without distinguishing between the position where they are mounting a challenge to admissibility or relevance as opposed to supporting a prosecution application to admit evidence.¹²
7. The Defence argues that the criteria set out in Article 82(1)(d) of the Statute are met in the present situation. It is submitted that the impugned decision directly impacts on the fairness of the proceedings. It is alleged that this question urgently needs clarification to allow the trial to proceed in a fair and expeditious manner, and to avoid reviewing the basic premises of victims' participation during the proceedings each time a specific request for participation is made.¹³
8. It is further submitted that some of the proposed grounds of appeal (in particular, the first and the fourth ones) address "two entirely new aspects, not previously directly addressed before the Appeals Chamber" in the *Lubanga* case.¹⁴ Moreover, it is contended that matters which were previously discussed before the

¹⁰ Ibid., par. 9-10, making reference to par. 86 of the impugned decision.

¹¹ Ibid., par. 11-12, making reference to par. 105 and 106 of the impugned decision.

¹² Ibid., par. 13-14, making reference to par. 104 of the impugned decision.

¹³ Ibid., par. 16.

¹⁴ Ibid., par. 17.

Appeals Chamber are revised in the impugned decision from a different perspective, in light of the distinguishing features of this case.¹⁵

9. The Defence also submits that the guidelines of the Trial Chamber in the context of a case by case approach are of such a scope that these issues remain “live, imminent and likely to resurface frequently in the absence of authoritative resolution”.¹⁶ The fact that these issues have not been previously canvassed by the Appeals Chamber, and that there are likely to be multiple instances of victims’ applications over the coming months of trial, militates in favour of their early resolution to assist in the fairness and expeditiousness of the trial.¹⁷

10. According to the Defence, it follows from the above reasons that the resolution of these issues can materially advance the proceedings by ensuring that the parties and participants share a clear understanding of the scope of lawful participation by the victims.¹⁸

11. Finally, the Defence submits that the outcome of trial is affected because, if these matters were left to the end of the trial and the Defence submissions proved correct before the Appeals Chamber, the Defence would have compelling grounds for a re-trial.¹⁹

¹⁵ Ibid., par. 18.

¹⁶ Ibid., par. 20.

¹⁷ Ibidem.

¹⁸ Ibid., par. 21.

¹⁹ Ibid., par. 22.

B. Joint response of the Legal Representatives of Victims

12. In their response, the Legal Representatives of Victims submit that the Chamber should reject the Application with regard to the first three grounds of appeal identified by the Defence.²⁰

13. In particular, they claim that the first ground of appeal is inadmissible pursuant to Rule 155 of the Rules. It is submitted that the request for leave to appeal the decision to allow the legal representatives to ask questions to witnesses, experts, and the accused “on questions that have as their purpose to clarify or complement previous evidence given by the witness”²¹ is untimely.²² They argue that the matter had already been decided upon in the earlier Decision on Rule 140, which the Defence did not seek leave to appeal.²³

14. Furthermore, they contend that the first three grounds of appeal identified by the Defence do not meet the requirements of Article 82(1)(d) of the Statute, as the matters raised are not issues for which “an immediate resolution by the Appeals Chamber would materially advance the proceedings”.²⁴ Their main argument is that the Appeals Chamber has already decided upon those same issues and that the impugned decision does not go beyond the Appeals Chamber’s parameters.²⁵ With regard to the second ground of appeal, they claim that the issue is premature. The Legal Representatives of Victims in the present case have not yet expressed their intention to introduce evidence or to call victims to testify, and therefore the prejudice alleged by the Defence remains hypothetical.²⁶

²⁰ Joint response, par. 2.

²¹ Decision on Rule 140, par. 90.

²² Joint response, par. 3-10.

²³ *Ibid.*, par. 6-9.

²⁴ *Ibid.*, par. 11.

²⁵ *Ibid.*, par. 12-29, making reference to 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-01/04-01/06-1432 (“Judgement of 11 July 2008”), par. 102, 104.

²⁶ *Ibid.*, par. 22-25.

C. Defence Reply

15. In its Reply, the Defence submits that the fact that a previous decision of the Chamber could have been appealed is not a reason to deny a request for leave to appeal.²⁷ The Defence claims that “[l]ater decisions made in a more specific manner in response to specific requests or concrete situations cannot be without the possibility of appeal simply because they develop upon existing directions” and adds “[a] general direction may be fair on its face but may be applied, extended or developed unfairly in later decisions”.²⁸ In this respect, the Defence argues that the Decision on Rule 140 “on its face did not reveal any specific difficulty for the Defence in the way it was expressed” with regard to the first three grounds of appeal, and that the Defence cannot be criticized for deciding not to appeal that decision.²⁹ With regard to the first ground of appeal, the Defence submits that the expression “clarify or complete elements of proof” used in the impugned decision has a broader meaning than the more neutral expression, “clarify or complement”, used in the Decision on Rule 140. It is argued that the formula used in the impugned decision may be interpreted as allowing questions, the answers to which “give force to the evidence elicited by the prosecution, or alternatively fill in gaps in the prosecution case”.³⁰

²⁷ Reply, par. 3.

²⁸ Ibid., par. 3.

²⁹ Ibid., par. 5-8.

³⁰ Ibid., par. 6.

III. ANALYSIS AND CONCLUSION

16. In reaching its decision on the Defence's Application, the Trial Chamber has considered Article 82(1)(d) of the Statute and the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006.³¹ It has accordingly examined the issues raised in the Application in light of the following criteria:

- a) Whether the matter is an "appealable issue";
- b) Whether the issue at hand could significantly affect:
 - (i) The fair and expeditious conduct of the proceedings; or
 - (ii) The outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

17. The requirements set out in Article 82(1)(d) of the Statute are cumulative. The failure to fulfil one or more of them is fatal to an application for leave to appeal.³²

18. As the Chamber has previously stated³³, basing itself on the jurisprudence of the Appeals Chamber,³⁴ an issue is an identifiable subject or topic requiring a

³¹ ICC-01/04-168, par. 9-20.

³² See for example, Trial Chamber I, Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application to Lift the Stay of the Proceedings', 24 September 2008, ICC-01/04-01/06-1473, par. 22.

³³ See for example, Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", 1 May 2009, ICC-01/04-01/07-1088, par. 17.

³⁴ ICC-01/04-168, par. 9.

decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.³⁵

19. The Chamber recalls that where the arguments raised by a party relate to the merits of a substantive issue rather than to whether the matter meets the test for leave to appeal, the substantive arguments will not be addressed. Instead, a determination will be made solely as to whether the matter raised meets the test to grant leave to appeal.³⁶

20. The Chamber notes that the Defence, while defining the five issues of appeal, made a number of submissions challenging the merits of the impugned decision. As mentioned above, challenges to the merits of the impugned decision are not relevant to the Application for leave to appeal. The Chamber therefore, has not considered the substantive arguments, and instead solely focused on the submissions dealing with the criteria prescribed in Article 82(1)(d) of the Statute.

A. First issue of appeal

21. The first issue of appeal is whether it is possible for the Legal Representatives of Victims to ask questions to a witness, an expert, or an accused, which “clarify and complete elements of proof already provided by” that person, where such questioning goes to proof of the crimes charged or the acts and conduct of the accused.

22. First, the Chamber notes that there might be a level of confusion with regard to the exact wording of the impugned decision. In paragraph 90 of the Decision on Rule 140, which preceded the impugned decision and dealt with the same question

³⁵ Idem.

³⁶ See, for example, Trial Chamber I, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, par. 19.

as the first issue of appeal, the Chamber used the following wording: “In principle, questioning by Victims’ Legal Representatives should be limited to questions that have as their purpose *to clarify or complement* previous evidence given by the witness.” The italicised words were translated into “*tendant à clarifier ou compléter*” in the official French translation. The exact same formula was used in paragraph 78 of the authoritative French version of the impugned decision. However, the English translation used the words “to clarify or supplement”. Since the words used in the French version of the impugned decision are identical to those used in the official translation of the Decision on Rule 140, it is clear that the Chamber did not have the intention of changing its instructions with regard to the scope of questioning by Victims’ Legal Representatives from one decision to another. Both decisions may therefore be regarded as identical on this point.

23. Further, the Chamber notes that by stating that questioning by Victims’ Legal Representatives must essentially relate to points to clarify or complement previous evidence, the Chamber did not specify the matters which these questions may address. It is therefore speculative at this point whether such questioning will “[go] to proof of the crime against the accused and even the acts and conduct of the accused.”³⁷ As the Decision on Rule 140 and the impugned decision make plain, all questioning by Victims’ Legal Representatives is subject to prior authorization by the Chamber and the impugned decision does not grant them any *right* to ask the kind of questions the Defence objects to. Thus, the issue identified by the Defence does not emerge from the impugned decision and therefore it is not an appealable issue within the meaning of Article 82(1)(d).

24. Given that the requirements of Article 82(1)(d) are cumulative, and that this requirement has not been met, the Chamber does not deem it necessary to consider the matter any further.

³⁷ ICC-01/04-01/07-1815, par. 2

B. Second issue of appeal

25. The second issue is whether it is possible for the Legal Representatives of Victims to lead evidence and to call victims to testify on the crimes against the accused, in a manner which includes incriminating evidence and testimony, *without disclosing it to the Defence prior to trial*.

26. The Appeals Chamber has addressed the possibility for victims to introduce evidence and to call victims to testify. In the present case, the Decision on Rule 140, which for the first time stated that the Legal Representatives of Victims could lead evidence and call victims to testify on the crimes against the accused, was issued on 20 November 2009, a few days before the start of trial. The impugned decision, where this aspect of victims' participation was dealt with more in detail,³⁸ was issued on 22 January 2010. With regard to disclosure, in the impugned decision the Chamber stated that there is no general obligation for victims to disclose to the parties any evidence in their possession, whether incriminating or exculpatory.³⁹ It further stated that in the event that the victims apply to the Chamber to present evidence and are authorised to do so, it will be for the Chamber to set the modalities for the disclosure of the said evidence and to decide on the measures required to safeguard the fairness of the trial, respecting the rights of the accused, and the interests of the victims. The Chamber concluded that it will ensure that the Prosecution and the Defence teams in particular receive the evidence sufficiently in advance to enable them to prepare effectively.⁴⁰ The Chamber further recalls that, with regard to applications for calling a victim to testify, the Decision on Rule 140 specifies that such an application "must be accompanied by a signed statement of the victim, containing a comprehensive summary of the testimony that is to be given

³⁸ Impugned decision, par. 81-101.

³⁹ Impugned decision, par. 105.

⁴⁰ Impugned decision, par. 107.

by the victim. If the Chamber grants the application, the attached statement shall count as disclosure in accordance with regulation 54(f) of the Regulations.”⁴¹

27. To date, the Legal Representatives of Victims have not yet sought to introduce documentary evidence or to call victims to testify, and for this reason, in accordance with the impugned decision, they have not disclosed any material to the parties.

28. The Chamber believes that whether the Legal Representatives of Victims may be authorized by the Chamber to introduce evidence without disclosing it to the Defence *prior to trial* is an issue that may significantly affect the fairness of the proceedings. Considering the circumstances of the present case, this decision, if erroneous, may have repercussions on the right of the accused to receive adequate time for the preparation of the defence, pursuant to Article 67(1)(b) of the Statute. The Chamber believes therefore that the first requirement of Article 82(1)(d) of the Statute is met.

29. With regard to the second requirement of Article 82(1)(d), the Chamber has to consider whether a prompt reference of the issue to the Appeals Chamber will ensure that the proceedings follow the right course, pre-empting any repercussions of erroneous decisions on the fairness of the proceedings or on the outcome of the trial.⁴² The Chamber considers that to leave this matter for a possible appeal of a judgement in the present case could create procedural difficulties with serious delays as a result. Moreover, considering the time-frame set out in the impugned decision regarding the introduction of documentary evidence and the possibility of calling victims to testify,⁴³ an immediate determination by the Appeals Chamber would ensure that if the impugned decision was wrong, it could be remedied before the accused has suffered any prejudice. Given the nature of the issue and the early

⁴¹ Decision on Rule 140, par. 26.

⁴² ICC-01/04-168, par. 14-19. See also, Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, par. 26.

⁴³ Impugned decision, in particular par. 86 and 100.

stage of the trial, the Chamber finds that an immediate resolution by the Appeals Chamber will materially advance the proceedings, and is therefore satisfied that this further requirement of Article 82(1)(d) of the Statute is also met.

C. Third issue of appeal

30. The third issue is whether it is possible for the Legal Representatives of Victims to call victims to testify on matters including *the role of the accused* in crimes charged against them.

31. In the impugned decision, the Chamber granted the Legal Representatives of Victims the opportunity to call one or more victims to give evidence under oath at trial.⁴⁴ In particular it stated that the persons concerned may give evidence about the crimes with which the accused have been charged, and about any part played therein by the accused.⁴⁵

32. The Chamber notes that the possibility for victims to present evidence touching upon the role of the accused may materially affect the nature, the substance and the extent of the evidence introduced during trial. This may also have an impact on the length of the trial. This decision may result in the Chamber considering evidence that otherwise would not be presented. Thus, the ability of victims, through their Legal Representatives, to call victims to testify on the role of the accused may significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial.

33. Furthermore, the Chamber considers that given the nature of the issue, the early stage of the present trial, and the repercussions that an erroneous decision on this matter would have on the fair and expeditious conduct of the proceedings, an

⁴⁴ Impugned decision, par. 86.

⁴⁵ Idem.

immediate resolution by the Appeals Chamber would materially advance the proceedings.

34. The Chamber is therefore satisfied that the requirements of Article 82(1)(d) of the Statute are met.

D. Fourth issue of appeal

35. The fourth issue is whether every item of evidence in possession of the Legal Representatives of Victims, be it incriminating or exculpatory, must be communicated to the parties.

36. This issue is related to the second issue of appeal. The Chamber recalls its findings in the impugned decision, and in particular that neither the Statute nor the Rules of Procedure and Evidence provide for a general obligation for victims to disclose to the parties any evidence in their possession, whether incriminating or exculpatory.⁴⁶ Nevertheless, the disclosure of all evidence in possession of the Legal Representatives of Victims, whether it is intended to be used at trial or not, is an important issue that may have an impact on the fairness of the proceedings. This is especially true for disclosure of potentially exculpatory material, as this may significantly affect the fairness of the proceedings and the outcome of the trial. The first requirement of Article 82(1)(d) of the Statute is therefore met.

37. Given the nature of the issue and the early stage of the trial, the Chamber believes that an immediate resolution by the Appeals Chamber would materially advance the proceedings and is therefore satisfied that the last requirement of Article 82(1)(d) of the Statute is also met.

⁴⁶ Impugned decision, par. 105 and 107.

E. Fifth issue of appeal

38. The fifth issue is whether it is possible for the Legal Representatives of Victims to give their observations on the relevance or admissibility of items of evidence, including observations supporting a Prosecution application to admit evidence.

39. In the impugned decision, the Chamber addressed the possibility for Legal Representatives of Victims to challenge the admissibility of evidence introduced by any of the parties, in light of the findings of the Appeals Chamber judgement of 11 July 2008.⁴⁷ In particular, it was held that a potential challenge to the admissibility and relevance of evidence pursuant to article 69(4) of the Statute by the Victims' Legal Representatives cannot be completely ruled out. The Chamber therefore accepted the possibility that a victim who is in possession of information clearly indicating the admissibility of disputed evidence, or establishing that such evidence is inadmissible or irrelevant, may transmit that information to the Chamber.⁴⁸

40. The Chamber accepts that the possibility for victims to challenge the admissibility of the evidence may have a bearing on the outcome of the proceedings. Indeed, if the intervention by a Legal Representative leads to the admissibility of an item of evidence that the Chamber might otherwise have excluded, this may have an impact on the factual findings of the Chamber. However, this form of participation has already been recognized by the Appeals Chamber, and it has merely been reaffirmed in the impugned decision. The Chamber further notes that the possibility of presenting observations on the relevance or admissibility of items of evidence and, in particular, of making submissions in support of the admissibility of evidence submitted by any of the parties, has been circumscribed by the stated goal: to prevent the Chamber from being misled by relying on inadmissible or irrelevant evidence or, on the contrary, dismissing evidence which is in fact admissible.⁴⁹

⁴⁷ Impugned decision, par. 104. See also Judgement of 11 July 2008, par. 97, 102

⁴⁸ Impugned decision, par. 104.

⁴⁹ Idem.

41. The Chamber is not persuaded that the ability of the Legal Representatives of Victims to support a Prosecution's application to admit evidence, by bringing to the attention of the Chamber "information clearly indicating the admissibility of disputed evidence", is something that could *negatively* impact on the fair and expeditious conduct of the proceedings, or the outcome of the trial, let alone in a significant manner.

42. It cannot be maintained that the consideration by the Chamber of information which is relevant to an issue of admissibility, in any way violates the fairness of the proceedings or negatively affects the outcome of the trial, simply because it was provided by a Legal Representative. Rather, such observations will allow the Chamber to make a more informed decision about the admissibility of the item of evidence in question.

43. This requirement of Article 82(1)(d) of the Statute having not been met, the Chamber will therefore not proceed to assess the last requirement.

**FOR THESE REASONS,
THE CHAMBER**


GRANTS leave to appeal the second, third and fourth issues of appeal; and

REFUSES leave to appeal the first and fifth issues of appeal.

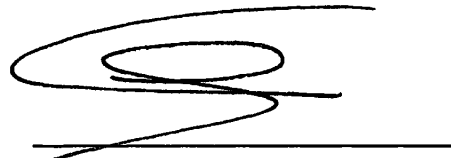
Done in both English and French, the English version being authoritative.



**Judge Bruno Cotte
Presiding Judge**



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this nineteenth day of April 2010

At The Hague, the Netherlands