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APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Ekaterina Trendafilova
Judge Daniel David Ntanda Nsereko
Judge Joyce Aluoch

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

Defence Reply to ‘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’

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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A. Procedural history

1. On 22 January 2010, Trial Chamber II issued the Decision on the Modalities of Victim Participation at Trial.¹
2. On 1st February 2010 the Defence for Germain Katanga (« Defence ») requested leave to appeal this Decision on five grounds.²
3. By its 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*", notified on 20 April 2010, the Trial Chamber granted the Defence leave to appeal three issues of appeal.³
4. On 3 May 2010, the Defence filed its Defence's Document in Support of Appeal against the *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*,⁴ by which it requested the Appeals Chamber to reverse the Trial Chamber's Decision, and to declare that:
 - (i) The legal representatives of victims cannot, without disclosure to the Defence prior to trial, introduce evidence and call victims to give incriminating evidence;
 - (ii) The legal representatives of victims are not entitled to present evidence and call witnesses on matters touching upon the role of the accused in crimes charged against him.
 - (iii) The legal representatives of victims have a general obligation to communicate to the Defence exculpatory evidence, in addition to incriminating evidence in circumstances where permitted to present such evidence.
5. In the *Demande conjointe des représentants légaux des victimes à participer à la procédure relative à l'appel de la Défense de Germain Katanga contre la décision du 22 janvier 2010 relative aux modalités de participation des victimes*, notified on 5 May 2010, the representatives of victims requested the Appeals Chamber to state that

¹ ICC-01/04-01/07-1788.

² ICC601/04-01/07-1815, 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)

³ ICC601/04-01/07-2032.

⁴ ICC-01/04-01/07-2063. See also the Authorities Relied Upon in the Document in Support of Germain Katanga's Appeal Against the "Decision on the Modalities of Victim Participation at Trial" (ICC-01/04-01/07-2063), ICC-01/04-01/07-2133 and annexes, 26 May 2010.

the personal interests of the victims were affected by Defence Request for Leave to Appeal the *Décision relative aux modalités de participation des victimes au stade des débats sur le fond* and to authorise the victims to participate in this appeal.⁵

6. On 24 May 2010, the Appeals Chamber granted the victims representatives the right to participate in the present appeal for the purpose of presenting their views and concerns with respect to their personal interests in the issues raised on appeal.⁶ The Appeals Chamber indicated that the Defence and the Prosecution may reply to the submissions of the representatives of victims by 3 June 2010.
7. On 28 May 2010, the victims' representatives filed their *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*.⁷
8. The Defence hereby submits its reply. For the reasons set out forthwith, the Defence requests the Appeals Chamber to dismiss the arguments of the legal representatives and to allow the *Defence's Document in Support of Appeal against the Décision relative aux modalités de participation des victimes au stade des débats au fond*, submitted by the Defence on 3 May 2010.⁸

B. First ground of appeal

9. The appellant's first ground of appeal challenges the Trial Chamber's affirmation that victims could present incriminating evidence, when no measures were taken for pre-trial disclosure of victim's evidence to the accused.
10. The legal representatives of victims submit that the appellant's submissions under his first ground of appeal are erroneous having regard to the place reserved for victims as participants before the court. They further submit that the Defence submissions are erroneous in practice having regard to what the Trial Chamber authorized in line with the principles as set out by the Appeals Chamber.⁹

⁵ ICC-01/04-01/07-2070.

⁶ ICC-01/04-01/07-2124, Decision on the Participation of Victims in the Appeal of Mr Katanga Against the "Decision on the Modalities of Victim Participation at Trial".

⁷ ICC-01/04-01/07-2142.

⁸ ICC-01/04-01/07-2010.

⁹ ICC-01/04-01/07-2142, para. 13.

11. The legal representatives point out that the status of victims differs from that of the prosecution and consequently they do not have the same rights or obligations. They assert that it is the Prosecutor who investigates the case and brings the charges and who has responsibility over the proof and not the victims. It is by reason of this function that the Prosecutor finds himself with certain obligations of disclosure. There is a close link between the role of parties in the proceedings and their obligations of communication.¹⁰
12. According to the legal representatives these propositions undermine the appellant's reference to the Special Tribunal for Lebanon and the Extraordinary Chambers of Cambodia because these tribunals afford a greater role to victims in calling witnesses and producing evidence. The legal representatives further argue that the appellant erroneously refers to the position in national proceedings where there are 'parties civiles' as a basis of comparison with the International Criminal Court. They assert that the state parties deliberately viewed the situation of victims before the ICC as *sui generis* having no comparison with the situation of 'parties civiles'.¹¹
13. The legal representatives argue that the victims are not given the right to call witnesses directly or produce documentary evidence by the decision of the Trial Chamber. This decision clearly distinguishes between the position of the parties and that of the victims. According to the legal representatives this explains why the Chamber did not impose the obligations of disclosure imposed upon the Prosecutor on the legal representatives for victims.¹²
14. The appellant does not contest that in the regime created by the International Criminal Court ("ICC"), the victims are accorded a limited role as participants, which cannot be equated with the position of parties. It is for this very reason that in instances where victims fulfil functions akin to those of the Prosecutor, such as where they are afforded the right to produce incriminating evidence against the accused, that the greatest of care must be taken to ensure that the regime and parameters within which this is done is no less stringent than that applicable to the Prosecutor. This is particularly so in terms of adequate notice to the accused and time and facilities to address such evidence. It is important that the accused is not placed in a more difficult

¹⁰ ICC-01/04-01/07-2142, paras. 14-16.

¹¹ ICC-01/04-01/07-2142, paras. 17-18.

¹² ICC-01/04-01/07-2142, paras. 19-21.

position with respect to addressing evidence from victims as it is with respect to addressing evidence from the Prosecutor. A verdict is decided on the entirety of the evidence and not on the basis of individual items of evidence. A fair trial requires that, in so far as possible, the accused be apprised of the full extent of the evidence against him before the commencement of the trial in order that he may prepare his case and confront each witness with full knowledge of what else is to come.

15. There may be exceptional instances where parties or participants are permitted to call evidence which was not disclosed prior to the commencement of trial. However, the Defence submits that, before this can happen, there must be a minimum attempt to ensure that all relevant information was brought to the attention of the accused prior to trial and that is not due to a lack of diligence that new evidence could not have been brought to the attention of the accused earlier.
16. The legal representatives counter the need for notice prior to trial by submitting that they cannot alter the charges against the accused by submitting evidence and such evidence cannot go beyond the scope of the charges.¹³ However, it is the evidence which forms the basis of the charges. Where evidence from victims is designed to support the charges then the accused has the right to prior notice of it if he is to have a fair trial. In any event, regardless of the question of the nature and scope of the charges, the accused has the right to adequate time and facilities to prepare. For this right to be fully respected, the evidentiary basis of charges should be disclosed prior to trial in order that the accused is aware of this evidence when confronting each and every witness against him.
17. It is submitted by the legal representatives that the appellant's position that it should have notice of all evidence prior to trial is erroneous because there are numerous situations where this is not the case. The example is given of the Chamber itself calling witnesses. This does not give rise to a violation of the rights of the accused and he is given time to deal with the statement of the witness.¹⁴ The appellant submits that it is wrong to assume that the calling of witnesses by the Chamber could never violate the rights of the accused. This issue may depend on a number of factors including, what proportion of the evidence against the accused consists of evidence called by the

¹³ ICC-01/04-01/07-2142, para. 22.

¹⁴ ICC-01/04-01/07-2142, paras. 23-25.

Chamber, whether the Chamber only calls witnesses against the accused or also witnesses in favour of the defence case, and the extent to which the accused is in a realistic position to deal with this evidence, taking into account the possible need to recall other witnesses. Given that the victims, unlike the Chamber, are not neutral, it is wrong to equate the position of the Chamber for the purposes of denying the accused pre-trial disclosure.

18. In addition, the legal representatives' interpretation of the appellant's position that it is complaining of not receiving all evidence prior to trial is missing the issue. In this case it is not so much a question of disclosure of all evidence. There has been absolutely no pre-trial or post commencement disclosure of incriminating evidence which the legal representatives intend to call. Neither has there been any attempt on the part of the Chamber to put in place a system for such pre-trial disclosure as there has been for the Prosecutor. In those circumstances there is not a proper basis for the option for the legal representatives of calling incriminating evidence.
19. The legal representatives submit that that they are not given the right to call victims directly but only the possibility of doing so if not repetitive of evidence already before the Chamber. It is noted that, in such circumstances, the Chamber does impose obligations of disclosure.¹⁵ It is the appellant's submission that by affirming this possibility, the Chamber has afforded a right. To pretend that no right has been given to the victims is artificial. The manner in which, and the extent to which, that right is exercised is another matter. It is the appellant's contention that such possibility or right in relation to incriminating evidence can only exist within the framework of an obligation of pre-trial disclosure similar, while perhaps not identical, to the obligations of the Prosecutor. In a case such as this one where no provision has been made for pre-trial disclosure of evidence proposed by legal representatives, it is submitted that a fair trial does not permit the Chamber to licence the legal representatives to call evidence of an incriminating nature.
20. Even if the Chamber's decision concerns a right or possibility, and not a decision, in a specific instance this stated right creates a legitimate expectation for the victims that their legal representatives can call incriminating evidence against the accused, even if subject to some control. The Chamber did not simply acknowledge that such evidence

¹⁵ ICC-01/04-01/07-2142, paras. 27-28.

cannot be called in this case because of the total lack of pre-trial notice and disclosure, save on a showing of highly exceptional circumstances justifying a departure from the general position in this case. This would have been a quite different and a more palatable statement of law in the circumstances of this case, since it would make it clear that the door is essentially closed on the admission of incriminating evidence through the legal representatives due to the failure to address the issue of pre-trial notice.

21. However, in this case a quite specific and general expectation has been created that victim evidence may be admitted on incriminating matters. This might be in principle permissible in terms of the Appeals Chamber's interpretation of the general provisions in the Statute, but that jurisprudence does not take into account the particular circumstances of this case where there has been no mechanism established or actual pre-trial disclosure of incriminating evidence emanating from legal representatives. In the present circumstances of total non-disclosure at the stage of partial completion of the prosecution witness, it was not right for the Trial Chamber to acknowledge in a general way the possibility of calling evidence on incriminating matters and it is not right for the case to proceed on this basis. In this respect it is respectfully submitted that the Trial Chamber erred in law.
22. There is little point in a Trial Chamber making a statement of law in a decision applicable to the parties and participants which is correct on a theoretical level in the context of another case where appropriate pre-trial mechanisms have been put in place, but which at the time of the decision has no application to the present case because of a failure to institute such mechanisms. This makes an otherwise reasonable statement of law an error of law in the circumstances of the case, because the implied effect of the statement of law is to ignore a basic legal pre-condition to the exercise of the legal right being pronounced.
23. The legal representatives raise the argument that it is impractical to suggest that the victims produce evidence prior to trial when there are elements of the dossier that they did not receive until later. The representatives argue that they did not have access to witness statements, the table of incriminating evidence or the admissions of the parties. It is therefore argued that the legal representatives did not have sufficient

information to be able to identify witnesses.¹⁶ The fallacy in this argument rests in the fact that, as the legal representatives themselves acknowledge, their role differs from that of the Prosecutor or that of the Defence. They act to represent the private interests of their clients. They are not there to support the prosecution case or that of the defence, although practice in this trial has shown that the tendency is to support the prosecution case almost systematically. Accordingly, the legal representatives can make decisions about which witnesses to call. Once they are aware of the basic parameters of the facts being addressed in the trial (in this case an attack on Bogoro on the 24th February 2003), they should be in a position to present evidence to support their clients' version of events.

24. Even if it could be argued, which is not admitted, that the legal representatives must have complete access to the dossier before being in a position to call evidence, this error rests with the Chamber and, or with the victims themselves and not the accused. The accused should not be prejudiced because of any failure on the part of the Chamber to introduce an appropriate regime for the victims or a failure on the part of the victims in not requesting appropriate measures to ensure their future full participation in proceedings.

25. There is a fundamental unfairness in the notion that while the Prosecutor must provide pre-trial disclosure of incriminating evidence, the victims have no such obligation on the basis that they do not have all elements of the prosecution case at their disposal. It allows them to do what the Prosecutor is not permitted to do, that is to mould the case against the accused depending on how the evidence unfolds.¹⁷ Particularly in the light of the common interest in incriminating the accused and the undeniable degree of strategic cooperation between the legal representatives and the Prosecutor, demonstrated in this case by their mutual support in the courtroom, this proposed result is manifestly unjust for the accused.

26. The legal representatives add that they do not have the same resources as the Prosecutor to investigate. The Chamber will not in any event rule on the list of

¹⁶ ICC-01/04-01/07-2142, paras. 29-31.

¹⁷ *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 30; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 26; *Prosecutor v. Kupreskic et al*, No. IT-95-16-A, Appeals Chamber Judgment, (23 October 2001), para. 92; *Prosecutor v. Muvunyi*, No. ICTR-2000-55A-A, Appeals Chamber Judgment, (29 August 2008), para. 18.

witnesses of the victims until hearing the prosecution case. It would imply that the Defence would waste time on investigations and the representatives could never in fact call a witness who was confirmed as a victim during the trial.¹⁸ None of these assertions can trump the importance of the appellant having notice of the evidence against him in order to prepare for his trial. It is submitted that fairness would dictate that it would be very rare for a victim to be confirmed during the trial, but that in cases where this occurred this would be in exceptional circumstances requiring exceptional consideration.

27. According to the legal representatives the appellant wishes to disrupt the equilibrium created by the state parties. Yet it is exactly the need for preserving this equilibrium which demands that victims not be permitted to support the prosecution case with evidence unless in the context of a proper system of pre-trial disclosure. In this case this safeguard has not been put in place and the appellant has cross-examined half the prosecution witnesses without any notice of incriminating evidence from the participant victims. Even since the lodging of this appeal no attempt has been made by the Chamber to require disclosure, nor have the legal representatives taken any steps to give such disclosure.

28. Finally, the legal representatives claim that the appellant makes an error in fact since it already has the statements of witnesses who will testify in the form of the victims' requests for participation disclosed to the Defence.¹⁹ This does not in any sense fairly fulfil the requirement of pre-trial notice. There were thousands of requests for participation and the contents of these requests were formulated with the purpose of obtaining participation and not with the purpose of providing notice to the appellant of evidence they would give against the accused.

C. Second ground of appeal

29. The appellant's second ground of appeal challenges the Trial Chamber's affirmation that the legal representatives of victims might call witnesses on matters including the role of the accused in crimes charged against them.

¹⁸ ICC-01/04-01/07-2142, paras. 30-31.

¹⁹ ICC-01/04-01/07-2142, para. 33.

30. The victims argue that the appellant intends to deprive victim participation of all efficacy by wishing to exclude the possibility of presenting testimony on the role of the accused. It is argued that this capacity is not to substitute the Prosecutor but to provide information to the extent necessary for the search and determination of the truth.²⁰ The appellant has clearly explained in his document in support of this appeal how there are large ranges of issues upon which victim testimony can focus without addressing the role of the accused in the crimes charged. This includes evidence of an incriminating nature. It cannot therefore be reasonably asserted that the participation is deprived of all efficacy, unless the mission of the victims is the same as the Prosecutor, that is to secure a conviction. If that is the mission there is no duty on the court to facilitate that mission at the expense of the fairness of the trial for the accused.
31. Almost any process of presenting evidence can be theoretically justified on the basis of the necessity of searching for and determining the truth, but the rules in seeking the truth must be fair. The ICC has adopted an adversarial system and the search for the truth must not be used as a justification for undermining the principle of equality of arms. The court system endeavours to come as close to the truth as possible through the use of the burden and standard of proof. That system requires that evidence be fairly presented and evaluated. If evidence is not properly tested due to an unequal adversarial system then truth becomes more relative than safe.
32. It is argued that the fact that it is the Chamber's power which is employed to call witnesses creates all the guarantees that are needed to avoid damage, inequity in the proceedings or the rights of the accused.²¹ This is incorrect. The Chamber can only hear and evaluate evidence. It cannot cure imbalances inherent in granting victims the ability to call all categories of evidence on similar terms to the prosecution.
33. It is stated that in practice the Chamber has already not permitted certain questions. This has no correlation to the current question.

D. Third ground of appeal

²⁰ ICC-01/04-01/07-2142, paras. 38-39.

²¹ ICC-01/04-01/07-2142, para. 41.

34. The appellant's third ground of appeal challenges the Trial Chamber's affirmation that nothing justifies a general obligation upon the representatives of victims to communicate to the parties every element in their possession, whether incriminating or exculpatory.
35. It is argued by the legal representatives that there is nothing in the texts which requires obligations of disclosure.²² The appellant is reproached for not basing itself on any general principle of law or principle of international law. It can hardly be expected that there would be established principles of customary international law or general principles of law on a procedure as unique as that of victim participation before the ICC. However, it is plain that there are provisions within the Statute which enable and impose a duty upon the Chamber to ensure the fairness of the trial. In terms of this duty an obligation of disclosure must arise. The legal representatives themselves recognize the fact that the Appeals Chambers has outlined the need to provide for modalities of disclosure.
36. The legal representatives submit that it is because of the position of victims in the Statute that there are no disclosure obligations on them.²³ If victim participation was confined to purely non-prosecutorial aspects of the trial and had no bearing on the presentation of incriminating evidence, this would be arguable. But this is not the case. The victims emphasize their private interests and question how they could be required to disclose exculpatory evidence while not being able to impute the crimes to the accused.²⁴ Here the legal representatives hit the nail on the head. Victim participants have a role in the presentation as well as the examination of incriminating evidence. The legal representatives even argue in this appeal for the ability to call evidence on the role of the accused in the crime, even without pre-trial disclosure on the accused. In such circumstances, it is manifestly unjust to consider that there are no obligations of disclosure on them.
37. Legal representatives argue that victims do not have the same resources as the prosecution.²⁵ This is not relevant since the issue relates not to the ability to find evidence but the obligation to disclose evidence which they have in their possession

²² ICC-01/04-01/07-2142, paras. 45-46.

²³ ICC-01/04-01/07-2142, paras. 48-49.

²⁴ ICC-01/04-01/07-2142, para. 56.

²⁵ ICC-01/04-01/07-2142, para. 53.

and intend to use, or evidence in their possession which tends to support the innocence of the accused or undermines the case against the accused.

Accordingly, the Defence requests the Appeals Chamber to grant the appeal submitted by the Defence as set out in its appeal.

Respectfully submitted,



David Hooper, Lead Counsel

Dated this 3rd June 2010
At The Hague, Netherlands