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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 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 the Defence
Appeal against the *Decision on the Modalities of Victim Participation at Trial* of
22 January 2010**

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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1. On 20 November 2009, Trial Chamber II issued a decision entitled *Directions for the conduct of the proceedings and testimony in accordance with rule 140*.¹ In that decision the Chamber decided, inter alia, that the Legal Representatives could, under certain conditions, call one or more of the victims whom they represent to testify in this case and that they could also, under the Chamber's supervision, put certain questions to the witnesses who have been summoned to appear.²

2. In its decision of 22 January 2010, that same Chamber issued a *Decision on the Modalities of Victim Participation at Trial*.³ That decision confirmed and amplified the Chamber's previous decision of 20 November 2009.⁴ It also rejected the request of the Defence for Germain Katanga to impose on the Legal Representatives of the Victims a general obligation to disclose all evidence in their possession.⁵

3. In its decision of 19 April 2010, Trial Chamber II granted the Defence for Germain Katanga ("the Defence") leave to appeal the latter decision on the basis of the second, third and fourth grounds put forward by the Defence in its application.⁶

4. On 3 May 2010, the Defence filed a document in support of its appeal.⁷ On 14 May 2010, the Prosecutor filed his response, setting out the grounds on which the Appeals Chamber should reject the Defence appeal.⁸

5. In these observations, filed in accordance with the decision of this Chamber of 24 May 2010, the Legal Representatives have the honour of presenting their views

¹ ICC-01/04-01/07-1665 and corrigendum filed on 30 November 2009.

² See paragraphs 19 *et seq.* and 82 *et seq.* respectively.

³ ICC-01/04-01/07-1788-tENG.

⁴ See paragraphs 81 *et seq.*

⁵ See paragraph 105.

⁶ *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"*, ICC-01/04-01/07-2032.

⁷ "Defence's Document in Support of Appeal against the *Décision relative aux modalités de participation des victimes au stade des débats au fond*", ICC-01/04-01/07-2010.

⁸ "Prosecution Response to Defence's Document in Support of Appeal against the *Décision relative aux modalités de participation des victimes au stade des débats au fond*", ICC-01/04-01/07-2100.

and concerns regarding the Defence appeal.⁹ These views and concerns relate to the three grounds of appeal raised by the Defence, since each ground directly affects the personal interests of the victims.

6. It must of course be recalled that the applicable texts on the subject are articles 68(3), 69(3) and 69(4) of the Statute and rules 89(1), 91(2) and 91(3) of the Rules of Procedure and Evidence.

7. It should be further emphasised that the specific matter of the modalities of victim participation at trial has already been the subject of a number of decisions issued by various Chambers of the Court.¹⁰ This Chamber, in particular, laid down a series of fundamental principles in its decision of 11 July 2008, balancing the fundamental rights of the accused and effective participation by the victims in the trial.¹¹

8. The Legal Representatives seek to draw inspiration as much from the letter as from the spirit of the decisions rendered by the Appeals Chamber, especially the decision of 11 July 2008, since they undeniably constitute one of the standard legal bases and a true cornerstone in this matter.

9. It should be noted that this decision fell within the framework of a far wider analysis, encompassing all of the concepts specifically relating to the matter of victim intervention in proceedings before the Court, as intended and conceived by the States Parties to the Statute.

⁹ *Decision on the Participation of Victims in the Appeal of Mr. Katanga Against the "Decision on the Modalities of Victim Participation at Trial"*, ICC-01/04-01/07-2124.

¹⁰ Trial Chamber I, *Decision on Victims' Participation*, 18 January 2008, ICC-01/04-01/06-1119; Trial Chamber I, *Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial*, 26 June 2009, ICC-01/04-01/06-2002-Conf; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008* issued on 18 January 2008 by Trial Chamber I, 11 July 2008, ICC-01/04-01/06-1432.

¹¹ ICC-01/04-01/06-1432.

10. It is thus important to emphasise the extent to which the decision of 11 July 2008 provided very welcome clarification in regard to the status of victims before the Court, but also enriched the true rationale informing and underpinning the procedural regime that permits such intervention to take place, thus confirming the essential need therefor.

First ground of appeal: The possibility that victims may testify or present evidence pertaining to the guilt or innocence of the accused without notice to the Defence prior to the commencement of the trial

11. The Defence contends that Trial Chamber II committed an error of law in allowing victims to testify or present incriminating evidence when it was no longer possible for the evidence that the victims intended to produce to be disclosed to the Defence prior to the trial.

12. The Defence recalls that the Statute imposes a certain number of obligations on the Prosecutor in order to ensure that the accused is informed in detail of the charges against him and of the evidence relied on in support of the charges. In view of this, it considers that it is vital that similar conditions, or indeed more restrictive ones, should be imposed on the victims with regard to the presentation of incriminating evidence.

13. However, it is apparent, in light of the place reserved for the participation of victims before the Court, as conceived by the States Parties and implemented by the Chambers of the Court, that the Defence's assertions are misconceived. They are also erroneous in practice in view of the decision of Trial Chamber II and the modalities of participation authorised by it in accordance with the jurisprudence of the Appeals Chamber.

14. As this Chamber has recalled, participating victims have a different status from the parties and, in particular, from that of the Prosecutor.¹² They have neither the same rights nor the same obligations.

15. It is the Prosecutor who decides to open an investigation and to determine the charges against the accused.¹³ The burden of proof is on him and not on the victims.¹⁴ Articles 64 and 69 of the Statute provide for evidence to be presented by the parties or at the request of the Chamber. As this Chamber noted in the *Lubanga* case:

[...] the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence.¹⁵

16. It is by reason of the position held by the Prosecutor at the trial that he is subject to a series of disclosure obligations. There is a close link between the role of the parties in the trial proceedings and their disclosure obligations.

17. The Defence is thus mistaken in its reliance on the Special Tribunal for Lebanon (“STL”) and the Extraordinary Chambers of the Courts of Cambodia in support of its first ground of appeal, since the texts of these courts accord the victims different rights: they are able to involve themselves directly in the trial by calling witnesses and tendering evidence.¹⁶

18. Similarly, the Defence argument based on a comparison of the situation of victims before the International Criminal Court with that obtaining in certain judicial systems which recognise the institution of civil complainant is irrelevant for two reasons. It is both erroneous and manifestly ill-informed. It disregards, precisely, the

¹² ICC-01/04-01/06-1432, paras. 93 *et seq.*

¹³ See in particular articles 15, 53, 54, 58 and 61(5) of the Statute; Appeals Chamber, *Judgment on the participation of victims*, para. 93.

¹⁴ Article 66(2).

¹⁵ ICC-01/04-01/06-1432, para. 93.

¹⁶ Rules of Procedure and Evidence of the STL, art. 87 B). These rules are available on the Tribunal’s official website:

http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/RPE-09-10-30_En.pdf

fact that the States Parties to the Statute explicitly precluded the *sui generis* status of victims before the Court from being in any way assimilated to the status of “*partie civile*” [civil complainant] as it is understood in certain national systems.

19. In the instant case, the impugned decision does not give the victims the right directly to call a witness to appear or to produce documentary evidence. It makes a clear distinction between the position of the victims in the trial proceedings and that conferred on the other parties (Prosecutor and Defence teams) in order to avoid any confusion between the respective roles of the different actors in the proceedings. The Chamber was thus not required to impose on the Legal Representatives disclosure obligations identical to those incumbent on the Prosecutor under the Statute and the Rules.

20. It should be noted that the Defence assertion that Trial Chamber II created a legitimate expectation that only the Prosecutor would submit incriminating evidence is erroneous. On 20 November 2009, that is to say before the trial began, the Chamber expressly stated that the Legal Representatives could either call victims to testify, or invite the Chamber to call other witnesses to give evidence.¹⁷

21. The Defence contends that Trial Chamber II committed an error of law on the ground that the case against the accused, as well as the evidence in support thereof, must be clearly identified prior to the commencement of the trial in order to allow the accused to prepare his defence and to guarantee him a fair trial.

22. The fact that the Legal Representatives may adduce evidence cannot, however, affect the accused’s right to be informed of the case against him. The Legal Representatives cannot in fact adduce evidence which goes beyond the charges retained against the accused. Thus they cannot modify either the basis of the proceedings against the accused or the Prosecutor’s own case.

¹⁷ ICC-01/04-01/07-1665 and Corrigendum filed on 1 December 2009, paras. 19 *et seq.*, and paras. 45 *et seq.*

23. The Defence argument that it has an absolute right to have at its disposal all evidence against the accused prior to the commencement of the trial is likewise misconceived.

24. There are a number of situations where the Defence is apprised of certain evidence only during the trial. Thus, where a Chamber decides to call a witness *proprio motu* at the conclusion of the examination of the parties' witnesses, clearly the Defence will not have at its disposal the statement of the said witness prior to the commencement of the trial.¹⁸ This is moreover confirmed by the case law of the ad hoc international criminal tribunals (ICTY and ICTR) cited by the Defence. On every occasion where the Chamber has called a witness to appear, it has not considered there to have been a violation of the rights of the accused, and it has simply ordered the disclosure of the statements of the said witness sufficiently in advance of his or her testimony. Likewise, according to the case law of the ICTY and ICTR, where a Chamber authorises the Prosecutor to add Prosecution witnesses during a trial, the Chamber duly takes into account the rights of the accused and grants the Defence additional time to prepare its case. It does not consider there to have been a violation of the rights of the accused.

25. In the *Lubanga* case, as noted by the Defence, Trial Chamber I rendered a decision similar to the impugned decision (allowing victims to come to testify under certain conditions), but prior to the commencement of the trial. However, it was only during the trial that it accepted that certain victims could come and testify. It was also during the trial that it decided that the statements of the victims thus called to testify should be disclosed to the Defence teams. In other words, Trial Chamber I did not consider it necessary to impose disclosure prior to the commencement of the trial, and considered that the rights of the Defence were in fact safeguarded by ordering disclosure a few months prior to the appearance in court of the said victims.

¹⁸ In accordance with articles 64(6)(d) and 69(3) of the Statute.

26. In the instant case, the impugned decision applies those principles, circumscribing the presentation of evidence by the Legal Representatives (including in-court testimony by victims) with a series of conditions.

27. The impugned decision grants victims neither the right to call a witness directly nor the right to adduce documentary evidence. It provides merely for the *possibility* of this, so long as, *inter alia*, the testimony envisaged does not duplicate evidence already admitted by the Chamber, is relevant to the issues in the case, and contributes to the determination of the truth. In its assessment of whether or not to admit evidence thus adduced, the Chamber notes explicitly that it will take due account of the rights of the accused (in particular their right to be tried without undue delay) and the requirements of a fair trial.

28. Furthermore, contrary to the assertions of the Defence, Trial Chamber II has provided for the imposition of disclosure obligations on the Legal Representatives in the event that they present evidence. In accordance with the case law of the Appeals Chamber,¹⁹ Trial Chamber II stressed that in such an event it would set out the modalities for the disclosure of said evidence, ensuring in particular that the Prosecutor and the Defence teams received the evidence sufficiently in advance to enable them to prepare effectively.²⁰ Moreover, nothing prevents the Chamber from excluding a victim's testimony or the admission of evidence presented by the Legal Representatives, if these would cause irreparable harm to the Defence.

29. Furthermore, in practice, it is difficult to see how Trial Chamber II could have imposed disclosure, prior to the commencement of the trial, of evidence which the victims intended to adduce.

¹⁹ ICC-01/04-01/06-1432, para. 100: "If the Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence."

²⁰ ICC-01/04-01/07-1788-tENG, para. 107.

30. It was only several months after the commencement of the trial phase that the Legal Representatives were able to gain access to certain material in the Prosecution file, inter alia the admission of certain facts by the parties, access to the statements of Prosecution witnesses and other relevant material, and the Prosecution table summarising the decision on the confirmation of charges and setting out the Prosecutor's argument in detail. Thus the Legal Representatives did not have at their disposal, prior to the commencement of the trial, sufficient material to give them a comprehensive overview of the case against the accused or, prior to commencement of the trial, to identify potential witnesses. Furthermore, the Legal Representatives do not have the same resources as the Prosecutor for conducting the necessary investigations.

31. The Defence's requirement would mean obliging the Legal Representatives to disclose, prior to the commencement of the trial and even though they have only an incomplete overview of the case, a list of potential witnesses and potential evidence, knowing perfectly well that the Chamber will make its ruling on the admission of this material only at the conclusion of the presentation of the Prosecution evidence.²¹ It would also mean that the Defence might conduct a series of investigations which could prove to be totally pointless if those victims were not ultimately called upon to testify. Lastly, it would also mean that the Legal Representatives would never be able to call as witnesses those victims whose applications for participation were approved during the trial.

32. In reality, the Defence arguments are liable to upset the balance sought by the States Parties to the Statute between the various participants in the trial (parties and represented victims). Thus the Defence ignores or downplays the fact that the Chambers of the Court have invariably sought to link the issue of the modalities of

²¹ The Chamber did indeed provide for the possibility of the Legal Representatives being able to call victims to testify, on condition inter alia that their testimony did not duplicate evidence already admitted by the Chamber (ICC-01/04-01/07-1665 and Corrigendum filed on 1 December 2009, para. 30. The impugned Decision cites that Decision).

victim participation with the rules governing the production of evidence before the Court.

33. Lastly, the Defence's first ground of appeal is also erroneous in terms of fact. The Defence already has at its disposal all the statements of the victims currently represented, since all of the applications for participation by victims have been disclosed to the Defence (some having already been available prior to commencement of the trial), and the Legal Representatives have no other statements at their disposal. Thus the Defence teams are already in possession of information concerning potential evidence which might be presented by the Legal Representatives.

34. In light of the foregoing, the first ground of appeal should accordingly be dismissed.

Second ground of appeal: The possibility that victims may testify on matters related to the role of the accused in the crimes with which they are charged

35. The Defence argues that Trial Chamber II committed an error of law in allowing the legal representatives to call victims to testify on the role of the accused in the crimes charged against them. It considers that, in so doing, the Chamber is allowing the victims to act as a second prosecutor and potentially to create confusion as to the case to which the accused have to answer.

36. In its decision of 11 July 2008, the Appeals Chamber considered it important to recall that the right to lead evidence pertaining to the guilt or innocence of the accused does indeed lie with the parties, namely the Prosecutor and the Defence, but that that did not in any way preclude the possibility of the victims leading evidence of this nature.²²

²² ICC-01/04-01/06-1432, paras. 94, 96 and 97.

37. Moreover, after emphasising that such presentation of further evidence would be effected under the authority of the Chamber's powers pursuant to article 69(3) of the Statute, the Appeals Chamber was careful to specify that, if the victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused, their right to participate in the trial would potentially become ineffectual.²³

38. In insisting that this option allowed to the victims cannot extend to the role of the accused, since that would go to the heart of the determination of his or her guilt, the Defence explicitly seeks to render the victims' participation in the trial ineffectual, even where such participation takes place under the supervision and, in particular, the authority of the Chamber.

39. In the instant case, the issue is not one of allowing the victims to replace or support the Prosecutor but, on the contrary, of permitting them to participate in the trial with the possibility of providing information on the role of the accused, subject to certain limitations and conditions and only to the extent that such information is necessary to the search for and determination of the truth.

40. Furthermore, the Chamber has developed a regime that enables victims to participate, under certain stringent conditions, in establishing the veracity of the raw facts without the need to determine the potential legal repercussions arising from the establishment of such facts, or the nature of the factual information so obtained.

41. Here too, it must be reiterated that the very fact that victims have not been granted any right, and that the only *possibility* allowed to them is subject to the authority of Trial Chamber II acting on its own prerogative, provides all the necessary safeguards to obviate any difficulties or prejudice to the fairness of the proceedings and the rights of the Defence.

²³ ICC-01/04-01/06-1432, para. 94.

42. Moreover, in practice, Trial Chamber II has already had occasion to reject certain questions put forward by the legal representatives where they considered them to be inappropriate having regard to the rights of the accused. Clearly, the utmost has been done to avoid the blurring of roles or duties as alleged by the Defence.

43. Accordingly, the second ground of appeal is without merit.

Third ground of appeal: The purported general obligation on victims to disclose every item of incriminating or exculpatory evidence

44. In the view of the Defence, Trial Chamber II erred in rejecting the idea of a general obligation to disclose every piece of incriminating or exculpatory evidence.

45. As Trial Chamber II held, there is no general obligation to disclose incriminating or exculpatory information under the Statute or the Rules of Procedure and Evidence.

46. On the contrary, the clear language of article 67(2) of the Statute and rules 76 to 84 of the Rules on disclosure obligations establishes that such obligations are directed only at the parties and not at the victims.²⁴ Trial Chamber I has ruled to that effect.²⁵ Contrary to the Defence submissions, such an obligation cannot be derived from general provisions such as articles 64(3)(c), 67(1) and 68(3) of the Statute.

47. The Defence maintains that such a disclosure obligation is required in the interest of justice and a fair trial, irrespective of whether or not the legal representatives seek to produce incriminating evidence. The Defence, however, fails

²⁴ ICC-01/04-01/06-1432, para. 93.

²⁵ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the defence application for disclosure of victims applications*, ICC-01/04-01/06-1637, 21 January 2009, para. 10.

to show that the disclosure obligation which it is seeking to have imposed on the victims stems from a principle of international law or a general principle of law.²⁶

48. In reality, it is because of the position afforded to them in the trial proceedings by the Statute and the other legal texts of the Court that victims do not have any of the disclosure obligations that the Defence suggests.

49. The status of the parties at trial is of a different nature from that granted to victims participating in the proceedings. It is by virtue of the position that the Prosecutor occupies in the trial proceedings that he is required to assume a series of disclosure obligations, including the obligation to disclose any evidence in his possession that tends to show the innocence of the accused, or mitigate the latter's liability, or which may affect the credibility of prosecution evidence. The Appeals Chamber of the International Criminal Tribunal for Rwanda has, on several occasions, confirmed such an analysis in the following terms:

The Prosecution's obligation to disclose exculpatory material is essential to a fair trial. The Appeals Chamber has always interpreted this obligation broadly. The positive nature of this obligation and its significance stem from the Prosecution's duty to investigate, which the Appeals Chamber has explained runs conterminously with its duty to prosecute. In particular, the Appeals Chamber recalls that *one of the purposes of the Prosecution's investigative function is "to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused."* The responsibility for disclosing exculpatory material rests on the Prosecution alone, and the determination of what material meets Rule 68 disclosure requirements is primarily a fact-based judgement, falling within the Prosecution's responsibility. *In other words, the Prosecution has a distinct obligation to participate in the process of administering justice by disclosing to the Defence, as required by Rule 68(A), material which it actually knows "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence."*²⁷

50. Accordingly, it is not possible – without doing violence to the fair treatment to which all are entitled – to impose on victims the same obligations as those

²⁶ Under article 21 of the Statute, the Court applies, in the first place, the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. In the second place, the Court applies the treaties and principles of international law; failing that, it applies "general principles of law derived by the Court from national laws of legal systems of the world."

²⁷ Appeals Chamber, *The Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations*, 30 June 2006, para. 9 (including the jurisprudence cited in the footnote) (emphasis added).

imposed on the parties, whereas it was specifically intended that these same victims should precisely be “unequal” to the parties at trial in procedural terms.

51. In seeking to impose on victims the obligations of the parties in evidentiary matters, the appellant is in fact calling into question the balance that the Chambers of the Court have endeavoured to achieve, running the risk that any change in the victims’ position might legitimately entitle them to claim in return an actual right – even if only a conditional one – to call witnesses or produce documentary evidence.

52. While this possibility would not be without certain advantages, it must nevertheless be acknowledged that it might well entail other difficulties and require a new, overall reappraisal of the status afforded to victims and the rights that they should enjoy.

53. Furthermore, the appellant appears to take no account of the fact that the victims and their legal representatives do not have the same means as the Prosecutor to contend with the dangers and difficulties that are intrinsic to the disclosure process.

54. Similarly, nor is the victims’ situation that of the accused: they are in a much more perilous position, since they remain in the field, and, in addition, are often living at the site of the crimes or in their immediate vicinity, exposing them to all kinds of risks.

55. Lastly, neither the victims nor the Legal Representatives are seeking to rely on considerations of objectivity or on a claim to be representing the general interest.

56. On the contrary, their interests are of a personal and subjective nature, and it would therefore clearly be illogical to expect or even require them to contribute to the presentation of material exculpating the accused without granting them the

means to support the attribution of responsibility for the crimes to those same accused.

57. It will be recalled that, in the impugned decision, Trial Chamber II also adhered to the principles established by the present Chamber when it stated that it will, where necessary, set the * modalities for the disclosure of any evidence that the victims seek leave to present and decide on the measures necessary to safeguard both the fairness of the trial and the respect for the rights of the accused.

58. Accordingly, the third ground of appeal is without merit.

FOR THESE REASONS,

MAY IT PLEASE THE CHAMBER

1) To declare the appeal admissible but without merit.

2) To dismiss the Defence appeal.

[signed]
Mr Fidel Nsita Luvengika
Legal Representative of the main group of
victims

[signed]
Mr Jean-Louis Gilissen
Legal Representative of the group of
child-soldier victims

Dated this 28 May 2010, at The Hague

