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No.: ICC-01/04-01/07 OA11

Date: **21 May 2010**

THE 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 DARFUR, SUDAN
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

Prosecution Response to the “Joint Application by the Legal Representatives of the Victims to Participate in the Proceedings Pertaining to the Appeal of the Defence for Germain Katanga Against the Decision of 22 January 2010 on the Modalities of Victim Participation at Trial”

Source: Office of the Prosecutor

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

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Introduction

1. The Defence for Germain Katanga (“the Appellant”) has appealed the decision of Trial Chamber II setting out the modalities for the participation of victims during the trial (“the Decision”).¹
2. The Legal Representatives of victims authorized to participate in the case jointly seek to participate in the current appeal proceeding and submit that the victims whom they represent fulfill the criteria for participation in this instance.²
3. The Prosecution considers that the victims have demonstrated that their personal interests may be affected by the substance of the appeal, namely, the possibility of victims to move the Chamber to call for incriminatory evidence without having disclosed it prior to trial; the scope of such evidence; and the enforcement of general disclosure obligations on the victims;³ and that they meet all other requirements for victims’ participation in interlocutory appeal set out by the Appeals Chamber. The Prosecution therefore supports the Appeals Chamber granting the victims leave to submit their views and concerns on this appeal, subject to the parties being given an opportunity to respond.

Procedural Background

4. The victims represented by the two Legal Representatives subscribing this Application have been granted leave to participate in the instant case.⁴ Mr. Luvengika and Mr. Gilissen were appointed permanent common legal representatives of the main group of victims; and of eight victims belonging to the group of former child soldiers, respectively.⁵
5. On 20 November 2009, Trial Chamber II issued a decision entitled Directions for the conduct of the proceedings and testimony in accordance with rule 140.⁶ On 22 January

¹ ICC-01/04-01/07-1788-tENG. On 3 May 2010 the Defence for Germain Katanga filed its document in support of appeal: ICC-01/04-01/07-2063 OA11.

² ICC-01/04-01/07-2070-tENG, paras. 9-21 (“Victims’ Application”).

³ The Trial Chamber granted leave to appeal the following three issues: “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” (ICC-01/04-01/07-2032, para. 25); “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” (para. 30); “whether every item of evidence in possession of the Legal Representatives of Victims, be it incriminating or exculpatory, must be communicated to the parties” (para. 35).

⁴ ICC-01/04-01/07-357; ICC-01/04-01/07-579; ICC-01/04-01/07-632; ICC-01/04-01/07-1347-Corr.

⁵ ICC-01/04-01/07-1488.

⁶ ICC-01/04-01/07-1665-Corr.

2010, that same Chamber issued a Decision on the Modalities of Victim Participation at Trial.⁷

6. On 1 February 2010, the Defence for Germain Katanga sought leave to appeal five issues arising out of the Decision.⁸ The Legal Representatives filed a joint response on 4 February 2010.⁹
7. On 19 April 2010, Trial Chamber II granted leave to appeal three confined issues.¹⁰ On 3 May 2010, the Appellant filed its document in support of appeal.¹¹ The Prosecution filed its response to the Appellant brief on 14 May 2010.¹²
8. On 4 May 2010 the Legal Representative filed a joint request for leave to participate before the Appeals Chamber (“Victims’ Application”).¹³
9. Pursuant to an order of the Appeals Chamber dated 19 May 2010,¹⁴ the Prosecution hereby responds to the Victims’ Application.

Victims can only participate in an interlocutory appeal with leave from the Appeals Chamber

10. The Appeals Chamber has set out the requirements for victims’ participation in interlocutory appeals, which have been consistently applied.¹⁵ According to these decisions, because “[a]n interlocutory appeal [...], in which a particular issue requires specific consideration, is a separate and distinct stage of the proceedings,”¹⁶ Article 68(3) “mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration.”¹⁷

⁷ ICC-01/04-01/07-1788-tENG (“the Decision”).

⁸ ICC-01/04-01/07-1815.

⁹ ICC-01/04-01/07-1841. To which the Katanga Defence sought leave to reply and replied on 15 February 2010: ICC-01/04-01/07-1870 and ICC-01/04-01/07-1873, respectively; the Chamber granted *a posteriori* Katanga’s leave to reply by an oral decision on 18 February 2010.

¹⁰ ICC-01/04-01/07-2032.

¹¹ ICC-01/04-01/07-2063 OA11.

¹² ICC-01/04-01/07-2100 OA11.

¹³ ICC-01/04-01/07-2070-tENG.

¹⁴ ICC-01/04-01/07-2112 OA11.

¹⁵ “In order for victims to participate in an appeal under article 82 (1) (b) of the Statute, an application seeking leave to participate in the appeal must be filed.” See ICC-01/04-01/06-824 OA7, para. 38, see also paras. 40, 43. “The Appeals Chamber finds these procedures adopted in respect of interlocutory appeals pursuant to article 82 (1) (b) of the Statute to be equally applicable to the instant interlocutory appeals arising under article 82 (1) (d) of the Statute”, see ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 37. See also, e.g., ICC-01/04-01/06-1335 OA9 and OA10, paras. 12-13; ICC-01/04-01/06-925 OA8, para. 23; ICC-01/04-01/06-1452 OA12, para. 7; ICC-01/05-01/08-566 OA2, para. 13.

¹⁶ ICC-01/04-01/06-824 OA7, para. 43.

¹⁷ ICC-01/04-01/06-824 OA7, para. 40; ICC-01/04-503 OA4 OA5 OA6, para. 36; ICC-01/05-01/08-566 OA2, para. 14.

11. As the Legal Representatives note, the Appeals Chamber further requires that the victims demonstrate that: (i) the individual seeking participation is a victim in the case or situation out of which the appeal arises (an assessment to be made by a Pre-Trial or Trial Chamber);¹⁸ (ii) the individual has personal interests which are affected by the issues on appeal; (iii) the individual's participation is appropriate; and (iv) the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁹

The victims appear to meet the requirements to participate in this case

12. Once victims have been admitted to participate in the relevant situation or case, they do not need to demonstrate again to the Appeals Chamber that they meet the definition of "victim" under Rule 85.²⁰ The persons represented by the Legal Representatives have been recognised as victims in the context of this case.²¹
13. The Prosecution considers that the issues in this appeal plainly affect the personal interests of the victims: the Appellant submits that victims should not be allowed to move the Chamber to call for incriminatory evidence when it has not been disclosed prior to trial; he seeks to limit the scope of the victims' evidence; and he states that the victims have a general obligation to disclose all incriminatory and exculpatory information in their possession.²² As the Legal Representatives note, the Appeals Chamber in the *Lubanga* case found that the victims' interests were affected when an appeal sought to limit the rights afforded to them by the Trial Chamber.²³ The current appeal not only has such potential effect but it also seeks to impose onerous obligations on the victims.
14. The Prosecution further considers that the presentation of the views and concerns of the victims on the issues in this appeal is appropriate.

The modalities of participation

15. The Prosecution submits that given the nature of the issues in this appeal, the victims should be permitted to present their views and concerns regarding those issues in writing,

¹⁸ ICC-02/05-01/09-48 OA, para. 10; ICC-01/04-01/06-1335 OA 9 and OA 10, para. 40.

¹⁹ ICC-01/04-01/06-1335 OA9 and OA10, paras. 35, 36; ICC-01/04-503 OA4 OA5 OA6, paras. 35, 90; ICC-01/04-01/06-1453 OA 13, para. 7; ICC-01/04-01/06-1452 OA12, para. 7; ICC-02/04-164 OA, para. 7; ICC-02/04-01/05-324 OA2, para 8; ICC-01/05-01/08-566 OA2, para. 8. See also ICC-01/04-01/06-824 OA7, paras. 2, 44 and 46; ICC-01/04-01/06-925 OA8, para. 23.

²⁰ See e.g. ICC-01/04-01/06-824 OA7, paras. 44, 45; ICC-01/04-503 OA4 OA5 OA6, para. 92.

²¹ See paragraph 4 above. The Prosecution notes that the Application indicates that the "victims [...] have all been authorized to participate at trial" (Application, p. 4) but it does not refer to the relevant decisions granting the applicants the status of victims' participating in the proceedings.

²² See ICC-01/04-01/07-2063 OA11, paras. 7-22 (first ground), paras. 23-32 (second); and paras. 33-38 (third).

²³ ICC-01/04-01/06-1335 OA9 OA10, para. 46.

through their Legal Representatives. Consistent with the jurisprudence of this Chamber, such views and concerns “must be specifically relevant to the issues arising in the appeal and to the extent that their personal interests are affected by the proceedings.”²⁴

16. Furthermore, as mandated by Rule 91(2), the Prosecution and the Defence must have an opportunity to respond to the views and concerns presented by victims in this appeal. Under these circumstances, the participation of the victims in this appeal would not be prejudicial to or inconsistent with the rights of the Accused and a fair and impartial trial.²⁵

Conclusion

17. For the reasons set out above, the Prosecution supports the participation of the victims in this appeal.
18. The Prosecution requests that the Appeals Chamber order that victims participating in this appeal to file their views and concerns in writing within a defined period; and permit the Prosecution and Defence to respond to those views and concerns with a deadline prescribed by the Chamber.



Luis Moreno-Ocampo,
Prosecutor

Dated this 21st day of May 2010
At The Hague, The Netherlands

²⁴ ICC-01/04-503 OA4 OA5 OA6, para. 101; ICC-01/04-01/06-1335 OA9 and OA10, para. 50. See also ICC-01/04-01/06-824 OA7, para. 55: “Observations to be received by the victims are [...] limited to, and must be specifically relevant to, the issues arising in the appeal, rather than more generally”.

²⁵ The Appeals Chamber has previously recognised that if victims are permitted to participate, “the Prosecutor and the Defence shall be allowed to reply to any filing of the victims in accordance with the provisions of rule 91(2) of the Rules of Procedure and of Evidence”, ICC-01/04-01/06-824 OA7, para. 49.