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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

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

Public Document

**DEFENCE OBSERVATIONS REGARDING VICTIMS' PARTICIPATION AND
SCOPE THEREOF**

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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Other

Defence Submissions

1. In the context of victim participation, its scope and modalities, the Defence respectfully submits the following observations.
2. The Defence does not seek to re-open matters of victim participation decided by the Appeals Chamber in Lubanga in its 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 July 11, 2008¹ (“Appeals Chamber Judgment on Victim Participation”), but seeks to define the scope and modalities of victim participation within the parameters set out in this Judgment.

General Principles set out by the Appeals Chamber

3. As recognised in the Appeals Chamber Judgment on Victim Participation, any entitlement granted to and participation of victims in the proceedings is subject to:
 - (i) the limits set by the Statute (in particular as regard the nature and scope of permissible involvement);
 - (ii) the fundamental rights of the accused, in particular the right to a prompt and fair hearing, as guaranteed by the Statute (and customary international law);
 - (iii) the supervision and control of the Trial Chamber.²
4. The Appeals Chamber took care to emphasis that “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 Defence”,³ and that the onus of proving the guilt of the accused is on the Prosecution.⁴
5. The Appeals Chamber found that these principles do not preclude “the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings,”⁵ as

¹ ICC-01/04-01/06-1432.

² *Ibid*, paras. 86-105.

³ *Ibid*, para. 93.

⁴ *Ibid*, para. 95.

⁵ *Ibid*, para. 94.

such, but nonetheless impose certain limits on this possibility. Victim participants may only be permitted to tender and examine evidence if their personal interests are engaged and if authorised to do so by the Court, which the Court may do only if it considers that the submission of the proposed evidence is necessary for the determination of the truth.⁶

6. The Appeals Chamber further emphasised that this did not create “an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation. For example, should a victim demonstrate that his or her personal interests would be negatively affected if a particular witness (who could attest to the harm suffered by the victim) was not called to testify or if a piece of evidence (which would have ramifications on the safety and security of the victim) were to be declared admissible, then the victim would be able to move the Chamber to exercise its powers under article 69 (3) to present the evidence or challenge the admissibility of the evidence respectively.”⁷
7. The Appeals Chamber further held that, in determining each application, Trial Chambers must be vigilant in safeguarding the rights of the accused. Bearing the rights of the accused in mind, Trial Chambers must in each particular case consider whether it would be appropriate to hear the proposed evidence, and if so, which modalities for proper disclosure should be in place and who would be the most suitable candidate to call and present the evidence: one of the parties, the Trial Chamber or the victim participants.⁸
8. The Appeals Chamber also confirmed the confined limits set out by the Trial Chamber within which Trial Chambers may exercise their powers to permit victims to tender and examine evidence: “(i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial.”⁹
9. Only with such safeguards in place did the Appeals Chamber find that allowing victim participants to lead evidence pertaining to the guilt or innocence of the accused and to

⁶ *Ibid*, paras. 95 & 98.

⁷ *Ibid*, para. 99.

⁸ *Ibid*, para. 100.

⁹ *Ibid*, para. 104.

challenge the admissibility or relevance of the evidence is not per se inconsistent with the Prosecutor's burden of proof and the fair trial rights of the accused.¹⁰ The Appeals Chamber has very narrowly set out the possibility for victim participants to present evidence pertaining to the guilt of the accused and has clearly not created an unfettered right to do so. Indeed, it only stated that "it cannot be ruled out that such questions or documents may pertain to the guilt or innocence of the accused" in so far as these questions or documents may affect their personal interests and the aforementioned conditions are met.¹¹ The Defence draw attention to the cautious and circumscribed approach of the Appeals Chamber in addressing this subject and to the very limited nature of the examples provided by the Appeals Chamber, both in respect to the possibility of Victim's adducing evidence with the leave of the Chamber and to their objecting to the admissibility of evidence.

10. The Defence fully endorses these limits and safeguards to victim participation and proposes, within these parameters, the following modalities for victim participation to be put in place in the present proceedings.

Evidence limited to Prosecution case

11. The defendant is entitled to prompt and detailed notice of the nature and scope of the Prosecution case. That case forms the framework of the trial and cannot be changed or modified by stealth, through the tendering of evidence. All through the proceedings, the case against the accused is and remains as pleaded in the document containing the charges.
12. Therefore, evidence led by victim participants cannot have the effect of expanding or modifying the nature (or scope) of the Prosecution case. The document containing the charges sets the framework of the charges and the evidence offered by the Prosecution sets the limits of the evidential material relevant to establishing these charges.
13. Under the Statute, the competence and responsibility (sole competence and responsibility) to prosecute that case, as pleaded, belongs to the Prosecution. This, in turn, means that the guilt or innocence of the accused must primarily be determined on the basis of the evidence called and disclosed by the Prosecution. The evidential function and scope of evidence called by victim representatives is more limited in scope. It is strictly confined to their personal interests. It is to be noted that the

¹⁰ *Ibid*, paras. 104-105.

¹¹ *Ibid*, para. 102.

examples of intervention found in the Appeals Chamber decision concern situations where the primary purpose of the intervention is not to adduce evidence of the guilt or innocence of the accused but to address a discrete matter relating directly to the interests of the victim.

14. Also, the Statute limits the involvement of the victims by limiting their participation to an entitlement, where their personal interests are affected, to present “their views and concerns”. The Statute does not give victims a right to cross-examine (nor do any relevant human rights treaty/convention). Clearly, the Statute has limited the scope of victims’ involvement in trial proceedings to an ability – with leave and under the control of the Chamber – to present their views and concerns.
15. Victim participants do not represent a party to the criminal trial. The Appeals Chamber has affirmed that the parties are the Prosecutor and Defence, not the victim participants.¹² Further, as aforementioned, the Appeals Chamber highlighted that the onus of proving the guilt of the accused is on the Prosecution.¹³ Accordingly, the role of victim participants should not be confused with that of one of the parties, in particular not with that of the Prosecutor. Indeed, the Appeals Chamber has recognised that the Court must actively ensure that the role of the victims does not usurp or duplicate the role of the Prosecutor.¹⁴
16. In this regard, Professor Bassiouni¹⁵ has noted:

If the victim is a 'participant', then the victim has only those procedural rights specified in the Statute. As a 'participant', a victim does not have the right to present evidence or to examine and cross-examine witnesses for the prosecution and for the defence. As a 'party', it may by implication have such rights, although there is nothing in the legislative history of the ICC Statute to assume that the victim was to be anything more than a participant. [...] An expanded procedural role for the victim may be in contradiction with the role and prerogatives of the Office of the Prosecutor. It should be noted that the ICC Statute's provisions and the Rules of Procedure are very detailed as to the role of the Office of the Prosecutor, and it would be highly inconsistent with the goals and purposes of these provisions to allow the victim a parallel role or one that could be in conflict with the Office of the Prosecutor.¹⁶

Proposed conditions for the submission of evidence by victim participants

¹² *Ibid*, para. 93.

¹³ *Ibid*, para. 95.

¹⁴ The Prosecutor v. Thomas Lubanga Dyilo, ‘Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007’; ICC-01/04-01/06-925, 13-06-2007, at para. 28: “[A]n assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”

¹⁵ Professor Bassiouni was the UN Special Rapporteur for the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and was also heavily involved in the drafting process of the Rome Statute.

¹⁶ C. Bassiouni, ‘International Recognition of Victims’ Rights’, 6 Hum. Rts. L. Rev. 203, at p. 18 [emphasis added].

17. In line with these principles, the Defence submits that the ability of victim participants to present information for the purpose of their admission in evidence should be subject to the following conditions:

- (i) *Timely notice*: To preserve the fundamental right of the accused to adequate time and facilities to prepare (and the right to confrontation) as form part of the fair trial guarantee, the victim participants should give timely and detailed notice of the evidence that it wishes to call at trial. Victim participants would have to detail each document that it will seek to produce at trial and provide a detailed notice of the alleged relevance of that document to their position. The same must be required if and where the victim participants seek to produce a witness statement, the admissibility of which will be subject to the general requirements set out in the Statute and the Rules.
- (ii) *Leave of the Chamber*: Evidence could only be presented by a victim participant where he or she has sought and obtained leave to do so from the Chamber (see, e.g. Article 68(1) and (3) of the Statute). The same is true where legal representatives of victims wish to ask a question of a witness. In each case, i.e., in relation to each question, leave of the Chamber would have to be sought and obtained.¹⁷
- (iii) *Disclosure*: A victim participant should give timely notice – to the Chamber, Defence and Prosecution – of its intention to seek to produce a particular document or to call a particular witness (where permitted to do so). The Defence submits that the Trial Chamber should set a deadline, well in advance of the start of the trial, for the victim participants to do so.
- (iv) *Admissibility*: Admissibility is subject to the general requirements and conditions pertaining to material tendered by the Defence or the Prosecution. Unless the same requirements of diligence apply to the victim participants in eliciting, obtaining and disclosing evidence, attention will have to be paid in that context to the authenticity and reliability of the material produced.

18. Within the above statutory framework, the Chamber could exercise a control as regard the nature of the proposed evidence and protect and guarantee the fundamental rights of the accused, in particular the right to timely/adequate notice of the case, equality of arms, right to confrontation and right to a fair trial.

¹⁷ See Rule 93(1) of the Rules of Evidence and Procedure regarding the possibility for parties civiles to ask questions.

19. Also, the Defence submits that such a procedural framework will allow the Chamber to control the scope and length of proceedings and thus guarantee the right of the accused to a trial within a reasonable timeframe.

No Investigative Role for Victim Participants

20. On similar grounds as set out above, it is submitted that victim participants should not be given any investigative role, as suggested by a victim representative during a Status Conference held on 28 November 2008.¹⁸ Whilst the Appeals Chamber has held that the legal representatives of victims may in principle, and in exceptional circumstances, tender evidence which is linked to their personal interest in the proceedings, this right does not in itself translate to a right to conduct investigations to find witnesses or other evidence. In this regard, the Defence notes that the ICC Statute and Rules do not grant any legal right to conduct investigations to victim participants or their legal representatives, but, instead, only refer to national authorities of the territorial State, the Prosecutor and Defence.
21. The Defence fully endorses the arguments set forth by the Defence for Mr. Ngudjolo in their *Requête en vue de fixer les modalités de la participation des victimes au stade du process*.¹⁹ In particular, the Defence agrees with the Ngudjolo Defence that the ability for victim participants to submit evidence pursuant to Article 69(3) of the ICC Statute is reactive rather than proactive in the sense that the Chamber must evaluate, based on the list of evidence submitted by the Prosecution, whether there is additional evidence that it considers necessary for the determination of the truth under Article 69(3).²⁰ Accordingly, the role of victim participants can only complement, but not supplement the role of Prosecution, which is the party in charge of investigations and prosecutions.
22. In this connection, it should be noted that victims have the power to submit a complaint to the Prosecutor under article 15(2), which in accordance with article 53 (1) of the Statute, triggers an automatic obligation on the Prosecutor to investigate the circumstances relating to the complaint, and any possible leads concerning the potential guilt or innocence of the defendant. Thus, the victim needs to address his or

¹⁸ Transcripts of 28 November 2008, page 3, line 20.

¹⁹ ICC-01/04-01/07-824, 13 January 2009, para. 38.

²⁰ *Idem*.

her complaint to the Prosecutor, who will then take charge of the investigations into the complaint.

23. The Defence points out that, in domestic systems where victims are granted participatory rights, they cannot conduct their own independent investigation, but may make specific requests for investigation to the Prosecution or investigating judge.²¹ Similarly, the Defence submits that, where the victim participants have particular investigative requests, rather than being allowed to undertake investigative missions, they should request the Prosecution to undertake specific investigative acts. The Prosecutor, being in charge of the investigations, has discretion to grant or dismiss such a request.

Dual Status Victim – Witness

24. The Defence submits that victim participants may only be witnesses for one of the parties, that is the Prosecution or Defence, or the Court, but cannot be presented by their own legal representatives. Allowing legal representatives to present their own victims as witnesses would extend the scope of their participatory role beyond what was envisaged by either the statutory provisions and Rules of the ICC or the Appeals Chamber.
25. The Defence further submits that victims who have been granted access to Prosecution evidence should be prohibited from testifying thereafter as Prosecution witnesses. Otherwise, such witnesses may alter their story, consciously or subconsciously, to make it consistent with the Prosecution evidence. As for newly admitted victims who are scheduled to testify for the Prosecution, the Chamber is invited to allow them to do so only if they had no prior access to the record of the case; and they have not been exposed to the account of other victims or witnesses during the application process. Alternatively, the Defence requests the Chamber to consider such access as a factor significantly undermining the weight of the testimony of a victim-witness.
26. This proposition is in line with domestic legal systems where victim participation is allowed. In France, for instance, victims are not permitted to testify subsequently as witnesses. Similarly, witnesses are not permitted to access the record of the case prior to their testimony.²²

²¹ See, for instance, France: Articles 80-91(1) and Article 418 of the French Code of Criminal Procedure.

²² See Article 422 of the French Code of Criminal Procedure. See also: Cass. Crim., 28/01/1958 : « En effet, **nul ne peut, dans la même affaire, être témoin et partie** » (emphasis added) and: C. Jorda et J. de Hemptinne, «The Status and Role of the Victim », in *The Rome Statute of the International Criminal Court: A Commentary*, Volume II edited by Cassese, Gaeta and Jones 2002 at page 1403.

27. Finally, the Defence submits that, based on the Prosecution's disclosure obligations and fundamental rights of the accused, as outlined in the *Lubanga* Decision of 21 January 2009, the Prosecution should be ordered to disclose to the Defence the non-redacted version of the applications of victims which have dual victim-witness status.²³
28. As the Defence has already indicated in a previous filing, notification of the fact that a proposed witness is also a victim (or the other way around) and the disclosure of his or her non-redacted application should be done promptly and without delay.²⁴
29. By contrast, the Office of Public Counsel for Victims is not entitled under the law of this Court to have access to the previous statements of the victim-witness.²⁵ Neither should the legal representative of such victim-witness be provided with the witness statement of the victim, since allowing them to discuss the contents of the statement with their client would disturb the modalities on witness proofing that will be put in place in the present proceedings. Similarly, the Legal Representatives should not be granted access to the Prosecution exhibits which the Prosecution intends to tender through the victim-witness.
30. The Defence submit that any proposed introduction of evidence or material on the part of the Victims should be provided to the Defence at least three months before the trial commences. This is necessary in order to secure the rights of the accused, and in particular to allow time for investigation of any issues that may arise. The Defence mentions at this juncture the obstacles met in investigations and the limited budget and time available to it to conduct appropriate and necessary inquiries.

²³ See, e.g., *Prosecutor v Lubanga*, Decision on Defence Application for Disclosure of Victims Applications, 21 January 2009, in particular paras 9-13.

²⁴ Defence Observations, 12 January 2009, para. 14.

²⁵ See, e.g., *Prosecutor v Bemba*, Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims, 8 January 2008, para. 10.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'D Hooper', with a long horizontal stroke extending to the right.

David HOOPER

Dated this 29 January 2009

At Kinshasa