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

Public Document

Defence Request for Leave to Appeal the *Décision relative aux modalités de participation des victims au stade des débats sur le fond* (ICC-01/04-01/07-1788)

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for the Defence for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

A. Introduction

1. The concept of victim participation, as pronounced in the Rome Statute and Rules, represents one of the most novel and groundbreaking developments in international criminal proceedings. On 22nd January 2010 the Trial Chamber issued its second significant decision on the subject of victim participation during the course of the trial. The Trial Chamber's *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*¹ follows and builds upon the guidance issued in the Chamber's ruling on the application of Rule 140 of 20th November 2009, corrigendum dated 1 December 2009.² The Defence hereby applies for leave to appeal the decision of 22 January.
2. All provisions and rulings on the participation of victims are subject to the overriding consideration enshrined in article 68(3) that rulings on victims participation must be determined in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
3. The following grounds of appeal are founded on the assertion that certain findings of the Chamber create possible forms of participation which are essentially prejudicial to, and inconsistent with, the rights of the accused and a fair trial.

B. Grounds of Appeal

First Ground of Appeal

1. The first ground of appeal is that the Trial Chamber erred in its finding, at paragraph 78 of its decision, 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.

¹ ICC-01/04-01/07-1788, 22 January 2010.

² Cf. ICC-01/04-01/07-1665-Corr and ICC-01/04-01/07-T-88-RED-FRA WT 01-12-2009, p. 2.

2. It will be submitted that this form of participation, so broadly framed, is inconsistent with the right to a fair trial where such questioning, designed to complete or clarify, goes to proof of the crime against the accused and even the acts and conduct of the accused. Such questions could cause prejudice to the accused because in cases where victims see their interests as lying in the conviction of an accused, it could have the effect of filling in the gaps left by the prosecution in proving its case. This effectively turns the victims' legal representatives into a supplementary arm of the Prosecutor and thus impacts upon the equality of arms as between the parties. It also means that the accused is not, as is his right under article 67(1)(e), examining witnesses against him and having his witnesses examined under the same conditions.
3. It is submitted that questions, in order not to offend the fairness of the trial, should be limited to the consequences of the crime or collateral issues directly relevant to the interests of victims. Their questions should not address the guilt or innocence of the accused and especially not the specific role of the accused as demonstrated through his actual acts and conduct.
4. What questions may be asked is an issue which is one step removed from the issue addressed by the Appeals Chamber in *Lubanga*: i.e. whether victims may call victims to testify on the guilt or innocence of the accused. The potential prejudice is much greater because it goes to the presentation and evaluation of the evidence of any or all prosecution witnesses forming the foundation of the case against the accused. Moreover, victims' legal representatives do not benefit from the same scope of information as the Prosecutor or the same degree of independence and may consequently go down avenues which the Prosecutor might not feel ethically or factually justified in pursuing.
5. With particular regard to the questioning of the accused, this broadly framed possibility open to victims of asking questions which 'complete or clarify elements of proof' generally, and including the accused's own conduct, offends, in particular, the right to silence since it places an additional pressure on an accused as to his decision to give evidence on his own behalf. It also introduces possible disadvantages in deciding to do so. This possible form of intervention is further inconsistent with a fair trial as it puts the accused in a position where he must face more than one accuser.

Second Ground of Appeal

6. The second ground of appeal is that the Trial Chamber erred in deciding, at paragraphs 81 to 93, as well as paragraphs 98 to 101, of its decision 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.

7. At the time of the decision of the Chamber the trial had already commenced and it is therefore no longer possible for the accused to have adequate notice of such evidence, since proper notice must allow the defence to take this evidence into account in its pre-trial preparation and cross-examination of prosecution witnesses. This distinguishes this decision from the decision of Trial Chamber I, taken one year before the commencement of the current trial, the decision on appeal being issued on 11 July 2008, some six months before the commencement of the *Lubanga* trial on 26 January 2009. Moreover, the *Lubanga* trial concerns a much narrower range of issues, so the prejudice to the Defence in not receiving notice of evidence prior to trial is not so pronounced as it is in this trial where the issues are of great complexity.

8. The Trial Chamber first recorded the possibility of victims' legal representatives calling victims to testify on the 20 November 2009. The trial commenced on the 24th November 2009. No steps have been taken by the legal representatives of the victims between the 20th November 2009 and the 22 January 2009 to give notice to the accused of victims' testimony. In the meantime, the first two witnesses have completed their evidence and a third, significant witness is well into his examination-in-chief. Even following the issuance of the decision no such notice has been given by the legal representatives. If there is to be a fair trial it is submitted that 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. The Defence is entitled to know the evidence against it before the trial so as to shape its tactics and question accordingly.

Third ground of appeal

9. The third ground of appeal is that the Trial Chamber erred in suggesting, at paragraph 86 of its decision, that the legal representatives of victims might call witnesses on matters including the *role of the accused* in crimes charged against them. It will be submitted that parameters of permissible testimony from victims must necessarily exclude evidence on the incriminatory acts and conduct of the accused in order for the participation to be consistent with a fair trial. Once the legal representatives of victims, who believe their interest lies in the conviction of the accused, are permitted to directly address the role of the accused in crimes they inevitably act as supplementary prosecutors.
10. This is a more refined question than the broader question addressed by the Appeals Chamber; that is whether evidence may go to questions of guilt or innocence of the accused.

Fourth ground of appeal

11. The fourth ground of appeal is that the Trial Chamber erred in its finding, at paragraph 105 of its decision, that nothing justifies a general obligation to communicate to the parties every element in their possession, whether incriminating or exculpatory. In particular, the Defence will submit that there is a general obligation to disclose exculpatory material to the Defence which exists independently of any application to submit testimony and in any event as a *sine qua non* for offering testimony on the role of the accused. Whether such an obligation exists is not a matter of judicial discretion as impliedly suggested by paragraph 106 of the Chamber's decision, but an inherent requirement to a fair trial where victims' participation is permitted.
12. It will be submitted that the fact that there is no express provision in the Statute and Rules does not exclude its existence as the regime for victim participation is in most respects far less regulated than that for the Prosecutor. The disclosure obligation is a necessary implication arising from article 68(3) providing that victim participation shall not prejudice or be inconsistent with the rights of the accused and a fair trial.

Fifth ground of appeal

13. The fifth ground of appeal is that the Trial Chamber erred in its finding, at paragraph 104 of its decision, 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.
14. This is different from the question before the Appeals Chamber in *Lubanga*; i.e. whether victims' legal representatives may challenge the relevance or admissibility of evidence. In the case of supporting prosecution applications to admit evidence, which are opposed by the Defence, participation of victim's legal representatives in such debates directly comprises the equality of arms between the Prosecutor and the Defence.

C. Satisfaction of the conditions for leave to appeal

15. It is now well established³ that leave to appeal pursuant to article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:
 - a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
 - b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
16. It is respectfully submitted that these criteria are met in the present situation. The question of victims' participation is novel in international criminal proceedings and

³ ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4

directly impacts on fair trial issues. This question is therefore in urgent need of clarification. Such clarification will help this trial, with its constant presence of victims' legal representatives, to proceed upon the right footing and in a fair and expeditious manner. It will obviate the need for constant review of the basic premises of victims participation during the course of the proceedings each time the Chamber is called upon to rule on a specific request to ask questions, call evidence, or participate in other manners.

17. The first Appeals Chamber decision in the *Lubanga* case addressed three specific aspects of this area of international criminal litigation. The above grounds of appeal, in particular grounds one (questioning witnesses) and four (disclosure obligations), address two entirely new aspects, not previously directly addressed before the Appeals Chamber.
18. Moreover, matters which were previously discussed before the Appeals Chamber are revisited from a different perspective, taking into account the distinguishing features of this case: in particular the stage of the proceedings and the broader scope of certain of the Trial Chamber's findings. Thus ground two (introducing evidence and testimony of victims) rests on the fact that the stage of the proceedings reached at the time of the Trial Chamber's decision, in the context of a much broader range of allegations, do not permit an identical analysis as that reached in the Appeals Chamber's first decision in this matter. Grounds three (testimony of victims on the role of the accused) and five (views on admissibility impliedly including views supporting the prosecution on admissibility of evidence) rest upon the fact that the Trial Chamber goes beyond the parameters of the Appeals Chambers findings. In the one case of ground three the Trial Chamber expressly includes not only the question of guilt or innocence in general terms, as addressed in *Lubanga*, but also the role of the accused in the possible scope of victims testimony. In the other case of ground five the Trial Chamber's finding incorporates not only challenges to admissibility which was addressed in *Lubanga*, but also submissions in support of admissibility of prosecution evidence. This raises distinct concerns for the Defence.
19. The issue of participation on issues relating to the guilt or innocence of the accused proved contentious before the Appeals Chamber such that there was a dissenting

opinion on the matter.⁴ The majority resolved the issue in face of the need to give meaningful participation to victims.⁵ The treatment of evidence on the specific role; thus the acts and conduct of the accused, are a special part of the evaluative process of great significance to the fairness of the trial, but which is a sufficiently narrow aspect of the evidence as to still allow meaningful participation by victims in other respects, in the event of restrictions on their contribution to such questions.

20. 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. 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.
21. It follows from the above analysis that 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.
22. The outcome of the proceedings is further affected since it is the position of the Defence that if this matter were left to the end of the trial, and the Defence submissions proved correct before the Appeals Chamber, then the Defence would have compelling grounds for a retrial. This would be on the basis that the Defence did not have the advantage of proper notice of victims testimony prior to trial and when dealing with the examination of prosecution witnesses. It would further result from the fact that the court record would be tainted due to the tangible influence of the victim's representatives on the manner in which evidence relating to the acts and conduct of the accused was introduced or effected. Whether this is an assistance to the truth finding process or whether it is outweighed by violation of the rights of the accused will be for the Appeals Chamber to determine, but if the Appeals Chamber decides in favour of the Defence it will be too late to remedy the damage done and re- trial may be the only proper option.

⁴ See ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting opinion of Judge G.M. Pikis, 11 July 2008, pp 37-44.

⁵ ICC-01/04-01/06-1432, 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, para. 97.

D. Relief sought

ACCORDINGLY,

The Defence for Mr Katanga hereby seeks leave to appeal, pursuant to article 82(1)(d) and rule 155, *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*, of 22 January 2010, on the grounds as set out hereinbefore.

Respectfully submitted,



David HOOPER

Dated this 1st February 2010
At The Hague