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THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

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

Public Document

Defence's Document in Support of Appeal against the *Décision 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. Introduction

1. This appeal seeks to clarify the appropriate parameters of victim participation before the International Criminal Court.
2. The appeal relates to the Decision of the Trial Chamber dated the 22 January 2010,¹ where the Trial Chamber laid down principles on victim participation applying the Statute, Rules and Regulations, as well as the guidelines of the Appeals Chamber in its decision of 11 July 2008.² The Trial Chamber decision was the second, significant decision on the subject of victim participation during the trial. The Trial Chamber's *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*³ follows and builds upon the guidance contained in the Chamber's ruling on the application of Rule 140 of 20th November 2009, corrigendum dated 1 December 2009.⁴
3. 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. It is submitted that the Trial Chamber erred in its findings in certain significant respects and, while applying them, developed the Appeals Chamber's rulings in a manner and to an extent which unduly prejudices the fairness of the trial for an accused.
4. The following grounds of appeal are anchored 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.

¹ *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*, 22 January 2010, ICC-01/04-01/07-1788.

² Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Appeals Chamber, 11 July 2008, ICC-01/04-01/06-1432

³ ICC-01/04-01/07-1788, 22 January 2010.

⁴ ICC-01/04-01/07-1665-Corr and ICC-01/04-01/07-T-88-RED-FRA WT 01-12-2009, p. 2.

B. Identification and nature of grounds of appeal

5. The Appellant sought leave to appeal on the 1st February 2010.⁵ In its decision of 20th April 2010, the Trial Chamber granted leave to appeal grounds 2 to 4 as set out in the Appellant's application for leave, but declined leave to appeal grounds 1 and 5.⁶
6. Accordingly, the Appellant has reordered the grounds of appeal as follows:
 - (i) The first ground of appeal is that the Trial Chamber made an erroneous legal finding, at paragraphs 81 to 93 as well as paragraphs 98 to 101 of its decision, that the legal representatives of victims may, impliedly, even without notice prior to the commencement of trial, present evidence and call victims to testify on the crimes against the accused, in a manner which includes incriminating evidence and testimony.
 - (ii) The second ground of appeal is that the Trial Chamber erred in its legal finding, 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.
 - (iii) The third ground of appeal is that Trial Chamber erred in its legal 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.

C. First ground of appeal

7. The first ground of appeal is that the Trial Chamber erred in law in deciding, at the time it did, at paragraphs 81 to 93 as well as paragraphs 98 to 101 of its decision, that the legal representatives of victims may, impliedly, even without notice prior to the commencement of trial, present evidence and call victims to testify on the crimes against the accused, in a manner which includes incriminating evidence and testimony. It is implicit in this finding that victims may call incriminating evidence without any notice having been given to the accused prior to the commencement of trial, since at the time of this decision, issued after the commencement of trial, the Trial Chamber had not introduced any regime for the giving of notice, nor had the legal

⁵ 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), ICC-01/04-01/07-1815.

⁶ Decision on the "Defence Application for Leave to Appeal the Trial Chamber's *Decision relative aux modalités de participation des victimes au stade des débats sur le fond*", ICC-01/04-01/07-2032

representatives of the victims given any notice to the Appellant of any incriminating evidence which they proposed to call.

8. This is an error of law. In this finding, the Trial Chamber has permitted victims to call witnesses to testify with the purpose of incriminating the accused even at a stage of the proceedings when it is no longer possible to provide notice of such evidence prior to trial, and without any corresponding obligation to give notice of evidence prior to trial. This is despite the fact that it is the primary duty of the Prosecutor, and not the victims, to build a case against the accused.⁷ The Trial Chamber has therefore defined the scope of, and conditions for, permissible victim initiated testimony too broadly and thus applied incorrect legal principles.⁸
9. It is submitted that the fairness of the trial depends upon the accused being given the best possible opportunity to defend himself. The Statute lists as one of the fundamental rights of an accused person in article 67(1) that he should have adequate time and facilities to prepare the case against him.
10. In order to preserve the fairness of the trial in this respect, it is submitted that the case against the accused, and the evidence in support of it, should be clearly identified to the accused prior to trial in order that he may know the nature and scope of the evidence against him and prepare to confront such evidence. This is reflected in the duty of the Trial Chamber under article 64(3)(c) of the Statute to ‘subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of trial to enable adequate preparation for trial’.⁹

⁷ Article 42 of the Statute

⁸ Cf. *Prosecutor v. Bagosora*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, par 16

⁹ Helen Brady has observed in her commentary on the Rules of Procedure and Evidence of the ICC, in connection with rules 76 and 77, that “similar rules exists in the ICTY and ICTR Rules”, and further, that the “Australian proposals (...) which formed the basis for both rules, were derived from ICTY Rules 66(A)(ii), 67(A)(i), and 66(B).” Brady also notes that neither of the two contending proposals concerning disclosure - the French proposal and the Australian proposal - envisaged that disclosure would take place after the commencement of the trial: the main distinction between the two concerned whether disclosure should be completed prior to the confirmation hearing or afterwards, but before the commencement of the trial. H. Brady, “Disclosure of evidence”, in *The International Criminal Court – elements of crimes and rules of procedure and evidence*, R. S. Lee (ed.), Transnational publishers, 2001, p. 409, and 422.

11. Such a regime of pre-trial disclosure has been imposed on victim participants in other jurisdictions. This appears to be the case before the Special Tribunal for Lebanon,¹⁰ as well as before the Extraordinary Chambers of the Courts of Cambodia.¹¹ An analysis of a selection of national civil law jurisdictions demonstrates that a power to provide pre-trial disclosure by *les parties civiles* is envisaged.¹²

12. A number of duties are imposed upon the Prosecutor to ensure that the accused has adequate notice and understanding of the case against him and the evidence in support of it. This includes the duty to give notice of evidence in support of its case prior to trial. This is reflected in the duty to provide the statements of witnesses prior to trial under Rule 76(1)(2) and the duty to allow inspection of documents by the defence under Rule 77. The importance of providing sufficient notice of the evidentiary basis of the case against the accused prior to trial has been recognised by the Trial Chamber in this case when further defining the obligations of the Prosecutor prior to trial:

¹⁰ J Hemptinne 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' *Journal of International Criminal Justice* 8 (2010), 165- 179, at pages 175-176 "First, at the end of the pre-trial phase, the Trial Chamber should receive from the Pre-Trial Judge (who acts independently, since he is not a member of the Trial Chamber) a detailed and neutral case file composed of, inter alia, the following documents: (i) evidentiary material provided by the parties; (ii) orders or decisions made during the pre-trial proceedings; (iii) filings of the parties and of the victims participating in the proceedings; (iv) transcripts of status conferences; (v) minutes of meetings and (vi) a detailed report containing, for instance, the parties' arguments, the points of agreement and disagreement among them, and some suggestions as to the number and relevance of the witnesses they intend to call. A reading of this case file should guarantee that, at the beginning of the trial, the Trial Chamber has a thorough understanding of the case at issue and, on that basis, is able to properly assess whether the questions posed by victims' legal representatives to any witness or expert are relevant, and whether the witnesses they intend to call are necessary for the establishment of the truth."

¹¹ ECCC, Rule 80, para 2 (Preparation for the trial), Internal Rules, Rev. 5 (as amended as of 9 February 2010): <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv5-EN.pdf>

"2. Where the Accused and/or any Civil Party wishes to summon any witnesses who are not on the list provided by the Co-Prosecutors, they shall submit an additional list to the Greffier of the Chamber within 15 (fifteen) days from notification of the list. The Greffier shall place such list on the case file and, subject to any protective measures, forward a copy of the list to the other parties." The Prosecution list is notified to the accused and the civil party 15 days from the date on which the indictment becomes final (rule 80(1)). Accordingly, civil parties are obliged to submit their list of witnesses 30 days after the indictment becomes final.

¹² See the Code de procédure pénale of France (Article 82-1 du Code de Procédure Pénale Français Modifié par Loi n°2000-1354 du 30 décembre 2000 - art. 24 JORF 31 décembre 2000 en vigueur le 1er janvier 2001), Cambodia (Article 260 §3 du Code de procédure pénale du Royaume du Cambodge : *La chambre d'instruction peut ordonner la comparution personnelle des parties, y compris du mis en examen détenu, ainsi que la production des pièces à conviction*), Algérie (Art. 184 § 3 du Code de procédure pénale Algérien : *La chambre d'accusation peut ordonner la comparution personnelle des parties ainsi que l'apport des pièces à conviction*), Sénégal (Article 192 du Code de procédure pénale : (...) *La chambre d'accusation peut ordonner la comparution personnelle des parties ainsi que l'apport des pièces à conviction*) and Mali (ART. 181 du Code de Procédure Pénale : *Elle [la chambre d'instruction] peut ordonner la comparution en personne des parties ainsi que l'apport des pièces à conviction*).

The Chamber further agrees with the Defence that it is entitled to be informed - sufficiently in advance of the commencement of the trial - of the precise evidentiary basis of the Prosecution case. Indeed, although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence. This is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of the trial.¹³

13. With respect to the right to present incriminating evidence, while the Appeals Chamber has recognised that the Statute does not exclude the possibility of the Trial Chamber authorising the legal representatives of victims to present evidence relating to the guilt of the accused, this must be consistent with the rights of the accused. In addition, as expressed by the Appeals Chamber, the right to lead evidence pertaining to the guilt or innocence of the accused lies primarily with the parties. Under such conditions, victims cannot be permitted to lead incriminating evidence against the accused under conditions which are less restrictive, and give less chance to the accused, than those under which the Prosecutor must present his evidence. The prejudice to the appellant's defence caused by late notification and disclosure of evidence exists equally in the case of evidence offered by participants as it does for evidence presented by the Prosecutor himself, so long as it relates to incriminating evidence.

14. Therefore, in the light of the conditions already imposed on the Prosecutor with respect to the disclosure and presentation of evidence, it is imperative that similar, if not more restrictive conditions, are equally applicable to participants who do not have the primary role of presenting incriminating evidence. It is submitted that only under such conditions can participants legitimately exercise such a privilege of presenting

¹³ *Prosecutor v. Katanga and Ngudjolo*, 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol' ICC-01/04-01/07-956, 13 March 2009 at para 6. See also Pre-Trial Chamber I in *Lubanga*, "the relevant rules on disclosure are a key tool in the Court's criminal procedure to ensure the fundamental right of any person to a fair and expeditious trial, and that they must be interpreted in a way consistent with, inter alia, the rights of the accused to be informed promptly and in detail of the nature, cause and content of the charges and to have adequate time and facilities to prepare the defence." *Prosecutor v. Lubanga*, Decision On The Final System Of Disclosure And The Establishment Of A Timetable 15 May 2006, ICC-01/04-01/06-102 at pages 4-5

incriminating evidence in a criminal trial¹⁴ While the possibility of victims presenting incriminating evidence is not expressly excluded by the Statute, neither is it expressly mentioned. The fact that disclosure obligations are expressly dealt with only in terms of the Prosecutor merely reflects the fact that the Prosecutor is the primary organ for the presentation of such evidence. It also emphasises the truly exceptional nature of the presentation of incriminating evidence by anyone other than the Prosecutor. It is not an indication that such obligations do not exist for participants afforded the privilege to present incriminating evidence.

15. Since the precise rights and duties of participation have not been comprehensively defined in the Statute, Rules and Regulations, it falls on the Chambers, and in particular the Appeals Chamber, to clarify the position by reference to general principles of fairness and the rights enshrined in the Statute, in particular the right to a fair trial. In the interests of a fair trial, where privileges expressly attributed to the Prosecutor under the Statute are extended to others, it is submitted that the corresponding duties must in principle apply to those others *mutatis mutandis*.

16. It is further submitted that a proper appreciation of the application of the law to this case requires an analysis not only of the Statute, Rules and Regulations, but also of the development and application of the legal regime relating to notice and disclosure by the Trial Chamber. In order to give effect to the letter and spirit of the Statute, the Trial Chamber provided a very specific framework for the important duties imposed upon the Prosecutor with respect to the disclosure and presentation of incriminating evidence. Prior to the commencement of the trial the Trial Chamber decided that the Prosecutor should disclose all incriminating evidence prior to the 31 January 2009, several months prior to the commencement of trial. No provision was made with respect to incriminating evidence originating from the legal representatives of the

¹⁴ See the observations of M. C. Bassiouni, 'International Recognition of Victims' Rights', 6 Human Rights Law Review 203 (2006), pp 245-246 "[...] [T]here is a great deal of ambiguity as well as lack of clarity in the mechanisms applicable to victims' access, participation and rights. For example, the ICC Statute uses alternatively the term 'participant' and 'party' in addressing victims without regard to the implications of these terms for the role of victims in the proceedings. If the victim is deemed a 'party', then the victim has certain procedural rights by implication. 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."

victims, even in the period between the 31 January 2009 and the commencement of trial.

17. By the time of the Chamber's January decision on the participation of victims, the trial had commenced. The prosecution case has since progressed significantly and a number of contentious, incriminating witnesses have given evidence. The accused has challenged and put his case to those witnesses. The appellant has not taken into account other, as yet un-served, incriminating evidence in dealing with these prosecution witnesses. The accused has no indication of what, if any, incriminating evidence might be called by the legal representatives of the victims. It is therefore no longer possible for the accused to have adequate notice of such evidence, since proper notice must in principle allow the Appellant to take this evidence into account in its preparation for, and cross-examination of, prosecution witnesses.¹⁵ Failure to allow this would in principle require the recall of prosecution witnesses who have already completed their testimony, which in practice would be an insufficient remedy.¹⁶

18. It is only exceptionally that new evidence should be allowed at later stages in the trial and only where everything has been done by the Trial Chamber and the parties and participants to ensure that all evidence is identified and disclosed prior to trial.¹⁷ This is not the case here and distinguishes this decision from the decision of Trial Chamber I taken one year before the commencement of the current trial. The decision on appeal was issued on 11 July 2008, six months before the commencement of the current trial on 26 January 2009. Moreover, the *Lubanga* trial concerns a much narrower range of

¹⁵ See, e.g., *Prosecutor v. Halilovic*, 'Decision on prosecution's application for leave to disclose further material and defence renewed motion to cease investigations', 30 September 2004 (the "continued disclosure of material on a piecemeal basis over an extended period of time is an inefficient use of the resources available to both parties and not in the interests of the good administration of justice, and may, if such practice continues without justification, adversely affect the rights of the [a]ccused pursuant to Article 21 of the Statute to be informed of the case against him and to have adequate time and facilities for the preparation of his defence").

¹⁶ See *Prosecutor v. Orić*, Decision on Defence Motion to Recall a Witness, Case No. IT-03-68-T, T. Ch. II, 30 November 2004, p. 3, concerning the fact that recalling witnesses can be an appropriate remedy for late disclosure of evidence.

¹⁷ *Prosecutor v. Krajisnik*; Trial Chamber, "Reasons for Decision Denying Defence Motion Regarding Chamber Witnesses Biljana Plavsic and Branko Deric and Decision on Admission into Evidence of Biljana Plavsic's Statement and Book Extracts", 14 August 2006, para. 2; *Prosecutor v. Popovic et al*, Trial Chamber, "Order to Summon Momir Nikolic", 10 March 2009, p. 1; *Prosecutor v. Blaskic*, Trial Chamber "Decision of Trial Chamber I in respect of the Appearance of General Enver Hadzihasanovic", 25 March 1999; *Prosecutor v. Blaskic*, Trial Chamber "Decision of Trial Chamber I in respect of the Appearance of General Philippe Morillon", 25 March 1999; *Prosecutor v. Blaskic*, Trial Chamber "Decision of Trial Chamber I in respect of the Appearance of Mr. Jean-Pierre Thebault", 25 March 1999; *Prosecutor v. Stakic*, Appeal Chamber, "Decision to Summon a Witness Proprio Motu", 20 September 2005, p. 2; *Prosecutor v. S. Milosevic*, Trial Chamber "Order Pursuant to Rule 98 to Call as Court Witness Carl Bildt", 18 February 2004, p.2

issues, so the prejudice to the Appellant in not receiving notice of evidence prior to trial is much less.

19. Encroachments upon the rights of the accused must be necessary and proportionate.¹⁸

Since in this case an appropriate regime has not been put in place for pre-trial disclosure of incriminating evidence emanating from victims, disclosure of such evidence later in the trial cannot be said to be a necessary and proportionate infringement upon the rights of the accused.

20. The Trial Chamber first recorded the possibility of victims' legal representatives calling victims to testify on 20 November 2009. The trial commenced on the 24th November 2009. No steps were taken by the legal representatives of the victims between the 20th November 2009 and the 22 January 2010, the date of the impugned decision, to give notice to the accused of any victims' testimony. Notwithstanding Article 64(3)(c) of the Statute, the Trial Chamber has not, prior to trial, imposed any regime for disclosure of information on the legal representatives of the victims. The appellant, in such circumstances has a legitimate expectation that the presentation of incriminating evidence will be left to those who have been the subject of orders of notice and disclosure prior to trial, in this instance the Prosecutor. Yet the Trial Chamber decided after the commencement of trial that the victims may call incriminating evidence in this case.

21. In the meantime, the first two witnesses were heard. Even following the issuance of the decision no such notice has been given. By the time of the Trial Chamber's decision the first truly contentious prosecution witness had already gone well into his examination-in-chief. At the time of writing, nine prosecution witnesses have completed their testimony. If there is to be a fair trial it is submitted that the Appellant is entitled to the statements of new incriminating witnesses before the commencement

¹⁸ *Prosecutor v. Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence" (Appeals Judgement) ICC-01/04-01/06-568, 13 October 2006; *Prosecutor v. Lubanga*, See 19.05.2006 - Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute ICC-01/04-01/06-108 19 May 2006, ICC-01/04-01/06-108-Corr; *Prosecutor v. Lubanga*, 15.05.2006 - Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, ICC-01/04-01/06-102; *Prosecutor v. Katanga and Ngudjolo*, Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui ICC-01/04-01/07-322, 13 March 2008

of the trial so that their testimony may be taken into account in the cross-examination of prosecution witnesses.

22. It is therefore submitted that in the circumstances of this case, with no pre-trial disclosure or provision for it, and the legitimate expectation that this creates in the minds of the appellant, it was a legal error to make a finding permitting the legal representatives of the victims to call incriminating evidence. In the alternative, this may be viewed as an abuse of discretion, in the light of the actual circumstances, contributed to by Trial Chamber's failure to make adequate provision prior to trial.

D. Second ground of appeal

23. The second 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 him. It is submitted that the 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. 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.

24. In its decision in the *Lubanga* case, it was held by this Chamber, at paragraph 97 of that decision, that 'To give effect to the spirit and intention of article 68(3) of the Statute in the context of the trial proceedings it must be interpreted so as to make participation by victims meaningful. Evidence to be tendered at trial which does not pertain to the guilt or innocence of the accused would most likely be considered inadmissible and irrelevant.'

25. The same cannot be said for evidence which does not relate to the *role of the accused* in crimes charged. Much of the evidence in a criminal trial will be considered admissible and relevant even though it does not address the role of the accused in the crimes charged (e.g. that an attack took place; that child soldiers were present; or that civilians were targeted and murdered) On the other hand this category of incriminating evidence, relating to the actual role of the accused (e.g. that the accused ordered

attacks, killings etc), goes to the heart of the determination of the guilt of the accused. It constitutes the essential core of the prosecution case against an accused and therefore should be adduced by the prosecuting authority, with all the safeguards inherent in his duties and obligations, in order to preserve the absolute fairness of the proceedings.

26. It is therefore submitted that while participants have been held to be in a position to present evidence relating to the guilt or innocence of the accused, so as to make their participation meaningful, they are not in a position to present all forms of evidence in all circumstances. Preservation of the fairness of the proceedings requires that a line be drawn in order to secure a fair trial for the person being tried. Participants cannot cross this line without becoming supplementary prosecutors in the case. It is submitted that the role of the accused in a crime, that is his *actus reus* and *mens rea*, constitutes the line of demarcation.

27. As the Appeals Chamber acknowledged, victims are participants and not parties. In terms of the relationship between investigative powers and the ability to tender evidence, the Appeals Chamber has directed that evidence should ‘primarily’ be tendered through the parties,¹⁹ and that “[p]resumptively, it is the Prosecutor’s function to lead evidence of the guilt of the accused.”²⁰ It follows that their ability to present evidence may be limited in a manner calculated to preserve the fairness of the trial for the accused. It is submitted that there are legal limits to the presentation of evidence by participants, who are not parties to the proceedings, which are necessarily inherent in the provisions of the Statute and the requirements of a fair trial. To acknowledge that the participants can present incriminating evidence of any nature, including evidence pertaining to the role of the accused, is to acknowledge that there are no limits to the nature of the evidence which might be presented by participants. This is inconsistent with the nature of a criminal trial and the text and spirit of the provisions of the Statute defining the role of the Prosecutor, and in particular article 42(1).

28. The point has been developed here that there comes a point when the presentation of evidence by participants not only touches upon the question of incrimination, but directly addresses the actual responsibility of an accused for crimes charged. This

¹⁹ Appeals Chamber decision at para 93.

²⁰ Appeals Chamber decision at para 93.

prejudices the Appellant's right to a fair trial because it upsets the delicate balance which has been created between the Prosecutor and the Appellant. The entire criminal process is structured around the Appellant meeting the case of the Prosecutor. The role and duties of the Prosecutor are defined with precision and care to allow the Appellant to meet the case effectively against him in a manner which is equitable and seeks to avoid miscarriages of justice. The Prosecutor is himself set up as a minister of justice and not a private party with specific private interests.

29. Even the role of the Prosecutor might be compromised if other participants in the trial can present evidence on the role of the accused in the commission of a crime. It is by clearly painting the picture of the role of the accused that the Prosecutor will adequately define his case for the judges. The Prosecutor has his vision of the case and the legal representatives have theirs. The selection and presentation of evidence on the role of the accused in a crime by legal representatives may blur the nature of the case against the accused with respect to his actual role, thus prejudicing not only the appellant who must understand the case against him, but also the Prosecutor, who is seeking to clarify this for the judges. For instance, it might be the case for the prosecution that the accused only arrived at the end of an attack but ordered the killing during the attack, while the victims might call a witness who states that the accused was present during the killings and personally participated in them on the orders of another. The calling of this witness would be inconsistent with the case for the Prosecutor and confuse the case which the Appellant has to meet.

30. This problem could be partially overcome by the Prosecutor and the legal representatives working closely together to ensure that their interests do not clash. But to encourage such a practice would turn the legal representatives of the victims into an additional arm of the Prosecutor's Office, undermining the intention of the drafters of the Statute and the fairness of the trial. It has been usefully observed by the Extraordinary Chambers of the Courts of Cambodia that:²¹

²¹ *Prosecutor v. Kaing Guek Eav alias Duch*, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions concerning the questioning of the accused, experts, and witnesses testifying on character, 9 October 2009. As similarly observed by Judges Pikis and Kirsch, the accused should in accordance with the scheme of the Statute, be faced by one prosecutor, who alone bears the onus of proving guilt at the trial, rather than by potentially multiple accusers: "The different roles played by the Prosecutor and the victims must be kept distinct if the proceedings are to run in an orderly fashion which best protects the interests of all parties and participants involved." ICC-01/04-556 (Appeals Chamber), Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals

26. Repeatedly in the course of the trial, the Defence has raised the issue of equality of arms in relation to the 93, now 90, Civil Parties to Case 001. The Trial Chamber accepts that this is a matter which can affect the fairness of the proceedings. The Chamber considers that the Accused's right to a fair trial in criminal proceedings includes the right to face one prosecuting authority only. Accordingly, and while the Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect, transform them into additional prosecutors.

27. Each party has a distinct role, in keeping with their particular interests and responsibilities at trial.

31. This explains, the Appellant submits, why the Appeals Chamber was careful to express itself in the second part of paragraph 97 to the effect that 'if it were generally and in all circumstances precluded from evidence pertaining to the guilt of the accused ... their right to participate in the trial would potentially become ineffectual.' This Chamber impliedly recognised that there may be legal parameters to the circumstances in which participants may present evidence relating to the guilt of the accused.

32. Accordingly, the appellant seeks a finding from the Appeals Chamber that while participants may present evidence on a wide range of matters, this may not include the actual role of the accused in the crimes charged and that this is the sole preserve of the Prosecutor, charged under the Statute to prosecute.

E. Third ground of appeal

33. The third 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 Appellant submits that there is a general obligation to disclose exculpatory material to the Appellant 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

of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007 (Dec. 19, 2008), para. 25.

as impliedly suggested by paragraph 106 of the Chamber's decision, but an inherent requirement to a fair trial where victims participation is permitted.

34. It is submitted that the fact that there is no express provision in the Statute and Rules does not exclude the existence of a duty of disclosure, as the regime for victim participation is in most respects far less regulated than that for the Prosecutor. While not express, there is a legal foundation for the obligation in provisions which anticipate and allow for the definition of disclosure obligations for the legal representatives of victims. These include Articles 64(3)(c), 67(1), and 68(3) of the Statute.
35. The 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.
36. There are two principle reasons for this necessary implication. First, in so far as the victims are permitted to present evidence of an incriminating nature, there must be a *quid pro quo* of disclosing exculpatory evidence in order that victim participation is not on a basis which is less restrictive than the regime applicable to the Prosecution.
37. Second, it is in the interests of justice and a fair trial that any exculpatory evidence in the possession of a participant in proceedings contributing to the incrimination of an accused should be disclosed. Indeed, it is submitted that such a duty arises irrespective of whether or not the participant actively seeks to incriminate an accused. It would be a remarkable thing if victims' representatives came into possession of material that was exculpatory of the accused but were able to sit on it and not disclose its existence to either the accused or the court. The notion is so manifestly unjust and contrary to the principles underlying the Statute and concepts of natural justice that it cannot seriously be entertained.
38. The discovery of such exculpatory evidence at a late stage in the proceedings, and especially after judgement, could necessitate a re-trial. This is neither in the interests of the good administration of justice nor fair to the accused who has the right to have his guilt or innocence finally determined in an expeditious manner.

F. Relief sought

ACCORDINGLY, the Appellant requests the Appeals Chamber to reverse the Trial Chamber's findings on the three grounds of appeals discussed above, and contained at paragraphs 81-91, 98-101, 86 and 105 of its 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.

Respectfully submitted,



David HOOPER Q. C.

Dated this 3 May 2010

At The Hague