



Original: **English**

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

Date: **03 June 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 “Observations conjointes des représentants légaux des victimes dur l’appel de la Défense contre la décision du 22 janvier 2010 relative aux modalités de participations des victimes au stade des débats sur le fond ”

Source: Office of the Prosecutor

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

The Office of the Prosecutor

**Counsel for the Defence of Germain
Katanga**

Mr David Hooper QC

Mr Andreas O'Shea

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

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

Background

1. The Defence for Germain Katanga (“the Appellant”) has appealed three issues arising out of the decision of Trial Chamber II setting out the modalities for the participation of victims during the trial (“the Decision”).¹
2. In response to the appeal,² the Prosecution noted that the Appeals Chamber did not confer a right on the victims to lead evidence; instead, it acknowledged that the Statute and Rules provide for the possibility that victims propose that the Trial Chamber call for additional evidence that it deems necessary to establish the truth under its authority pursuant to Article 69(3). The Prosecution further argued that this principle applies whether the victims’ suggested evidence relates to peripheral or contextual elements or, more directly, to the role of the accused in the crimes charged. Finally, the Prosecution submitted that victims do not have an obligation to disclose evidence prior to trial in order to petition the production of evidence during trial, nor have they any general duty of disclosure.
3. The Victims have been granted leave to participate in these appeal proceedings,³ and filed their observations to the Appeal brief on 28 May 2010.⁴ The Prosecution hereby responds to the Victims’ Observations.

Submissions

4. The Victims are in agreement with the Prosecution on a number of key principles underpinning their participation in proceedings before this Court. They acknowledge that they have a different status in the proceedings than that of the parties, and as a result they have different rights and bear different obligations than the parties.⁵ Critically, they recognize the parties’ primary right to lead evidence pertaining to the guilt or innocence of the accused.⁶ They also agree that the role of victims is not to replace or supplement the Prosecutor: while the Prosecutor represents the general interest and is also obligated to act

¹ ICC-01/04-01/07-1788-tENG. The three issues that the Trial Chamber granted leave to appeal were “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). The Appellant’s Brief: ICC-01/04-01/07-2063 OA11.

² ICC-01/04-01/07-2100 OA11 (“Prosecution’s Response brief”).

³ ICC-01/04-01/07-2124 OA11.

⁴ ICC-01/04-01/07-2142 OA11 (“Victims’ Observations”).

⁵ Victims’ Observations, paras. 14, 19.

⁶ *Ibid.*, para. 15; see Prosecution’s Response brief, para. 21, both quoting ICC-01/04-01/06-1432 OA9 OA10, para. 93.

objectively, the interests of the victims are necessarily personal and subjective.⁷ The Prosecutor thus decides whether to open an investigation and what charges to pursue, and it bears the burden of proving those charges. As a result of this particular role, as well as its duty of objectivity, the Prosecution also has specific procedural duties, such as the disclosure of any exculpatory material in its possession.⁸

5. The Victims further agree that if the Chamber were to consider hearing evidence at their request, it would be pursuant to the Chamber's authority under Article 69(3), as established by the Appeals Chamber.⁹ Any evidence called by the Chamber must be necessary to establish the truth in relation to the charges,¹⁰ and cannot go beyond the charges against the accused nor can it modify the Prosecution's case.¹¹
6. Because the Chamber calls evidence (whether *proprio motu* or prompted by a request from the victims) under authority conferred on it by Article 69(3), as a practical matter there cannot be an absolute requirement that all evidence be disclosed prior to trial.¹² Nor can there be arbitrary limitations such as a blanket prohibition on relevant evidence relating to the acts and conduct of the accused.¹³ Rather, as the Decision sets out following the Appeals Chamber jurisprudence, the Trial Chamber will set the modalities for the disclosure of the said evidence if the Chamber decides to order its presentation at the request of the victims. In doing so, the Trial Chamber will ensure that the Prosecution and the Defense receive the evidence sufficiently in advance so they can properly prepare.¹⁴

⁷ Victims' Observations, paras. 39, 55-56; Prosecution's Response brief, para. 39.

⁸ Victims' Observations, paras. 15, 16, 49.

⁹ Victims' Observations, paras. 37-38; Prosecution's Response brief, paras. 21, 33.

¹⁰ Victims' Observations, para. 39.

¹¹ *Ibid.*, para. 22.

¹² Victims' Observations, para. 23-24; Prosecution's Response brief, para. 26.

¹³ Victims' Observations, para. 38; Prosecution's Response brief, para. 33.

¹⁴ Victims' Observations, para. 28; Prosecution Response brief, paras. 29-30.

Conclusion

7. The Prosecution largely concurs with the Victims' Observations, which underline the undisputed distinction between victims and parties to the proceedings, and in particular between victims and Prosecution, and the ensuing differences in terms of their rights and obligations which the Decision correctly recognised. The Prosecution therefore requests that the Appeals Chamber reject the present Appeal.



Luis Moreno-Ocampo,
Prosecutor

Dated this 3rd day of June 2010

At The Hague, The Netherlands