

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/07 OA 11

Date: 16 July 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 THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public document

Judgment

**on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of
22 January 2010 Entitled "Decision on the Modalities of Victim
Participation at Trial"**

TK

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Mr David Hooper
Mr Andreas O'Shea

Legal Representatives of Victims

Mr Fidel Nsita Luvengika
Mr Jean-Louis Gilissen

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Germain Katanga against the decision of Trial Chamber II entitled “Decision on the Modalities of Victim Participation at Trial” of 22 January 2010 (ICC-01/04-01/07-1788-tENG),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on the Modalities of Victim Participation at Trial” is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. It is not incompatible with the Court’s legal framework or the accused’s right to a fair trial if, during the course of the trial, and after being satisfied that the requirements of article 68 (3) of the Statute are met, the Trial Chamber requests victims to submit evidence that was not previously disclosed to the accused; in such a situation, the Trial Chamber will order disclosure of the evidence to the accused sufficiently in advance of its presentation at the trial, and take any other measures necessary to ensure the accused’s right to a fair trial, in particular the right to “have adequate time and facilities for the preparation of the defence”.¹

2. The Trial Chamber did not err in not imposing a general obligation on victims to disclose to the accused all evidence in their possession, whether incriminating or exculpatory.

3. The possibility for victims to testify on matters including the role of the accused in crimes charged against them is grounded in the Trial Chamber’s authority to

¹ Article 67 (1) (b) of the Statute.



request evidence necessary for the determination of the truth and is not *per se* inconsistent with the rights of the accused and the concept of a fair trial. Whether a victim will be requested to testify on matters relating to the conduct of the accused will depend on the Trial Chamber's assessment of whether such testimony: (i) affects victim's personal interests, (ii) is relevant to the issues of the case, (iii) is necessary for the determination of the truth, and (iv) whether the testimony would be consistent with the rights of the accused and a fair and impartial trial.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

4. On 20 November 2009, Trial Chamber II (hereinafter: "Trial Chamber") rendered the "Directions for the conduct of the proceedings and testimony in accordance with rule 140"² (hereinafter: "Decision on Rule 140"). A corrigendum to this decision was filed on 1 December 2009.³ The Decision on Rule 140 provided the parties and participants with detailed directions for the conduct of the proceedings and instructions concerning the "different ways in which victims may be allowed to intervene in the proceedings".⁴ The trial started on 24 November 2009.⁵

5. On 22 January 2010, the Trial Chamber rendered the "Decision on the Modalities of Victim Participation at Trial"⁶ (hereinafter: "Impugned Decision"), setting out the principles of victim participation during the trial and providing detailed instructions for the parties and participants on the modalities of victim participation, in addition to those in the Decision on Rule 140.⁷

6. On 1 February 2010, Mr Katanga filed the "Defence Request for Leave to Appeal the *Décision relative aux modalités de participation des victimes [sic] au stade*

² ICC-01/04-01/07-1665.

³ ICC-01/04-01/07-1665-Corr.

⁴ ICC-01/04-01/07-1665-Corr, para. 4. In the Decision on Rule 140, the Trial Chamber informed the parties and participants that it would render a decision "[w]ith regard to the modalities of the participation by the Legal Representatives of the victims [...] in the coming days." The decision which was subsequently rendered was the Impugned Decision.

⁵ See ICC-01/04-01/07-T-80-ENG.

⁶ ICC-01/04-01/07-1788-tENG.

⁷ Impugned Decision, para. 67.

des débats sur le fond (ICC-01/04-01/07-1788)”⁸ (hereinafter: “Request for Leave to Appeal”), requesting leave to appeal five issues arising from the Impugned Decision.

7. On 19 April 2010, the Trial Chamber rendered the “Decision on the ‘Defence Application for Leave to Appeal the Trial Chamber’s *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*””⁹ (hereinafter: “Decision Granting Leave to Appeal”), granting Mr Katanga’s application for leave to appeal in relation to the second, third and fourth issues.¹⁰

B. Proceedings before the Appeals Chamber

8. On 3 May 2010, Mr Katanga filed the “Defence’s Document in Support of Appeal against the *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*”¹¹ (hereinafter: “Document in Support of the Appeal”).

9. On 4 May 2010, the victims represented by Mr Fidel Nsita Luvengika and Mr Jean-Louis Gilissen (hereinafter: “Victims”) filed 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”¹² (hereinafter: “Victims’ Joint Application to Participate”), requesting leave to participate in the appeal of Mr Katanga against the Impugned Decision.

10. On 14 May 2010, the Prosecutor filed the “Prosecution Response to Defence Document in Support of Appeal against the *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*”¹³ (hereinafter: “Response to the Document in Support of the Appeal”).

11. On 21 May 2010, Mr Katanga¹⁴ and the Prosecutor¹⁵ filed their respective responses to the Victims’ Joint Application to Participate.

⁸ ICC-01/04-01/07-1815.

⁹ ICC-01/04-01/07-2032.

¹⁰ In the Document in Support of the Appeal, the second, third and fourth issues raised in the Request for Leave to Appeal were then numbered the first, second and third grounds of appeal respectively.

¹¹ ICC-01/04-01/07-2063 (OA 11).

¹² ICC-01/04-01/07-2070-tENG (OA 11).

¹³ ICC-01/04-01/07-2100 (OA 11).

¹⁴ “Defence Observations on 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

12. On 24 May 2010, the Appeals Chamber rendered the “Decision on the Participation of Victims in the Appeal of Mr Katanga Against the ‘Decision on the Modalities of Victim Participation at Trial’”,¹⁶ granting the Victims the right to participate in the present appeal.

13. On 28 May 2010, the Victims filed the “Joint Observations of the Legal Representatives of the Victims on the Defence Appeal against the *Decision on the Modalities of Victim Participation at Trial* of 22 January 2010”¹⁷ (hereinafter: “Joint Observations of the Victims”).

14. On 3 June 2010, the Prosecutor¹⁸ and Mr Katanga¹⁹ filed their responses to the Joint Observations of the Victims (hereinafter: “Prosecutor’s Response to the Joint Observations” and “Mr Katanga’s Response to the Joint Observations”, respectively).

III. MERITS

15. The Appeals Chamber notes that Mr Katanga raises three grounds of appeal. Since the first and third grounds of appeal are related, the Appeals Chamber will consider the first, third and second ground, in this order.

A. First ground of appeal

16. In the Decision Granting Leave to Appeal, the Trial Chamber defined the first issue in the present appeal as “whether it is possible for the Legal Representatives of Victims to lead evidence and to call victims to testify on the crimes against the

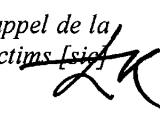
the Decision of 22 January 2010 on the Modalities of Victim Participation at Trial”, ICC-01/04-01/07-2120 (OA 11).

¹⁵ “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’”, ICC-01/04-01/07-2122 (OA 11).

¹⁶ ICC-01/04-01/07-2124 (OA 11).

¹⁷ ICC-01/04-01/07-2142-tENG (OA 11).

¹⁸ “Prosecution Response to the ‘Observations conjointes des représentants légaux des victimes sur l’appel de la Défense contre la décision du 22 janvier 2010 relative aux modalités de participation des victimes au stade des débats sur le fond’”, ICC-01/04-01/07-2158-Corr (OA 11).

¹⁹ “Defence Reply to ‘Observations conjointes des représentants légaux des victimes sur l’appel de la Défense contre la décision du 22 Janvier 2010 relative aux modalités de participation des victimes au stade des débats sur le fond’”, ICC-01/04-01/07-2160 (OA 11). 

accused, in a manner which includes incriminating evidence and testimony, *without disclosing it to the Defence prior to trial*".²⁰

17. Mr Katanga clarified the issue as follows:

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.²¹

1. Relevant Parts of the Impugned Decision

18. In the Impugned Decision, the Trial Chamber recalled that "[t]he Statute does not explicitly grant victims the right directly to call a witness to give evidence".²² Nevertheless, the Trial Chamber considered that allowing victims to apply to the Trial Chamber to request the submission of evidence pursuant to article 69 (3) of the Statute would be a method by which the victims could express their "views and concerns" within the meaning of article 68 (3) of the Statute.²³

19. Recalling the Appeals Chamber's "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" of 11 July 2008²⁴ (hereinafter: "Appeals Chamber Judgment in the *Lubanga Case*"),²⁵ the Trial Chamber determined that if any of the Victims wish to submit evidence, they must first seek leave of the Trial Chamber by applying to the Trial Chamber in writing.²⁶ Their application should set out "how the evidence they intend to adduce is relevant and how it may contribute to the determination of the truth".²⁷ When requesting permission to testify under oath, the application must be filed before the conclusion of the Prosecutor's case and must contain a signed

²⁰ Decision Granting Leave to Appeal, para. 25. This is the second issue discussed in the Decision Granting Leave to Appeal, but is the first issue for which leave to appeal was granted.

²¹ Document in Support of the Appeal, para. 7. The Appeals Chamber notes that Mr Katanga does not refer to paragraphs 94-97 of the Impugned Decision.

²² Impugned Decision, para. 81.

²³ Impugned Decision, para. 82.

²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1432 (OA9, OA10), paras 86-105.

²⁵ Impugned Decision, para. 48.

²⁶ Impugned Decision, paras 82, 84.

²⁷ Impugned Decision, para. 84.



“comprehensive summary” of their proposed testimony.²⁸ The application then would be notified to the parties who would have seven days to respond.²⁹ If the application is granted, the signed “comprehensive summary” of the proposed testimony “shall count as disclosure in accordance with regulation 54 (f) of the Regulations”.³⁰ The Victims may also propose to the Chamber the presentation of documentary evidence.³¹ The proposed documentary evidence must be filed with the application and would be notified to the parties and participants in the proceedings.³² The Trial Chamber directed that, in principle, applications for leave to submit documentary evidence should be filed as soon as possible.³³

2. Arguments of Mr Katanga

20. In the Document in Support of the Appeal, Mr Katanga observes that an implicit consequence of the timing of the Impugned Decision, having been rendered after the commencement of trial, was that Mr Katanga could not have had notice prior to the commencement of trial of any of the incriminating evidence the Victims would propose to present.³⁴ In the view of Mr Katanga, the Trial Chamber erred in law or abused its discretion in setting up a participation regime by which the Victims may propose to the Trial Chamber incriminating evidence without the Trial Chamber imposing a corresponding obligation on the Victims to disclose the evidence to the accused prior to the trial.³⁵

21. In support of this assertion, Mr Katanga recalls that: (i) article 67 (1) (b) of the Statute preserves the right of the accused to have adequate time and facilities to prepare his defence; (ii) article 64 (3) (c) of the Statute provides for the disclosure of any information not previously disclosed, sufficiently in advance of the commencement of trial; and (iii) rules 76 (1) and (2) and 77 of the Rules of Procedure and Evidence provide that the Prosecutor shall disclose prior to the commencement of

²⁸ Decision on Rule 140, paras 25-26.

²⁹ Decision on Rule 140, para. 28.

³⁰ Decision on Rule 140, para. 26.

³¹ Impugned Decision, paras 98-101.

³² Impugned Decision, para. 99.

³³ See Impugned Decision, para. 100. The Trial Chamber directed that if the documentary evidence suggested by the victims is closely linked to the testimony of a named witness, the application should be received “sufficiently before the testimony of said witness” and “[i]n any other circumstances, which in principle should not arise until the close of the Defence case, the application must be filed as soon as possible.”

³⁴ Document in Support of the Appeal, para. 7.

³⁵ Document in Support of the Appeal, para. 8.

trial the names and statements of the prosecution witnesses and material in the possession of the Prosecutor.³⁶

22. Mr Katanga maintains that the fact that disclosure obligations in the Statute and Rules of Procedure and Evidence expressly apply only to the parties is merely a consequence of the fact that the possibility of victims presenting incriminating evidence is also not expressly mentioned.³⁷ In Mr Katanga's view, since the "precise rights and duties" of participation have not been expressly regulated, it is essential for the Trial Chamber to clarify these rights and duties, especially with reference to the accused's right to a fair trial.³⁸

23. Concerning the right to a fair trial, Mr Katanga submits that the entire case against the accused, including the evidence in support of it, should be clearly identified prior to trial in order for the accused to be able to adequately prepare and confront such evidence.³⁹

24. Mr Katanga concedes that exceptionally, there may be circumstances in which new evidence not disclosed prior to trial may be allowed at later stages of the trial, but asserts that this should be the case only where "everything has been done by the Trial Chamber [...] to ensure that all evidence is identified and disclosed prior to trial".⁴⁰ In this respect, any encroachment on the accused's rights must be necessary and proportionate, but in this case, where the Trial Chamber has not put into place a regime which ensures pre-trial disclosure, late disclosure of victim-proffered evidence "cannot be said to be a necessary and proportionate infringement upon the rights of the accused".⁴¹

25. Mr Katanga also argues that the Victims should not be subject to less restrictive conditions for presenting incriminating evidence than the Prosecutor, pointing out that

³⁶ Document in Support of the Appeal, paras 9, 10, 12.

³⁷ Document in Support of the Appeal, para. 14.

³⁸ Document in Support of the Appeal, para. 15.

³⁹ Document in Support of the Appeal, para. 10.

⁴⁰ Document in Support of the Appeal, para. 18.

⁴¹ Document in Support of the Appeal, para. 19.

the prejudice to the accused caused by late notification is the same, regardless of who submits the incriminating evidence.⁴²

26. In Mr Katanga's view, adequate notice of any additional incriminating evidence is now no longer possible since the accused is unable to prepare for and cross-examine prosecution witnesses who have already testified, in light of any additional evidence the Victims may present.⁴³ Mr Katanga also argues, without explaining further, that re-calling these witnesses would be an insufficient remedy.⁴⁴

3. Arguments of the Prosecutor

27. The Prosecutor submits that if Mr Katanga's argument that all of the evidence must be disclosed prior to trial under article 64 (3) (c) of the Statute were correct, then it would disable the Trial Chamber from exercising its authority under article 69 (3) of the Statute.⁴⁵

28. In the view of the Prosecutor, the Trial Chamber can decide on the measures necessary to ensure the accused's right to a fair trial if and when an application to present additional evidence is granted.⁴⁶ Such measures may include: (i) excluding the evidence; (ii) admitting the evidence after balancing the importance of the evidence with the timing of its disclosure; (iii) determining whether the evidence is "necessary for the determination of the truth";⁴⁷ and (iv) declining to take the evidence into account in the judgment.⁴⁸

29. The Prosecutor therefore prays that the Appeals Chamber should reject Mr Katanga's arguments, since "[t]he categorical rule that evidence cannot be introduced if it was not disclosed before trial [...] is not supported by the Statute or the Rules, is contrary to the practice of other tribunals, is unnecessary to protect the fair trial rights of the Accused, and may defeat the essential requirement that the Trial Chamber discover the truth".⁴⁹

⁴² Document in Support of the Appeal, para. 13.

⁴³ Document in Support of the Appeal, para. 21.

⁴⁴ Document in Support of the Appeal, para. 17.

⁴⁵ Response to the Document in Support of the Appeal, para. 26.

⁴⁶ Response to the Document in Support of the Appeal, para. 29.

⁴⁷ Article 69 (3) of the Statute.

⁴⁸ Response to the Document in Support of the Appeal, para. 30.

⁴⁹ Response to the Document in Support of the Appeal, para. 31.

4. Joint observations of the Victims and responses thereto

30. The Victims argue that Mr Katanga's assertions are misconceived.⁵⁰ In their view, they have a different status from the parties, and therefore do not have the same rights or obligations.⁵¹ They emphasise that the burden of proof rests on the Prosecutor, that he conducts the investigation, and that the parties are primarily responsible for the presentation of evidence, thereby incurring the obligation to disclose.⁵² The Victims recall that the Impugned Decision did not grant them a direct right to present evidence, and clearly differentiated between the roles of the Victims and of the parties. In their view, it therefore makes sense that the Victims do not have the same disclosure obligations as the parties.⁵³

31. In the view of the Victims, the fact that they may be permitted to submit evidence through the Trial Chamber does not impact the accused's right to be informed of the case against him, because the Victims will not be permitted to present evidence which "goes beyond the charges retained against the accused".⁵⁴ The Victims also recall that the Trial Chamber gave notice to the parties that the Victims may be permitted to submit incriminating evidence in the Decision on Rule 140, which was rendered before the trial began.⁵⁵

32. The Victims aver that Mr Katanga's argument that all evidence must be disclosed prior to the commencement of trial is misconceived, since when the Trial Chamber decides to call a witness, the Trial Chamber is not required to disclose the statement before the commencement of trial, but rather "sufficiently in advance of [the witness's] testimony",⁵⁶ as was the practice before Trial Chamber I.⁵⁷

33. The Victims underline that their role in presenting evidence is subject to a number of conditions.⁵⁸ They assert that in keeping with the Appeals Chamber

⁵⁰ Joint Observations of the Victims, para. 13.

⁵¹ Joint Observations of the Victims, para. 14.

⁵² Joint Observations of the Victims, paras 15-16.

⁵³ Joint Observations of the Victims, para. 19.

⁵⁴ Joint Observations of the Victims, para. 22.

⁵⁵ Joint Observations of the Victims, para. 20, citing Decision on Rule 140, paras 19 *et seq.*, and paras 45 *et seq.* As stated above at para. 4, a corrigendum to the Decision on Rule 140 was filed after the commencement of the trial, *see* ICC-01/04-01/07-1665-Corr.

⁵⁶ Joint Observations of the Victims, para. 24.

⁵⁷ Joint Observations of the Victims, para. 25.

⁵⁸ Joint Observations of the Victims, paras 26-27.



Judgment in the *Lubanga* case,⁵⁹ the Trial Chamber provided that any evidence presented by the Victims would be disclosed to the accused, and that in any event, such evidence could always be excluded if it would cause “irreparable harm to the defence”.⁶⁰

34. Finally, the Victims point out that the accused persons already have access to their applications for participation, and thus “are already in possession of information concerning potential evidence which might be presented” by the Victims.⁶¹

35. In response to the Joint Observations of the Victims, the Prosecutor highlights that the Victims and the Prosecutor are in agreement on several “key principles”: (i) victims have a different status in the proceedings than the parties, and therefore different rights and obligations relating to gathering, presenting and disclosing evidence; (ii) any presentation of evidence by victims is contingent on the Trial Chamber exercising its authority under article 69 (3) of the Statute; and (iii) since it will be the Trial Chamber that will call evidence suggested by victims, there cannot be “an absolute requirement that all evidence be disclosed prior to trial”.⁶²

36. In response to the Joint Observations of the Victims, Mr Katanga agrees with the assertion of the Victims that the roles of the victims and of the parties are different. However, Mr Katanga asserts that for this reason “the greatest of care” must be taken to ensure that the regime for victims presenting evidence is “no less stringent than that applicable to the Prosecutor”.⁶³ Mr Katanga avers that while there may be exceptional circumstances under which evidence not disclosed prior to the commencement of trial may be presented, this should occur only when there has been some demonstration of due diligence that all of the relevant information was disclosed to the accused.⁶⁴ In Mr Katanga’s view, where the evidence supports the charges, he has the right to prior notice of that evidence to ensure his right to a fair trial.⁶⁵ In the view of Mr Katanga, “[g]iven that the victims, unlike the Chamber, are not neutral it

⁵⁹ Appeals Chamber Judgment in the *Lubanga* case, para. 100.

⁶⁰ Joint Observations of the Victims, para. 28.

⁶¹ Joint Observations of the Victims, para. 33.

⁶² Prosecutor’s Response to the Joint Observations, paras 4-6.

⁶³ Mr Katanga’s Response to the Joint Observations, para. 14.

⁶⁴ Mr Katanga’s Response to the Joint Observations, para. 15.

⁶⁵ Mr Katanga’s Response to the Joint Observations, para. 16.

is wrong to equate the position of the Chamber [with the position of the Victims] for the purposes of denying the accused pre-trial disclosure”.⁶⁶

5. Determination by the Appeals Chamber

37. For the reasons provided below, the Appeals Chamber finds that the Trial Chamber did not err in deciding that the Victims may be requested to submit incriminating evidence in the course of the trial, even though such evidence will not have been disclosed to the accused prior to the commencement of the trial.

38. At the outset, the Appeals Chamber recalls that the participation of victims in the proceedings before the Court is circumscribed by article 68 (3) of the Statute, which provides as follows:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the right of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

39. Thus, participating victims are not parties to the proceedings; under article 68 (3) of the Statute they may only present their “views and concerns”, and this only if their personal interests are affected.

40. In the view of the Appeals Chamber, there may be instances where, in requesting to present their views and concerns and after having substantiated this request pursuant to article 68 (3) of the Statute, victims bring to the Trial Chamber evidence that the Trial Chamber may consider necessary for the determination of the truth. When doing so, the victims “are required to demonstrate why their interests are affected by the evidence or issue”, in keeping with article 68 (3) of the Statute.⁶⁷ It is only if the Trial Chamber is persuaded that the requirements of article 68 (3) have been met, and, in particular, that it has been established that the personal interests of the victims are affected, that the Chamber may decide whether to exercise its discretionary powers under the second sentence of article 69 (3) of the Statute “to request the submission of all evidence that it considers necessary for the

⁶⁶ Mr Katanga’s Response to the Joint Observations, para. 17.

⁶⁷ Appeals Chamber Judgment in the *Lubanga* case, para. 99.



determination of the truth”. If the Trial Chamber is of the view that the evidence in question should be submitted, it will then decide on the appropriate measures that must be taken, in particular to protect the right of the accused to “have adequate time and facilities for the preparation of the defence”.⁶⁸

41. The Appeals Chamber will analyse the first ground of appeal in view of this framework.

(a) Whether it is possible under the Court’s legal framework for evidence to be produced at trial, which had not been disclosed prior to the commencement of trial


42. Mr Katanga argues that the Trial Chamber erred in rendering the Impugned Decision “at the time it did”,⁶⁹ improperly foreclosing any possibility that evidence suggested by the Victims could be disclosed prior to the commencement of trial. Mr Katanga also argues that such a regime is contrary to the aim of the Statute, which emphasises disclosure in advance of the trial.⁷⁰ As explained further below, the Appeals Chamber is not persuaded by the argument of Mr Katanga that the regime set forth in the Impugned Decision is contrary to the aim of the Statute.

43. The Appeals Chamber underscores that the Statute and the Rules of Procedure and Evidence provide that disclosure *by the Prosecutor* should, in principle, take place prior to the commencement of trial. Pursuant to article 61 (3) of the Statute and rules 121 (3) and (5) of the Rules of Procedure and Evidence, the Prosecutor must disclose all of the evidence intended for use at the confirmation hearing prior to that hearing. After the confirmation hearing, pursuant to article 64 (3) (c) of the Statute, the Trial Chamber shall “provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial”.⁷¹ The Statute, Rules of Procedure and Evidence

⁶⁸ Article 67 (1) (b) of the Statute. See also Appeals Chamber Judgment in the *Lubanga* case, para. 100.

⁶⁹ Document in Support of the Appeal, para. 7.

⁷⁰ Document in Support of the Appeal, paras 8-15. Mr Katanga asserts that “[i]n the interests of a fair trial, where privileges expressly attributed to the Prosecutor under the Statute are extended to [the Victims], it is submitted that the corresponding duties must in principle apply to those others *mutatis mutandis*”.

⁷¹ Rule 84 of the Rules of Procedure and Evidence essentially repeats this obligation, providing that “to avoid delay and to ensure that the trial commences on the set date” the Trial Chamber shall “make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence”. Rules 76 and 77 of the Rules of Procedure and Evidence read together with article 64 (3) (c) of the Statute and rule 84 of the Rules of Procedure and Evidence 

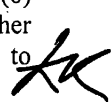
and Regulations of the Court also emphasise the duty of the Chamber to ensure that the Prosecutor discloses, prior to the commencement of trial, any evidence not previously disclosed during the pre-trial phase of the case.⁷²

44. However, the possibility of the Trial Chamber requesting victims to submit evidence is contingent on (i) the Victims fulfilling the requirements of article 68 (3) of the Statute, and (ii) the Trial Chamber deciding to exercise its authority under article 69 (3) of the Statute. The submission of such evidence therefore falls within the regime provided for the Trial Chamber to exercise its authority to request the submission of “evidence that it considers necessary for the determination of the truth”. Since the Trial Chamber may not know in advance of the trial which evidence will be necessary for the determination of the truth and, as far as evidence submitted by victims is concerned, whether the victims’ personal interests are affected, the Trial Chamber has the power to order the production of such evidence *during the course of the trial*. Thus, article 64 (6) (d) of the Statute provides that “[i]n performing its functions [...] during the course of a trial, the Trial Chamber may, as necessary: [...] (d) Order the production of evidence in addition to that already [...] presented during the trial by the parties”. Because article 64 (6) (d) of the Statute specifically refers to evidence in addition to that which has been presented during the trial by the parties, it is clear that it is intended to give effect to the power of the Trial Chamber under the second sentence of article 69 (3) of the Statute.⁷³

45. In light of the above, the necessary implication is that there may be circumstances under which evidence called by the Trial Chamber may not be communicated to the accused before the commencement of the trial. Insisting otherwise would deprive the Trial Chamber of its ability to make its assessment as to what is necessary for the determination of the truth after having heard the evidence presented by the parties. Thus, while it is correct that the Statute emphasises

require that disclosure of the evidence listed in the Rules also must take place in advance of the commencement of trial.

⁷² See articles 61, 64 (3) (c) and 6 (d) of the Statute, rules 79 and 121 of the Rules of Procedure and Evidence and regulation 54 of the Regulations of the Court.

⁷³ See also G. Bitti “Article 64 Functions and Powers of the Trial Chamber”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 1213, margin number 23. In the view of the author, article 64 (6) (d) of the Statute “gives an *ex-officio* power to the Trial Chamber to order the production of further evidence to that already presented by the parties: that gives a very important role to the judges to ascertain the truth”. 

disclosure of evidence by the Prosecutor prior to the commencement of the trial, this does not apply to evidence submitted at the request of the Trial Chamber under article 69 (3) of the Statute.

46. Mr Katanga concedes that there may be circumstances in which evidence not disclosed prior to the commencement of trial may be submitted at trial, arguing, however that “it is only exceptionally that new evidence should be allowed at later stages in the trial”.⁷⁴ In the view of Mr Katanga, if the possibility for victims to present evidence is based on “highly exceptional circumstances justifying a departure from the general position” then “this would have been quite different and a more palatable statement of the law”.⁷⁵ Mr Katanga argues that instead the Trial Chamber created a “general expectation [...] that victim evidence may be admitted on incriminating matters”.⁷⁶

47. The Appeals Chamber is not persuaded by this argument, because the Trial Chamber, in determining whether to exercise its authority under article 69 (3) of the Statute to request victims to submit evidence, and if the requirements of article 68 (3) are fulfilled, does so with the understanding that “the right to lead evidence pertaining to the guilt or innocence of the accused [...] lies primarily with the parties”.⁷⁷ As was explained in the Appeals Chamber Judgment in the *Lubanga* case:

The language of article 69 (3) cited above, and article 64 (6) (d) which provides that the Court shall have the authority to ‘[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties’ clearly envisions that evidence presented during the trial would be presented by the parties.⁷⁸

48. The Appeals Chamber underlines once again that victims do not have the right to present evidence during the trial; the possibility of victims being requested to submit evidence is contingent on them fulfilling numerous conditions. Firstly, their participation is always subject to article 68 (3) of the Statute, which requires that they demonstrate that their personal interests are affected by the evidence they request to

⁷⁴ Document in Support of the Appeal, para. 18; Mr Katanga’s Response to the Joint Observations, para. 15.

⁷⁵ Mr Katanga’s Response to the Joint Observations, para. 20.

⁷⁶ Mr Katanga’s Response to the Joint Observations, para. 20.

⁷⁷ Appeals Chamber Judgment in the *Lubanga* case, para. 93.

⁷⁸ Appeals Chamber Judgment in the *Lubanga* case, para. 100.



submit.⁷⁹ Secondly, when requesting victims to submit evidence, the Trial Chamber must ensure that the request does not exceed the scope of the Trial Chamber's power under article 69 (3) of the Statute. In addition, the Trial Chamber will "ensure that [the] trial is fair and expeditious and is conducted with full respect for the rights of the accused",⁸⁰ which includes the right to "have adequate time and facilities for the preparation of the defence".⁸¹

(b) Whether the accused's right to a fair trial requires that all evidence presented at trial must be disclosed to the accused prior to the commencement of trial

49. The Appeals Chamber recalls that the application of articles 64 (6) (d) and 69 (3) of the Statute in relation to the Trial Chamber's authority to request the submission of evidence during trial must be consistent not only with the rights enumerated in article 67 (1) of the Statute,⁸² but also with internationally recognised human rights pursuant to article 21 (3) of the Statute.

50. Mr Katanga argues that the Impugned Decision inherently violates the accused's right to a fair trial guaranteed under article 67 (1) of the Statute, and in particular the right "to have adequate time and facilities for the preparation of the defence" because it provides for the possibility that evidence may be presented at trial, which has not been disclosed to the accused prior to the commencement of trial.⁸³ The Appeals Chamber notes, however, that Mr Katanga does not provide any additional support for this assertion.

51. The Appeals Chamber observes that the Grand Chamber of the European Court of Human Rights (hereinafter: "ECtHR") has held that "the concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed [...] with a view to

⁷⁹ Appeals Chamber Judgment in the *Lubanga* case, para. 99.

⁸⁰ Article 64 (2) of the Statute.

⁸¹ Article 67 (1) (b) of the Statute.

⁸² Article 67 (1) (a) of the Statute "[t]o be informed [...] in detail of the nature, cause and content of the charge[s]"; article 67 (1) (b) of the Statute "[t]o have adequate time and facilities for the preparation of the defence"; article 67 (1) (e) of the Statute "[t]o examine, or have examined, the witnesses against him or her and to obtain witnesses on his or her behalf"; article 67 (1) (e) of the Statute to "raise defences and to present other evidence".

⁸³ Document in Support of the Appeal, paras 8-9.



influencing the court's decision"⁸⁴ and that "Article 6 § 1 [of the Convention for the Protection of Human Rights and Fundamental Freedoms⁸⁵ (hereinafter: "European Convention")] requires [...] that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused".⁸⁶ The Inter-American Court of Human Rights (hereinafter: "IACtHR") has also held that accused persons must have sufficient access to the probative material, so that they may effectively defend themselves against the allegations they face.⁸⁷ In both Courts, the concern is whether the proceedings, as a whole, are fair.⁸⁸ However, the Appeals Chamber has not been presented with any authority which indicates that disclosure of evidence after the commencement of trial *per se* results in a violation of the accused's human rights. Rather, the Appeals Chamber observes, as was explained in *Rajcoomar v. United Kingdom*, that the issue at the ECtHR is whether "whatever the earlier shortcomings, disclosure was eventually made, at a stage in the domestic proceedings when the defence could still have made use of the newly revealed evidence, if any of it had been of any assistance".⁸⁹

52. In the view of the Appeals Chamber, the regime set out in the Impugned Decision and the Decision on Rule 140 for the disclosure of evidence requested by the Trial Chamber provides adequate safeguards for the Trial Chamber to ensure that the

⁸⁴ ECtHR, Grand Chamber, *Kress v. France*, "Judgment", 7 June 2001, application no. 39594/98, para. 74; ECtHR, Grand Chamber, *Martinie v. France*, "Judgment", 13 July 2006, application no. 58675/00, para. 46.

⁸⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocol 14, 1 June 2010, 213 United Nations Treaty Series 2889.

⁸⁶ ECtHR, Grand Chamber, *Rowe and Davis v. United Kingdom*, "Judgment", 16 February 2000, application no. 28901/95, para. 60 (citations and references omitted). See also ECtHR, Grand Chamber, *A v. United Kingdom*, "Judgment", 19 February 2009, application no. 3455/05, para. 206.

⁸⁷ IACtHR, *Castillo Petruzzi et al v. Peru*, "Judgment" (Merits, Reparations and Costs), 30 May 1999, Series C No. 52, para. 141; IACtHR, *Case of the Constitutional Court v. Peru*, "Judgment", (Merits, Reparations, and Costs), 31 January 2001, Series C no.71, para. 83; IACtHR, *Lori Berenson-Mejía v. Peru*, "Judgment" (Merits, Reparations and Costs), 25 November 2004, Series C No. 119, para. 167.

⁸⁸ See e.g. ECtHR, Grand Chamber, *A v. United Kingdom*, "Judgment", 19 February 2009, application no. 3455/05, para. 208; ECtHR, Grand Chamber, *Perna v. Italy*, "Judgment", 6 May 2003, application no. 48898/99, para. 29; ECtHR, Grand Chamber, *Elsholz v. Germany*, "Judgment", 13 July 2000, application no. 25735/94, para. 66; see also IACtHR, *Villagran Morales v. Guatemala*, "Judgment" (Merits), 19 November 1998, Series C No. 63, para. 229; IACtHR, *Lori Berenson-Mejía v. Peru*, "Judgment" (Merits, Reparations and Costs), 25 November 2004, Series C No. 119, para. 133; IACtHR, *Bamaca Velazquez v. Guatemala*, "Judgment", 25 November 2000, Series C No.70, para. 189.

⁸⁹ ECtHR, *Rajcoomar v. United Kingdom*, "Admissibility", 14 September 2004, application no. 59457/00, p. 185. See also ECtHR, *Edwards v. United Kingdom*, "Judgment", 16 December 1992, application no. 13071/87, paras 36-39 (disclosure violation was remedied by subsequent procedures). In *Padin Gestoso v. Spain*, "Judgment", 8 December 1998, application no. 39519/98, the ECtHR held that a lack of access to a file for part of the period before a trial will not raise issues, if access was possible for a sufficient time for the defence to prepare.

accused's fair trial rights are respected. In this respect, the Impugned Decision specifically states that "[t]he Chamber will in particular ensure that the Prosecution and the Defence teams receive the evidence sufficiently in advance to enable them to prepare effectively".⁹⁰

53. This approach is also consistent with the Appeals Chamber Judgment in the *Lubanga* case, in which the Appeals Chamber explained:

If the Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence.⁹¹

54. In light of the above, the Appeals Chamber is not persuaded that the Impugned Decision inherently violates Mr Katanga's right to a fair trial.

6. Conclusion

55. To conclude, the Appeals Chamber finds that it is not incompatible with the Court's legal framework or the accused's right to a fair trial if, during the course of the trial, and after being satisfied that the requirements of article 68 (3) of the Statute are met, the Trial Chamber requests victims to submit evidence that was not previously disclosed to the accused; in such a situation, the Trial Chamber will order disclosure of the evidence to the accused sufficiently in advance of its presentation at the trial, and take any other measures necessary to ensure the accused's right to a fair trial, in particular the right to "have adequate time and facilities for the preparation of the defence".⁹²

B. Third ground of appeal

56. In the Decision Granting Leave to Appeal, the Trial Chamber defined the third issue as "whether every item of evidence in the possession of the Legal

⁹⁰ Impugned Decision, para. 107; Decision on Rule 140, para. 23.

⁹¹ Appeals Chamber Judgment in the *Lubanga* case, para. 100.

⁹² Article 67 (1) (b) of the Statute.



Representatives of Victims, be it incriminating or exculpatory, must be communicated to the parties”.⁹³

57. Although the issue on appeal is whether the Victims should be obliged to disclose exculpatory and incriminating evidence, Mr Katanga’s arguments and his prayer for relief under the third ground of appeal focus on the obligation to disclose *exculpatory* information.⁹⁴ On this basis, the Appeals Chamber will concentrate its discussion on the merits of this ground of appeal on whether the Victims must disclose exculpatory information to the accused.

1. Relevant Parts of the Impugned Decision

58. In the Impugned Decision, and in response to the submission of Mr Katanga that the Victims were obliged to disclose any incriminatory and exculpatory information in their possession, the Trial Chamber recalled that neither the Statute nor the Rules of Procedure and Evidence imposed such an obligation.⁹⁵ In the view of the Trial Chamber, because victims’ participation is conditioned on prior authorisation, “there is no justification for obliging [victims] generally to disclose to the parties any evidence in their possession, whether incriminating or exculpatory”.⁹⁶

2. Arguments of Mr Katanga

59. Mr Katanga challenges the Trial Chamber’s assertion that nothing justifies a general obligation to communicate to the parties every element in the Victims’ possession, whether incriminating or exculpatory.⁹⁷ He stresses that victims owe a general obligation to the accused to disclose exculpatory material.⁹⁸

60. Whilst conceding that there are no express provisions in the Statute and Rules of Procedure and Evidence which oblige victims to disclose such material, Mr Katanga argues that such an obligation can be derived from articles 64 (3) (c), 67 (1) and 68 (3) of the Statute.⁹⁹ In addition, Mr Katanga avers that the Victims’ obligation to

⁹³ Decision Granting Leave to Appeal, para. 35. This was the fourth issue addressed by the Trial Chamber, but the third issue for which leave to appeal was granted.

⁹⁴ Document in Support of the Appeal, paras. 33-38 and p. 16.

⁹⁵ Impugned Decision, para. 105.

⁹⁶ Impugned Decision, para. 105.

⁹⁷ Document in Support of the Appeal, para. 33.

⁹⁸ Document in Support of the Appeal, para. 33.

⁹⁹ Document in Support of the Appeal, para. 34.

disclose exculpatory material exists independently of any application by them to submit evidence, and is a “*sine qua non* for offering testimony on the role of the accused”.¹⁰⁰

61. Finally, Mr Katanga submits that a general disclosure obligation imposed on the Victims contributes to the expeditiousness of the proceedings insofar as it prevents the necessity of a re-trial should exculpatory evidence in the Victims’ possession be discovered at a later stage of the proceedings.¹⁰¹

3. *Arguments of the Prosecutor*

62. In response to Mr Katanga’s arguments, the Prosecutor avers that not only is there no basis for imposing a general disclosure obligation on victims, but also that there are compelling reasons not to impose such an obligation.¹⁰²

63. Firstly, in the view of the Prosecutor, the “core purpose” of the disclosure regime in the Statute and Rules of Procedure and Evidence is “to ensure that the principle of objectivity during [the Prosecutor’s] investigations produces meaningful effects at the trial stage”.¹⁰³ In this respect, since victims do not have a duty to investigate incriminating and exonerating circumstances equally, a duty imposed on the Prosecutor under article 54 (1) (a) of the Statute, general disclosure obligations need not be imposed on them.¹⁰⁴

64. Secondly, the Prosecutor avers that victims lack the expertise and resources to assess any dangers that may arise from disclosure to the accused.¹⁰⁵ Thus, imposing disclosure obligations on victims could result in risk to third parties.¹⁰⁶

65. Finally, the Prosecutor questions the enforceability of imposing a disclosure regime on victims, querying whether potential violations would profoundly impact the proceedings in a manner “for which the Statute does not foresee a remedy”.¹⁰⁷

¹⁰⁰ Document in Support of the Appeal, para. 33.

¹⁰¹ Document in Support of the Appeal, para. 38.

¹⁰² Response to the Document in Support of the Appeal, para. 39.

¹⁰³ Response to the Document in Support of the Appeal, para. 39.

¹⁰⁴ Response to the Document in Support of the Appeal, para. 39.

¹⁰⁵ Response to the Document in Support of the Appeal, para. 40.

¹⁰⁶ Response to the Document in Support of the Appeal, para. 40.

¹⁰⁷ Response to the Document in Support of the Appeal, para. 41.

4. Joint observations of the Victims and responses thereto

66. The Victims submit that the “clear language of article 67 (2) of the Statute and rules 76 to 84 of the Rules” establish that disclosure obligations are directed only at the parties and not at the victims.¹⁰⁸ The Victims further submit that disclosure obligations cannot be derived from general provisions such as articles 64 (3) (c), 67 (1) and 68 (3) of the Statute and that Mr Katanga has not shown that disclosure obligations stem from a general principle of law or principle of international law.¹⁰⁹

67. The Victims submit that it is due to the Prosecutor’s role in the trial proceedings that he has a series of disclosure obligations, including the obligation to disclose exculpatory evidence.¹¹⁰ The Victims argue that because of their limited role in the proceedings “victims do not have any of the disclosure obligations that the Defence suggests”.¹¹¹ Thus, they submit that it is not possible to impose on them obligations equal to those imposed on the parties when “it was specifically intended that these same victims should precisely be ‘unequal’ to the parties at trial in procedural terms”.¹¹²

68. Finally, the Victims assert that they are not intending “to rely on considerations of objectivity or on a claim to be representing the general interest”.¹¹³ Thus, they contend that it would be illogical to expect that they contribute to the presentation of exculpatory material “without granting them the means to support the attribution of responsibility for the crimes to those same accused”.¹¹⁴

69. In response to the Joint Observations of the Victims, the Prosecutor largely concurs with the Victims’ submissions.¹¹⁵

70. In response to the Joint Observations of the Victims, Mr Katanga submits that, while it can hardly be expected that established principles of customary international law or general principles of law on such a unique procedure as victim participation before the Court would impose disclosure obligations on victims, there are provisions

¹⁰⁸ Joint Observations of the Victims, para. 46.

¹⁰⁹ Joint Observations of the Victims, paras 46-47.

¹¹⁰ Joint Observations of the Victims, para. 49.

¹¹¹ Joint Observations of the Victims, para. 48.

¹¹² Joint Observations of the Victims, para. 50.

¹¹³ Joint Observations of the Victims, para. 55.

¹¹⁴ Joint Observations of the Victims, para. 56.

¹¹⁵ Prosecutor’s Response to the Joint Observations, para. 7.

in the Statute that enable and impose a duty upon the Trial Chamber to ensure the fairness of the trial.¹¹⁶ Mr Katanga argues furthermore that in the circumstances of the present case, because the Victims have a role in the presentation and the examination of incriminating evidence, it would be “manifestly unjust to consider that there are no obligations of disclosure on them”.¹¹⁷

5. *Determination by the Appeals Chamber*

71. For the reasons provided below, the Appeals Chamber finds that the Trial Chamber did not err in deciding that “nothing justifies a general obligation on the victims to disclose every element in their possession, whether incriminating or exculpatory”. The Appeals Chamber makes this determination whilst finding that, although no general obligation *must* be imposed on victims, there may be specific instances in which a Trial Chamber may require victims to disclose exculpatory evidence in their possession to the accused,¹¹⁸ such as when a party or participant brings to the attention of the Trial Chamber that such information is available and the Trial Chamber finds that such information is necessary for the determination of the truth.

(a) **Whether the disclosure regime provided in the Statute and the Rules of Procedure and Evidence generally obligates the Victims to disclose exculpatory evidence to the accused**

72. As recalled by the Trial Chamber¹¹⁹ and conceded by Mr Katanga,¹²⁰ neither the Statute nor the Rules of Procedure and Evidence expressly oblige the Victims to disclose exculpatory evidence to the accused. Rather, article 67 (2) of the Statute provides that the Prosecutor is responsible for disclosure of exculpatory evidence. In addition, rule 77 of the Rules of Procedure and Evidence provides that the Prosecutor shall disclose evidence which is material for the preparation of the defence, and evidence which will be used at trial.

73. In the Document in Support of the Appeal, Mr Katanga argues that although there is no express obligation in the Statute and Rules of Procedure and Evidence that victims disclose exculpatory material to the accused, if the Victims are permitted to

¹¹⁶ Mr Katanga’s Response to the Joint Observations, para. 35.

¹¹⁷ Mr Katanga’s Response to the Joint Observations, para. 36.

¹¹⁸ See regulation 54 (f) of the Regulations of the Court.

¹¹⁹ Impugned Decision, para. 105.

¹²⁰ Document in Support of the Appeal, para. 34.

present incriminating evidence, there must be a *quid pro quo* of requiring them to disclose exculpatory evidence.¹²¹ In the view of Mr Katanga, this is necessary in order to ensure that victims are not subject to a disclosure regime that is less restrictive than the regime applicable to the Prosecutor.¹²² In response, the Prosecutor argues that his disclosure obligations are based on his role in the proceedings, essentially asserting that there are compelling reasons not to impose these obligations on the Victims *mutatis mutandis*.¹²³

74. The Appeals Chamber agrees with the Prosecutor in this regard. As the Appeals Chamber has previously underscored:

The Rome Statute framework contains numerous provisions [...] pertaining to the role assigned specifically to the Prosecutor in, *inter alia*, investigating the crimes, formulating the charges and determining what evidence should be brought in relation to the charges (articles 15, 53, 54, 58 and 61 (5) of the Statute). Article 66 (2) of the Statute provides: “[t]he onus is on the Prosecutor to prove the guilt of the accused”. Presumptively, it is the Prosecutor’s function to lead evidence of the guilt of the accused. In addition, the regime for disclosure contained in rules 76 to 84 of the Rules which sets out the specific obligations of the parties in this regard is a further indicator that the scheme is directed towards the parties and not victims.¹²⁴

75. The Appeals Chamber also recalls that the drafting history of the Statute supports the notion that the Prosecutor’s disclosure obligations to the accused are linked to the Prosecutor’s role in conducting the investigation,¹²⁵ and stem from the Prosecutor’s obligation to investigate incriminating and exonerating circumstances equally under article 54 (1) (a) of the Statute. In contrast, as explained in greater detail in the preceding section relating to the first ground of appeal, pursuant to article 68 (3) of the Statute, the victims’ role in the proceedings is significantly more limited. The Appeals Chamber considers that imposing a general disclosure obligation on the victims to disclose evidence to the accused would disregard the limited role of the victims of presenting their views and concerns where their personal interests are

¹²¹ Document in Support of the Appeal, para. 36.

¹²² Document in Support of the Appeal, para. 36.

¹²³ Response to the Document in Support of the Appeal, paras 39-40.

¹²⁴ Appeals Chamber Judgment in the *Lubanga* case, para. 93.

¹²⁵ United Nations General Assembly, “Draft Report of the Preparatory Committee”, 23 August 1996, A/AC.249/L.15, p. 14: “Given the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize any potential advantage to the Prosecutor over the defence”.

affected.¹²⁶ Bearing in mind the differing roles of the victims *vis-à-vis* the parties, the Appeals Chamber finds that it is inappropriate simply to extend the Prosecutor's statutory obligations to victims participating in the proceedings.

(b) Whether it is a requirement of a fair trial to impose a general obligation on the Victims to disclose any exculpatory evidence in their possession

76. Mr Katanga argues that the absence of an express provision requiring victims to disclose evidence to the accused is not by itself determinative of whether such an obligation should be imposed.¹²⁷ In the view of Mr Katanga, such an obligation may still be grounded in articles 64 (3) (c), 67 (1) and 68 (3) of the Statute,¹²⁸ as “an inherent requirement to a fair trial where victim participation is permitted”.¹²⁹

77. The Appeals Chamber recalls that the disclosure of exculpatory evidence is a right grounded not only in article 67 (2) of the Statute, but also in the accused's right to a fair trial under article 67 (1) of the Statute. The question that arises is whether in applying article 67 (1) of the Statute consistently with internationally recognised human rights, the Trial Chamber must impose a general requirement on victims participating in the proceedings to disclose exculpatory information to the accused. For the reasons provided below, the Appeals Chamber determines that no such requirement need be imposed.

78. In this context, the Appeals Chamber observes that the ECtHR has held that “[a]rticle 6 § 1 [of the European Convention] requires [...] that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused”¹³⁰ and that in some instances a failure to do so can give rise to a defect in trial proceedings.¹³¹ However, Mr Katanga has not referred to any authority which specifically supports the conclusion that other participants in the proceedings also have obligations to disclose material evidence to the accused.

¹²⁶ Article 68 (3) of the Statute.

¹²⁷ Document in Support of the Appeal, para. 34.

¹²⁸ Document in Support of the Appeal, para. 34.

¹²⁹ Document in Support of the Appeal, para. 33.

¹³⁰ ECtHR, Grand Chamber, *Fitt v. United Kingdom*, “Judgment”, 16 February 2000, application no. 29777/96, para. 44. See also ECtHR, Grand Chamber, *Rowe and Davis v. United Kingdom*, “Judgment”, 16 February 2000, application no. 28901/95, para. 60; and ECtHR Grand Chamber, *Jasper v. United Kingdom*, “Judgment”, 16 February 2000, application no. 27052/95, para. 51.

¹³¹ See the discussion below.



79. By way of example, the vast jurisprudence of the ECtHR relating to disclosure of material evidence is generally directed at the prosecution's obligation to disclose, and the courts' corresponding duty to ensure proper disclosure between the parties.¹³² The Appeals Chamber observes, however, that the ECtHR *has* held in a few instances that failing to disclose to the defence exculpatory evidence that was not in the immediate possession of the prosecution may constitute a violation of article 6 (3) (b) of the European Convention.¹³³ For example, the ECtHR found in *Janatuinen v. Finland* that:

Failure to disclose to the defence material evidence, which contains such particulars which could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in art. 6(3)(b) of the Convention.¹³⁴

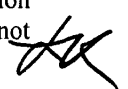
80. The Appeals Chamber considers, however, that this jurisprudence is not analogous to the issues presented in this appeal. In each of these instances, the evidence withheld from the accused was in the possession of the police or investigating authorities and not participants in the proceedings. In addition, in the cases cited, the defence specifically requested the potentially exculpatory evidence which it believed the investigators or police had in their possession, and no general disclosure obligation was therefore imposed.¹³⁵

¹³² ECtHR, Grand Chamber, *A v. United Kingdom*, "Judgment", 19 February 2009, application no. 3455/05; ECtHR, Grand Chamber, *Edwards and Lewis v. United Kingdom*, "Judgment", 27 October 2004, application nos. 39647/98 and 40461/98; ECtHR, Grand Chamber, *Jasper v. United Kingdom*, "Judgment", 16 February 2000, application no. 27052/95; ECtHR, Grand Chamber, *Fitt v. United Kingdom*, "Judgment", 16 February 2000, application no. 29777/96; ECtHR, Grand Chamber, *Rowe and Davis v. United Kingdom*, "Judgment", 16 February 2000, application no. 28901/95.

¹³³ Article 6 (3) (b) of the European Convention reads as follows: "Everyone charged with a criminal offence has the following minimum rights: [...] to have adequate time and facilities for the preparation of his defence". ECtHR, *Janatuinen v. Finland*, "Judgment", 8 December 2009, application no. 28552/05, para. 45. See also ECtHR, *Natunen v. Finland*, "Judgment", 31 March 2009, application no. 21022/04, para. 43. ECtHR, *C.G.P. v. The Netherlands*, "Admissibility", 15 January 1997, application no. 29835/96, p. 5; ECtHR, Commission Plenary, *Jespers v. Belgium*, "Judgment", 14 December 1981, application no. 8403/78, para. 59.

¹³⁴ ECtHR, *Janatuinen v. Finland*, "Judgment", 8 December 2009, application no. 28552/05, para. 45.

¹³⁵ ECtHR, *Janatuinen v. Finland*, "Judgment", 8 December 2009, application no. 28552/05, para. 45. See also ECtHR, *Natunen v. Finland*, "Judgment", 31 March 2009, application no. 21022/04, para. 43. ECtHR, *C.G.P. v. The Netherlands*, "Admissibility", 15 January 1997, application no. 29835/96, p. 5. But see ECtHR, Commission Plenary, *Jespers v. Belgium*, "Judgment", 14 December 1981, application no. 8403/78, paras 66-67 (no article 6 violation found for possibly exculpatory evidence that was not requested by the defence).



81. In this context, the Appeals Chamber recalls that under article 54 (1) (a) of the Statute, the Prosecutor has a duty to investigate exonerating and incriminating circumstances equally. Under article 54 (3) (b) of the Statute, the Prosecutor may, with respect to his investigations “[r]equest the presence of and question persons being investigated, victims and witnesses”. The Appeals Chambers therefore considers that it is reasonable that, in particular where the submissions in the victims’ applications for participation indicate that victims may possess potentially exculpatory information,¹³⁶ the Prosecutor’s investigation should extend to discovering any such information in the victims’ possession. Such information would then be disclosed to the accused pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence.

(c) Whether the Trial Chamber should have imposed a general obligation on victims to disclose exculpatory information in order for the Trial Chamber to exercise its authority under article 69 (3) of the Statute


82. Mr Katanga further avers that a general obligation to disclose exculpatory material is a “*sine qua non* for offering testimony on the role of the accused”.¹³⁷ Before the Trial Chamber, Mr Katanga elaborated on this position as follows:

[I]f [the Victims] are given an opportunity to produce incriminating material, they should also be obliged to produce exculpatory material. Otherwise, the evidence may be presented to the Chamber in a distorted manner. This is particularly evident where a victim participant is in possession of material which would affect the credibility or reliability of the evidence they intend to present to the Chamber, but applies equally to other types of exculpatory evidence.¹³⁸

83. Thus, Mr Katanga argues that if victims are permitted to submit incriminating evidence to the Chamber, they should be required to disclose any information which would affect the credibility or reliability of the evidence they intend to present. The Appeals Chamber is not persuaded by this argument. Firstly, the Appeals Chamber

¹³⁶ Under rule 89 (1) of the Rules of Procedure and Evidence, the Prosecutor receives copies of victims’ applications for participation. Under regulation 86 (2) of the Regulations of the Court, such applications shall contain, to the extent possible, *inter alia* “[a] description of the harm suffered resulting from the commission of any crime under the jurisdiction of the Court”, “[a] description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victims believes to be responsible for the harm”, and “[a]ny relevant supporting documentation, including names and addresses of witnesses”.

¹³⁷ Document in Support of the Appeal, para. 33.

¹³⁸ “Defence for Germain Katanga’s Additional Observations on Victims’ Participation and the Scope Thereof”, 10 November 2009, ICC-01/04-01/07-1618, para. 15. 

recalls that in accordance with the Impugned Decision, the Trial Chamber will request the Victims to submit evidence only “if their intervention would make a relevant contribution to the determination of the truth and does not prejudice the principles of the fairness and impartiality of the proceedings before the Court”.¹³⁹ Secondly, the Appeals Chamber observes that the Legal Representatives of the Victims are bound by the Code of Professional Conduct for counsel,¹⁴⁰ and under article 24 (1) and (3) counsel “shall take all necessary steps to ensure that his or her actions [...] are not prejudicial to the ongoing proceedings” and “shall not knowingly mislead the Court”. The Appeals Chamber therefore considers that it is not necessary for the Trial Chamber to impose a general disclosure obligation on the Victims to ensure that it is not misled by items of evidence submitted at their request pursuant to article 69 (3) of the Statute.

84. Mr Katanga further argues that if victims are permitted to submit incriminating evidence to the Trial Chamber, they should also be required to disclose any exculpatory evidence in their possession in order to ensure that the Trial Chamber does not receive a distorted picture of the evidence in the trial *as a whole*. The Appeals Chamber is also not persuaded by this argument.

85. Firstly, the Appeals Chamber recalls that article 69 (3) of the Statute provides the Trial Chamber with the authority to request the submission of all evidence that the Trial Chamber considers necessary for the determination of the truth. This decision is within the Trial Chamber’s discretion. Thus, even if the Trial Chamber decides that it is satisfied that the personal interests of the Victims have been demonstrated and that it will request the Victims to submit incriminating evidence, nothing precludes the Trial Chamber from then requesting that any exculpatory evidence in the possession of the Victims is also submitted, in order to ensure that the Trial Chamber does not receive the evidence in a distorted manner.

86. Secondly, in relation to victim participation in particular, the Trial Chamber has broad authority under article 68 (3) of the Statute and rules 91 (3) and 93 of the Rules of Procedure and Evidence to determine the conduct of the proceedings,¹⁴¹ and retains

¹³⁹ Impugned Decision, para. 65.

¹⁴⁰ Professional Code of Conduct for counsel, article 1.

¹⁴¹ See also article 64 (2) of the Statute.

the authority to order the production of exculpatory or mitigating evidence itself, if and when it considers that such information would be necessary for the determination of the truth.¹⁴² This is also the case where it is specifically brought to the attention of the Trial Chamber by one of the parties or participants that potentially exculpatory information exists and is in the possession of a participating victim. Finally, the Appeals Chamber recalls that the Trial Chamber also has the authority to take any measures necessary to ensure the accused's rights to a fair trial, if and when a request to present evidence is granted.

6. Conclusion

87. Having concluded that there are no statutory obligations on participating victims to disclose all exculpatory information in their possession, and having found that internationally recognised human rights do not support Mr Katanga's position that such an obligation generally must be imposed on participants in the proceedings, the Appeals Chamber finds that the Trial Chamber did not err in not imposing a general obligation on the Victims to disclose all evidence in their possession, whether incriminating or exculpatory. Accordingly, the Appeals Chamber determines that the third ground of the appeal should be dismissed.

C. Second ground of appeal

88. In the Decision Granting Leave to Appeal,¹⁴³ the Trial Chamber granted leave to appeal in respect of the following issue: "whether it is possible for the Legal Representatives of Victims to call *victims* [emphasis added] to testify on matters including the role of the accused in crimes charged against them".¹⁴⁴

89. However, in the Document in Support of the Appeal, Mr Katanga articulated the second ground of appeal as follows: "the Trial Chamber erred in suggesting, at paragraph 86 of its decision, that the legal representatives of victims might call *witnesses* [emphasis added] on matters including the *role of the accused* in crimes charged against him".¹⁴⁵

¹⁴² Articles 64 (6) (d) and 69 (3) of the Statute.

¹⁴³ Decision Granting Leave to Appeal, para. 30.

¹⁴⁴ Decision Granting Leave to Appeal, para. 30.

¹⁴⁵ Document in Support of the Appeal, para. 23.

90. In the Impugned Decision¹⁴⁶ the Trial Chamber alluded to the possibility of the Legal Representatives calling *victims* to testify on the role of the accused. The Appeals Chamber therefore considers that this ground of appeal concerns solely the scope of the victims' testimony,¹⁴⁷ and more precisely, whether victims, after being permitted to testify, can give evidence under oath pertaining to the conduct of the accused.¹⁴⁸

1. Relevant Parts of the Impugned Decision

91. The Trial Chamber decided, at paragraph 86 of the Impugned Decision, that the Legal Representatives may be permitted to call one or more victims to testify on matters including the role of the accused in crimes charged against them.¹⁴⁹ The relevant part of the Impugned Decision reads as follows:

The Chamber will grant the Legal Representatives the opportunity to call one or more victims to give evidence under oath at trial. [...] Since the persons concerned will give evidence about the crimes with which the accused have been charged, and about any part played therein by the accused, the Defence should be given the opportunity to present its case once all victims of the crimes to which the accused must answer have given their evidence, including any victims called by the Legal Representatives.¹⁵⁰

2. Arguments of Mr Katanga

92. Mr Katanga submits that the parameters of permissible victims' testimony must necessarily exclude the Victims presenting evidence on the conduct and on the incriminatory acts of the accused, because otherwise, their participation would be inconsistent with a fair trial.¹⁵¹

93. Mr Katanga considers that there are limitations to the presentation of evidence by participants which are inherent in the provisions of the Statute and the concept of a

¹⁴⁶ Impugned Decision, para. 86.

¹⁴⁷ See Impugned Decision, para. 85, where the Trial Chamber indicated that it "did deem it necessary to draw a distinction between victims whom the Legal Representatives wish to call at trial and witnesses whom they propose to have testify". See also Response to the Document in Support of the Appeal, p. 13 (footnote 54), where the Prosecutor notes that Mr Katanga articulated this ground of appeal slightly differently from how the Trial Chamber certified it. He argues, however, that this difference does not have an impact on the ground of appeal.

¹⁴⁸ The Appeals Chamber considers that this ground of appeal does not concern paras 94-97 of the Impugned Decision. See also Document in Support of the Appeal, para. 23.

¹⁴⁹ Impugned Decision, para. 86.

¹⁵⁰ Impugned Decision, para. 86 (references omitted).

¹⁵¹ Document in Support of the Appeal, para. 23.

fair trial.¹⁵² In his view, the Appeals Chamber, in recognising the possibility for victims to submit evidence pertaining to the guilt of the accused in the *Lubanga* case,¹⁵³ also “impliedly recognised” that there might be legal limitations to the circumstances in which victims may lead incriminating evidence.¹⁵⁴

94. Mr Katanga further submits that permitting participants to present any type of incriminating evidence, including evidence pertaining to the conduct of the accused, is inconsistent with the nature of a criminal trial and the role of the Prosecutor as defined in the Statute, in particular in article 42 (1).¹⁵⁵ He contends that this type of incriminating evidence is essential to the determination of the guilt of an accused and therefore should be adduced by the Prosecutor, in order to safeguard the “absolute fairness of the proceedings”.¹⁵⁶

95. Consequently, Mr Katanga argues that although victims have the possibility to present evidence relating to the guilt or innocence of the accused, they cannot lead evidence on the conduct of the accused “without becoming supplementary prosecutors in the case”.¹⁵⁷

96. Mr Katanga further asserts that permitting participants to present evidence that directly relates to the criminal responsibility of an accused disrupts the balance between the parties, therefore affecting his right to a fair trial.¹⁵⁸ He submits that the Prosecutor, who is a “minister of justice and not a private party with specific private interests”, has carefully defined duties in order to permit an accused to meet the Prosecutor’s case in an equitable manner and to avoid miscarriages of justice.¹⁵⁹ Mr Katanga maintains that because the Prosecutor has his theory of the case and the Legal Representatives have theirs, victims leading evidence on the role of the accused may not only blur the case which the accused must meet, but may also prejudice the position of the Prosecutor, who is seeking to present his case to the judges.¹⁶⁰

¹⁵² Document in Support of the Appeal, para. 27.

¹⁵³ Appeals Chamber Judgment in the *Lubanga* case, para. 97.

¹⁵⁴ Document in Support of the Appeal, para. 31.

¹⁵⁵ Document in Support of the Appeal, para. 27.

¹⁵⁶ Document in Support of the Appeal, para. 25.

¹⁵⁷ Document in Support of the Appeal, para. 26.

¹⁵⁸ Document in Support of the Appeal, para. 28.

¹⁵⁹ Document in Support of the Appeal, para. 28.

¹⁶⁰ Document in Support of the Appeal, para. 29.

97. Consequently, Mr Katanga seeks a ruling from the Appeals Chamber to the effect that the presentation of evidence on the conduct of the accused is within the exclusive authority of the Prosecutor, and that the Victims may not be allowed to introduce such evidence.¹⁶¹

3. Arguments of the Prosecutor

98. In the Prosecutor's view, the Trial Chamber properly established that evidence generally concerning the guilt of the accused is not distinct from evidence that specifically relates to the conduct of the accused.¹⁶²

99. The Prosecutor argues that the Trial Chamber may order the presentation of additional evidence by the Victims, pursuant to its authority under article 69 (3) of the Statute, if such evidence is not only probative or relevant, but also "necessary for the determination of the truth".¹⁶³ He further submits that, in addition to this latter requirement, the Trial Chamber must satisfy itself that evidence proposed by the Victims concern their personal interests.¹⁶⁴

100. The Prosecutor contends that because the role of the accused in the crimes charged is a pivotal and contested question in most trials, the Trial Chamber may consider this a subject on which additional evidence is necessary for the determination of the truth.¹⁶⁵ He further asserts that Mr Katanga's submission to the effect that only the Prosecutor may lead evidence on the conduct of the accused erroneously restricts the authority of a Chamber to request the submission of evidence *ex officio*.¹⁶⁶

101. Finally, the Prosecutor considers that the crucial question is whether the Trial Chamber applies the appropriate criteria to ensure that any request for additional evidence is warranted by the Statute and does not create an unfair trial.¹⁶⁷ In his view,

¹⁶¹ Document in Support of the Appeal, para. 32.

¹⁶² Response to the Document in Support of the Appeal, para. 7. The Prosecutor further argues that Mr Katanga did not provide a clear basis for this proposed distinction; *see* Response to the Document in Support of the Appeal, para. 33.

¹⁶³ Response to the Document in Support of the Appeal, para. 33.

¹⁶⁴ Response to the Document in Support of the Appeal, para. 33 (footnote 58).

¹⁶⁵ Response to the Document in Support of the Appeal, para. 33.

¹⁶⁶ Response to the Document in Support of the Appeal, para. 33.

¹⁶⁷ Response to the Document in Support of the Appeal, para. 34.

the exercise of the Trial Chamber's authority under article 69 (3) of the Statute at the request of a participant should be "truly exceptional".¹⁶⁸

102. In sum, the Prosecutor submits that this ground of appeal should be rejected.¹⁶⁹

4. Joint observations of the Victims and responses thereto

103. The Victims argue that Mr Katanga intends to make victims' participation in the trial ineffectual by submitting that they cannot testify on the role of accused.¹⁷⁰

104. They further submit that the matter does not concern permitting victims to replace or support the Prosecutor, but rather permitting them, under certain circumstances, to participate in the trial by providing information on the conduct of the accused to the extent that such information is necessary for the determination of the truth.¹⁷¹

105. The Victims contend that the Trial Chamber has developed a system in which they are permitted to participate, under clearly circumscribed conditions, in the establishment of the veracity of the "raw facts" without the need to analyse the legal repercussions that may arise from the determination of such facts or from the nature of the information obtained.¹⁷²

106. The Victims further submit that because they do not have the right, but rather the possibility to present evidence, conditioned upon the authority of the Trial Chamber acting on its own prerogative, such a regime provides all of the necessary safeguards to guarantee the fairness of the proceedings and compliance with the rights of the accused.¹⁷³

107. Finally, the Victims argue that the Trial Chamber has done its utmost to avoid blurring the roles of the Prosecutor and the Defence and has already rejected certain questions proposed by the Legal Representatives because it considered such questions

¹⁶⁸ Response to the Document in Support of the Appeal, para. 34.

¹⁶⁹ Response to the Document in Support of the Appeal, para. 35.

¹⁷⁰ Joint Observations of the Victims, para. 38.

¹⁷¹ Joint Observations of the Victims, para. 39.

¹⁷² Joint Observations of the Victims, para. 40.

¹⁷³ Joint Observations of the Victims, para. 41.

inappropriate in light of the rights of the accused.¹⁷⁴ Accordingly, the Victims submit that the second ground of appeal is unfounded.¹⁷⁵

108. In response to the Joint Observations of the Victims, the Prosecutor notes that the Victims agree with him on a number of important issues pertaining to their participation in the proceedings.¹⁷⁶ Therefore, the Prosecutor largely concurs with the Joint Observations of the Victims.¹⁷⁷

109. In response to the Joint Observations of the Victims, Mr Katanga contends that although virtually any process of presenting evidence can be justified on the grounds of the determination of the truth, the search for the truth must be fair and must not be used as a basis for undermining the principle of equality of arms.¹⁷⁸ Finally, he submits that the Trial Chamber can only hear and evaluate evidence; it cannot cure disparities inherent in the possibility for the Victims to present all categories of evidence on similar terms to the Prosecutor.¹⁷⁹ He further submits that the assertion that the Trial Chamber has rejected a number of questions proposed by the Legal Representatives is unrelated to this ground of appeal.¹⁸⁰

5. *Determination by the Appeals Chamber*

110. For the reasons provided below, the Appeals Chamber determines that the Trial Chamber did not err in deciding that, in the event that the Trial Chamber exercises its authority under article 69 (3) of the Statute and requests any of the Victims to testify, the testimony may include matters relating to the role of the accused in the crimes charged.

111. As explained above,¹⁸¹ the Appeals Chamber decided in the *Lubanga* case that victims do not have a right to present evidence pertaining to the guilt of the accused.¹⁸² Rather, the Appeals Chamber recalled¹⁸³ that the Trial Chamber has the

¹⁷⁴ Joint Observations of the Victims, para. 42.

¹⁷⁵ Joint Observations of the Victims, para. 43.

¹⁷⁶ Prosecutor's Response to the Joint Observations, para. 4.

¹⁷⁷ Prosecutor's Response to the Joint Observations, para. 7.

¹⁷⁸ Mr Katanga's Response to the Joint Observations, para. 31.

¹⁷⁹ Mr Katanga's Response to the Joint Observations, para. 32.

¹⁸⁰ Mr Katanga's Response to the Joint Observations, para. 33.

¹⁸¹ See above, paras 38-40.

¹⁸² Appeals Chamber Judgment in the *Lubanga* case, paras 93, 94, 99.

¹⁸³ Appeals Chamber Judgment in the *Lubanga* case, para. 95.

authority, pursuant to article 69 (3) of the Statute, to request the submission of all evidence that “it considers necessary for the determination of the truth”. If the Victims demonstrate that the testimony they wish to give affects their personal interests, the Trial Chamber may request them to submit such evidence, if this is “necessary for the determination of the truth”.¹⁸⁴

112. The Appeals Chamber considers that the delineation of what constitutes evidence “necessary for the determination of the truth” will inevitably be decided by the Trial Chamber on a case-by-case basis. Nevertheless, the Appeals Chamber finds that the role of the accused in the crimes charged is a crucial question on which the Trial Chamber will have to decide at the end of the trial. Thus, in principle, evidence pertaining to the role of the accused may fall within the scope of evidence that the Trial Chamber considers necessary for the determination of the truth. While the Prosecutor bears the responsibility for prosecutions before the Court¹⁸⁵ and the burden to prove the guilt of the accused,¹⁸⁶ no provision in the Statute or the Rules of Procedure and Evidence confines the submission of evidence pertaining to the conduct of the accused to the Prosecutor, thereby limiting the Trial Chamber’s powers under article 69 (3) of the Statute. Consequently, the Trial Chamber may request victims to testify on the role of the accused, if it considers that such testimony is necessary for the determination of the truth.

113. Mr Katanga argues that if the Victims were permitted to testify on the role of the accused, they would become “supplementary prosecutors in the case”.¹⁸⁷ The Appeals Chamber is not persuaded by this argument. As the Appeals Chamber previously decided in the *Lubanga* case, victims may be permitted to participate in the proceedings by submitting evidence pertaining to the guilt or innocence of the accused.¹⁸⁸ Evidence on the conduct of the accused is encompassed within the general category of evidence pertaining to the guilt or innocence of the accused which victims may be permitted to submit. The Appeals Chamber finds no reason to distinguish between different categories of evidence that victims may or may not be requested to present. Therefore, the Appeals Chamber considers that if victims are requested to

¹⁸⁴ Article 69 (3) of the Statute. *See* Appeals Chamber Judgment in the *Lubanga* case, para. 99.

¹⁸⁵ Article 42 (1) of the Statute.

¹⁸⁶ Article 66 (2) of the Statute.

¹⁸⁷ Document in Support of the Appeal, para. 26.

¹⁸⁸ Appeals Chamber Judgment in the *Lubanga* case, para. 94.

testify on the role of the accused in the crimes charged, this does not make them “supplementary prosecutors in the case”.¹⁸⁹

6. Conclusion

114. In sum, the Appeals Chamber finds that the possibility for the Victims to testify on matters including the role of the accused in the crimes charged against them, grounded on the Trial Chamber’s authority to request evidence necessary for the determination of the truth, is not *per se* inconsistent with the rights of the accused and the concept of a fair trial. However, and as the Appeals Chamber held previously in the *Lubanga* case,¹⁹⁰ the Trial Chamber must ensure, on a case-by-case basis, that the right of the accused to a fair trial is respected. Therefore, whether a victim will be requested to testify on matters relating to the conduct of the accused will depend on the Trial Chamber’s assessment of whether such testimony: (i) affects the victim’s personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the testimony would be consistent with the rights of the accused, and in particular the right to have adequate time and facilities to prepare his defence (article 67 (1) (b) of the Statute), and a fair and impartial trial.

115. Accordingly, the Appeals Chamber determines that the second ground of the appeal is dismissed and the Impugned Decision under this ground is confirmed.


¹⁸⁹ Document in Support of the Appeal, para. 26.

¹⁹⁰ Appeals Chamber Judgment in the *Lubanga* case, para. 100.

IV. APPROPRIATE RELIEF

116. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, the Appeals Chamber has not identified any error in the Impugned Decision. It is therefore appropriate to confirm the Impugned Decision and to dismiss the appeal.

Done in both English and French, the English version being authoritative.


Judge Erkki Kourula
Presiding Judge

Dated this 16th day of July 2010

At The Hague, The Netherlands

