

PARTLY DISSENTING OPINION OF JUDGE KUNIKO OZAKI

I respectfully disagree with the Majority's conclusion that Victims a/30365/15 and a/00256/13 should be authorised to present evidence for the following reasons.

1. At the outset, I wish to emphasise the distribution of roles in the Rome Statute's framework, and notably the provision in Article 66(2) that '[t]he onus is on the Prosecutor to prove the guilt of the accused'. In my view, this provision clearly demonstrates that it is the Prosecution's function to lead evidence of the guilt of the accused,¹ while victims, who are not parties to the proceedings,² are not vested with a self-standing right to present evidence,³ and should only be allowed to call witnesses 'to the extent that this does not in effect transform them into auxiliary prosecutors'.⁴ It is on this understanding that the Appeals Chamber found that '[t]he framework established by the [Trial Chamber in the *Lubanga* case and which] is premised on an interpretation of article 69(3), second sentence, read with article 68(3) and rule 91(3) of the Rules, [...] leaves open the possibility for victims to

¹ See *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 ('Appeals Chamber Judgment of 11 July 2008'), para. 93, in which the Appeals Chamber held that '[p]resumptively, it is the Prosecutor's function to lead evidence of the guilt of the accused'.

² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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", 16 July 2010, ICC-01/04-01/07-2288 ('Appeals Chamber Judgment of 16 July 2010'), para. 39.

³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, ICC-01/05-01/08-2138 ('*Bemba* Decision on Victims'), paras 12-13. I also note in this respect that it has been the constant practice of this Chamber to allow LRV's questioning of Prosecution witnesses only to the extent that the questions directly relate to the harm suffered by the victims and his or her family, or other closely connected matters. See for example transcript of hearing on 15 September 2015, ICC-01/04-02/06-T-25-Red-ENG WT, page 8. See also transcript of hearing on 16 September 2015, ICC-01/04-02/06-T-26-Red-ENG WT, pages 24-25.

⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr ('*Katanga* Decision on conduct of proceedings'), para. 22(b).

move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth'.⁵

2. The Appeals Chamber in the *Katanga* case held that the presentation of evidence by victims depends on the Trial Chamber's assessment of four conditions, namely whether the 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) [...] would be consistent with the rights of the accused and a fair and impartial trial.'⁶
3. In addition, various chambers of this Court have identified and applied more detailed conditions and criteria for such presentation. For example, useful guidance can be found in the relevant factors identified by Trial Chamber II and endorsed by Trial Chamber III:⁷
 - a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.
 - b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.
 - c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.
 - d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.
4. Turning to the decision at hand, while the Majority gave due consideration to the first two conditions identified by the Appeals Chamber in the *Katanga* case and referred to in paragraph 2 above, I am

⁵ Appeals Chamber Judgment of 11 July 2008, para. 98.

⁶ Appeals Chamber Judgment of 16 July 2010, para. 3. While I note that these conditions were held to relate to the determination of '[w]hether a victim will be requested to testify on matters relating to the conduct of the accused', I consider that these four conditions are relevant to any testimony relating to the guilt or innocence of the accused presented by victims.

⁷ *Katanga* Decision on conduct of proceedings, para. 30 and *Bemba* Decision on Victims, para. 24.

of the view that insufficient importance has been attached to the latter two. I also consider that the list of requirements set out in paragraph 11 of the decision is too selective and insufficiently balanced.

5. With regard to the third condition, the Appeals Chamber has consistently emphasised that the possibility for victims to present evidence is based on the Chamber's discretionary power under Article 69(3) to request the submission of any evidence it considers *necessary* for the determination of the truth.⁸ In this respect, I also note that although the requirement of appropriateness referred to by the Majority⁹ was approved by the Appeals Chamber in the *Lubanga* case,¹⁰ it was used in conjunction with this prerequisite of necessity pursuant to Article 69(3) of the Statute.¹¹ Moreover, in relation to the Chamber's power to request victims to submit evidence, the Appeals Chamber found that a 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'.¹² I also note that Trial Chambers II and III considered that the expected testimony needs to be considered to 'make a *genuine* contribution to the ascertainment of the truth'.¹³
6. This condition is also closely connected to the fourth condition that the presentation of evidence needs to be consistent with the rights of the accused, in its various components, which has also been consistently

⁸ Appeals Chamber Judgment of 11 July 2008, para. 98; Appeals Chamber Judgment of 16 July 2010, paras 3, 44, and 112.

⁹ Decision, para. 11. The Majority defines the criterion of appropriateness with reference to the evidence's 'relevance to the issues of the case and capacity to assist the Chamber in its understanding of the case or evidence heard so far'.

¹⁰ Appeals Chamber Judgment of 11 July 2008, para. 104.

¹¹ Appeals Chamber Judgment of 11 July 2008, para. 95.

¹² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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", 16 July 2010, ICC-01/04-01/07-2288, para. 48.

¹³ *Katanga* Decision on conduct of proceedings, para. 20 (emphasis added). This finding was endorsed in *Bemba* Decision on Victims, para. 23.

emphasised in the jurisprudence of this Court.¹⁴ Indeed, if the Chamber was to authorise victims to present any testimony relevant to the guilt of the accused in addition to and after the Prosecution case, the accused's rights would risk being impacted in various ways. Most importantly, I note in this regard that, as stressed by the Appeals Chamber, the disclosure regime established in Rules 76 to 84 of the Rules is 'directed towards the parties and not victims'.¹⁵ Allowing the presentation of victims' testimony which does not meet the four conditions established by the Appeals Chamber may therefore result in the accused having to confront 'auxiliary prosecutors', who would complement the evidence already presented by the Prosecution without being subject to the corresponding disclosure obligations. Moreover, in most circumstances, it would also affect the right of the accused to be tried without undue delay.

7. Having considered these factors in my evaluation of the proposed testimonies, I came to the conclusion that, on the basis of the information provided by the LRV, only Victim a/30012/15 can be expected to provide testimony that would genuinely contribute to the establishment of the truth and therefore be necessary for this purpose. As noted in the decision, the relevant victim is reported to be able to provide evidence on, *inter alia*, Mr Ntaganda and Kisembo [REDACTED], and he can therefore be expected to provide relevant and potentially unique information on the conduct of Mr Ntaganda and Kisembo in the period between end of 2002 and beginning of 2003.¹⁶ However, I find that the LRV failed to demonstrate that the proposed

¹⁴ See Appeals Chamber Judgment of 11 July 2008, para. 104, recalled in Appeals Chamber Judgment of 16 July 2010, para. 114.

¹⁵ Appeals Chamber Judgment of 11 July 2008, para. 93; Appeals Chamber Judgment of 16 July 2010, para. 74.

¹⁶ Decision, paras 20 and 22.

testimonies of Victims a/30365/15 and a/00256/13 would fulfil such conditions.

Victim a/30365/15

8. As set out in the decision, this victim's expected testimony appears to be of relevance with regard to numerous crimes allegedly committed in or around [REDACTED]. It is further found that '[a]lthough in part cumulative of evidence already presented, the expected testimony covers a wide range of crimes charged and is therefore potentially representative of a larger group of victims.'¹⁷ I agree with these observations.
9. However, I disagree with the Majority's conclusion that for these reasons, it would be appropriate for this victim to present evidence before the Chamber. Indeed, the Majority acknowledges that the expected testimony would be in part cumulative of evidence already presented, and I find, on the basis of the information provided by the LRV, that there is no indication that the proposed testimony would include any new information that could be expected to make a genuine contribution to the ascertainment of the truth. For these reasons, I respectfully disagree with the Majority's decision to authorise this victim to present evidence.

¹⁷ Decision, para. 25.

Victim a/00256/13

10. As noted in the decision, the proposed testimony appears relevant to several crimes alleged to have been committed in [REDACTED] as part of the 'Second Attack', which has already been discussed during the testimony of a number of witnesses. It was further found that, as a [REDACTED] who can testify regarding the use of heavy weaponry, the victim may be in a position to provide additional information of relevance.¹⁸ I share these observations.
11. That notwithstanding, I remain unpersuaded by the Majority's conclusion that for these reasons, it would be appropriate to authorise this victim to appear as a witness primarily on the aspect of the use of heavy weaponry.¹⁹ Indeed, I note that on the basis of the information provided by the LRV, '[REDACTED] were killed by a shot of heavy weapon launched by UPC'.²⁰ It does not follow from this information that the victim personally witnessed the killing of [REDACTED]. Further, I am not convinced that, on the basis of his position, this victim would be 'uniquely apt to give evidence about a particular matter'. In the circumstances, I do not consider this expected testimony to make a genuine contribution to the ascertainment of the truth, and therefore, I respectfully disagree with the Majority's decision to authorise this victim to present evidence.

¹⁸ Decision, para. 34.

¹⁹ Decision, para. 34.

²⁰ Confidential Redacted Version of Request by the Common Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns, ICC-01/04-02/06-1739-Conf-Red, para. 27.

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

A handwritten signature in black ink, appearing to read 'K. Ozaki', written in a cursive style. The signature is positioned above a horizontal line.

Judge Kuniko Ozaki

Dated 15 February 2017

At The Hague, the Netherlands