

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-01/04-01/07**
Date: **16 November 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

Public

**Prosecution's Response to "Defence for Germain Katanga's Additional
Observations on Victims' Participation and scope thereof"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for the Defence of Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Jean-Louis Gilissen

Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Defence for Germain Katanga ("the Defence") has requested that Trial Chamber II rule that participating victims have a duty to disclose to the Defence any evidence in their knowledge or possession which may be potentially exculpatory or is material to the preparation of the defence.¹ The Prosecution opposes the Defence Request. Neither the Statute and the Rules, nor the existing jurisprudence provide for such disclosure obligation on victims. The Statute and the Rules in fact did not anticipate that the victims would lead any evidence relevant to the guilt or innocence of the accused; and the Prosecution has consistently argued that this was not their remit, but that of the Prosecutor's.
2. However, the Appeal Chamber accepted that in exceptional circumstances victims may present evidence during the trial. In this case, the Prosecutor submits that the Trial Chamber can make a specific order for disclosure. In that event, the Chamber could consider ordering on a case-by-case basis that the victims disclose any related potentially exculpatory evidence, or other material that is required for the parties and the Chamber to properly assess the evidence which they will present. However, this discrete possibility does not provide a basis for a blanket order for disclosure of evidence from the victims.

Procedural Background

3. On 29 January 2009, the Defence filed its "Defence Observations Regarding Victims' Participation and the Scope Thereof".² In those observations, the Defence referred to the need for victims to provide adequate and timely notice of any evidence which they wish to present at trial, and referred to disclosure

¹ ICC-01/04-01/07-1618 ("Defence Request"), para. 1.

² ICC-01/04-01/07-858.

in the context of victims presenting specific evidence.³ However, it made no reference to any general obligation to disclose all potentially exculpatory evidence.

4. On 10 November 2009, the Defence filed additional observations, requesting “a ruling that the participating victims have a duty to disclose exculpatory material within their knowledge or possession”⁴ (“Defence Request”).
5. The Prosecution hereby responds to the Defence Request.

Prosecution’s Submissions

6. The Statute and the Rules do not impose any disclosure obligations on victims who are participating in the proceedings. Rather, disclosure obligations apply to the parties only. The Defence recognises that there are no explicit disclosure obligations placed on victims by the Court’s legal framework, as Trial Chamber I has confirmed.⁵
7. In paragraphs 2-3 of the Request, the Defence refer to the possibility that victims may be granted an “investigative role”, and on the “right [...] to present incriminating evidence” which it considers that victims have been granted, as a basis for the disclosure obligations which they request.⁶ However, given that no such role or general right has been granted, this cannot be the foundation for imposing broad disclosure obligations on victims.
8. While recognising that victims may ask the Chamber to exercise its powers to request the presentation of evidence under Article 69(3), including requesting such presentation from the victims, the Appeals Chamber has not granted

³ At para. 17(i) and (iii).

⁴ ICC-01/04-01/07-1618.

⁵ Defence Request, para. 3; referring to *Prosecutor v. Lubanga*, “Decision on the defence application for disclosure of victims applications”, ICC-01/04- 01/06-1637, 21 January 2009, para. 10.

⁶ Defence Request, paras. 2-3.

victims a general right to lead evidence. Much less have victims been granted any “investigative role” that could somehow entail the imposition of general disclosure duties.

9. The Prosecution further submits that there is no such disclosure regime in the Statute and Rules because the Statute and Rules do not anticipate that victims will present evidence at trial in normal circumstances.
10. It is due to the Prosecution’s statutory right to present any relevant evidence relating to the guilt or innocence of the accused that it must also disclose any potentially exculpatory evidence. Victims do not have a comparable right to present any evidence pertaining to the accused’s guilt or innocence. This further underscores that any obligation on victims to disclose exculpatory material can only arise exceptionally and in connection with an application to present a particular item of evidence.
11. The ability of the victims to request permission to present an item of evidence, recognised by the Appeals Chamber, is strictly limited and cannot be confused with a “right for participating victims to present incriminating evidence for the Court.”⁷ The Appeals Chamber recognised that the Chamber has the power to request the submission of evidence, and considered that this could include requesting the submission of evidence from victims.⁸
12. The Appeals Chamber further emphasised that it “did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis”.⁹ Under the Appeals Chamber’s ruling, the right to request the production of evidence requires a discrete application from victims in each instance, demonstrating not only

⁷ Defence Request, para. 2.

⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, paras. 95, 98-99.

⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, paras. 4, 99.

how their personal interests are affected but also that it is appropriate for the Trial Chamber to request this evidence from the victims.¹⁰

13. It is in this context of a specific application to present a given item of evidence, and to safeguard the rights of the accused, that the Appeals Chamber referred to certain disclosure obligations on the part of the victims. The Prosecution submits that specific disclosure obligations of this nature will have to be imposed by the Trial Chamber on a case-by-case basis. Such order will have to be appropriately tailored to the scope of the evidence which the victims seek to have introduced. However, the recognition that a specific order for disclosure would be required as part of any presentation of evidence related to the guilt or innocence of the accused from a victim cannot sustain a general disclosure obligation unrelated to, and in the absence of, any application to present evidence.
14. Finally, it should be borne in mind also that victims have no duty or ability to assess the risk and need to protect witnesses and persons at risk under the Statute and that such duty will have to be exercised by the Court.

¹⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, paras. 4, 104.

Conclusion

15. For the above-referred reasons, the Prosecution requests that the Chamber reject the Defence Request. However, the Prosecution submits that the Chamber should revisit the issue if it permits the presentation of evidence from victims in the course of the trial.



Luis Moreno-Ocampo, Prosecutor

Dated this 16th day of November 2009

At The Hague, The Netherlands