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**International
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THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**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***

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga

Mr David Hooper QC
Mr Andreas O'Shea

Counsel for the Defence of Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Fidel Nsita Luvengika
Mr Jean-Louis Gilissen

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Introduction

1. The Defence for Germain Katanga (“the Appellant”) has appealed the decision of Trial Chamber II setting out the modalities for the participation of victims during the trial (“the Decision”).¹
2. The Appeals Chamber recognized the “possibility”, but not the “right” of victims to lead evidence. Following its lead, the Trial Chamber agreed to allow for the possibility that victims might tender evidence to assist in the search for truth. However, the Chamber also made clear that victims “can only participate actively 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”.² The Chamber, indeed, stated repeatedly that victims could not lead evidence if it would prejudice the fairness and impartiality of the trial.³
3. The Decision and other relevant decisions of the Court, in particular the Appeal Judgment on victim participation in the *Lubanga* case,⁴ never granted victims an autonomous right to present evidence. Rather, they established that victims have no express “right” under the Statute or Rules to lead evidence. In this case the authority instead was based on the Trial Chamber’s independent residual power under Article 69(3) to request the presentation of evidence if it considers this “necessary for the determination of the truth”.⁵
4. The current appeal (in particular the first issue) highlights the difficulties and perils surrounding the premature evaluation of the possibility that a non-party may request the presentation of unspecified evidence. In fact it is difficult to define, in the absence of the concrete factual scenario, the exceptional standard established by Article 69(3) to request the presentation of evidence if the Chamber considers this “necessary for the determination of the truth”.⁶ It may only be possible for the Appeals Chamber to urge that Trial Chambers be extremely restrictive in the exercise of its power to include evidence from sources other than the parties, such as victims.

¹ ICC-01/04-01/07-1788-tENG.

² Id. at para. 65.

³ Id. at paras. 53, 65, 74, 83, 84, 96, 100, 107.

⁴ ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008 (“Appeal Judgment”).

⁵ Appeal Judgment, paras. 98-99.

⁶ *Ibid.*

5. In the case, the Defence is not challenging the principle established by the Appeals Chamber that, “the right to lead evidence pertaining to the guilt or innocence of the accused [...] lies primarily with the parties, namely, the Prosecutor and the Defence”.⁷ The main defence argument is, rather, that no adverse evidence may be led at trial – in this case by the victims, but the claim applies equally to evidence by the Prosecution or the Court itself – unless it was fully disclosed to the defence before trial starts. That contention, based on the assumption that the introduction at trial of evidence that was not disclosed before trial is necessarily prejudicial, cannot be correct. It fails to consider that the Statute and Rules permit a variance in the disclosure timing upon a showing of good cause and that the Chamber itself may call for additional evidence at the trial. Nor is it consistent with decisions of other international tribunals and domestic courts that recognize that circumstances may justify the introduction of evidence that was not disclosed pre-trial to the defence.
6. The Prosecution submits that it is not automatically prejudicial to admit evidence that was not disclosed at the pre-trial stage. Rather, whether the consideration of late-disclosed evidence is unfairly prejudicial will be determined by assessing the circumstances in the individual case. As the Decision itself recognized, the Trial Chamber shall analyze the necessity to include new evidence to establish the truth and take into account any prejudice caused to the defence when deciding on victims’ requests to present evidence and setting the modalities for the disclosure of said evidence.⁸ That discretionary determination will then be reviewable against the full factual backdrop of the trial.
7. With regard to the second issue is “whether it is possible for the Legal Representatives of Victims to call victims to testify on matters including *the role of the accused* in crimes charged against them”. As said, the evidence will be presented under the Trial Chamber’s authority under Article 69(3). The Decision properly explained that there is no distinction between evidence that generally concerns guilt or innocence and evidence that specifically concerns the *actus reus* or *mens rea* of the accused. The only requirement is that the evidence shall be “necessary for the determination of the truth”.⁹

⁷ Appeal Judgment, para. 93.

⁸ Decision, paras. 84 and 104.

⁹ See Appeal Judgment, paras. 98-99.

8. Finally, the Appellant claims that victims as participants have an obligation to turn over to the defence any exculpatory evidence in their possession even if the victims do not request the presentation of evidence of guilt. As the Trial Chamber correctly found, the Statute and Rules do not impose such an obligation on victims (or other non-parties). It also explained that since victims have no right to lead evidence, the attendant obligations of disclosure do not attach to them. Should the Chamber decide to exceptionally call evidence upon request of the victims, it has the authority to ensure appropriate disclosure to protect the rights of the accused, and it made clear in its Decision that it will take those steps as necessary.
9. For these reasons the Prosecution requests that the Appeals Chamber reject the appeal.

Procedural Background

10. On 20 November 2009, the Trial Chamber issued its “Directions for the conduct of the proceedings and testimony in accordance with rule 140”.¹⁰
11. On 22 January 2010, the Chamber rendered the decision on the modalities of victim participation at trial.¹¹
12. On 1 February 2010, the Defence for Germain Katanga sought leave to appeal five issues arising out of the decision pursuant to article 82(1)(d).¹²
13. On 19 April 2010, the Trial Chamber granted leave to appeal three confined issues:
 - “Whether it is possible for the Legal Representatives of Victims to lead evidence and to call victims to testify on the crimes against the accused, in a manner which includes incriminating evidence and testimony, *without disclosing it to the Defence prior to trial*” (“the First Issue”),¹³

¹⁰ ICC-01/04-01/07-1665; a corrigendum was issued on 1 December 2009, ICC-01/04-01/07-1665-Corr. In that decision, the Trial Chamber already recognised that in accordance with the Appeal Judgment, victims may under certain circumstances apply to give oral testimony, and that the power of the Trial Chamber to call witnesses at its own motion under Articles 64(6)(b), (d) and 69(3) could be exercised after those witnesses had been brought to the attention of the Chamber by legal representatives of victims (see paras. 19, 25-26, 45-46).

¹¹ ICC-01/04-01/07-1788.

¹² ICC-01/04-01/07-1815. The Legal Representatives of Victims filed a joint response on 4 February 2010 (ICC-01/04-01/07-1841); to which the Katanga Defence sought leave to reply and replied on 15 February 2010 (ICC-01/04-01/07-1870 and ICC-01/04-01/07-1873, respectively; the Chamber granted *a posteriori* Katanga’s leave to reply by an oral decision on 18 February 2010.

¹³ ICC-01/04-01/07-2032 (“Decision Granting Leave to Appeal”), paras. 25-29.

- “Whether it is possible for the Legal Representatives of Victims to call victims to testify on matters including *the role of the accused* in crimes charged against them” (“the Second Issue”),¹⁴
- “Whether every item of evidence in possession of the Legal Representatives of Victims, be it incriminating or exculpatory, must be communicated to the parties”.¹⁵

14. On 3 May 2010, the Appellant filed its document in support of appeal (“Appeal Brief”).¹⁶ The Prosecution hereby files its response to the Appeal Brief, pursuant to Regulation 65(5) of the Regulations of the Court.

Statement of Facts

15. Prior to the start of trial, Trial Chamber II requested and received from the parties and participants views on modalities of victim participation in the trial itself. Its consideration also included review of the decisions of Pre-Trial Chamber I, Trial Chamber I, and this Chamber.¹⁷

16. After considering the various submissions, including the victims’ announced “intention of leading evidence pertaining to the guilt of the accused”,¹⁸ the Trial Chamber issued its Decision. It accepted that this Chamber recognized the “possibility” but not the “right”, of victims, subject to Trial Chamber approval, to lead evidence if it is “necessary for the determination of the truth”. It then agreed to allow for the possibility in this case that victims might tender evidence to assist in the search for truth. However, the Chamber also made clear that victims “can only participate actively 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”.¹⁹ It consistently reiterated that victims could not lead evidence if it would prejudice the fairness and impartiality of the trial.²⁰

17. The Trial Chamber then established modalities for evidence led by the victims. It held that before victims may lead documentary evidence or present live testimony

¹⁴ Id. at paras. 30-34.

¹⁵ Id. at paras. 35-37.

¹⁶ ICC-01/04-01/07-2063 OA11.

¹⁷ Decision, paras. 1-41.

¹⁸ Id. at para. 3.

¹⁹ Id. at para. 65.

²⁰ Id. at paras. 53, 65, 74, 83, 84, 96, 100, 107.

from one or more victims or other witnesses, their Legal Representatives must first apply in writing, setting out the relevance of the evidence to the determination of the truth, and the parties must have the opportunity to respond. The Chamber will then decide if the evidence is necessary to the discovery of the truth and if its admission would not result in prejudice to the Defence or to the fairness and impartiality of the trial.²¹

18. With particular respect to the possible testimony of other witnesses, the Chamber explained that upon the conclusion of the defence case the Chamber itself might decide to call further witnesses, including at the suggestion of the Legal Representatives. It made clear, however, that it “should only call witnesses whose testimony can make a genuine contribution to the determination of the truth, whilst ensuring that it will not be prejudicial to the Defence or affect the right to a fair and impartial trial.”²²
19. Finally, the Chamber rejected the argument by the accused that victims and their Legal Representatives should be required to disclose to the defence all evidence in their possession. The Chamber noted that “neither the Statute nor the Rules impose such an obligation [...] [and] since the victims do not have the right to present evidence, there is no justification for obliging them generally to disclose to the parties any evidence in their possession, whether incriminating or exculpatory.”²³ The Chamber added, however, that if victims apply and the Chamber authorizes them to present evidence, the Chamber can impose disclosure requirements.²⁴

Argument

20. The Prosecution submits that the Appellant’s first two grounds of appeal show that the allocation of functions and responsibilities amongst the parties, the Chamber, and the victims has implications for the conduct of the proceedings.
21. As the Appeals Chamber recognized in *Lubanga*, “the right to lead evidence pertaining to the guilt or innocence of the accused [...] lies primarily with the

²¹ Id. at para. 81-84; see also paras. 98-101 (specifically regarding documentary evidence), para. 107 (regarding the obligation of sufficient advance disclosure to the parties “to enable them to prepare effectively”).

²² Id. at paras. 95-96.

²³ Id. at para. 105.

²⁴ Id. at para. 107.

parties, namely, the Prosecutor and the Defence”.²⁵ The Appeals Chamber, however, then recognised the possibility, in principle, that victims might present evidence or call witnesses (including the victims themselves) to testify. However, its explanation for this possibility is based on, and exists solely as a consequence of, the Trial Chamber’s residual authority under Article 69(3) “to request the submission of all evidence that it considers necessary for the determination of the truth”.²⁶ While it did so to respect “the spirit and intention” of Article 68(3)²⁷ – which allows victims to express their views and concerns -- it did not read that provision to include an autonomous right to present evidence. Rather, the Appeals Chamber considered that Article 68(3) meant that “the victim would be able to *move the Chamber* to exercise its powers under article 69(3)”.²⁸ Thus, the Prosecution submits that the Appeal Judgment intended that the Trial Chamber exercise its Article 69(3) authority, upon application by a victim, to request or order the presentation of the evidence.²⁹

22. The Prosecution does not question the power of a Trial Chamber to do so, in keeping with its mandate to establish the truth. Nevertheless, this is a power which should be exercised sparingly and only when necessary,³⁰ in order to guarantee a fair, impartial, and expeditious trial. The cautious and restrained use of this power by

²⁵ Appeal Judgment, para. 93.

²⁶ Article 69(3), quoted in Appeal Judgment, para. 95

²⁷ Appeal Judgment, para. 97.

²⁸ Appeal Judgment, para. 99 (emphasis added); see also para. 98, “the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.”

²⁹ The Trial Chamber’s authority lies in Article 64(6)(d) to “order the production of evidence in addition to that already collected to trial or presented during trial by the parties”, or in Article 69(3) to “request the submission of evidence that it considers necessary for the determination of the truth”. Both provisions enshrine the principle of judicial authority to call evidence. As Triffterer notes “in the context of the Statute, [Article 69(3)] became an indicator regarding the role of that delegations wanted to give to the judges in trial proceedings”. Article 64(6)(d) specifically endorses this principle at the Trial Chamber’s level but always in pursuance of the “very important role [given] to the judges to ascertain the truth” and “to provide a fair trial to the accused”. The principle underlying both provisions was also recognised in rule 98 of the ICTY’s Rules: “A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance”. See Piragoff D.K., and Bitti G., in *Evidence*, “Article 69” [5]-[6] and *The Trial*, “Article 64” [20], respectively, in Triffterer *et al. Commentary to the Rome Statute of the International Criminal Court* (2nd Edition) (C.H.Beck-Hart-Nomos, 2008). None of this is altered by the fact that the Trial Chamber may “order the victims to present the evidence” (Appeal Judgment, para. 100), as it remains evidence called by the Trial Chamber itself, and the Chamber merely retains the discretion to decide on the best manner to adduce that evidence at trial: “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” (Appeal Judgment, para. 100).

³⁰ For instance, where a witness refuses to testify on behalf of a particular party but might be willing to do so if called by the Chamber (see Terrier F., “Powers of the Trial Chamber” in Cassesse, Gaeta, Jones (ed.) *The Rome Statute of the International Criminal court: a commentary*, p. 1273. (Oxford, 2002)); or when a State prevents access to certain material by a party and that material can only be obtained at a later point during the case, and perhaps at the behest of the Trial Chamber.

Trial Chambers, based on the accepted primacy of the parties in presenting the evidence,³¹ is further supported by the practice in other international tribunals.³²

23. The need for restraint by the Chamber in exercising this power is supported by the concerns regarding the presentation of evidence which has not been subject to the existing, rigorous and carefully balanced procedures set out in the Statute and Rules. These include especially the disclosure regime and the particular obligations placed on the Prosecutor. Those concerns are even more acute when they apply to the possibility that victims, motivated by their distinct interests, may trigger the presentation of evidence outside of the cases presented by the parties.³³ Victims do not bear the obligations that the Statute imposes on the parties as a counterpart to such important prerogatives – much less are they vested with the protective functions and duties of the Trial Chamber.³⁴
24. The power of the Chamber under Article 69(3) may be necessary as a safeguard to ensure that the truth is established, but it should not be expanded or interpreted as a grant of any rights to the victims to participate as if they were parties to the trial proceedings. While the Statute enables victim participants to present their personal views and concerns, it does not established victims as *partes civiles*. The Appeals Chamber may consider this appeal as an opportunity to further clarify and delimit its earlier judgment to address these concerns and to refine the exceptional standard “necessary for the determination of the truth” established by Article 69(3).³⁵

³¹ Appeal Judgment, para. 93. A similar principle has been recognised in the ICTY: see *Prosecutor v. Stakic*, IT-97-24-T, Trial Judgment, 31 July 2003, para 13, noting that primary responsibility for providing evidence lies on the parties and the Chamber must base its factual findings on the evidence tendered by them. See also McClelland, G., “A Non-Adversary Approach to International Criminal Tribunals”, *Suffolk Transnational Law Review*, Winter 2002, 1 at p. 30.

³² Rule 98 of the ICTY Rules of Procedure and Evidence provides: “A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance”. Chambers of that Tribunal have resorted to this provision in exceptional circumstances, such as where there were serious concerns regarding the shortcomings of the evidence presented, see *Prosecutor v. Stakic*, Trial Judgment, IT-97-24-T, 21 July 2003, para. 13, or if the information sought was of crucial importance for the Chamber to fulfil its obligations, see *Prosecutor v. Deronjic*, IT-02-61-T, 5 December 2003, Order of Additional Evidence Pursuant to Rule 98. Some commentators have criticised this provision for eroding the impartiality of the judges and creating an opportunity for them to take on the role of the prosecutor. See Johnson, Scott T., “On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia”, *International Legal Perspectives*, Spring 1998, p 182-183.

³³ In this regard, the Prosecution notes that when victims are in the possession of meaningful evidence necessary to establish the truth they may directly contact the Prosecution or the Defence, as appropriate.

³⁴ Terrier F., “Powers of the Trial Chamber” in Cassesse, Gaeta, Jones (ed.) *The Rome Statute of the International Criminal court: a commentary*, pp. 1273-1274: the Trial Chamber has the obligation to provide for the protection of confidential information and must provide for protection of the accused, witnesses and victims pursuant to Article 64(6)(c) and (e).

³⁵ Appeal Judgment, paras. 98-99.

The First Ground of Appeal: whether victims may testify or lead evidence relating to the guilt or innocence of the accused without disclosing it to the defence prior to trial³⁶

25. In this ground of appeal, the Appellant contests the fact that after the trial started and the victims provided no notice or disclosure to the defence, the Chamber ruled that victims may move the Chamber to call for additional evidence to that tendered by the parties.³⁷ The Appellant argues that permitting victims to call for incriminating evidence without having disclosed it prior to trial infringes the rights of the accused and the fairness of proceedings.³⁸
26. As noted previously, the evidence in question essentially will be *Chamber* evidence.³⁹ To the extent that the Appellant's argument is based on a reading of Article 64(3)(c)⁴⁰ as imposing an absolute requirement that *any* evidence presented must be disclosed prior to the commencement of the trial,⁴¹ this is erroneous. The Chamber cannot determine whether it would be necessary to exercise its residual power until it knows the evidence which has been presented by the parties.⁴² The Appellant's argument, if correct, would also disable the Trial Chamber from ever considering crucial evidence necessary to the determination of the truth if that evidence was not discovered by the Prosecution, despite due diligence, until after the trial began.⁴³

³⁶ The issue for which leave to appeal was granted is "whether it is possible for the Legal Representatives of Victims to lead evidence and to call victims to testify on the crimes against the accused, in a manner which includes incriminating evidence and testimony, *without disclosing it to the Defence prior to trial*" – Decision Granting Leave to Appeal, para. 25. The issue is not a question of whether the Accused had notice of the possibility of victims presenting evidence. See Appeal Brief paras. 7-8, 20-22, where the Appellant seems to present the issue as if the impugned decision awards the victims the right to lead evidence. The victims have a general right to move the Chamber to call for evidence and this right had been acknowledged by the Appeals Chamber (01/04-01/06-1432 OA9 OA10) and not by the impugned decision.

³⁷ See in particular Decision, paras. 81 (referring to Appeal Judgment, paras. 86-105) and 84.

³⁸ Appeal Brief, paras. 7-22.

³⁹ The Appellant's arguments are, in large part, based on a misunderstanding of the regime which the Appeals Chamber set out under which victims may be able to present evidence relating to the guilt or innocence of the accused. As stated above, neither the Appeal Judgment nor the Decision grant victims an autonomous right to present evidence, or extend the Prosecutor's privileges to others.

⁴⁰ "[T]he Trial Chamber assigned to deal with the case shall: [...] (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial".

⁴¹ Appeal brief, paras. 10 and 20

⁴² The same principle applies to the Chamber's power to order the production by the parties of additional evidence, either documentary or oral. The Trial Chamber in this case stated that any witnesses to be heard at the request of the victims would testify after the Prosecution and Defence cases: "[o]nly after such presentation will the chamber be able to make a fully informed assessment of the interest and relevance of those witnesses". Decision, para. 95.

⁴³ Various international criminal tribunals have held that even if evidence is disclosed after the commencement of trial the accused may still have sufficient notice to prepare his/her case (see *Prosecutor v. Nahimana et al.*,

27. The analogy that the Appellant seeks to draw with certain domestic jurisdictions and other international tribunals that impose disclosure obligations on *parties civiles* or victims is misplaced.⁴⁴ In those jurisdictions victims either have the legal status of “party”⁴⁵ or are expressly awarded rights that the Rome Statute does not envisage for victims participating in proceedings before the ICC.⁴⁶
28. Such a rule, moreover, is not necessary. The Appeals Chamber decided that “[t]he Chamber will authorise the submission of such evidence *only if it will not result in any prejudice to the Defence and will not be prejudicial to the fairness and impartiality of the trial*” (emphasis added).⁴⁷ The Appeal Judgment also recognised that *if* a Trial Chamber exercises its power and decides that additional evidence should be presented upon the victims’ request, it should rule “on the modalities for the proper disclosure of such evidence before allowing it to be adduced”.⁴⁸ Indeed, compliance with such a disclosure order is a precondition for presenting such evidence pursuant to an order of the Chamber.⁴⁹
29. In this regard the Trial Chamber decided that it “will set the modalities for the disclosure of said evidence and to decide on the measures required to safeguard the fairness of the trial” *if and when* the legal representatives’ application for leave to

ICTR-99-52-I, Decision on the Prosecutor’s Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001); especially taking into consideration the measures which a Chamber may take to counter-balance any prejudice suffered and preserve the essential rights of the defence (see *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Defence Oral Motions for Exclusion of XBM’s Testimony, for Sanctions Against the Prosecution and Exclusion of Evidence Outside the Scope of the Indictment, 19 October 2006, para.7; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Milan Lukić’s Motion To Suppress Testimony For Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para. 18).

⁴⁴ Appeal Brief, para. 11, footnotes 10-12.

⁴⁵ Appeal Brief, footnote 12. (parties civiles – as the Appellant refers) However, the Appellant only refers to pre-trial disclosure obligations of *parties civiles* without developing whether victims can become parties. The Prosecution does not dispute that in some jurisdictions, such as France, victims can become *parties civiles* if they take certain procedural steps, but this is irrelevant for the instant issue as the ICC does not award the status of “parties” to the victims. See for France: Van den Wyngaert, Christine (ed), *Criminal Procedure Systems in the European Community*, (Butterworths, 1993), pp. 115-116.

⁴⁶ For instance, in the ECCC victims who wish to participate in the proceedings will join as “civil parties” with the specific purpose of supporting the prosecution (See Rule 23(1)(a) and (2)). Civil Parties are participants in the proceedings against those allegedly responsible for the crimes under investigation by the ECCC, and they enjoy the same rights as every other party to the proceedings, such as the prosecution and the charged / accused persons. (See http://www.eccc.gov.kh/english/victims_rights.aspx). In contrast, in the STL, victims although not considered *parties civiles* (See J Hemptinne “Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon”, 8 *Journal of International Criminal Justice* (2010), 165, at 172) are explicitly awarded the right to call witnesses and present evidence - prior authorization by the Trial Chamber (See rules 87(B) and 146(B)(ii) STL RPE) and are therefore burdened with corresponding disclosure obligations (See rules 91(H), 112bis and 113).

⁴⁷ Decision, para. 84.

⁴⁸ Appeal Judgment, para. 100.

⁴⁹ Appeal Judgment, para. 104(iv).

present additional evidence is granted.⁵⁰ The Trial Chamber explicitly stated that it will “in particular ensure that the Prosecution and the Defence teams receive the evidence sufficiently in advance to enable them to prepare effectively.”⁵¹ In doing so, it demonstrated that it was acutely aware of the impact which the timing of any disclosure may have on the interests and effective preparation of the parties.⁵²

30. When evidence proffered by victims is not disclosed in advance of trial, the Trial Chamber can exclude the evidence on that ground. Or it can admit the evidence after balancing the relevant factors, including the nature and importance of the evidence, the timing of its disclosure, and the steps available to ameliorate potential prejudice. So too, if the Trial Chamber decides to call for additional evidence *ex officio*, it should take the same considerations into account and determine if the new evidence meets the standard of “necessary for the determination of the truth” required by Article 69(3). If it admits the evidence but then, in preparing the verdict, it concludes that the Accused suffered unfair prejudice, it can remedy the harm by declining to take the evidence into account in reaching its judgment. If it does not reconsider, the Appeals Chamber may review the decision of the Trial Chamber, weighing the probative value and claims of prejudicial in light of the other evidence offered at trial.⁵³
31. The categorical rule that evidence cannot be introduced if it was not disclosed before trial thus is not supported by the Statute or 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. For those reasons, it should be rejected.

⁵⁰ Decision, paras. 105-107.

⁵¹ Decision, para. 107.

⁵² See also paras. 84, 87, 100, 101. The Appeals Chamber similarly mandated Trial Chambers to always be “vigilant in safeguarding the rights of the accused” (Appeal Judgment, para. 100).

⁵³ Similarly, the Appeals Chamber of the ICTY has reviewed as part of a final appeal decisions by Trial Chambers to allow the admission of new evidence (which had not been disclosed prior to trial) as fresh evidence, in rebuttal or as part of a re-opening of the Prosecution case – see e.g. *Prosecutor v Kordic and Cerkez*, IT-95-14/2-A, Appeal Judgment, 17 December 2004, paras. 211 ff; *Prosecutor v Mucić et al.*, IT-96-21, Appeal Judgment, 20 February 2001, paras. 269ff.

The Second Ground of Appeal: whether victims may testify on matters including the role of the accused in crimes charged against them⁵⁴

32. In the second ground of appeal, the Appellant takes issue with the Trial Chamber's ruling that victims could be permitted to "give evidence about the crimes with which the accused have been charged, and about any part played therein by the accused".⁵⁵ This ground of appeal addresses the quality and scope of the evidence from witnesses or victims that may be called at the Chamber's request. The Appellant argues that allowing victims to lead evidence on the personal responsibility of the accused for crimes charged would prejudice his right to a fair trial.⁵⁶
33. As explained above, the Appeals Chamber based its decision on the premise that the Trial Chamber may order the presentation of additional evidence pursuant to its authority in Article 69(3).⁵⁷ To do so, the Chamber must satisfy itself that the proposed evidence is "necessary for the determination of the truth" within the meaning of Article 69(3).⁵⁸ This criterion requires a particular quality of the evidence in question: not merely that it is probative or relevant, but also that it is *necessary* for the purposes of establishing the truth. The Appellant provides no clear basis or justification for his additional proposed distinction between necessary evidence that generally relates to guilt or innocence – which the Appeals Chamber has said may be proposed by victims – and necessary evidence that relates

⁵⁴ The Appellant was granted leave to appeal the issue of "whether it is possible for the Legal Representatives of Victims to call victims to testify on matters including the *role of the accused* in crimes charged against them" – Decision Granting Leave to Appeal, para. 30. The Appellant phrases the issue slightly differently: "the second ground of appeal is that the Trial Chamber erred in suggesting, at paragraph 86 of its decision, that the legal representatives of victims might call witnesses on matters including *the role of the accused* in crimes charged against him" (Appeal Brief, para. 23). However, this has no impact on the ground as both instances (testimony given by victims and that by witnesses upon the legal representatives' application to the Trial Chamber) fall within the Court's authority to request additional evidence that it considers necessary for the determination of the truth.

⁵⁵ Decision, para. 86.

⁵⁶ Appeal Brief, paras. 27-28.

⁵⁷ See also Article 64(6)(d).

⁵⁸ In addition this general requirement for all Chamber evidence, if the evidence was called by the Chamber as a result of a request from victims, its production would also have to satisfy the statutory requirements of Article 68(3), under which that request would have been made. This means that a *double threshold* would have to be met before a positive decision is made by the Chamber to call the evidence in those circumstances. First, a Trial Chamber must satisfy itself that the request (and thus the proposed evidence) goes to the victim's "personal interests" (Article 68 (3), Appeal Judgment, para. 99; see also Rule 91(3)(b) which requires that any decision on the questioning of a witness by a legal representative must be made "in order to give effect to article 68, paragraph 3"). This requirement must be approached in a narrow fashion: the Appeals Chamber has previously stated that in each case an assessment must be made "as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor" (ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28). The Prosecution considers that establishing the guilt or innocence of the accused should not be confused with the interests of victims under Article 68; the effective investigation and prosecution of crimes lies at the heart of the Prosecution's mandate.

specifically to the *actus reus* or *mens rea* of the accused. Evidence relevant to an element of a charged crime will bear on guilt or innocence, regardless whether it relates directly, indirectly, or not at all to specific acts of the accused himself. Moreover, since the role of the accused in the crimes charged will be a crucial and contested question in most trials before the Court, it can be expected that this would be a subject on which a Trial Chamber could consider that further evidence might be necessary for the establishment of the truth. As with the first issue, the claim that only the Prosecution may lead evidence on the role of the accused also wrongly excludes the ability of a Chamber to call for evidence *ex officio* and thus asserts a position at odds with the Statute and the Rules.

34. In short, the critical issue is not the subject matter of evidence that may be offered, but whether the Trial Chamber applies the appropriate criteria to ensure that any calling of evidence by it is warranted by the Statute and does not create an unfair trial. In particular, the exercise of this power at the request of a participant other than one of the parties who have the primary responsibility for the presentation of evidence should be truly exceptional,⁵⁹ as agreed by the Appellant⁶⁰ and recognised by the Trial Chamber in the Decision.⁶¹

35. For those reasons, the Court should reject Appellant's contention that there should be a bar against non-Prosecution evidence going to the role of the accused in the crimes.

The Third Ground of Appeal: whether victims must disclose all evidence, incriminatory and exculpatory, to the parties independent of any request to present evidence⁶²

36. In his final ground of appeal, the Appellant challenges the Trial Chamber's ruling that victims are not obligated to disclose to the parties all evidence in their possession.⁶³ He argues that victims should have "a general obligation to

⁵⁹ "Before the Trial Chamber, other than for reparation purposes, it should be the rare exception where victims are allowed to present evidence to prove the innocence or guilt of the accused or challenge the admissibility or relevance of a piece of evidence" - *OTP Policy Paper on Victims' Participation*, April 2010, p. 18.

⁶⁰ Appeal Brief, para. 14.

⁶¹ Decision, para. 94. This statement is made in the context of calling other witnesses.

⁶² The Appellant was granted leave to appeal the issue of "whether every item of evidence in possession of the Legal Representatives of Victims, be it incriminating or exculpatory, must be communicated to the parties" – Decision Granting Leave to Appeal, para. 35.

⁶³ Decision, para. 105. See also Decision Granting Leave to Appeal, para. 36: "The Chamber recalls its findings in the impugned decision, and in particular that neither the Statute nor the Rules of Procedure and Evidence provide for a general obligation for victims to disclose to the parties any evidence in their possession, whether incriminating or exculpatory."

communicate to the parties every element in their possession, whether incriminating or exculpatory” and in particular, to disclose exculpatory material even if they do not seek an opportunity to lead evidence.⁶⁴

37. The issue on appeal is whether there is a *general* duty on victims, who are not parties, to disclose every item of evidence separate and apart from any application to present a specific item of evidence.⁶⁵

38. As Trial Chamber II explained in the Decision, “neither the Statute nor the Rules impose such an obligation [of general disclosure]”; and “since the victims do not have the right to present evidence, only the possibility of applying to the Chamber for leave to present evidence, there is no justification for obliging them generally to disclose to the parties any evidence in their possession, whether incriminating or exculpatory”.⁶⁶

39. Not only is there no basis for such a duty: there are also compelling reasons to not impose it on victims. One of the core purposes of the disclosure obligations on the Prosecution is to ensure that the principle of objectivity during investigations produces meaningful effects at the trial stage: incriminating and potentially exculpatory information collected under Article 54(1)(a) must be disclosed to the defence. The victims are not subject to a similar objective investigative duty – quite to the contrary, the role of victims is to present their personal “views and concerns”, which will necessarily be subjective.

40. In addition, victims do not have specific duties to protect victims, witnesses, their families or other persons at risk on account of the activities of the Court (in contrast to the Prosecution’s duties under Article 54(1)(b), (3)(f) and 68(1)); nor do they have the expertise and resources required to assess and react to any dangers to the safety and well-being of persons that may arise out of disclosure. Imposing disclosure duties on victims may thus result in third parties, or even the victims themselves, being placed at risk.

⁶⁴ Appeal Brief, para. 33.

⁶⁵ While this is clear from the terms of the Decision and the Application for Leave to Appeal, it is further made explicit in the Decision Granting Leave to Appeal: “the disclosure of all evidence in possession of the Legal Representatives of Victims, *whether it is intended to be used at trial or not*, is an important issue” (para. 36, emphasis added).

⁶⁶ Decision, para. 105. Just as victims do not have general duties of disclosure, so they also do not have a general right to receive disclosure and inspection under Rules 77 and 78 (see ICC-01/04-01/06-1119, para. 111: “the Trial Chamber agrees with the prosecution that inspection, as provided for in Rules 77 and 78 of the Rules relates only to the prosecution and the defence.”)

41. At present, because victims are only required to disclose particular evidence which they requested and obtained permission to present from the Chamber, any remedy for a failure of disclosure could be similarly limited. In contrast, if victims are required to disclose all evidence irrespective of whether they intend to ask for permission to present that evidence, violations by non-parties could impact on the proceedings in a more profound manner for which the Statute does not foresee a remedy.
42. For these reasons, the third ground of appeal also should be dismissed.

Relief sought

43. For the reasons set out above, the Prosecution requests that the Appeals Chamber reject the appeal.



Luis Moreno-Ocampo,
Prosecutor

Dated this 14th day of May 2010
At The Hague, The Netherlands