

1 International Criminal Court

2 Appeals Chamber - Courtroom 1

3 Presiding Judge Erkki Kourula

4 Situation in the Democratic Republic of the Congo -

5 ICC-01/04-01/07

6 In the case of The Prosecutor v. Germain Katanga and

7 Mathieu Ngudjolo Chui

8 Judgment

9 Friday, 16 July 2010

10 (The hearing starts at 2.00 p.m.)

11 (Open session)

12 THE COURT USHER: All rise. The International

13 Criminal Court is now in session. Please be seated.

14 JUDGE KOURULA: Good afternoon. Court officer, please

15 would you be so kind as to call the case.

16 THE COURT OFFICER: Thank you, your Honour. Situation

17 in the Democratic Republic of Congo in the case The Prosecutor

18 versus Germain Katanga and Mathieu Ngudjolo Chui,

19 ICC-01/04-01/07.

20 JUDGE KOURULA: Thank you so much. May I ask the

21 parties and participants to introduce themselves for the record.

22 Shall we start with the Office of the Prosecutor, per chance?

23 MR GUARIGLIA: Good afternoon, your Honours. It's

24 Fabricio Guariglia, senior appeals counsel. And today appearing

25 with me is Ben Batros, appeals counsel, unfortunately for the

1 last time before this Chamber, today being his last day with
2 this Court.

3 JUDGE KOURULA: Thank you. And Defence for
4 Mr Katanga?

5 MR O'SHEA: Yes. May it please your Honour, I'm
6 Andreas O'Shea of the Bar of England and Wales, and I appear
7 this morning with Fanny De Beco of the Paris Bar. Thank you
8 very much.

9 JUDGE KOURULA: Thank you. And then victims'
10 representatives.

11 MR GILISSEN: (Interpretation) Thank you,
12 Mr President. My name is Jean-Louis Gilissen from the Liège
13 Bar, and with Mrs Goffin I am representing the group of child
14 soldiers.

15 MR NSITA: (Interpretation) Good afternoon, your
16 Honour. My name is Fidel Luvengika Nsita. I am from the
17 Brussels Bar, and I represent the main group of victims, and my
18 assistant is Anta Guissé of the Paris Bar, and case manager
19 Estelle Jeanmart. Thank you.

20 JUDGE KOURULA: Today the Appeals Chamber is
21 delivering its judgment on the appeal of Mr Germain Katanga
22 against the decision of Trial Chamber II of 22 January 2010
23 entitled "Decision on the Modalities of Victim Participation at
24 Trial."

25 The Appeals Chamber unanimously decides as follows:

1 The decision of the Trial Chamber II entitled
2 "Decision on the Modalities of Victim Participation at Trial" of
3 22 January 2010 is confirmed. The appeal is dismissed.

4 I shall summarise the reasons for the Appeals
5 Chamber's judgment. Please note that only the judgment, which
6 will be filed and notified to the parties and participants
7 shortly, is authoritative, not the summary.

8 A few relevant procedural points and history. On 22
9 January 2010, the Trial Chamber rendered the "Decision on the
10 Modalities of Victim Participation at Trial" (that is, "Impugned
11 Decision"), setting out principles of victim participation
12 during the trial and providing detailed instructions on the
13 modalities of such participation in the trial.

14 Mr Katanga sought leave to appeal the Trial Chamber's
15 decision on 1 February this year. Leave was granted 19 April
16 certifying three grounds for appeal. Mr Katanga filed a
17 Document in Support of the Appeal on 3 May, to which the
18 Prosecutor filed a response on 14 May. The victims authorised
19 to participate filed joint observations on the appeal on 28 May,
20 to which the parties again responded on 3 June this year.

21 The first ground of appeal -- as I mentioned, there
22 are three grounds for appeal. The first ground of appeal is
23 whether the Trial Chamber erred in providing for the possibility
24 that it may request victims to submit evidence during the course
25 of trial without requiring that such evidence be disclosed to

1 the accused prior to the commencement of the trial.

2 Mr Katanga argues that the regime provided in the
3 impugned decision contravenes his fair trial rights as is
4 contrary to the aim of the Statute and Rules of Procedure and
5 Evidence which emphasise disclosure in advance of trial.

6 The Prosecutor, for his part, argues that a
7 categorical rule that evidence can't be introduced if it was not
8 disclosed prior to the trial is unnecessary to protect the
9 rights of the accused is not supported by the Statute and the
10 Rules of Procedure and Evidence and would disable the Trial
11 Chamber from exercising its authority under Article 69(3) of the
12 Statute.

13 In the observations, the victims largely concur with
14 the Prosecutor, and also argue the Trial Chamber properly
15 recognised that role of the victims and the parties is
16 different, and thus different rights and duties apply to the
17 parties and to the victims respectively.

18 The Trial Chamber at the outset recalls that victims
19 may participate in the proceedings only insofar as they
20 demonstrate that the criteria of Article 68(3) of the Statute
21 have been met, in particular, that personal interests are
22 affected and that their participation is not prejudicial to or
23 inconsistent with the rights of the accused.

24 The first ground of appeal essentially requires that
25 the Appeals Chamber answer two questions:

1 Firstly, whether it contravenes the Statute Rules and
2 Regulations for evidence to be submitted at trial which has not
3 been disclosed to the accused prior to the commencement of the
4 trial; and

5 second, whether it would violate the accused's rights
6 to a fair trial, and in particular his right to have adequate
7 time and facilities for the preparation of his defence, if the
8 Trial Chamber requests victims to submit evidence that was not
9 disclosed to the accused prior to trial.

10 With respect to the first question, the Appeals
11 Chamber underscores that, in principle, under the Statute and
12 Rules of Procedure and Evidence, the Prosecutor is obligated to
13 disclose evidence to the accused prior to the commencement of
14 trial.

15 However, the Appeals Chamber recalls that the
16 possibility for the victims to present evidence during the trial
17 is contingent on the Trial Chamber deciding to exercise its
18 authority under Article 69(3) of the Statute, when the Trial
19 Chamber considers that such evidence is necessary for the
20 determination of the truth. The Appeals Chamber further
21 observes that pursuant to Article 64(6)(d) of the Statute, the
22 Trial Chamber may, during the course of the trial, order the
23 production of evidence in addition to what has been presented by
24 the parties.

25 The necessary implication is that there may be

1 circumstances under which evidence called by the Trial Chamber
2 may not be communicated to the accused before the commencement
3 of the trial. Insisting otherwise would deprive the Trial
4 Chamber of its ability to make its assessment as to what is
5 necessary for the determination of the truth after having heard
6 the evidence presented by the parties. Thus, while in principle
7 the Statute and the Rules of Procedure and Evidence emphasise
8 disclosure of evidence by the Prosecutor prior to the
9 commencement of the trial, this doesn't apply to evidence
10 submitted at the request of the Trial Chamber under Article
11 69(3) and Article 64(6)(d) of the Statute.

12 Since the possibility for the victims to participate
13 in the trial is contingent on the Trial Chamber requesting the
14 submission of evidence that it considers necessary for the
15 determination of the truth, the victims' participation falls
16 within the disclosure regime provided for the Trial Chamber.
17 This means that evidence that victims submit at the request of
18 the Trial Chamber may be disclosed to the accused during the
19 course of the trial.

20 In relation to the second question, namely, whether
21 such a regime is compatible with the accused's rights to a fair
22 trial, the Appeals Chamber observes that it has not been
23 presented with any authority indicating that the submission of
24 evidence during trial, which has not been disclosed to the
25 accused prior to the commencement of trial, is per se

1 incompatible with the right to a fair trial. Rather, the
2 Appeals Chamber finds that the impugned decision creates
3 adequate safeguards for the Trial Chamber to ensure that the
4 Prosecutor and Defence receive evidence sufficiently in advance
5 to allow them adequately to prepare and to ensure that the
6 accused's fair trial rights are respected.

7 For these reasons, the Appeals Chamber dismisses the
8 first ground of appeal.

9 Under the second ground of appeal, the issue presented
10 is whether the Trial Chamber erred in deciding that it may
11 request victims to testify on matters including the role of the
12 accused in crimes charged against him.

13 Under this ground of appeal Mr Katanga argues that
14 allowing victims to testify on the conduct of the accused is
15 inconsistent with his right to a fair trial and, in particular,
16 the role of the Prosecutor under Article 42 of the Statute.

17 In response, the Prosecutor argues that the role of
18 the accused in the crimes charged is a pivotal question in the
19 trial. The Prosecutor submits that if Mr Katanga's argument in
20 this regard is accepted, it will restrict the authority of the
21 Trial Chamber to request evidence that it considers necessary
22 for the determination of the truth under Article 69(3) of the
23 Statute.

24 The view of the victims, if one were to accept the
25 position of Mr Katanga that victims can't testify on the role of

1 the accused, this would render victim participation in the trial
2 ineffectual.

3 The Appeals Chamber determines that the Trial Chamber
4 did not err in deciding that, if it requests victims to testify,
5 they may testify on matters including the role of the accused.
6 The Appeals Chamber considers that if the victims demonstrate
7 that their personal penal interests are affected, the Trial
8 Chamber may request them to testify when it considers that their
9 testimony is necessary for the determination of the truth. The
10 Appeals Chamber is of the view that the delineation of what
11 constitutes evidence that is "necessary for the determination of
12 the truth" will be decided on a case-by-case basis by the Trial
13 Chamber and may include evidence on the role of the accused in
14 the crimes charged. As the Appeals Chamber previously decided
15 in the Lubanga case, the Trial Chamber may request from the
16 victims the submission of evidence pertaining to the guilt or
17 innocence of the accused. Evidence on the conduct of the
18 accused is encompassed within the general category of evidence
19 pertaining to the guilt or innocence of the accused. Thus, the
20 Appeals Chamber finds no reason to distinguish between different
21 categories of evidence that victims may or may not be permitted
22 to present.

23 Accordingly, the Appeals Chamber determines that the
24 second ground of appeal is dismissed.

25 The issue presented under the third ground of appeal

1 is whether the Trial Chamber erred in stating that "nothing
2 justifies imposing a general obligation on the victims to
3 disclose evidence to the accused, whether incriminating or
4 exculpatory."

5 Under this ground of appeal, Mr Katanga argues that
6 the Trial Chamber should have imposed a general obligation on
7 the victims participating in the proceedings to disclose
8 exculpatory evidence to the accused as a quid pro quo of
9 providing them with the possibility to submit incriminating
10 evidence during the trial.

11 In response, the Prosecutor argues that no such
12 obligation must be imposed on the victims. The Prosecutor
13 recalls that his obligation under Article 67(2) of the Statute
14 and Rule 77 of the Rules of Procedure and Evidence to disclose
15 evidence which may mitigate the guilt of the accused stems from
16 the Prosecutor's duty to investigate exonerating and
17 incriminating circumstances equally.

18 In their joint observations, the victims largely
19 concur with the submissions of the Prosecutor, again
20 highlighting that there is no need to impose a general
21 obligation on victims since their role in the proceedings is
22 already limited.

23 Because Mr Katanga's submissions and his prayer for
24 relief focus on exculpatory evidence, the Appeals Chamber will
25 similarly focus its discussion of this ground of appeal on

1 whether the Trial Chamber erred in not imposing a general
2 obligation on victims to disclose exculpatory evidence to the
3 accused.

4 Thus, the Appeals Chamber considers that in relation
5 to this ground of appeal, three interrelated questions are
6 presented:

7 First, whether a general obligation on the victims to
8 disclose exculpatory evidence may be derived from the Statute or
9 the Rules of Procedure and Evidence;

10 second, whether the accused's right to a fair trial
11 requires that the Trial Chamber impose a general obligation on
12 the victims to disclose exculpatory evidence to the accused; and
13 third, whether imposing a general obligation on the victims is
14 necessary for the Trial Chamber to exercise its authority under
15 Article 69(3) of the Statute to request the submission of
16 evidence that it considers necessary for the determination of
17 the truth.

18 The Appeals Chamber finds that each of these questions
19 should be answered in the negative.

20 As to the first question, namely whether, as the Trial
21 Chamber held, nothing in the Statute or the Rules of Procedure
22 and Evidence justifies imposing a general obligation on the
23 victims to disclose exculpatory evidence to the accused, the
24 Appeals Chamber confirms this finding. The Appeals Chamber
25 agrees with the submissions of the Prosecutor in this respect,

1 that the Prosecutor's obligations under Article 67(2) of the
2 Statute and Rule 77 of the Rules of Procedure and Evidence are
3 linked to the Prosecutor's duty to investigate exonerating and
4 incriminating circumstances equally. Because the Appeals
5 Chamber finds that the Prosecutor and the victims have different
6 roles in the proceedings and, in particular, that the role of
7 the victims in the proceedings is limited to presenting their
8 views and concerns only when their personal interests are
9 affected, the Appeals Chamber considers that it would be
10 inappropriate to impose on the victims *mutatis mutandis* the
11 Prosecutor's general obligation to disclose exculpatory evidence
12 to the accused.

13 In relation to the second question, whether the
14 accused's right to a fair trial requires that the Trial Chamber
15 impose a general obligation on the victims to disclose
16 exculpatory evidence to the accused, the Appeals Chamber
17 observes that it has not been presented with any authority which
18 supports the notion that it would violate the accused's right to
19 a fair trial if the Trial Chamber does not impose an obligation,
20 or that participants in the proceedings owe an obligation to the
21 accused to disclose every item in their possession, whether
22 incriminating or exculpatory.

23 Finally in relation to the third question, that is
24 whether the Trial Chamber erred in not requiring the victims
25 generally to disclose information in their possession in order

1 to assist the Trial Chamber in its determination of the truth,
2 the Appeals Chamber considers that Mr Katanga has not presented
3 it with any reason why the Trial Chamber should have imposed a
4 general disclosure obligation on victims.

5 The Appeals Chamber considers that, if and when the
6 Trial Chamber decides that a victim has demonstrated that his or
7 her personal interests are affected and requests the victim to
8 submit evidence that the Trial Chamber considers necessary for
9 the determination of the truth, the Trial Chamber has broad
10 authority to decide, based on the circumstances of the case,
11 whether it will order the victim to also submit any additional
12 evidence, including evidence of an exonerating nature or
13 evidence which would tend to mitigate the guilt of the accused
14 if the Trial Chamber considers it necessary for the
15 determination of the truth.

16 On the appeal, pursuant to Article 82(1)(d) of the
17 Statute, the Appeals Chamber may confirm, reverse or amend the
18 decision appealed. In the present case, not having identified
19 any errors in the impugned decision, the Appeals Chamber
20 determines that the impugned decision is confirmed and the
21 appeal is dismissed.

22 This concludes the hearing. I thank you all and, in
23 particular, the interpreters and court reporters. The session
24 is closed. Thank you.

25 (The hearing ends at 2.27 p.m.)