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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 Document
URGENT**

Decision on the Modalities of Victim Participation at Trial

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

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 Section**

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TRIAL CHAMBER II of the International Criminal Court (“the Chamber”), acting pursuant to articles 64, 67, 68 and 69 of the Rome Statute (“the Statute”), rules 89, 90, 91, 92 and 93 of the Rules of Procedure and Evidence (“the Rules”) and regulation 86 of the Regulations of the Court, decides as follows.

I. PROCEDURAL HISTORY

1. On 2 April 2008 and 10 and 23 June 2008, Pre-Trial Chamber I granted 57 persons leave to participate as victims in the instant case.¹
2. By order of 13 November 2008, the Chamber addressed a list of questions to the parties, participants and Registry for purposes of the initial status conference scheduled for 27 and 28 November 2008.² The Chamber requested that, prior to the hearing, they file a document in writing concisely setting out their answers to the questions asked, and explained that they would have the opportunity to expand orally on some of these questions during that status conference. The Chamber further informed them that, in its view, a number of issues relating to the conduct of proceedings before the Court had already been settled by the Appeals Chamber, Trial Chamber I and Pre-Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“the Lubanga case”),³ including the issue of victim participation.⁴

¹ Pre-Trial Chamber I, *Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08*, 2 April 2008, ICC-01/04-01/07-357; Pre-Trial Chamber I, *Public Redacted Version of the “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case”*, 10 June 2008, ICC-01/04-01/07-579; Pre-Trial Chamber I, *Decision on the Application for Participation of Witness 166*, 23 June 2008, ICC-01/04-01/07-632.

² *Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute)*, 13 November 2008, ICC-01/04-01/07-747-tENG.

³ *Ibid.*, para. 5.

⁴ *Ibid.*, para. 6.

3. The participants filed their observations on 24 November 2008.⁵ In response to specific questions from the Chamber, the Legal Representatives all expressed the intention of leading evidence pertaining to the guilt of the accused.
4. The Defence for Mathieu Ngudjolo, on the other hand, stated that a series of factual and legal circumstances should lead the Chamber to reconsider the issue of the victims' participation at the trial stage.⁶ It reaffirmed its position during the status conference held on 27 and 28 November 2008.⁷
5. After that conference and by order of 10 December 2008, the Chamber instructed the parties, participants and the Registry to submit further documents and it granted the Defence for Mathieu Ngudjolo leave to file a written application on the issue of the modalities of victim participation, "whilst

⁵ Defence for Mathieu Ngudjolo, "*Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance II en vue de la conférence de mise en état du 27 novembre 2008 (article 64-3-a du Statut)*", 24 November 2008, ICC-01/04-01/07-758 ("Response of the Defence for Mathieu Ngudjolo of 24 November 2009"); Defence for Germain Katanga, "Defence Response to the Order dated 13 November 2008", 24 November 2008, ICC-01/04-01/07-763; "*Réponse de l'Accusation à l'« Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut) » du 13 novembre 2008*", 24 November 2008, ICC-01/04-01/07-764; Legal Representatives of the Victims, "*Réponse de la Représentante Légale des Victimes a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0046/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08 et a/0109/08 aux questions de la Chambre de Première Instance II en vue de la conférence de mise en état (article 64-3-a du Statut)*", 24 November 2008, ICC-01/04-01/07-759; "*Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a) du Statut*", 24 November 2008, ICC-01/04-01/07-761; "*Réponses du Représentant Légal des Victimes a/0015/08, a/0022/08 ; a/0024/08 ; a/0025/08 ; a/0027/08 ; a/0028/08 ; a/0029/08 ; a/0030/08 ; a/0031/08 ; a/0032/08 ; a/0033/08 ; a/0034/08 ; et a/0035/08 à l'ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de Première Instance II, en vue de la Conférence de mise en état l'article 64-3-a du Statut*", 24 November 2008, ICC-01/04-01/07-762; "*Observations du Représentant légal des victimes a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08 sur les questions liées à la conférence de mise en état du 27 novembre 2008*", 24 November 2008, ICC-01/04-01/07-767.

⁶ Defence for Mathieu Ngudjolo, "*Réponses de la Défense de M. Ngudjolo aux questions de la Chambre de première instance II en vue de la conférence de mise en état du 27 novembre 2008 (article 64-3-a du Statut)*", 24 November 2008, ICC-01/04-01/07-758, paras. 22 to 28.

⁷ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008; ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008.

specifically drawing the attention of the Defence to the need to set out all of the arguments in favour of a review of the issue”.⁸

6. On 13 January 2009, the Defence for Mathieu Ngudjolo filed an application to determine the modalities of the participation of victims at the trial stage (“the Application”),⁹ and the Defence for Germain Katanga submitted its own observations on 29 January 2009.¹⁰ The Prosecutor¹¹ and the Legal Representatives of the Victims¹² filed their responses on 5 February 2009.
7. On 22 July 2009, the Chamber ordered that the Registry, after consulting the Legal Representatives, assist the victims in the case in choosing a common legal representative.¹³ The Chamber also considered it necessary to divide the victims into two groups, the first group consisting of former child soldiers alleged to have participated in the attack on Bogoro on 24 February 2003, and the second consisting of all the other victims.¹⁴
8. On 31 July 2009, the Chamber issued the operative part of its decision on 345 applications for participation, granting 288 applicants the status of victim

⁸ *Order Instructing the Participants and the Registry to File Additional Documents*, 10 December 2008, ICC-01/04-01/07-788-tENG, para. 10.

⁹ Defence for Mathieu Ngudjolo, “Application to Determine the Modalities of the Participation of Victims at the Trial Stage”, 13 January 2009, ICC-01/04-01/07-824-tENG.

¹⁰ Defence for Germain Katanga, “Defence Observations regarding victims’ participation and scope thereof”, 29 January 2009, ICC-01/04-01/07-858.

¹¹ Office of the Prosecutor, “Réponse de l’Accusation aux observations de la Défense sur les modalités de participation des victimes au stade du procès”, 5 February 2009, ICC-01/04-01/07-875-Conf (see also the public redacted version, registered on 6 February 2009, ICC-01/04-01/07-877).

¹² Legal Representatives of the Victims, “Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 à la « Requête en vue de fixer les modalités de participation des victimes au stade du procès » de la Défense de M. Ngudjolo et aux « Defence Observations regarding victim’s participation and scope thereof » de la Défense de G. Katanga”, 5 February 2009, ICC-01/04-01/07-873; “Réponse à la requête de la Défense « en vue de fixer les modalités de la participation des victimes au stade du procès »”, 5 February 2009, ICC-01/04-01/07-874.

¹³ *Order on the organisation of common legal representation of victims*, 22 July 2009, ICC-01/04-01/07-1328.

¹⁴ *Ibid.*, paras. 12 and 13. The Chamber essentially took into consideration the following three factors: the need to enable the participation of the victims, through their Legal Representatives, to be as meaningful as possible as opposed to being purely symbolic; the Chamber’s duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity; and its obligation under article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. *Ibid.*, para. 10.

participating in the proceedings.¹⁵ The grounds for this decision were made public on 23 September 2009.¹⁶

9. On 22 September 2009, the Registry transmitted to the Chamber a report appointing Mr Fidel Nsita Luvengika as the permanent common Legal Representative of the main group of victims,¹⁷ and Mr Jean-Louis Gilissen as the Legal Representative of eight victims belonging to the group of former child soldiers.¹⁸
10. On 10 November 2009, the Defence for Germain Katanga filed further observations on the modalities of the victims' participation.¹⁹ By e-mail of 11 November 2009, the Chamber requested the other parties and participants to inform it whether they intended to respond thereto, and set a time limit of 16 November 2009 for responses. The Defence for Mathieu Ngudjolo stated that it would not file any further observations and referred back to the arguments set out in its Application of 13 January 2009.²⁰ The Prosecutor²¹ and the Legal Representatives of the Victims²² submitted their observations on 16 November 2009.

¹⁵ *Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*, 31 July 2009, ICC-01/04-01/07-1347; *Corrigendum du dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*, 5 August 2009, ICC-01/04-01/07-1347-Corr. In that decision, the Chamber also requested further information from 45 applicants, denied five others leave to participate and decided to join seven applicants' applications to those of victims who had already been granted leave to participate.

¹⁶ *Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure*, 23 September 2009, ICC-01/04-01/07-1491-Red and ICC-01/04-01/07-1491-Conf-Exp-Anx.

¹⁷ Registry, "*Désignation définitive de Me Fidel Nsita Luvengika comme représentant légal commun du groupe principal de victimes et affectation des victimes aux différentes équipes*", 22 September 2009, ICC-01/04-01/07-1488.

¹⁸ *Ibid.*, pp. 4 to 7.

¹⁹ Defence for Germain Katanga, "Defence for Germain Katanga's Additional Observations on Victims' Participation and scope thereof", 10 November 2009, ICC-01/04-01/07-1618.

²⁰ See the e-mail of 12 November 2009 sent by the Defence for Mathieu Ngudjolo to the Legal Adviser to the Trial Division referring to application ICC-01/04-01/07-824.

²¹ Office of the Prosecutor, "Prosecution's Response to 'Defence for Germain Katanga's Additional Observations on Victims' Participation and scope thereof'", 16 November 2009, ICC-01/04-01/07-1641.

²² Legal Representatives of the Victims, "*Observations conjointes des Représentants légaux des victimes sur la requête de la Défense de Germain Katanga intitulée «Defence for Germain Katanga's Additional*

11. On 20 November 2009, the Presiding Judge issued directions for the conduct of the hearings and testimony in accordance with rule 140 of the Rules (“the Decision on Rule 140”).²³
12. On 23 November 2009, the Chamber granted leave to 14 additional victims to participate in the proceedings and requested seven other applicants to provide it with further information.²⁴ The grounds for this decision were made public on 22 December 2009.²⁵
13. The trial started on 24 November 2009.²⁶
14. By oral decision of 27 November 2009 (“the Decision of 27 November 2009”), the Chamber authorised the Legal Representatives of the Victims to access, via Ringtail, all of the documents that the parties intended to use during examination of the witnesses, at the same time that the list of evidence was disclosed by the parties.²⁷
15. In a further oral decision, of 1 December 2009 (“the Decision of 1 December 2009”), the Chamber granted the Legal Representatives leave to access the table of incriminating evidence filed by the Prosecutor on 16 November 2009.²⁸

Observations on Victims’ Participation and scope thereof”, 16 November 2009, ICC-01/04-01/07-1642.

²³ *Directions for the conduct of the proceedings and testimony in accordance with Rule 140*, 20 November 2009, ICC-01/04-01/07-1665; *Corrigendum - Directions for the conduct of the proceedings and testimony in accordance with Rule 140*, 1 December 2009, ICC-01/04-01/07-1665-Corr; (“the Decision on Rule 140”).

²⁴ *Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure*, 23 November 2009, ICC-01/04-01/07-1669.

²⁵ *Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure*, 22 December 2009, ICC-01/04-01/07-1737 and ICC-01/04-01/07-1737-Conf-Exp-Anx.

²⁶ ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009.

²⁷ ICC-01/04-01/07-T-86-Red-ENG WT 27-11-2009, pp. 1 and 2, referring to paragraph 103 of the Decision on Rule 140. See also, Legal Representatives of the Victims, “*Observations conjointes des Représentants légaux des victimes sur l’ordre d’interrogation des témoins*”, 6 November 2009, ICC/01/04-01/07-1605.

²⁸ ICC-01/04-01/07-T-88-Red-ENG WT 01-12-2009, p. 2.

16. Lastly, on 2 December 2009, the Legal Representatives of the Victims filed joint observations on access to certain documents and on preparation of the examination of Prosecution witnesses.²⁹ The Defence for Mathieu Ngudjolo responded to that document on 7 December 2009.³⁰

II. THE PARTICIPANTS' SUBMISSIONS

A. Submissions of the Defence for Mathieu Ngudjolo

17. In the view of the Defence for Mathieu Ngudjolo, the issues pertaining to the participation of victims in the proceedings were considered by the Appeals Chamber in light of the specific circumstances of the *Lubanga* case, which allows the present Chamber to rule on the matter afresh if need be, without flouting the authority of that Judgment.³¹ In that regard, it argues that the Appeals Chamber confined itself to noting the lack of any error in the Trial Chamber's decision in the *Lubanga* case, and that its judgment is in no way binding on the present Chamber.³² The Defence considers that the mode and modalities of participation must be assessed on a case-by-case basis, in light of the circumstances of the particular case, ensuring that a fair balance is maintained between the necessary participation of victims and respect for the rights of the defence.³³
18. Moreover, the Defence further states that the two cases differ as a result, *inter alia*, of the number of victims participating in the proceedings,³⁴ of their

²⁹ "Observations conjointes des Représentants légaux des victimes sur l'accès à certains documents et la préparation des interrogatoires des témoins à charge, Article 68(3) du Statut", 2 December 2009, ICC-01/04-01/07-1704.

³⁰ Defence for Mathieu Ngudjolo, "Réponse de la Défense de Mathieu Ngudjolo Chui aux observations des Représentants légaux des victimes sur l'accès à certains documents et la préparation des interrogatoires des témoins à charge", 7 December 2009, ICC-01/04-01/07-1711.

³¹ ICC-01/04-01/07-758, paras. 26 to 28; ICC-01/04-01/07-824-tENG, paras. 22 to 24.

³² ICC-01/04-01/07-824-tENG, para. 22.

³³ *Ibid.*, para. 24.

³⁴ *Ibid.*, paras. 26 and 27.

complexity and of the nature of the charges,³⁵ of the joinder of the proceedings,³⁶ and of the impact on the exercise of the rights of the defence of extending the scope of victim participation.³⁷

19. In its Application, the Defence for Mathieu Ngudjolo requests the Chamber to reconsider the principle of allowing the legal representatives of victims to lead evidence, or failing that, to subject such a possibility to strict judicial scrutiny in order to secure a fair trial and equality of arms between the parties.³⁸ In particular, the Defence argues that the relevant statutory and regulatory provisions show that the presentation of evidence pertaining to the guilt or innocence of an accused person is a prerogative that is granted solely to the parties, namely the Prosecutor and the Defence.³⁹ It further considers that the Legal Representatives of the Victims can or must only produce evidence establishing that the situation of the persons whom they are representing does indeed fall within the definition of victim under rule 85 of the Rules.⁴⁰ It further states that the Appeals Chamber did not intend to grant victims the right to lead evidence pertaining to the guilt or innocence of the accused, but only gave them the possibility of doing so, depending on the circumstances of the case, subject to the Chamber's assessment and at its request.⁴¹ It emphasises that to allow incriminating evidence to be led by victims or their legal representatives would be tantamount to making them "prosecutors *bis*".⁴²

³⁵ Ibid., para. 28.

³⁶ Ibid., para. 29.

³⁷ Ibid., paras. 30 to 35.

³⁸ Ibid., p. 21.

³⁹ Ibid., paras. 6 to 15.

⁴⁰ Ibid., para. 13.

⁴¹ Ibid., para. 19.

⁴² Ibid., para. 47; see also, paras. 45 and 46.

20. In this context, the Defence contends that the victims cannot be granted the power to investigate, any more than they are entitled to call witnesses or to present written testimony.⁴³
21. Lastly, it considers that the anonymous victims cannot be authorised to participate actively in the proceedings, since such participation would be inconsistent with the rights of the defence, the fairness of the proceedings and equality of arms.⁴⁴
22. In its latest filing of 7 December 2009, the Defence for Mathieu Ngudjolo objects to the request by the Legal Representatives of the Victims for leave to access the evidence in the record. It argues that to grant them such a right would, once again, amount to allowing them to act as second prosecutors against the accused.⁴⁵ As regards the agreements on evidence, the Defence for Mathieu Ngudjolo has no objection to the agreements concluded by it with the Prosecutor being disclosed to the Legal Representatives of the Victims.⁴⁶

B. Submissions of the Defence for Germain Katanga

23. In its observations, the Defence for Germain Katanga states that it is not challenging the authority of the Appeals Chamber Judgment of 11 July 2008, but that it is seeking to define the scope and modalities of victim participation within the parameters set out in that Judgment.⁴⁷

⁴³ Ibid., paras. 37 to 41.

⁴⁴ Ibid., para. 42.

⁴⁵ ICC-01/04-01/07-1711, paras. 5 to 10 and p. 7.

⁴⁶ Ibid., paras. 11 to 13 and p. 7.

⁴⁷ ICC-01/04-01/07-858, paras. 1 and 2.

24. In this respect, whilst endorsing the limits and safeguards put in place by the Appeals Chamber, it advances the following propositions.⁴⁸
25. It essentially considers that the evidence led by participating victims cannot have the effect of expanding or modifying the nature or scope of the Prosecution case.⁴⁹
26. It then proposes that the presentation of evidence be subject to four conditions: timely notice thereof, leave of the Chamber, timely notice of disclosure of documents, and admissibility of the documents tendered.⁵⁰
27. The Defence further states that the victims should not be entitled to conduct investigations, since they cannot replace the Prosecutor in carrying out this function.⁵¹ It emphasises that the role of participating victims must not be confused with that of the parties.⁵² The Defence considers that, in any event, where the victims present evidence, this must be disclosed to it three months before the trial commences.⁵³
28. The Defence further argues that the victims participating in the proceedings may appear only as witnesses for one of the parties, that is, the Prosecution or the Defence, or at the Chamber's request, but they cannot be called by their own legal representatives.⁵⁴ It further asserts that victims who have been granted access to the confidential case record should be prohibited from testifying as Prosecution witnesses. Nevertheless, should they be allowed to do so, the Defence requests the Chamber to take account of the fact that they have had

⁴⁸ *Ibid.*, para. 10.

⁴⁹ *Ibid.*, paras. 11 to 16.

⁵⁰ *Ibid.*, paras. 17 to 19.

⁵¹ *Ibid.*, paras. 20 to 23.

⁵² *Ibid.*, para. 15.

⁵³ *Ibid.*, para. 30.

⁵⁴ *Ibid.*, para. 24.

access to this confidential material in the case, which will tend to undermine the weight of their testimony.⁵⁵

29. The Defence for Germain Katanga further requests the Chamber to order the victims participating in the proceedings and their Legal Representatives to disclose to the Defence any information in their possession which tends to show the innocence of the accused or mitigate his guilt, irrespective of their entitlement to lead incriminating evidence at trial.⁵⁶ It submits that it would be unfair to grant victims the right to present evidence without imposing on them the obligation to disclose such material.⁵⁷ It considers that such an obligation follows from article 67(2) of the Statute and rule 77 of the Rules. It further maintains that article 64(3)(c) of the Statute does not confine disclosure obligations to the parties, but that they also apply to victims.⁵⁸
30. Lastly, the Defence for Germain Katanga recalls that it is incumbent on the Chamber to ensure a fair trial, to protect the rights of the accused and to ascertain the truth.⁵⁹ In this respect, it emphasises the importance of any exculpatory evidence that the victims may possess⁶⁰ and refers, *inter alia*, to rule 113 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, which imposes on victims the obligation to disclose exculpatory evidence to the Defence.⁶¹

⁵⁵ *Ibid.*, paras. 25 and 26.

⁵⁶ ICC-01/04-01/07-1618, para. 30.

⁵⁷ *Ibid.*, paras. 2 and 3.

⁵⁸ *Ibid.*, para. 8.

⁵⁹ *Ibid.*, paras. 4 to 12.

⁶⁰ *Ibid.*, paras. 13 to 19.

⁶¹ *Ibid.*, para. 26.

C. The Prosecutor's submissions

31. The Prosecutor maintains that it is for him to prosecute crimes and that neither the Statute nor the Rules confer on victims a role in the conduct of investigations.⁶² He states that the Appeals Chamber Judgment of 11 July 2008 did not have the *ultra legem* effect of affording victims the right to investigate an accused's criminal responsibility.⁶³
32. Similarly, he considers that no provision of the Statute or the Rules authorises victims to lead evidence. In his view, this right belongs solely to the parties.⁶⁴ On the other hand, he considers that the Legal Representatives of the Victims could undertake investigations into the existence, nature and extent of harm suffered by their clients "[TRANSLATION] for the purpose of producing this evidence in the presence of the Prosecution and Defence witnesses, which would, inter alia, obviate the need subsequently to recall those witnesses".⁶⁵ With respect to investigations into the guilt of the accused, the Prosecutor maintains that the Legal Representatives of the Victims should transmit directly to him any proposals which they feel it necessary to make.⁶⁶
33. As regards those persons with dual witness/victim status, the Prosecutor challenges the arguments of the Defence for Germain Katanga and does not accept its request for the exclusion of persons with such dual status from the list of Prosecution witnesses.⁶⁷ In this respect, he views the situation of these victim-witnesses as comparable to that of any other Defence or Prosecution witness who would have had the opportunity to follow the hearings on the internet or on television.⁶⁸ Moreover, he notes that the only person falling within that

⁶² ICC-01/04-01/07-877, paras. 5 to 7.

⁶³ *Ibid.*, para. 8.

⁶⁴ *Ibid.*, para. 7.

⁶⁵ *Ibid.*, para. 9.

⁶⁶ *Ibid.*, para. 10.

⁶⁷ *Ibid.*, paras. 13 to 15 and 27.

⁶⁸ *Ibid.*, para. 17.

category is Witness 166, whose statement was taken before he submitted an application for participation and was granted victim status.⁶⁹

34. Lastly, the Prosecutor argues that neither the Statute nor the Regulations of the Court imposes on victims with leave to participate or their Legal Representatives an obligation to disclose incriminating or exculpatory evidence in their possession. He considers that the parties alone are subject to such an obligation, although this might not be the case were the Chamber to allow the Legal Representatives to lead evidence at trial.⁷⁰

D. The Legal Representatives' submissions

35. Mr Jean-Louis Gilissen and Mr Joseph Keta recall that, pursuant to the Appeals Chamber Judgment of 11 July 2008, the right accorded to victims to lead evidence is not inconsistent either with the Prosecutor's obligation to prove the guilt of the accused, or with the rights of the defence or the requirements of a fair trial.⁷¹ They consider that the Application by the Defence for Mathieu Ngudjolo is neither justified nor relevant, since the presentation of evidence will be effected in accordance with strict procedures, will include the safeguards laid down by the Appeals Chamber and will be subject to the Chamber's scrutiny prior to any grant of leave to lead such evidence.⁷²
36. The two Legal Representatives consider that, while it is agreed that the victims cannot assume the role of the Prosecutor, with whom the burden of proof solely lies, and that their intervention must in no way have the effect of their replacing the latter, they nevertheless have – as does the Court – an interest in the

⁶⁹ *Ibid.*, para. 20.

⁷⁰ ICC-01/04-01/07-1641, paras. 6 to 15.

⁷¹ ICC-01/04-01/07-873, p. 6.

⁷² *Ibid.*, pp. 6 and 7.

determination of the truth.⁷³ Furthermore, they emphasise that the proliferation of victims in the instant case will have no implications for the Defence's workload since "[TRANSLATION] not all the victims will want or be able to systematically present evidence".⁷⁴

37. With respect to the possibility of the Legal Representatives conducting investigations, they recall that their sole objective is to gather evidence seeking to prove the harm suffered by the victims and not to investigate the guilt of the accused.⁷⁵
38. As regards the issue of dual victim/witness status, Mr Gilissen and Mr Keta dispute the position taken by the Defence, since, in their view, there is no provision in the Court's texts which allows for the right of a victim with dual status to participate in the proceedings to be reduced, or for the value of that person's testimony to be diminished.⁷⁶
39. Lastly, with respect to the issue of access to evidence, the two Legal Representatives object to the request by the Defence for Germain Katanga seeking the disclosure of all of the incriminating or exculpatory evidence in their possession.⁷⁷ They state that no such disclosure obligation is provided for under the Statute or the Rules.⁷⁸ They add that, as regards victim participation at trial, there are sufficient safeguards for the rights of the accused, without the need to impose such wide-ranging obligations on the victims;⁷⁹ that victim participation cannot be confined solely to the award of pecuniary reparation and that "[TRANSLATION] irrespective of their motives, it cannot result in a

⁷³ *Ibid.*, p. 6.

⁷⁴ *Ibid.*, pp. 7 and 8.

⁷⁵ *Ibid.*, pp. 8 and 9.

⁷⁶ *Ibid.*, pp. 10 and 11.

⁷⁷ ICC-01/04/01/07-1642.

⁷⁸ *Ibid.*, paras. 3 and 5 to 7.

⁷⁹ *Ibid.*, paras. 3 and 8 to 22.

general obligation being imposed on them ‘to investigate exonerating circumstances’”.⁸⁰

40. In their latest observations, filed on 3 December 2009, the two Legal Representatives request the Chamber to order that the actual incriminating evidence, as well as details of the evidence in relation to which the parties have reached agreement, “[TRANSLATION] including those matters in relation to which the parties concur that there is disagreement”, be disclosed to them or, where appropriate, be made available to them via the e-Court system.⁸¹ They further request the Chamber to allow them to participate in the witness familiarisation process.⁸²
41. The previous Legal Representatives of the Victims, Ms Bapita, Mr Diakiese and Mr Mulamba, considered that the Application by the Defence for Mathieu Ngudjolo was inadmissible because the Chamber does not have the authority to review an Appeals Chamber Judgment, and because of a violation of the *non bis in idem* principle, and on “[TRANSLATION] grounds of mootness”.⁸³ In terms of the substance, they considered the Application to be without merit.⁸⁴

III. THE CHAMBER’S ANALYSIS

42. To date, 359 victims have been granted leave to participate in the proceedings in the instant case.⁸⁵
43. Before determining the modalities of their participation in the proceedings, the Chamber considers it necessary to recall and analyse the relevant legal

⁸⁰ Ibid., paras. 3 and 23 to 27.

⁸¹ ICC-01/04-01/07-1704, paras. 12 to 29 and p. 9.

⁸² Ibid., paras. 30 to 33 and p. 9.

⁸³ ICC-01/04-01/07-874, paras. 21 to 27.

⁸⁴ ICC-01/04-01/07-874, paras. 28 to 51.

⁸⁵ See *supra*, paras. 1, 8 and 12 of this Decision.

provisions and the principal decisions previously issued by other Chambers of the Court.

A. Applicable provisions and current jurisprudence

44. Under article 68(3) of the Statute:

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 rights 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.⁸⁶

45. The Rules also contain several provisions on victim participation in the proceedings. Thus, under rule 89(1) of the Rules, it is for the Chamber to specify the modalities of their participation. Under rule 91(2), the legal representatives of the victims may attend and participate in the proceedings in accordance with the terms set by the Chamber. Lastly, rule 91(3)(a) grants legal representatives the possibility of questioning witnesses, experts or the accused with prior leave of the Chamber and subject to conditions set by the Chamber.

46. Furthermore, the Court has issued a certain number of decisions which the Chamber cannot disregard,⁸⁷ in spite of the discretion it possesses under article

⁸⁶ The actual wording of article 68(3) of the Statute is largely based on paragraph 6(b) of the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, adopted by Assembly General resolution 40/34 of 29 November 1985.

⁸⁷ See in particular, Appeals Chamber, *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 (“the Judgment of 11 July 2008”); Trial Chamber I, *Decision on victims’ participation*, 18 January 2008, ICC-01/04-01/06-1119 (“the Decision of 18 January 2008”); Trial Chamber I, *Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial*, 26 June 2009, ICC-01/04-01/06-2002-Conf (see also the public version filed on 9 July 2009, ICC-01/04-01/06-2032) (“the Decision of 26 June 2009”). See also Pre-Trial Chamber I, *Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case*, 13 May 2008, ICC-01/04-01/07-474; Pre-Trial Chamber I, *Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims*, 30 May 2008, ICC-01/04-01/07-537.

68(3) of the Statute to determine the modalities of victim participation in the instant case. Such decisions include in particular the Decision of 18 January 2008, issued in the *Lubanga* case, whereby Trial Chamber I afforded victims the opportunity to introduce evidence and challenge the admissibility of evidence. In particular, it held that “the right to introduce evidence during trials before the Court is not limited to the parties”.⁸⁸ In light of article 69(3) of the Statute and rule 91(3) of the Rules, Trial Chamber I found that the victims participating in the proceedings could be permitted to call and question witnesses “if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has ‘requested’ the evidence”. Moreover, it stated that, for the foregoing reasons, it would not restrict questioning by victims to reparations issues but, rather, would allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration.⁸⁹

47. Trial Chamber I further held that:

[...] the right to make submissions on matters of evidence is not reserved to the parties, and [that] there is no provision within the Rome Statute framework which prohibits the Trial Chamber from ruling on the admissibility or relevance of evidence having taken into account the views and concerns of the victims, in accordance with Articles 68(3) and 69(4) of the Statute [...].⁹⁰

48. The Appeals Chamber stated the following in its Judgment of 11 July 2008:⁹¹ “The right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence.”⁹² However, it considered that the relevant provisions of the Statute and the Rules did not “preclude the possibility for victims to lead evidence

⁸⁸ Decision of 18 January 2008, para. 108.

⁸⁹ *Ibid.*, para. 108.

⁹⁰ *Ibid.*, para. 109.

⁹¹ Judgment of 11 July 2008, see in particular paras. 86 to 105.

⁹² *Ibid.*, para. 93.

pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.”⁹³ Furthermore, the Chamber concluded its analysis by holding that “[i]f victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.”⁹⁴

49. Nonetheless, the Appeals Chamber did not grant victims the right to present evidence themselves at trial. It solely accorded them the possibility of seeking leave from a Chamber for the submission of evidence in accordance with article 69(3) of the Statute. It follows that it is for the Chamber, pursuant to the aforementioned Judgment, to determine whether it should order the submission of an item of evidence at a victim’s request.⁹⁵
50. With regard, more specifically, to the possibility of challenging the admissibility or relevance of evidence, the Appeals Chamber held that:

[T]he Trial Chamber relied on its general powers under article 69 (4) to declare any evidence admissible or relevant. [...] Under article 64 (9) of the Statute, the Trial Chamber has the power to rule on the admissibility or relevance of evidence on its own motion. These provisions must be seen in light of the provisions on victims’ participation, in particular article 68 (3) of the Statute and rules 89 and 91 of the Rules. In light of these provisions, nothing in articles 69 (4) and 64 (9) excludes the possibility of a Trial Chamber ruling on the admissibility or relevance of evidence after having received submissions by the victims on said evidence.⁹⁶

51. The Chamber recalls that Trial Chamber I determined the modalities for victim participation in the *Lubanga* case in accordance with its interpretation of article 68(3) of the Statute. It further notes that, in its Judgment of 11 July 2008, the Appeals Chamber held that the approach adopted by Trial Chamber I, pursuant to its discretion under the aforementioned article 68(3), was consistent

⁹³ Ibid., para. 94.

⁹⁴ Ibid., para. 97.

⁹⁵ Ibid., para. 98.

⁹⁶ Ibid., para. 101.

with the Statute in that it allowed participating victims to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of the evidence during the trial proceedings.⁹⁷

52. Whilst acknowledging the general scope of that decision, it remains the case that the Chamber is under an obligation to determine the modalities of victim participation in the case before it, in accordance with article 68(3) of the Statute and in light of the specific circumstances in the instant case. It too finds, as will be explained in greater detail below, that article 68(3) does not preclude the Legal Representatives of the Victims from being permitted to request the Chamber to order the submission of certain evidence. The Chamber would point out that this is not a right, but a mere possibility granted to the victims, under certain conditions, in order to give full effect to the provisions of article 68(3) of the Statute, after having duly balanced their interests with those of the accused.⁹⁸ In this respect, the Chamber notes that, during the drafting of the Statute, proposals for the victims to be able to present evidence for the purpose of establishing the criminal responsibility of the accused via their legal representatives were not retained in the final version of the Statute.⁹⁹

B. The Chamber's findings

53. The Chamber recalls that, under article 68 of the Statute, those victims with leave to participate in the proceedings are entitled to set out their "views and concerns". Except for provisions such as those of rule 91 of the Rules, which provide for certain modalities of participation, the founding texts do not provide an exhaustive definition of the terms "views and concerns", and each

⁹⁷ *Ibid.*, para. 105.

⁹⁸ See also para. 83 of this Decision.

⁹⁹ See in particular, "Report of the Inter-Sessional Meeting in Zutphen", UN Doc. A/AC.249/1998/L.13, 4 February 1998, p. 117; "Report of the Preparatory Committee on the Establishment of an International Criminal Court", Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998.

Chamber has the discretion to define their content according to the specific circumstances of the case before it. The same applies to its determination of the appropriate time and the modalities for exercising such a right in circumstances which are not prejudicial to or inconsistent with the rights of the defence and the requirements of a fair and impartial trial.

54. Those factors that it must take into account include, for example, the nature and scope of the charges, the number of victims taking part in the proceedings and the degree of similarity between their respective interests, as well as the manner in which they are represented. The regime governing victim participation may thus vary from case to case and, whilst bearing in mind the requirements laid down by article 68(3) of the Statute, each Chamber must accordingly assess which modalities of participation are the most appropriate in view of the specific circumstances of the case before it.
55. In the instant case, it is important for the Chamber specifically to take into account the participation, at the present time, of more than 350 victims of offences as varied as murder, rape, acts of sexual slavery, destruction, pillaging and the use of child soldiers to participate actively in hostilities. The Chamber must also not lose sight of the presence in the proceedings of two accused, whose interests may not coincide.
56. Moreover, it is appropriate to recall, as already emphasised in paragraph 7 of the present Decision, that the Chamber has provided for the victims to be represented by just two counsel.
57. It is now incumbent on the Chamber to comply with the requirements of article 68(3) of the Statute by satisfying itself that the personal interests of the victims are affected by the proceedings and ensuring that their views and concerns are set out and considered in a manner which is not prejudicial to or inconsistent with the rights of the defence and the requirements of a fair and

impartial trial. It must further ensure, as required by the Appeals Chamber in its Judgment of 11 July 2008, that their participation is meaningful.¹⁰⁰

1. Personal interests of the victims

58. In order to be granted leave to express their “views and concerns” at the trial, the Statute requires that victims be able to demonstrate that their personal interests are affected. Accordingly, where it is clear that an intervention by a legal representative is not related to the personal interests of any of the victims represented by that counsel, the Chamber cannot allow it.
59. The Chamber is mindful of the fact that there may be many such interests.¹⁰¹ In light of the information contained in the applications for participation which have been submitted in this case, it notes that the victims are seeking not only to obtain reparations, but that they also mention other grounds, such as seeking determination of the truth concerning the events they experienced, or wishing to see the perpetrators of the crimes they suffered being brought to justice.
60. Where victims seek reparations, the Chamber may consider exercising its discretion pursuant to regulation 56 of the Regulations of the Court to hear witnesses and examine evidence. The Chamber is of the view that the only legitimate interest the victims may invoke when seeking to establish the facts which are the subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened. They may do so by providing it with their knowledge of the background to the case or by drawing its attention to relevant information of which it was not aware. In the latter case, the Chamber may also deem it appropriate for a particular victim to testify in person.

¹⁰⁰ Judgment of 11 July 2008, para. 97.

¹⁰¹ In this regard, see Decision of 18 January 2008, para. 97.

61. In their applications for participation, the victims authorised to participate in this case all described events which occurred in the village of Bogoro and the immediate outskirts on 24 February 2003. The charges which the Court must consider all lie precisely within this geographical and temporal limit, and the Chamber is bound to note that they are closely linked to the personal interests invoked by the victims. The Chamber considers that the personal interests of each of the victims individually have therefore been demonstrated and that their Legal Representatives need not demonstrate these again at trial. In other words, once the Chamber has established that an individual victim may participate in the proceedings under rule 89 of the Rules, this means that the Chamber has thereby recognised that this individual has a personal interest in the trial proceedings.
62. The Chamber would, however, explain this matter in greater detail. In the event that the Legal Representatives of the Victims make a request to intervene, it reserves the right, as it indicated in the Decision on Rule 140, to satisfy itself that that intervention is indeed linked to the interests of the victims they represent.¹⁰² Where this is unclear, it may request that the existence of such a link be explained, although, as the Chamber has pointed out, the Legal Representative is not thereby obliged to re-establish the existence of the interest itself.
63. Furthermore, the Chamber will not seek to require the Legal Representatives of the Victims to establish anew the existence of the personal interest of each of the victims they represent when they wish to intervene, but will simply ask that they act on behalf of the common interest of all victims or of a group of victims whom they represent.
64. Moreover, the Chamber considers that it is not necessary for the Legal Representative to state the identity of the victim or victims on whose behalf he wishes to intervene. If the nature of the intervention sought relates to the

¹⁰² See inter alia Decision on Rule 140, paras. 87 and 89.

interests of one or more victims participating in the proceedings, it considers that it has sufficient information to determine whether such intervention is appropriate in light of the criteria defined by the Statute and the Rules.

2. Modalities of participation

65. During the trial, the accused will be disputing the charges confirmed by the Pre-Trial Chamber and the evidence tendered by the Prosecutor, who is the only person empowered to establish their guilt. However, in the Chamber's view, the victims, whose participation in the trial takes effect from its commencement, 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 before the Court. Nor must their intervention have a negative impact on the expeditiousness required of those proceedings.
66. In the Decision on Rule 140, the Chamber gave detailed directions on how the trial must be organised and conducted. At that time, it already laid down a number of rules stating the manner in which the victims will be able to participate in the trial.
67. The present Decision addresses the issues raised by the parties and participants, and states the precise modalities of their participation in the areas which were not covered in the aforementioned Decision on Rule 140.

a) Possibility of making opening and closing statements at the trial

68. Under rule 89(1) of the Rules, victims are expressly authorised to make statements. In the present case, pursuant to that sub-rule, at the status

conference on 3 November 2009 the Chamber granted the Legal Representatives of the Victims leave to make opening and closing statements at the trial.¹⁰³ Accordingly, they made their opening statements on 24 November 2009 at the start of the trial.¹⁰⁴ At the end of the trial, they will have another opportunity to make statements, after the Prosecutor and before the Defence teams.

b) Right to attend and participate in hearings

69. Under rule 91(2) of the Rules, the legal representative of a victim is entitled to attend and participate in all proceedings in accordance with the terms of the ruling of the Chamber under rules 89 and 90 of the Rules. The legal representative may participate in all hearings unless, in the circumstances of the case, the Chamber concerned is of the view that his or her intervention should be confined to written observations or submissions. The Prosecutor and the Defence must have the opportunity to respond to any oral or written observation by the legal representative of the victim.
70. Accordingly, it is for the Chamber to state the conditions under which the legal representatives of victims may exercise the right thus granted to them to attend and participate in the hearings.
71. The Chamber is of the view that the Legal Representatives in this case may attend and participate in public and *in camera* hearings under the conditions which it defines. Where hearings must be held *ex parte*, it will assess on a case-by-case basis whether or not they should be invited to attend.

¹⁰³ ICC-01/04-01/07-T-76-CONF-ENG CT 3-11-2009, p. 26. See also the Decision on Rule 140, paras. 1 and 2.

¹⁰⁴ ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009, pp. 39 -48.

c) Possibility of questioning witnesses, an expert or the accused

72. Under rule 91(3)(a) of the Rules, when a legal representative wishes to question a witness, an expert or the accused, he or she must make application to the Chamber. The Chamber may order that the questions be formulated in writing and communicated to the Prosecutor and, if appropriate, the Defence, for their observations.
73. Pursuant to rule 91(3)(b) of the Rules, the Chamber shall issue a ruling on the request, taking into account “the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3”. In accordance with the Chamber’s powers under article 64 of the Statute, the ruling may include directions on the manner and order of the questions and the production of documents. The Chamber may, if it considers it appropriate, put questions to a witness, expert or accused on behalf of the legal representative.
74. Questioning of witnesses pursuant to rule 91(3) of the Rules constitutes one of the ways in which the legal representatives of victims may present their “views and concerns” within the meaning of article 68 of the Statute. Accordingly, they may put questions to the witnesses called by one of the parties to the trial, provided, however, that this is not prejudicial to or inconsistent with the rights of the accused and the requirements of a fair and impartial trial.
75. The Chamber recalls that such questioning must have as its main aim the ascertainment of the truth, since the victims are not parties to the trial and have no role to support the case of the Prosecutor. However, their intervention may potentially enable the Chamber to better understand some of the matters at issue, given their local knowledge and social and cultural background.¹⁰⁵

¹⁰⁵ Decision on Rule 140, para. 82.

76. Given the lack of any relevant provisions in the Statute, the Chamber specified in the Decision on Rule 140 the order in which the parties and participants will question witnesses, any experts, or the accused. It also laid down the precise procedures for any questioning undertaken by the Legal Representatives of the Victims.¹⁰⁶
77. Thus they will have an opportunity to question witnesses after the Prosecution's examination-in-chief or after its cross-examination of a Defence witness.¹⁰⁷ Any application for this purpose must state how the intended question is relevant and must comply with the procedure defined by the Chamber in the Decision on Rule 140, whether for questions under article 75 of the Statute,¹⁰⁸ anticipated questions¹⁰⁹ or unanticipated questions.¹¹⁰
78. The questions which the Legal Representatives may put must essentially relate to points to clarify or supplement evidence already given by the witness. Accordingly, a neutral style of questioning should be adopted.¹¹¹

d) Participation in the familiarisation process

79. On this point, the Chamber endorses the position adopted by Trial Chamber I in the *Lubanga* case. That Chamber stated that the intended purpose of such a process is to assist witnesses to understand better the Court's proceedings and the precise role played by each of the participants in the proceedings and to provide witnesses with an opportunity to acquaint themselves with the

¹⁰⁶ Ibid., paras. 14 to 48, 90 and 91. At the status conference on 2 November 2009, the Chamber indicated that it would authorise the legal representatives to question witnesses who will be heard in this case. See ICC-01/04-01/07-T-74-Red-ENG WT 02-11-2009, p. 54.

¹⁰⁷ Decision on Rule 140, paras. 18, 37 and 42.

¹⁰⁸ Ibid., paras. 84 to 86.

¹⁰⁹ Ibid., paras. 87 to 88.

¹¹⁰ Ibid., para. 89.

¹¹¹ Ibid., paras. 90 and 91.

individuals who may examine them in court.¹¹² In a subsequent decision, that same Chamber ruled that legal representatives may be present during the familiarisation process.¹¹³

80. Following a similar approach, this Chamber considers that the objectives sought in the familiarisation process and the opportunity the Legal Representatives are given to question witnesses, where appropriate, warrant their participation in such a process. It recalls that the participation of the parties and participants in this process is governed by the “Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” drafted by the Victims and Witnesses Unit,¹¹⁴ which the Chamber will apply to this case.

e) Possibility of tendering incriminating or exculpatory evidence

81. The Statute does not explicitly grant victims the right directly to call a witness to give evidence or to tender documentary evidence. However, the Appeals Chamber has stated that article 69(3) of the Statute authorises the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth. Accordingly, it has ruled that, in order to allow victims to participate meaningfully in the trial, the Trial Chamber may, where appropriate, authorise them to tender evidence.¹¹⁵ It nevertheless stated that the combined effect of articles 68(3) and 69(3) of the Statute and rule 91(3) of the Rules is that the legal representatives of the victims must seek the prior leave of the Trial Chamber for this purpose, which will then determine who shall tender

¹¹² Trial Chamber I, *Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial*, 30 November 2007, ICC-01/04-01/06-1049.

¹¹³ Trial Chamber I, *Decision regarding the Protocol on the practices to be used to prepare witnesses for trial*, 23 May 2008, ICC-01/04-01/06-1351, para. 39.

¹¹⁴ ICC-01/04-01/07-842-Conf-Anx, in particular, paras. 37 to 41. See also, *Decision on a number of procedural issues raised by the Registry*, 14 May 2009, ICC-01/04-01/07-1134, para. 18.

¹¹⁵ Judgment of 11 July 2008, paras. 86 to 105.

that evidence and according to which modalities. It may, where appropriate, order a legal representative to tender it him- or herself.¹¹⁶

82. The Chamber considers that requesting the submission of incriminating or exculpatory evidence pursuant to 69(3) of the Statute would be a means for the victims to express their “views and concerns” within the meaning of article 68(3) of the Statute. Accordingly, it will allow them this possibility, subject to certain conditions set out below. In the Chamber’s view, making it possible for the Legal Representatives of the Victims to propose the submission of evidence would in fact assist it in its implementation of article 69(3) of the Statute, and hence in its search for the truth.
83. Nevertheless, as indeed indicated by the Appeals Chamber, this Chamber would stress that this is simply a possibility afforded to the victims in order to give full effect to the provisions of article 68(3) of the Statute, once the victims’ interests, the rights of the accused and the requirements of a fair and impartial trial have been duly balanced.
84. In this regard, the Decision on Rule 140 provides, *inter alia*, for the possibility of the Legal Representatives either calling victims to give evidence or calling other witnesses “when requested”. In either case, the Legal Representatives of the Victims must apply to the Chamber in writing, setting out how the evidence they intend to adduce is relevant and how it may contribute to the determination of the truth. The 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.¹¹⁷

¹¹⁶ *Ibid.*, paras. 98 to 100.

¹¹⁷ Decision on Rule 140, paras. 7, 19 to 32 and 45 to 48.

85. As indicated below, the Chamber 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.

(1) *Possibility of calling one or more victims*

86. The Chamber will grant the Legal Representatives the opportunity to call one or more victims to give evidence under oath at trial.¹¹⁸ In its view, the most appropriate stage, having regard to the rights of the accused, to hear any victims called by the Legal Representatives is directly after the Prosecution has presented its case. 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.

87. Again, any application for this purpose must state the relevance of the testimony to the issues of the case and how it may help the Chamber to gain a better understanding of the facts.¹¹⁹ The application must be filed prior to the conclusion of the Prosecution's case and in accordance with the procedure defined in the Decision on Rule 140.¹²⁰ The Chamber will assess every application with this in mind, taking particular account of the rights of the accused to be tried without undue delay.¹²¹

88. Regarding the question whether their status as participating victims in the proceedings might preclude them from giving evidence under oath, the Chamber concurs with Trial Chamber I that the possibility of their giving

¹¹⁸ Ibid., paras. 19 to 32.

¹¹⁹ Ibid., para. 20.

¹²⁰ Ibid., paras. 24 to 29.

¹²¹ Ibid., paras. 21 and 22.

evidence cannot be totally excluded.¹²² Furthermore, that Chamber authorised three of the victims participating in the *Lubanga* case to come to give evidence under oath after the conclusion of the Prosecution case.¹²³ Indeed, it would be contrary to the Chamber's obligation to establish the truth if it were to exclude highly relevant and probative testimony of witnesses for the sole reason that they have also been authorised to participate in the proceedings as victims. Nevertheless, the Chamber is aware of the objections raised by the Defence in this regard. It is further mindful of the fact that, in those legal systems which attribute an active role to victims in criminal proceedings, such victims are usually not authorised to testify under oath.¹²⁴ However, the Chamber notes that the fact that a victim gives evidence under oath – which in itself gives him or her the status of a witness – allows the Defence to cross-examine him or her, which acts as a safeguard and makes the said victim liable to prosecution under article 70(1)(a) of the Statute if he or she gives false testimony.

89. Furthermore, it should be noted that, if the victim were authorised merely to make a written statement, that could not be taken into account in the final judgment, which would be contrary to the objective of contributing to the determination of the truth that justifies intervention by victims.
90. It is therefore incumbent upon the Chamber, when determining whether it is appropriate to allow a particular victim to testify in person, to satisfy itself that his or her dual status as victim and witness does not compromise the probative value of the testimony. Prior to ruling on such a request, the Chamber may ask for the observations of the parties.

¹²² ICC-01/04-01/06-1119, paras. 132 to 134.

¹²³ Decision of 26 June 2009, *supra* footnote 87.

¹²⁴ See inter alia, for France, article 335 of the Code of Criminal Procedure; for Belgium, *Criminal Procedure Systems in the European Community*, Ed., Christine Van den Wyngaert, 1993, Butterworths, p. 40.

91. The Chamber recalls, in this respect, that the participation of victims in the fact-finding process of the Court is conditional upon their making a real contribution to the search for the truth. Consequently, if there are potential doubts as to the reliability of a victim's testimony, the Chamber may decide not to authorise the victim to testify under oath. This decision is entirely independent of the Chamber's discretion under article 69 of the Statute to determine the relevance and admissibility of the evidence the victim may give during his or her testimony.
92. The Chamber emphasises that it will not authorise testimony from any victims who wish to remain anonymous to the Defence.¹²⁵ On this point, it recalls that, in its decisions of 6 and 18 November 2009, it ordered the disclosure of the identity of the majority of the victims who did not oppose such disclosure.¹²⁶ Lastly, it points out that some victims have yet to specify whether or not they agree to their identity being disclosed to the parties.
93. Nevertheless, the Chamber does not rule out the possibility of anonymous victims participating in the proceedings. In the event that they are called to appear as witnesses in accordance with this Decision, they must relinquish their anonymity.¹²⁷

(2) *Possibility of calling other witnesses*

94. Although it cannot be the rule, the possibility cannot be excluded that the Legal Representatives will want to draw the Chamber's attention to witnesses who could provide it with relevant information about issues which affect the

¹²⁵ Decision on Rule 140, para. 22(c).

¹²⁶ *Décision relative à la divulgation de l'identité des victimes aux parties*, 6 November 2009, ICC-01/04-01/07-1607; *Corrigendum de la « Décision relative à la divulgation de l'identité des victimes aux parties »* (ICC-01/04-01/07-1607), 12 November 2009, ICC-01/04-01/07-1607-Corr; *Deuxième décision relative à la divulgation de l'identité des victimes aux parties*, 18 November 2009, ICC-01/04-01/07-1650.

¹²⁷ See ICC-01/04-01/07-1607-Corr, para. 20.

interests of the victims.¹²⁸ This possibility might be implemented once the Defence teams have concluded the presentation of their case,¹²⁹ during the phase which the Chamber plans to devote to considering any additional evidence or to hearing any witnesses called in addition to those presented by the parties.

95. In effect, in the Decision on Rule 140, the Chamber indicated that the trial would be organised in a series of phases: the first devoted to the presentation by the Office of the Prosecutor of its case against the accused, at the end of which the victims may, if they so wish, petition the Chamber for permission to testify in person; and the second phase, during which the Defence for both accused will present their respective defence cases. At the end of this second phase, the Chamber may decide to call further witnesses, including at the suggestion of the Victims' Legal Representatives.¹³⁰ Thus the Chamber does not rule out having to order the submission of evidence or the calling of witnesses in addition to those called at trial by the parties, pursuant to articles 64(6)(d) and 69(3) of the Statute. In its view, whether those additional witnesses are called on its own motion or at the suggestion of the Victims' Legal Representatives, they should as far as possible be called to appear at the conclusion of the presentation of the parties' cases (Prosecution and Defence). Only after such presentation will the Chamber be able to make a fully informed assessment of the interest and relevance of those witnesses.
96. Accordingly, the Chamber's intervention must be sought in accordance with the directions set forth in the Decision on Rule 140.¹³¹ If the Chamber considers that those witnesses may be able to provide important information that was not hitherto included in the evidence called by the parties, it may decide to call them on its own motion, in accordance with articles 64(6)(d) and 69(3) of the

¹²⁸ Decision on Rule 140, paras. 7 and 45.

¹²⁹ *Ibid.*, para. 7.

¹³⁰ *Ibid.*, paras. 3 to 7.

¹³¹ *Ibid.*, paras. 45 to 48.

Statute.¹³² Nevertheless, 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. It is therefore important that the Legal Representatives clearly explain the relevance of the proposed testimony in relation to the issues of the case.¹³³

97. Lastly, the Chamber would make it clear that, if it calls a witness at the request of a Legal Representative, it can authorise the latter to question the witness, either before or after the Chamber's examination.¹³⁴

(3) Possibility of tendering documentary evidence

98. Similarly, the Chamber considers that the aforementioned provisions of the Statute do not preclude the Legal Representatives from asking it to decide whether it should order that certain documentary evidence be tendered. Again, the Chamber considers this a means for the victims to express their "views and concerns" within the meaning of article 68(3) of the Statute. In the Chamber's view, making it possible for the Legal Representatives of the Victims to propose the presentation of documentary evidence would indeed assist it in its implementation of article 69(3) of the Statute, and by the same token in its search for the truth.
99. Accordingly, the Chamber will allow the Legal Representatives this possibility, provided that they comply with the following procedure. They must make a written application to the Chamber showing how the documents they intend to present are relevant and how they may contribute to the determination of the truth. This application, along with the evidence they wish to present, must be notified to the parties and other participants for their observations.

¹³² Ibid., para. 46.

¹³³ Ibid., para. 47.

¹³⁴ Ibid., para. 48.

100. If the evidence which the Legal Representatives wish to tender is closely linked to the testimony of a named witness, the application must be submitted in sufficient time prior to said witness's testimony to allow the Chamber and the parties to take proper note of the application's content. In any other circumstance, which in principle should not arise until the close of the Defence case, the application must be filed as soon as possible.
101. It should be recalled that the Chamber will only authorise the presentation of such evidence provided that it is not prejudicial to the Defence or to the fairness and impartiality of the trial. It will assess the evidence thus tendered pursuant to its power to "[r]ule on the admissibility or relevance of evidence" under article 64(9) of the Statute.

(4) *Possibility of conducting investigations*

102. The Chamber must stress that the fact that the victims are authorised to present incriminating or exculpatory evidence during the trial does not, however, mean that they are entitled to conduct investigations in order to establish the guilt of the accused. Granting them such a right would, as has already been stated, be tantamount to assigning them the role of assistant prosecutors, which, it must be reiterated, the Chamber will not do, since that would be prejudicial to the rights of the Defence, the principle of equality of arms and the requirements of a fair trial.
103. Nevertheless, as indeed they themselves propose in their observations, the Legal Representatives of the Victims may conduct investigations in order to collect information with a view to establishing the existence, nature and extent of the harm suffered by their clients.

f) Possibility of challenging the admissibility of evidence

104. As regards a potential challenge to the admissibility and relevance of evidence pursuant to article 69(4) of the Statute, the Chamber again considers that this is a means for the victims to express their views and concerns within the meaning of article 68(3) of the Statute. It is of the view that such a possibility cannot be completely ruled out. Thus it must permit a victim who has information clearly indicating the admissibility of disputed evidence, or, on the contrary, establishing that such evidence cannot be admitted or is irrelevant, to transmit that information to the Chamber. Such information may prevent the Chamber from being misled by relying on inadmissible or irrelevant evidence – or dismissing evidence that is in fact admissible and relevant – in order to establish the facts.

g) Disclosure of incriminating or exculpatory information

105. In the view of the Defence for Germain Katanga, the victims and their Legal Representatives are obliged to disclose to the Defence any evidence in their possession, whether incriminating or exculpatory. In this regard, the Chamber notes that neither the Statute nor the Rules impose such an obligation. It notes further that, 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.

106. On this last point, it should be recalled that the Appeals Chamber stated that “[i]f 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".¹³⁵

107. Accordingly, in the event that the victims apply to the Chamber for leave to present evidence and are authorised to do so, it will be for the Chamber to set the modalities for the disclosure of said evidence and to decide on the measures required to safeguard the fairness of the trial, given the need to respect the rights of the accused, but also the interests of the victims. The Chamber will in particular ensure that the Prosecution and the Defence teams receive the evidence sufficiently in advance to enable them to prepare effectively.

h) Possibility that a victim may also have the status of a witness called by one of the parties

108. In this case, Witnesses 161 and 166 have such dual status.¹³⁶

109. The Defence for Germain Katanga recalled the risk it perceives that a victim who has been authorised by the Chamber to participate in the proceedings and who is also called to testify as a prosecution witness may adjust his or her version of the facts to make it compatible with the Prosecutor's case. It stressed that this risk results mainly from the access they may have been granted to the documents and evidence in the record established by the Office of the Prosecutor.

110. The Chamber considers that neither the Statute nor the Rules prohibit victim status from being granted to a person who already has the status of a prosecution or defence witness. Similarly, rule 85 of the Rules does not prohibit

¹³⁵ Judgment of 11 July 2008, para. 100.

¹³⁶ Office of the Prosecutor, "*Dépôt d'une liste révisée des témoins de l'Accusation et de leur ordre de deposition*", with confidential, *ex parte* Annex A, only available to the Prosecution and confidential Annex B, 5 November 2009, ICC-01/04-01/07-1599-Conf-AnxB.

a person who has been granted the status of victim from subsequently giving evidence on behalf of one of the parties.¹³⁷

111. Furthermore, the Chamber recalls the restrictions imposed by the Pre-Trial Chamber on the Legal Representatives of the Victims and their clients, which are as follows:

DECIDE that:

(i) only the Legal Representatives of non-anonymous victims shall have the rights to access the confidential part of the record of the present case and to attend closed session hearings; and that therefore

(ii) non-anonymous victims (Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07) shall not have access to the confidential part of the case record nor shall they attend closed session hearings,

DECIDE that the Legal Representatives of non-anonymous victims shall be prohibited from transmitting to their clients copies of any document or evidence included in the confidential part of the case record, as well as any transcript of hearings held in closed session;

DECIDE that:

(i) the above limitations shall not extend to a general prohibition on the Legal Representatives of non-anonymous victims from discussing with their clients the information and evidence to which they are privy through accessing the confidential part of the case record and attending closed session hearings; and

(ii) the Legal Representatives of non-anonymous victims shall only be prohibited from discussing with their clients the above-mentioned information and evidence insofar as it would allow the non-anonymous victims that they represent to identify the specific witnesses in the confirmation hearing of the present case.¹³⁸

112. The Chamber stresses that the aforementioned decision, which it has never sought to challenge, and which has never been appealed by the parties, makes a clear distinction between the Legal Representatives of the Victims and the victims themselves, since the victims are unable to access the confidential documents in the record or the evidence contained therein.

¹³⁷ See also, Decision of 18 January 2008, paras. 132 to 134; Trial Chamber I, *Decision on certain practicalities regarding individuals who have the dual status of witness and victim*, 5 June 2008, ICC-01/04-01/06-1379.

¹³⁸ Pre-Trial Chamber I, *Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims*, 30 May 2008, ICC-01/04-01/07-537, pp. 12-13.

113. The decision by the Single Judge confines itself to allowing only the Legal Representatives of the Victims the possibility of consulting with their clients on certain aspects of the case record, in order to enable them fully to discharge their professional obligations. In all likelihood, the only limits explicitly imposed by the Pre-Trial Chamber on that possibility allowed to the Legal Representatives were primarily intended to protect the witnesses' safety. The fact remains that, in consultations with their clients, the Legal Representatives – who are bound by the provisions of the Code of Professional Conduct for counsel – must ensure that they do not transmit confidential information to witnesses such that it might influence their statements or even prompt them to change their statements.
114. At the current stage of the proceedings, the Chamber has no intention of deviating from the directions recalled above; on the contrary, it is of the view that it is bound to affirm them. It stresses that Witnesses 161 and 166 must not under any circumstances become privy to the testimony of the other prosecution witnesses, or to the evidence. Nevertheless, the Chamber is mindful that this is a public trial, and it cannot be ruled out that those two witnesses may have access from the DRC, even if only partially, to certain sequences from broadcasts of the trial. In this respect, it must recall the underlying spirit of rule 140(3) and urge the Legal Representatives to bring it to the attention of those witnesses and to the victims whom, subject to the Chamber's leave, they wish to call as witnesses.
115. Furthermore, it should be recalled that Witnesses 161 and 166 submitted their applications for participation as victims after making their statements to the representative of the Office of the Prosecutor.¹³⁹ As regards Witness 166, the Chamber recalls that Pre-Trial Chamber I issued a decision granting him this dual status of victim and witness, while limiting his participation rights to those

¹³⁹ See for Witness 161, DRC-OTP-0164-0488 and ICC-01/04-01/07-803-Conf-Exp-Anx2; and for Witness 166, DRC-OTP-1007-0002 and ICC-01/04-01/07-510-Conf-Exp-Anx93.

granted to anonymous victims,¹⁴⁰ and that his case was discussed at length during the pre-trial phase.¹⁴¹

116. The Chamber further notes the fact that Witness 166 is currently the twenty-third of the 26 witnesses the Prosecutor intends to call at trial.¹⁴² It also notes that, since his testimony is scheduled for the end of the Prosecution's case, it may be that other prosecution witnesses before him will have testified on the same matters, which would inevitably diminish the impact of his testimony.¹⁴³ In the contrary situation, the Chamber will assess the probative value of his evidence at the relevant time.

117. Likewise, in the case of Witness 161, the Chamber will then take into account that witness's dual status in order to assess the probative value of his evidence.

- i) Possibility for victims to have access to confidential documents and to the evidence in the case record

118. The Chamber recalls that, under rule 92(5) and (6) of the Rules, the Registrar must inform the legal representatives of requests, submissions, motions and any other documents relating thereto, as well as decisions issued by the Court during the stage in which they are participating.

119. Similarly, rule 131(2) of the Rules provides that victims or their legal representatives may consult the record of the proceedings, subject, where

¹⁴⁰ Pre-Trial Chamber I, *Decision on the Application for Participation of Witness 166*, 23 June 2008, ICC-01/04-01/07-632.

¹⁴¹ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 30 September 2008, ICC-01/04-01/07-717, paras. 200 to 209.

¹⁴² Office of the Prosecutor, "*Dépôt d'une liste révisée des témoins de l'Accusation et de leur ordre de déposition*", 5 November 2009, ICC-01/04-01/07-1599. See also, "Notice of a modification to the order of the Prosecution's witnesses", 14 January 2010, ICC-01/04-01/07-1764.

¹⁴³ In this regard, see ICC-01/04-01/07-1599, para. 7.

appropriate, to any restrictions concerning confidentiality and the protection of national security information.

120. Furthermore, in accordance with article 8(4) of the Code of Professional Conduct for counsel, legal representatives of victims must not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless authorised to do so by an order of the Court.
121. The Chamber is of the view that, in order to promote effective participation of victims in the trial, the Legal Representatives must be able to consult all of the public and confidential decisions and documents in the record of the case, with the exception of any document classified as *ex parte*. This led it to decide at the status conference of 1 October 2009 that “Legal Representatives for anonymous or non-anonymous victims will henceforth have access to all confidential documents in the case, with the exclusion of all those documents classified as *ex parte*”.¹⁴⁴
122. As regards access to the evidence, the Chamber is of the view that, in order to give full effect to victim participation during the trial, the Legal Representatives should be authorised to consult the material adduced by the parties. In its Decision of 27 November 2009, it considered that it must grant them leave to consult the material the Prosecutor intends to use when questioning prosecution witnesses at least three days prior to the corresponding testimony.¹⁴⁵ By Decision of 1 December 2009, the Chamber also granted the Legal Representatives leave to access the table of incriminating evidence established by the Prosecutor.¹⁴⁶ Lastly, the Chamber recalls that one of the two Legal Representatives of the Victims, Mr Fidel Nsita Luvengika, was granted access to

¹⁴⁴ ICC-01/04-01/07-T-71-Red-ENG WT 01-10-2009, pp. 4 and 5.

¹⁴⁵ ICC-01/04-01/07-T-86-Red-ENG WT 27-11-2009, pp. 1 and 2; see also, Decision on Rule 140, para. 103.

¹⁴⁶ ICC-01/04-01/07-T-88-Red-ENG WT 01-12-2009, p. 2.

the confidential case record at the pre-trial stage.¹⁴⁷ At that time, the distinction between the Legal Representatives was made only on the basis of the anonymity of the victims they represented. Since the victims represented by Mr Jean-Louis Gilissen are now no longer anonymous, that access should also be extended to include him. Access to the evidence covers the entire case record. Accordingly, the Legal Representatives of the Victims should have access to the entire record available via the Ringtail system.

123. Nevertheless, the Chamber is of the view that the confidentiality obligation to which the Legal Representatives are bound means that access to the evidence in the case, as set out in the table and registered in the Ringtail system, which is maintained by the Registry and accessible to the Chamber, is restricted to themselves and to them alone: such access cannot be extended to include their clients.

124. The Chamber has satisfied itself that no incriminating documents obtained by the Prosecutor under article 54(3)(e) of the Statute on the condition that they are not made accessible to the legal representatives of the victims are currently stored in the aforementioned Ringtail system. The Defence teams of the two accused must therefore ensure in due course and with the assistance of the Registry that any documents on which they intend to rely to defend their clients, and which were obtained from the Prosecutor on the same basis and subject to the same condition, do not become accessible to the Legal Representatives of the Victims through Ringtail, to which they henceforth have access.

125. Lastly, the Chamber notes that the parties have entered into a number of agreements under rule 69 of the Rules pertaining to evidence,¹⁴⁸ and that the

¹⁴⁷ ICC-01/04-01/07-474, para. 132.

¹⁴⁸ Office of the Prosecutor, "Prosecution's Observations on Agreements as to Evidence", 6 November 2009, with confidential, *ex parte* Annexes, only available to the Office of the Prosecutor and the Defence, ICC-01/04-01/07-1609.

Legal Representatives of the Victims have requested access to these. For the reasons set out above and in order to ensure effective participation of the victims at trial, the Chamber grants this request, and orders the Prosecutor to file a document indicating the facts on which agreement has been reached, and to make that document accessible to the Legal Representatives of the Victims.

FOR THESE REASONS, the Chamber

DECIDES that the Legal Representatives of the Victims may make opening and closing statements at the trial, after the Prosecutor's statement and prior to those of the Defence teams;

DECIDES that the Legal Representatives of the Victims may attend and participate in the entire proceedings, including both public and closed sessions, unless the Chamber decides otherwise;

DECIDES that the Legal Representatives of the Victims may, if they so request and with the Chamber's leave, question a witness, an expert or the accused, under the conditions set forth in paragraphs 72 to 78 of this Decision;

DECIDES that, with the Chamber's leave, the Legal Representatives of the Victims may, if they so wish, call one or more victims to give evidence, in accordance with paragraphs 81 to 93 of this Decision;

DECIDES that, with the Chamber's leave, the Legal Representatives of the Victims may, if they so wish, call witnesses, in accordance with paragraphs 81 to 85 and 94 to 97 of this Decision;

DECIDES that the Legal Representative of the victims may request the Chamber to determine whether there is cause to order the submission of incriminating or exculpatory evidence;

DECIDES that, with the Chamber's leave, the Legal Representatives of the Victims may submit their observations on the relevance or admissibility of certain evidentiary materials adduced by the parties;

DECIDES that the Registry shall notify the Legal Representatives of the Victims of all of the public and confidential documents pertaining to this case, with the exception of any documents classified as *ex parte*, and shall grant them access to the evidence in the case, as registered in the Ringtail system;

ORDERS the Prosecutor to file a document indicating the facts for which an agreement on evidence has been reached, and to make it accessible to the Legal Representatives of the Victims; and

ORDERS the Defence teams of the two accused to ensure in due course and with the assistance of the Registry that documents on which they intend to rely to defend their client and which were obtained from the Prosecutor under article 54(3)(e) of the Statute, subject to the condition that they do not become accessible to the Legal Representatives of the Victims, are not made accessible to the said Representatives through the Ringtail system.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 22 January 2010
At The Hague, The Netherlands