

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07

Date: 22 July 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sylvia Steiner, Judge
Judge Anita Ušacka, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Prosecution's Observations Addressing Matters that Were Discussed at the Confirmation Hearing

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga

Mr David Hooper
Mr Göran Sluiter

Counsel for the Defence of Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean-Chrisostome Mulamba
Nsokoloni

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. On 13 June 2008, Pre-Trial Chamber I ("PTC I") issued the schedule of the confirmation hearing.¹ According to the schedule, the Prosecution and Legal Representatives "may address in writing any matters that they discussed at the confirmation hearing".² The Defences for Germain KATANGA and Mathieu NGUDJOLO CHUI have until 28 July to file a document that may also address "matters that they discussed at the confirmation hearing".³
2. On 16 July 2008, PTC I reiterated that the parties and participants could file submissions addressing issues discussed during the Confirmation Hearing and stressed that: "the written submissions must be confined to the issues discussed during the course of the confirmation hearing. No new issues can be taken into account by the Chamber" (emphasis added).⁴
3. The Office of the Prosecutor ("Prosecution") herewith, submits its observations confined to issues discussed during the course of the Confirmation Hearing.

Introduction

4. The Prosecution does not intend to revisit the oral arguments and responses presented during the 2 July 2008 public hearing.
5. The Prosecution reiterates that the presentation of its evidence made over the course of 3 and 4 July 2008 focused on the most relevant pieces of evidence selected from the Prosecution's List of Evidence. However, as stated on 3 July 2008,⁵ the Prosecution relies on all of the evidence presented in its additional List of Evidence,⁶ filed in support of the Amended Document Containing the

¹ ICC-01/04-01/07-587-Anx I.

² *Ibid.*, section m, p. 4.

³ *Ibid.*, section n, p. 4.

⁴ ICC-01/04-01/07-T-50- ET, p.8, line 18.

⁵ ICC-01/04-01/07-T-42- ET, p.13, line 21.

⁶ The Prosecution would like to specify that witness 238 is identified as witness 138 in the Prosecution's List of Evidence. This is a clerical mistake. Any reference to W-138 should be read as W-238.

Charges to establish that substantial grounds exist to commit the two individuals to stand trial.⁷

Defence Submissions Regarding the Admissibility and Weight of Certain Evidence

6. The Prosecution submits that relevant evidence should be deemed *prima facie* admissible under the Rome Statute ("Statute"), in particular for the purposes of the confirmation decision.⁸ Article 69(4) of the Statute provides that the Court "may rule on the relevance or admissibility of any evidence" and in so doing it may consider "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial." In exercising its discretion, the Court may either first determine whether evidence is sufficiently relevant to warrant admission and subsequently evaluate its weight, or admit the evidence and consider relevance, admissibility and weight together.⁹
7. In either option, the Chamber is entitled to assess freely all evidence for that purpose.¹⁰ The goals of the ICC include the promotion of fair and expeditious proceedings and the search for truth.¹¹ In achieving these goals, the Statute and the Rules of Procedure and Evidence ("Rules") do not limit the Chamber

⁷ In the Lubanga case, PTC I ruled that: "'the substantial ground to believe" standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole", ICC-01/04-01/06-803-tENG, para. 39.

⁸ In the Lubanga case, PTC I further ruled that: "any item included in the Prosecution Additional List of Evidence [...] shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber", ICC-01/04-01/06-803-tENG, para. 40. In addition, the Appeals Chamber has ruled that the confirmation hearing does not require a full testing of each item of evidence: "The right to challenge the evidence [...] must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect. [...] As the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested", ICC-01/04-01/06-774 OA6, 14 December 2006, para. 47.

⁹ Lee, R., (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, NY: 2001) p. 351.

¹⁰ Rule 63(2) and Lee, R., (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, NY: 2001) p. 352. This authority of the Chamber to admit and freely assess all available evidence, including 'hearsay', was recently confirmed by the Trial Chamber I in the case of the Prosecutor v. Thomas Lubanga Dyilo in the "Decision on the admissibility of four documents" ICC-01/04-01/06-1399.

¹¹ Articles 54(1), 64(2) and 69(3).

in the way it governs the admissibility of documents.¹² To that end, for example, the ICC law provides that the Chambers are not bound by national rules of evidence other than in accordance with Article 21.¹³

8. The defence for Mathieu NGUDJOLO has challenged the admissibility of various pieces of evidence on the basis that they are "hearsay", a term used in certain national jurisdictions to describe evidence that is not given by individuals with direct knowledge of events. It is respectfully submitted that the *ad hoc* importation of certain rules of evidence stemming from one legal tradition into the ICC context would be inconsistent with the object and purpose of the Statute.¹⁴
9. Furthermore, the Statute and the Rules of the ICC were drafted in large part based on the long established practice and legal rules developed by earlier international criminal tribunals and reflect the particular circumstances in which international criminal trials must proceed.¹⁵ The Trial Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo* concluded that:

[t]he drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited - at the outset - the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorized by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to "apply national laws governing evidence". For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary

¹² See *Prosecutor v. Oric*, Case No. IT-03-68-T, Trial Chamber II, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October 2004, para. 8; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 19. See also Tochilovsky, V., *Jurisprudence of the International Criminal Courts: Procedure and Evidence* (WLP, 2006), p. 276.

¹³ Rule 63(5).

¹⁴ In this regard, see also the decision of Trial Chamber I in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admissibility of four documents" ICC-01/04-01/06-1399, para. 24.

¹⁵ Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999), 892-898 in which the primary sources of the rules of evidence are cited as the Nuremberg Charter and the Rules of the ICTY.

given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling - for credible reasons - to give evidence.¹⁶

Evidence of Deceased Witnesses 167 and 258

10. The Prosecution contends that there is no express provision excluding documentary evidence simply on the ground that the declarant or author has not been called or is unavailable to testify. It is submitted that the exact opposite is the case for evidence proffered at the stage of the confirmation hearing. Article 61(5) explicitly permits the use, and therefore the admission, of documentary and summary evidence from witnesses.
11. This is relevant to the Defence for Mathieu NGUDJOLO's challenges to the admission of the statement of witness 258 and the documents authored by witness 167, both of whom are deceased. The Defence submitted that these documents are inadmissible because the Defence has been unable to assess the credibility of these witnesses through in-court questioning. While the inability to question a witness on a statement or document could be a form of prejudice that may be examined when ruling on the admissibility of a witness statement at trial, where the statutory standard is *viva voce* testimony,¹⁷ it is submitted that the absence of such an ability *at the stage of the confirmation hearing*, is not a basis for ruling a statement inadmissible.¹⁸ To hold such would render completely hollow the permissible language of Article 61(5) referred to

¹⁶ ICC-01/04-01/06-1399, para. 24.

¹⁷ Article 69(2).

¹⁸ As noted above, the Appeals Chamber has ruled that "[t]he right to challenge the evidence [...] must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect" and that as a result, "the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested", ICC-01/04-01/06-774 OA6, 14 December 2006, para. 47.

above.¹⁹ In other words, if the Defence position was correct, any statement or document tendered without calling the declarant witness would be inadmissible since there was no opportunity for the Defence to question the witness to assess credibility. For these reasons, it is submitted that the Defence inability to examine a declarant on a statement at the confirmation hearing is not a factor in the determination of the admissibility of the statement. Consequently, it is submitted that the statement of witness 258 and documents authored by witness 167 are admissible in these proceedings.

List of Victims Prepared by Witness 166

12. For similar reasons, the Defence for Mathieu NGUDJOLO has challenged the admissibility of the list of victims of the Bogoro attack authored by Witness 166. The Prosecution respectfully submits that the oral submission, made by the Defence Team of Mathieu NGUDJOLO on 14 July 2008²⁰ in relation to the list of victims who were reportedly killed during the attacks on Bogoro, as provided by Witness 166,²¹ is ill-founded. As stated by the Prosecution during the presentation of its evidence on Counts 1, 2 and 4 on 4 July 2008 the list is "a compilation of the reports made to the witness, (...) Witness 233 and the committee of displaced persons which was based in Bunia".²²
13. Witness 166's statement contains very detailed information on the origin of the list. In paragraphs 66 to 85, it is set out who composed the three lists that were later combined into one list by Witness 166²³ and how, after he combined the three lists, Witness 166 continued to receive reports from family members, and through other means, of victims who were killed during the attack on

¹⁹ The Appeals Chamber has further recognised that "The use of summaries may affect the ability of the suspect pursuant to article 61 (6) (b) to challenge the evidence presented by the Prosecutor at the confirmation hearing in two respects [...] However, this does not mean that the use of such summaries at the confirmation hearing is necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial," *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 50.

²⁰ See ICC-01/04-01/07-T-48-ENG-RT, p. 8, lines 19-25; p. 9, lines 1-9; p.10, lines 7-11.

²¹ DRC-OTP-1007-0029.

²² ICC-01/04-01/07-T-43-ENG-ET, p. 13, lines 12-15.

²³ DRC-OTP-1007-0002 at 0013 paras. 67-69; at 0014, para. 71.

Bogoro.²⁴ Witness 166 emphasized that the list he provided is not a record of all the victims who were killed during the attack on Bogoro, because, among other reasons, the list mainly includes reports made by the “déplacés” who fled to Bunia, while civilians also fled into other directions.²⁵

14. The Prosecution respectfully submits that the Defence’s statement that “[i]n this case, the sources Witness 166 bases himself on are unknown”,²⁶ and “(...) we have a list of persons deceased, but we don't know how it was drawn up (...)”²⁷ is not correct. This information is found in the statement of Witness 166.²⁸ Additionally, the list itself provides very detailed information on the victims, namely their name, age and the name of parents and –in most cases– the name of the person who reported the victim as being killed during the attack on Bogoro.²⁹ Therefore, the Prosecution submits that the list provided by Witness 166 is admissible.

Interview of Minors and the Consent of a Legal Guardian to the Interview

15. The Defence for Mathieu NGUDJOLO argues that the Prosecution interviewed witnesses under 18 years of age, without the consent of a legal guardian. The Prosecution submits that it has respected its obligations pursuant to Article 54(1)(b) of the Statute. Additionally, there is no legal requirement pursuant to the ICC legal regime to obtain the prior consent of a parent or guardian to proceed to the interview of a witness under 18 years of age. Nevertheless, the Prosecution did obtain consents from a parental authority or legal guardian when possible.

16. The consent of the guardian of Witness 157 was obtained for the first interview of the Witness.³⁰ The name of the guardian is redacted pursuant to

²⁴ DRC-OTP-1007-0002 at 0014 para. 71.

²⁵ DRC-OTP-1007-0002 at 0016, para. 85.

²⁶ ICC-01/04-01/07-T-48-ENG-RT, p. 8, lines 21-22.

²⁷ ICC-01/04-01/07-T-48-ENG-RT, p. 8, lines 22-23.

²⁸ DRC-OTP-1007-0002 at 0013-0016, paras. 66-85.

²⁹ DRC-OTP-1007-0029 at 0029-0034.

³⁰ See DRC-OTP-0164-0534, paras. 1 and 9.

the first decision on redactions.³¹ A psychologist was also present during the interview whose name is also redacted pursuant to the same decision.³² For the second interview, the consent was provided by the mother of Witness 157.³³

17. Witness 279 was interviewed by the Office of the Prosecutor after securing the consent of a family member. A psychologist was also present during the interview.³⁴ Both names were redacted pursuant to the fifth decision on redactions.³⁵

18. Witness 280 was also interviewed after securing the consent of a family member. A psychologist was present during the interview.³⁶ Both names were redacted pursuant to the fifth decision on redactions.³⁷

19. As a consequence of the conflict in Ituri, Witness 28 lost all contact with his family members. Witness 28 believes they may still be alive but has no information as to their whereabouts. An OTP psychologist was present for the first interview.³⁸ At the time of the second interview, the witness was in the care of the Victims and Witnesses Unit Protection Program ("ICCPP"). The Victims and Witnesses Unit ("VWU") made the necessary arrangements to make the Witness available for the interview.

20. The Prosecution submits that any lack of prior consent of a parent or legal guardian cannot result in a ruling of inadmissibility. The Defence has failed to provide any substantive explanation on the specific factual circumstances of the witness as to why the absence of prior consent affects the reliability or the admissibility of the statement.

The Admissibility of Summary Evidence

³¹ ICC-01/04-01/07-90, para. 30 and ICC-01/04-01/07-84-Conf-Exp-Anx1, p.53.

³² See also ICC-01/04-01/07-90, para. 58.

³³ See DRC-OTP-1006-0054, para. 4.

³⁴ See DRC-OTP-1007-1077, paras 1 and 4.

³⁵ ICC-01/04-01/07-427, paras 33 and 66 and ICC-01/04-01/07-405-Conf-Exp-Anx1, pp. 68 and 72.

³⁶ See DRC-OTP-1007-1089, paras. 1 and 4.

³⁷ ICC-01/04-01/07-427, paras 33 and 66 and ICC-01/04-01/07-405-Conf-Exp-Anx1, pp. 75 and 78.

³⁸ See DRC-OTP-0155-0106, paras. 1 and 5.

21. As submitted previously, Article 61(5) permits the use of summary evidence at the confirmation hearing.³⁹ No statutory provision or rule mandates that the use of summary evidence is limited to corroborative status. Support for this position is found in Rule 63(4), which specifically bars a Chamber from imposing a corroborative requirement in order to prove any crime, specifically emphasizing crimes of sexual violence. Consequently, it is submitted that corroboration is not a condition precedent to the admissibility of summary evidence at the stage of the confirmation hearing, as intimated by the defence for Mathieu NGUDJOLO in oral submissions before this Chamber. In any event, it is submitted that the summary evidence is confirmed both by the evidence of other witnesses regarding the existence of sexual violence victims within both FRPI and FNI camps as well as the similarities between the experiences of the summarized statements of victims of sexual violence. These similarities are mutually confirmatory and enhance the reliability of the totality of the evidence regarding the commission of the crimes of sexual violence. It is submitted that the summaries are properly received and admitted into evidence.

The Photographs of Witnesses 132 and 287 Depicting their Injuries

22. The Defence argues that the causal link between the photographs and the alleged wounds to have been inflicted by the combatants has not been established at all, since the pictures of the wounds were taken in 2007-2008.
23. The Prosecution submits that Witness 132 describes in her statement how she suffered an injury to her right shoulder during the attack on the village of Bogoro. The photographs show an injury to her right shoulder.⁴⁰

³⁹ See paras. 10-11 (referring to Article 61(5)) and footnote 19 (referring to the Appeals Chamber's jurisprudence confirming the admissibility of summary evidence at the confirmation hearing), above. The Appeals Chamber has further ruled that it is in principle permissible for the Prosecutor to present summaries under Article 68(5) as evidence at the confirmation hearing without disclosing to the defence the identities of the witnesses; *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 OA5, 14. December 2006, paras. 44-46.

⁴⁰ See DRC-OTP-1016-0156, at para. 23. The pictures can be found at DRC-OTP-1016-0216, DRC-OTP-1016-0217, DRC-OTP-1016-0218, DRC-OTP-1016-0219 and DRC-OTP-1016-0220.

24. Witness 287, also describes in her statement how she sustained the injury to her knee. The photographs submitted by the Prosecution demonstrate such injury.⁴¹

25. The Prosecution contends that the photographs are self-evident. The photographs are supplementary evidence that visually demonstrate the injuries suffered by the victims. The evidence contained in the statements alone establish substantial grounds to believe that both victims suffered injuries pursuant to Article 7(1)(k).

Photographs of the *Institut de Bogoro*

26. As stated by the Prosecution during its closing statement, the pictures of the *Institut de Bogoro* were submitted for one purpose, for this Chamber's appreciation of the size of the building itself, its surroundings and the first classroom where Witness 268 was detained with the bodies of dead civilians.

In Country Relocation of Witnesses by the Office of the Prosecutor

27. The Defence argues that because Witnesses 28 and 250 were preventively relocated by the Office of the Prosecutor: "the credibility of those witnesses can be formally challenged based on the promises which must have been made to these witnesses by the Prosecution, their statements must be declared inadmissible" (emphasis added).⁴²

28. Witnesses 28 and 250 were relocated in country on an emergency basis by the Office of the Prosecutor with the knowledge and the agreement of the VWU, because both witnesses were facing an immediate threat of harm.⁴³ This is not

⁴¹ DRC-OTP-1013-0205, at paras. 39-40. The pictures can be found at DRC-OTP-1013-0252, DRC-OTP-1013-0253, DRC-OTP-1013-0254 and DRC-OTP-1013-0255.

⁴² ICC-01/04-01/07-T-FRA ET, p. 20, line 23.

⁴³ W-28 was preventively relocated on 21 April 2006 until the VWU formally accepted the witness in the ICCPP on 2 March 2007. W-250 was relocated on 19 March 2007, until the VWU formally accepted the witness in the ICCPP on 20 September 2007. On the preventive relocation because of exigent circumstances, *see* ICC-01/04-01/07-428, para. 35.

the case of a preventive relocation after a refusal by the Registrar to implement protective measures.⁴⁴

29. The Defence also argues that:

In its response to the Victims and Witnesses Unit, in particular paragraphs 12 and 13, that is document 664 of the 7th of July, 2008, the Prosecution states that its investigators have ongoing contact with witnesses in the field and that it can call upon staff in the field to conduct investigations if necessary. These meant by the Office of the Prosecutor are, to our mind, particularly worrying and highly contestable. There may well be persons who are in danger, but this is not the process which should be followed to ensure their protection.⁴⁵

30. This assertion misrepresents the Prosecution's position in its "Response to Victims and Witnesses Unit's considerations on the system of witness protection and the practice of "preventive relocation"". ⁴⁶ In paragraphs 12 and 13 of its submission before the Appeals Chamber, the Prosecution describes the best practices for the assessment of risk and the need for protection of its witnesses. The Prosecution also describes in those paragraphs the different sources from which it collects information to assess the level of risk in a given area. The Office of the Prosecutor, pursuant to its obligation entrenched in Article 68(1) of the Statute, is obviously in contact with its witnesses to monitor their personal security and the level of risk in the area where he or she lives. Once a witness is in the International Criminal Court Protection Program, he or she no longer lives in a risk area and consequently there is no need for the OTP to monitor his/her personal security.

31. The Defence concludes on this point: "manifestly the preventative measures that have been taken and the impact that they have had for victims 28, 250, 132, and 287 can only be prejudicial to the right of Mr. Mathieu NGUDJOLO to a fair trial as required by Article 67 of the Statute. At the very least, and in

⁴⁴ ICC-01/04-01/07-428, para. 25 (ii).

⁴⁵ ICC-01/04-01/07-T-FRA ET, p. 21, line 4.

⁴⁶ ICC-01/04-01/07-664 OA7.

the alternative, if it must, their statements should only be given very limited probative value.”⁴⁷

32. The Defence has failed to support its submission that these witnesses were tainted by the Prosecution with any evidence. The Defence has had every opportunity to lead evidence before the Chamber on this or any other issue, and has decided not to do so. Their position is based on supposition and innuendo and ought to be rejected.

Contacts Prior to Interviews

33. According to the Defence, several witnesses in their statements refer to contacts prior to their interview. This is the case for Witnesses 28, 157, 161, and 166. The Defence alleges that the Prosecution did not provide any details on the way in which these interviews or these meetings and/or preliminary contacts have been conducted, on their content or the institutions which may have conducted them.
34. Witnesses 28, 157, 161 and 166 were initially screened by the Office of the Prosecutor before they were formally interviewed. The screening notes are on the Prosecution’s List of Evidence and their content available to the Chamber, parties and Legal Representative of non-anonymous victims.⁴⁸ The Defence has not substantiated its claim, in any way, with evidence.

The Admissibility of Statements from Witnesses Afforded Rights under Article 55(2)

35. The Defence for Mathieu NGUDJOLO appears to have suggested in oral submissions on 14 July 2008 that there was an issue regarding the admissibility of statements taken from witnesses who were interviewed after being afforded the legal protections established by Article 55(2) of the Statute.

⁴⁷ ICC-01/04-01/07-T-FRA ET, p. 21, line 15.

⁴⁸ See DRC-OTP-0150-0177 for W-28; DRC-OTP-0150-0144 for W-157; DRC-OTP-0153-0106 for W-161 and DRC-OTP-1016-083 for witness 166.

The Prosecution submits, in reiteration of its oral submissions on the same issue raised by the defence for Germain KATANGA on 2 July 2008, that these witnesses were all fully advised of their rights and that the statements were taken in full compliance with the Rome Statute and subordinate texts. The Prosecution notes also that the defence for Germain KATANGA explicitly abandoned its request that the statement of Witness 258 be ruled inadmissible; instead advocating that it is a matter of weight to be attributed to the statement, and not admissibility.⁴⁹ The Prosecution agrees with this position.

Dual Status of Victim-Witnesses

36. The Defence for Mathieu NGUDJOLO has not cited any statutory provision which prevents a participating victim from being a witness for either party at any stage of the proceedings. The Trial Chamber I has affirmed that this situation is permissible, and has established a series of detailed practices to govern circumstances in which an individual has so-called 'dual status'.⁵⁰ The implied Defence position that participating victims cannot also be witnesses, if correct, would run contrary to the Rome Statute. Victims of crimes under the jurisdiction of this Court have a legal entitlement to participate in the proceedings, and ought not be required to choose between being able to provide testimony to the Court and presenting their views and concerns under Article 68(1).

37. The Prosecution additionally notes that the statement of the only dual-status witness identified by the Defence in the proceedings before this Chamber, namely Witness 166, was taken well before that witness was granted participatory rights in the pre-trial stages of the case.⁵¹ Consequently, this witness was not a victim participant, at that stage, and the Defence complaints have no applicability to this specific witness.

⁴⁹ ICC-01-04-01-07-T-41-ENG-ET, p. 49 lines 16-22.

⁵⁰ "Decision on certain practicalities regarding individuals who have the dual status of witness and victim" ICC-01/04-01/06-1379

⁵¹ DRC-OTP-1007-0002 taken from 17-19 February 2007.

Theory of Similar Facts

38. The Defence for Mathieu NGUDJOLO notes that on several occasions, the Prosecutor has tried to outweigh the weakness of the evidence presented by referring to the attacks of Mandro, Tchomia or Bunia which are unrelated to the charges against Mathieu NGUDJOLO.
39. The various attacks the Prosecution referred to during the presentation of its evidence are part of the wider armed conflict that took place in Ituri. The attack on Bogoro cannot be viewed in isolation, and must be understood within the context of this conflict. The activities of the suspects before and after the attack on Bogoro are also probative to their intent and knowledge. An example being their awareness of the existence of the ongoing conflict and that the underlying attacks of this conflict were widespread or systematic.⁵²

Alleged Amendment to the Document Containing the Charges Requested by the Prosecution on 4 July 2008

40. The Prosecution did not request an amendment to the Document Containing the Charges. The Prosecution merely reaffirmed its previous position, that only Mathieu NGUDJOLO and Germain KATANGA are alleged to have had an essential role in the implementation of the common plan and to have provided the necessary contribution, and are therefore alleged to be co-perpetrators pursuant to Article 25(3)(a).⁵³

Statements Made by the Legal Representatives of Victims

41. The Prosecution has no comment to submit.

⁵² “Nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the acts or omission with which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred”, see ICC/01/04/01/06-803-tEN, para. 152.

⁵³ ICC-01-04-01-07-590, par. 11. The same understanding of the Prosecution’s theory has also been recognised by the Single Judge, *see* ICC-01-04-01-07-648, para. 23.

Modes of Liability

42. During the hearing of 11 July 2008, the Defence of Germain KATANGA raised a number of issues in relation to co-perpetration under Article 25(3)(a) and the interpretation of the mental element in Article 30, arguing in particular that it disagrees with the legal findings of Pre-Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* in these regards.⁵⁴
43. First, the Prosecution submits that the Defence has not presented any reasons which would justify departing from the existing jurisprudence of this Chamber on these matters. The Prosecution submits that absent compelling reasons to do so, which have not been presented in this case, the Pre-Trial Chamber should not depart from its existing jurisprudence.⁵⁵
44. The Prosecution further submits that a detailed discussion of the legal elements of the mode of liability is not appropriate at this stage of the proceedings. As the Prosecution has consistently argued, any legal finding made by the Pre-Trial Chamber in the context of the decision on the confirmation of the charges cannot produce any binding effect in the trial proceedings.⁵⁶ The Trial Chamber has full authority to make fresh and independent determinations on matters concerning the interpretation of co-perpetration in Article 25(3)(a) or the mental elements prescribed in Article 30, and the Defence will have the opportunity to adduce legal and factual arguments before that Chamber in due course. For these reasons, it is submitted that any further discussions regarding the legal requirements of co-perpetration should be deferred and that such argument should be made

⁵⁴ ICC-01/04-01/07-T-46-ENG-ET, 11 July 2008, p. 28, line 11 ff.

⁵⁵ The Pre-Trial Chamber previously elaborated in great detail on the concept of co-perpetration and on the mental elements as embodied in the Statute (*Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, 29 November 2006 ("Lubanga Confirmation Decision"), paras. 322-367). This is particularly so in the instant proceedings, since no other Chamber of this Court has, thus far, provided any diverging interpretation of these matters.

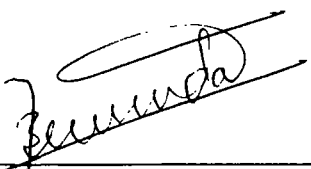
⁵⁶ See submissions to that effect by the Prosecutor (*Prosecutor v. Lubanga*, ICC-01/04-01/06-953, 12 September 2007, para. 9).

before the Trial Chamber in the event that the charges against Germain KATANGA and Mathieu NGUDJOLO are confirmed.

45. Finally, the Prosecution submits that the evidence that was presented to the Pre-Trial Chamber during the confirmation hearing is sufficient to establish substantial grounds to believe that Germain KATANGA and Mathieu NGUDJOLO committed each of the crimes charged pursuant to any interpretation of co-perpetration or of the mental element required by Article 30.

Request

46. The Prosecution requests the Pre-Trial Chamber to confirm the charges against Germain KATANGA and Mathieu NGUDJOLO CHUI as set out in the Document Containing the Charges and to commit both individuals to a Trial Chamber for trial on these charges.



Fatou Bensouda, Deputy Prosecutor

Dated this 22nd day of July 2008

At The Hague, The Netherlands