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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Sylvia Steiner

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Germain Katanga and Mathieu Ngudjolo Chui***

Public Document

**Submissions of the Defence of Mr Mathieu Ngudjolo in the Context of the
Confirmation Hearing**

Source: Mathieu Ngudjolo's Defence Team

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

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I. Procedural Background

1. The Prosecutor of the International Criminal Court has requested Pre-Trial Chamber I to commit Mr Ngudjolo and Mr Katanga for trial before the Trial Chamber on the basis that there are allegedly substantial grounds to believe that they have committed crimes falling within the jurisdiction of the Court.¹
2. The Legal Representatives of the Victims have concurred with the Prosecutor's request, the evidence presented by him and the deductions he has drawn from it, and they themselves have sought to have Mr Ngudjolo and Mr Katanga brought to trial.²
3. According to the Prosecutor, Mr Ngudjolo allegedly committed, jointly with Mr Katanga, thirteen crimes constituting thirteen counts, namely and in order: murder at Bogoro village constituting a crime against humanity (articles 7(1)(a) and 25(3)(a) or (b) of the Statute); murder or wilful killing at Bogoro village constituting a war crime (articles 8(2)(c)(i) and 25(3)(a) or (b) of the Statute); inhumane acts at Bogoro village constituting a crime against humanity (articles 7(1)(k) and 25(3)(a) or (b) of the Statute); cruel or inhuman treatment at Bogoro village constituting a war crime (articles 8(2)(c)(i) or 8(2)(a)(ii) and 25(3)(a) or (b) of the Statute); using children

¹ Transcript of the hearing of 15 July 2008 ICC-01/04-01/07-T49-ENG, p. 2 line 22 – p. 3, line 4: "Good morning, Madam President, your Honours, dear colleagues of the Defence and Legal Representatives of the victims. The Prosecution will now make its closing statement or submissions. Madam President, your Honours, the Prosecution's evidence filed at this confirmation hearing establishes substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are criminally responsible of the crimes as charged in the Document Containing the Charges." and p. 15 lines 18-21: "Therefore, Katanga and Ngudjolo are each responsible for the crimes committed by both FRPI and FNI combatants in Bogoro regardless, regardless of whether they each had authority over the other's subordinates."

² Transcript of the hearing of 15 July 2008, ICC-01/04-01/07-T49-ENG, p. 29, l 22 – p. 30, l 2, Mr Jean-Louis Gilissen: "The human community needs explanations as to what happened in Bogoro. So let them provide such explanation. It is time for them. The time is now. They should be tried fairly and justly, especially fairly and justly, Madam President, your Honours, because in Ituri the people who suffered need justice. Thank you."

Page 45, lines 20-23, Mr Hervé Diakiese: "[...] relying on all this evidence and the statements of the victims I represent, it is our humble hope that you will confirm the charges against the two suspects and that you will commit them for trial by the relevant Chamber."

P. 54, l. 23 – p. 55 l 2, Ms Carine Bapita: "[...] I agree with the submissions of my learned colleagues, but I would like to draw your attention to the fact that sufficient evidence was presented for you now to be able to confirm the charges Mr. Germain Katanga and Mr. Mathieu Ngudjolo are accused of and send them to trial to be accountable for their actions."

to participate actively in hostilities constituting a war crime (articles 8(2)(e)(vii) or 8(2)(b)(xxvi) and 25(a) or (b) of the Statute); sexual slavery following the Bogoro attack constituting a crime against humanity (articles 7(1)(g) and 25(3)(a) of the Statute); sexual slavery following the Bogoro attack constituting a war crime (articles 8(2)(e)(vi) or 8(2)(b)(xxii) and 25(3)(a) or (b) of the Statute); rape following the attack on Bogoro village constituting a crime against humanity (articles 7(1)(g) and 25(3)(a) or (b) of the Statute); rape following the attack on Bogoro village as constituting a war crime (articles 8(2)(e)(vi) or 8(2)(b)(xxii) and 25(3)(a) or (b) of the Statute); outrages upon personal dignity at Bogoro as constituting a war crime (articles 8(2)(c)(ii) or 8(2)(b)(xxi) and 25(3)(a) or (b) of the Statute); intentional attack against the civilian population of Bogoro village constituting a war crime (articles 8(2)(e)(i) or 8(2)(b)(i) and 25(3)(a) or (b) of the Statute); pillaging at Bogoro constituting a war crime (articles 8(2)(b)(xxi) and 25(3)(a) or (b) of the Statute) and, lastly, destruction of property in Bogoro village and surrounding areas constituting a war crime (articles 8(2)(e)(xii) or 8(2)(b)(xiii) and 25(3)(a) or (b) of the Statute).³

4. In the view of the Prosecution, those crimes were allegedly committed in the context of an inter-ethnic armed conflict supported by the Government of the DRC and certain foreign countries such as Uganda and Rwanda.⁴

5. The Prosecutor asserts that the intention was to dislodge Thomas Lubanga's *Union des Patriotes Congolais* (UPC) from Bogoro, which was a strategic strongpoint. He contends that Bogoro paid the price for the presence of UPC combatant units and was therefore wiped off the map. Still according to the Prosecution, the attack allegedly resulted from a common plan devised by Germain Katanga and Mathieu Ngudjolo, whom it considers to be the highest-ranking military commanders of their respective movements, that is, the FRPI and the FNI.⁵ The execution of the common plan allegedly resulted in the massacre of at least 200 people, various acts of

³ "Submission of Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648", Pre-Trial Chamber, 26 June 2008, ICC-01/04-01/07-649-Anx1A, pp. 32-37.

⁴ *Ibid.*, ICC-01/04-01/07-649-Anx1A, paras. 15, 16, 17 and 18.

⁵ *Ibid.*, ICC-01/04-01/07-649-Anx1A, paras. 63-70.

pillaging, murder, homicide, rape of women and the sexual enslavement of many of the latter.⁶

6. On this basis, the Prosecution seeks trial for Mr Ngudjolo and Mr Katanga before the Trial Chamber of the International Criminal Court.⁷ It must first of all be observed that, in order to persuade the Pre-Trial Chamber so to decide, the Prosecution adduced a certain number of evidentiary materials, for the most part comprised of certain witness statements – some anonymous, others not anonymous – which allegedly disclosed the above-mentioned common plan and at the same time demonstrated the responsibility of Mr Ngudjolo and Mr Katanga for the crimes with which they are charged.⁸

7. In order to demonstrate the lack of reliability and relevance – indeed inadmissibility – of certain items of evidence adduced by the Prosecution in order to seek Mr Ngudjolo's committal for trial, Mr Ngudjolo's Defence ("the Defence") considers it essential to attempt to define what is meant by substantial grounds to believe that crimes were committed and to undertake a brief discussion of the conditions for admissibility of evidence in criminal proceedings..

II. Attempt to define the notion of substantial grounds to believe that crimes falling within the jurisdiction of the International Criminal Court have been committed

8. Article 61(1) of the Statute provides for the Prosecution to seek trial at a confirmation hearing. In relation hereto, article 61(5) of the Statute provides:

At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

⁶ *Ibid.*, ICC-01/04-01/07-649-Anx1A, paras. 78-87.

⁷ Transcript of the hearing of 15 July 2008, ICC-01/04-01/07-T49-ENG.

⁸ "Additional List of Evidence", 12 June 2008, ICC-01/04-01/07-584-Conf-Anx1B.

Furthermore, article 61(7) of the Statute provides:

The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed; (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence; c) Adjourn the hearing and request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

9. There are no provisions of the Statute or of the other relevant texts governing proceedings before the Court which define the concept of “substantial grounds”. At the stage of the confirmation of charges, there is clearly no question of deciding on the person’s guilt or innocence. It is simply a matter of the Pre-Trial Chamber verifying whether, in light of the evidence presented by the Prosecution, there are substantial – i.e. serious – grounds to commit that person for trial before the Trial Chamber, and of being satisfied that there are serious grounds to believe that the crimes are attributable to the said persons.

10. The Defence recalls that in the Lubanga case Pre-Trial Chamber I clearly defined the concept of “substantial grounds to believe” by relying in the main on the jurisprudence of the European Court of Human Rights (ECHR). The Chamber stated:

In this regard, in its judgement of 7 July 1987 in *Soering v. United Kingdom*, the European Court of Human Rights (ECHR) defined this standard as meaning that ‘substantial grounds have been shown for believing’. In a joint partially dissenting opinion appended to the judgement in *Mamatkulov and Askarov v. Turkey*, Judges Bratza, Bonello and Hedigan considered that ‘substantial grounds to believe’ should be defined as ‘strong grounds for believing’. Moreover, in that case, the Grand Chamber of the ECHR assessed the material placed before it as a whole.⁹

Accordingly, the Pre-Trial Chamber concluded that:

[F]or the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations. Furthermore the ‘substantial grounds to believe’ standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole. After an exacting scrutiny of all the evidence, the Chamber will determine whether it is thoroughly satisfied that the Prosecution’s allegations are sufficiently strong to commit Thomas Lubanga Dyilo for trial. In

⁹ *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges*, Pre-Trial Chamber I, 29 January 2007, ICC-01/04-01/06-803, para. 38.

this regard, the Chamber will consider the various witness statements in the context of the remaining evidence admitted for the purpose of the confirmation hearing, without however referencing all of them in this decision.¹⁰

11. In light of this jurisprudence, the Defence therefore recalls that the burden of proof lies with the Prosecution and that, accordingly, no argument can be drawn from the fact that no exculpatory evidence was presented. Moreover, it is not sufficient for evidence to be adduced to substantiate the charges; the character and nature of that evidence must also be consistent with its admissibility.

12. Furthermore, the Defence would point out that, contrary to what certain Legal Representatives submit, substantial grounds cannot be confused with an appearance of facts, an idea,¹¹ a possibility,¹² and still less with a simple response to the desire of victims who believe that Mr Ngudjolo and Mr Katanga committed the acts in question.¹³ It is, moreover, helpful to recall the fundamental principle of presumption of innocence governing any fair criminal trial.

III. The evidence adduced by the Prosecution must be sufficiently reliable and relevant to establish substantial grounds to believe that the person committed the acts ascribed to him

13. In the view of the Defence, it is not sufficient for evidence to be adduced, it must also be admissible – its admissibility being conditional *inter alia* on its legality, regularity, reliability and probative value. For, under article 69(4) of the Statute, “[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such

¹⁰ *Ibid.*, ICC-01/04-01/06-803, para. 39.

¹¹ “Written Submissions of Victims a/0333/07 and a/0110/08”, 22 July 2008, ICC-01/04-01/07-693-tENG, p. 10.

¹² “Final Submissions of the Legal Representative of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0044/08, a/0046/08, a/0049/08, 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 and a/0109/08”, 22 July 2008, ICC-01/04-01/07-691-tENG, para. 50.

¹³ “Observations of the Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08 a/0032/08, a/0033/08, a/0034/08 and a/0035/08 on the evidence adduced by the Prosecutor”, 22 July 2008, ICC-01/04-01/07-689-tENG, para. 28.

evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.” Article 69(2) of the Statute further recalls that the presentation of written evidence must not be prejudicial to or inconsistent with the rights of the accused.

14. Henri Capitant attributes three meanings to the term “regularity”. In the general sense, it means

[TRANSLATION] Compliance with a rule, nature of that which complies with the law, in particular with formal requirements (formal regularity). From the perspective of civil proceedings, it relates to a document prepared in proper form (without formal defect or substantive irregularity). Lastly, the quality of that which is constant in its periodicity.¹⁴

15. A condition for the admissibility of evidence in criminal proceedings, regularity requires “fairness” in seeking and obtaining evidence establishing the material truth of the crimes attributed to a person.¹⁵ It should not be confused with legality, also a condition of admissibility of evidence, which

[TRANSLATION] relates to the express prescriptions and prohibitions of the law and the regularity of evidence, which concerns the substantive rules and general principles of criminal procedure.¹⁶

16. A concept on which the ‘theory of admissible criminal evidence’ is based,¹⁷ and hence the principle that the intimate conviction of the judge may not be founded on

¹⁴ ASSOCIATION HENRI CAPITANT, *Vocabulaire juridique*, Paris, Presses Universitaires de France, 1987, p. 697.

¹⁵ For a conceptual approach of fairness, see DE VALKENNEER, CH., *Trickery in the Delivery of Penal Evidence*, Larcier, Brussels, 2000, pp. 109-118 [of French version]. Extensive reference is made to ECHR case law.

¹⁶ See, for example, supported by ECHR case law, DU JARDIN, J., “La preuve en droit pénal et le respect des droits de la défense. Conclusions avant cassation 13 May 1986, in *Liber Amicorum Jean Du Jardin*, Kluwer, Deurne, 2001, pp. 491-494; DU JARDIN, J., “De quelques aspects de l’évolution récente du droit de la preuve en matière pénale”, in *Annales de Droit de Louvain*, Vol. 60, 2000, pp. 145-157; BOSLY, H.-D., “La régularité de la preuve en matière pénale”, in *Journal des Tribunaux*, 1992, pp. 121-128, more specifically pp. 122-126; MASSET, A., “Limites de certains modes de preuve”, in *Les droits de la défense en matière pénale*.

¹⁷ KUTY, F., “L’exigence de loyauté dans la recherche de la preuve pénale”, note sous *Cour militaire* (Ch. Fr. Perm), 18 December 1997, in *Revue de droit pénal et de criminologie*, 1999, pp. 254-268; KUTY, F., “Regard sur la provocation policière et ses conséquences”, observations sous Liège (4^e ch. Corr.), 19 May 1998, in *Journal des Tribunaux*, 1999, pp. 10-12; KUTY, F., “Lorsque Strasbourg déclare que la provocation policière vicie ab initio et définitivement tout procès pénal, observations sous *Cour européenne des droits de l’homme*”, in *Jurisprudence de Liège, Mons et Bruxelles*, 1998, pp. 1155-1156.

illegal¹⁸ or irregular¹⁹ evidence, fairness is the requirement that honest means must be used in the administration of justice. According to Franklin Kutty, fairness in criminal matters consists in the state of mind which, at all stages of the criminal process, must imbue the various judicial participants concerned with respect for human dignity, the rights of the defence and the requirements of morality and dignity imposed on legal proceedings.²⁰

17. In the *Unterpertinger v. Austria* decision of 11 October 1984, the European Commission on Human Rights emphasised the significance of the admissibility of evidence in these terms at paragraph 96: “[TRANSLATION] The rules on admissibility of evidence are, however, of fundamental importance, in that one of the essential elements in a determination of criminal charges is precisely the administration of evidence”.²¹

18. The ECHR often satisfies itself that “those evidential elements which were relevant to the proceedings [...] had been procured in such a way as to guarantee a

¹⁸ KUTY, F., “L’exigence de loyauté dans la recherche de la preuve pénale”, note sous *Cour militaire* (Ch. Fr. Perm), in *Revue de droit pénal et de criminologie*, 1999, pp. 256-257, No. 7: “[TRANSLATION] Evidence characterised as illegal violates a legal or regulatory provision of a substantive or procedural nature, of national or international origin. In particular, this is the case with a violation of a provision of the European Convention on Human Rights or the International Covenant on Civil and Political Rights, a violation of professional secrecy, privacy of mail, or provisions on the suppression of documentary evidence, etc. Similarly, it applies in the case of a violation of a procedural rule designed to ensure the proper conduct of duties of inquiry and investigation, whether stipulated in an international instrument, the Code of Criminal Procedure or in particular legislation or regulations.”

¹⁹ KUTY, F., *idem*, p. 257: “Moreover, evidence obtained through an unfair act will also be characterised as irregular. It is thus a matter of having regard for the values considered essential for the proper administration of justice, but which cannot be formulated as such in a text. Accordingly, evidence obtained in violation of a general principle of law, respect for human dignity or the rights of the defence will be unfair and, hence, characterised as irregular.”

²⁰ KUTY, F., “L’exigence de loyauté dans la recherche de la preuve pénale”, in *Revue de droit pénal et de criminologie*, 1999, p. 266 No. 24.

²¹ KUTY, F., *Justice pénale et procès équitable. Notions générales. Garanties d’une bonne administration de la justice Volume I*, De Boeck & Larcier, Brussels, 2006, note 2081.

fair trial.”²² [...] “[TRANSLATION] it is for the Court to be satisfied that the evidence was presented in such a way as to guarantee a fair trial.”²³

19. In respect of the evidence presented by the Prosecutor, the Defence would invite the Pre-Trial Chamber to examine closely the conditions of admissibility of the said evidence and, hence, the probative value to be assigned to it. The Defence believes that certain items of evidence produced by the Prosecution lack full probative value, or are indeed inadmissible, since their production did not comply with all of the necessary conditions for admissibility. Under article 61(6)(b) of the Statute, Mr Ngudjolo has the right to challenge the evidence produced by the Prosecutor. The Defence will now proceed to conduct such a challenge, on the basis of a critical analysis of the evidence.

IV. The Prosecutor’s evidence tested against the conditions for the admissibility of evidence

20. The Prosecutor relies primarily on the statements of nineteen direct and indirect witnesses and three summaries in order to establish that there are substantial grounds to believe that Mr Ngudjolo committed the acts with which he is charged. At the hearings of 3 and 4 July 2008, the Prosecutor presented a series of extracts from the said statements. His strategy consisted in bringing these extracts together so as to produce a purportedly logical and unblemished account. However, the Defence points out that the Prosecutor, disregarding the poor quality of the evidence submitted by him, failed to enlighten the Chamber as to the reliability of his sources,²⁴ and thus to establish the degree of relevance and probative value of the

²² ECHR, *Barberà, Messegue and Jabardo v. Spain*, Judgment of 6 December 1988 issued in plenary session, para. 83, referenced by KUTY, F., *idem*, footnote 2098.

²³ ECHR, *A.H.P. v. Belgium* Partial Decision on Admissibility of 18 September 2001 rendered unanimously, no. 49104, para. 8, referenced by KUTY, F., *ibid.*, footnote 2101.

²⁴ Reliability is an implicit requirement of admissibility. See, *inter alia*, ICTY, *Prosecutor v. Zejnil Delalic et al*, *Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence...*, Case No. IT-96-21, Trial Chamber, 19 January 1998, para. 32 and, more generally, paras. 28-37 on admissibility, see <http://un.org/icty/celebici/trialc2/decision-e/80119EV2.htm>.

evidence adduced. In fact, the Prosecution started from the premise of the overall admissibility of the evidence submitted to the record.

21. The Defence notes that the Prosecutor's narrative presentation in no way established the admissibility of the evidence and/or its probative value. The Defence observes that in its closing remarks the Prosecution recalled, somewhat symptomatically, that the documents cannot be read in isolation and must be analysed in light of the list of evidence.²⁵ The Prosecution thus appears to be shifting the burden of proof and delegating it ultimately to the Chamber. Accordingly, the Defence respectfully submits that, in so doing, the Prosecution has departed from the requirements of articles 69 and 67(1)(i) of the Statute by assuming the overall admissibility of evidence²⁶ without showing in what way that evidence is legal, reliable, relevant, probative and hence admissible, and without considering the prejudicial effects of that evidence on the fairness of the trial at its pre-trial stage.

22. The Defence intends to demonstrate to your Chamber how certain evidentiary materials are not reliable or admissible on account of their nature and/or source, or how, for manifold reasons, they have only limited probative value, or cannot guarantee the fairness of the criminal proceedings. It is for this Chamber, in light of article 69 of the Statute and of the discretion which it enjoys, to assess the evidence submitted by the Prosecution. In this sense – and contrary to what certain Legal Representatives claim – it is not enough for the Office of the Prosecutor to limit itself to substantiating the charges in accordance with article 61(5) of the Statute, but the evidence on which it bases its position must also be reliable, relevant, probative and admissible.²⁷ Contrary to what the Legal Representative of Victims a/0333/07 and a/0110/08 submits, not only is the Defence in no way confusing the concepts which may lead to evidence being dismissed, but it also confirms that problems inherent to

²⁵ Transcript of 15 July 2008, ICC-01/04-01/07-T49-ENG, p.8: "The Prosecution would like to recall that any document or statement of a witness cannot and should not be analysed in isolation. Documents or statements have to be analysed against the entirety of the Prosecution's list of evidence."

²⁶ See "Prosecution's Observations Addressing Matters that Were Discussed at the Confirmation Hearing", 22 July 2008, ICC-01/04-01/07-692, para. 6.

²⁷ ICC-01/04-01/07-689, *op. cit.*, para. 25; ICC-01/04-01/07-691, *op. cit.*, para. 48.

the evidence subsist – problems which must be dealt with in accordance with the above-mentioned provisions of the Statute. Such an examination is necessary in order to assess the substantial grounds, since it fundamentally affects the rights of the Defence.²⁸ The stage of the proceedings cannot provide a pretext for dispensing with a rigorous examination of the evidence in the record.

23. In these submissions, the Defence will develop the main objections it raised orally at the confirmation hearing, that is: hearsay evidence (1), statements and documents relating to deceased persons (2), interviews with minors (3), use of uncorroborated summaries (4), photographs (5), preventive relocations by the Office of the Prosecutor (6), various parties' contact with witnesses prior to interviews (7), dual witness-suspect status (8), dual witness-victim status (9), and similar facts (10).

1. Hearsay evidence

Preliminary remark

24. Of the witnesses called by the Prosecutor, some were not present at the Bogoro attack. Moreover, in order to establish the existence of substantial grounds, the Prosecution cites United Nations reports or documents from Non-Governmental Organisations (NGOs). Such evidence is hearsay. Although hearsay evidence is not automatically excluded in international criminal law, it must be stated that it is for the Prosecution to prove its relevance and probative value.²⁹ This obligation is all the greater since at this stage the Defence has not had the opportunity to cross-examine

²⁸ ICC-01/04-01/07-693, *op. cit.*, p. 9. See also ICC-01/04-01/07-691, *op. cit.*, para. 47.

²⁹ ICTY *Prosecutor v. Naser Oric*, Case No. IT-03-68, Judgement, Trial Chamber, 30 June 2006, para. 23: <http://www.un.org/icty/oric/trialc/judgement/ori-jud060630e.pdf>;

see also *Prosecutor v. Brdjanin*, Case No. IT-99-36, Judgement, Trial Chamber, 1 September 2004, para. 29: "With respect to documentary hearsay evidence, the Prosecution must prove its relevance and probative value beyond reasonable doubt, whereas the Defence is only required to prove the relevance and probative value of such evidence on a balance of probabilities." <http://www.un.org/icty/brdjanin/trialc/judgement/brd-tj040901e.pdf>.

the Prosecution's witnesses, such cross-examination being, however, necessary where indirect evidence is presented.³⁰

25. The Defence also emphasises that the particular context in which the hearsay arose must be taken into account. In this respect, the ICTY has held that the circumstances of testimony must be considered in order to assess its probative value, stating:

For the reasons inherent to an armed conflict, thousand of people are displaced, detained or even killed. Under such conditions, it can be expected that the witnesses will refer to events which others, and not they themselves, experienced. This, however, may be considered only on the basis of parity between the parties and on respect for the rights of the accused as expressed in internationally recognised standards.³¹

Your Chamber must therefore be particularly mindful of the context surrounding the hearsay in the instant case.

26. In order to permit a serious assessment of the hearsay evidence brought by the Prosecutor, the Defence wishes to cite the *Parphat* judgment recently issued by the Appeals Court of the District of Columbia in the United States, which sets out certain requirements for the admissibility of hearsay evidence. These requirements may, *mutatis mutandis*, guide your Chamber in a number of ways.³² The Court stipulated various prerequisites, including reliability and probative value, as criteria for the

³⁰ ICTY, *Prosecutor v. Zlatko Aleksovski*, *Decision on Prosecutor's Appeal on Admissibility of Evidence*, Case No. IT-95-14/1, Appeals Chamber, 16 February 1999, para. 15, see

<http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm>:

"Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence."

³¹ ICTY, *Prosecutor v. Blaškić*, *Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability*, Case No. IT-95-14-T, Trial Chamber, 21 January 1998, para. 4.

³² *Parphat v. R. Gates*, Secretary of Defense *et al.*, US Court of Appeals for the District of Columbia Circuit, 06-1397, 20 June 2008, <http://www.fas.org/sgp/jud/parhat.pdf>.

admissibility of evidence.³³ Moreover, the Court considered that 1) knowledge of the information source is imperative;³⁴ 2) the Defence must possess exculpatory evidence in order to assess the value of the hearsay evidence on the Prosecution's point(s);³⁵ and 3) repetition of similar information is not a sufficient ground to demonstrate the reliability of hearsay evidence.³⁶

27. Lastly, the Defence wishes to make it clear that, contrary to what the Prosecution maintains, the concept of hearsay is in no sense the panacea of national jurisdictions.³⁷ Hence, this analysis, which makes reference to certain national systems, as well as to further developments from decisions of the *ad hoc* international tribunals, is entirely consistent with the objective and purpose of the Court and the

³³ *Ibid.* p. 25: "As the Supreme Court explained in Concrete Pipe, in the course of discussing the nature of "the burden of showing something by a 'preponderance of the evidence': "Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty".

³⁴ *Ibid.* p. 2: "The Tribunal's findings regarding the Uighur group rest, in key respects, on statements in classified State and Defense Department documents that provide no information regarding the sources of the reporting upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability".

³⁵ *Ibid.* pp. 20-21: "Finally, the government relies on the interview report of a single Uighur detainee, Akhdar Basit, which states that Basit told the interviewer that a leader at the camp told him that the camp....In any event, the government's reliance on Basit's interview report is problematic because the CSRT was not provided with exculpatory evidence on the same point...Because the Tribunal was not afforded the opportunity to consider contrary evidence, we cannot conclude that reliance on the interview report "was consistent with the standards and procedures specified by the Secretary of Defense." DTA para. 1005(e)(2)(C)(i). We express no opinion as to whether the Recorder's failure to present exculpatory evidence to the CSRT serves as an independent ground for invalidating the Tribunal's entire determination. And p.30: "Indeed, the Navy Memorandum expressly directs agencies with "reasonably available information . . . bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant" either to provide the information to the Tribunal or to provide "an acceptable substitute," which "may include an unclassified or, if not possible, a lesser classified, summary of the information." *Navy Memorandum at E-1 § E(3)*".

³⁶ *Ibid.* p. 28: "First, the government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. We are not persuaded....many of those assertions are made in identical language, suggesting that later documents may merely be citing earlier ones, and hence that all may ultimately derive from a single source. Second, the government insists that the statements made in the documents are reliable because the State and Defense Departments would not have put them in intelligence documents were that not the case. This comes perilously close to suggesting that whatever the government says must be treated as true, thus rendering superfluous both the role of the Tribunal and the role that Congress assigned to this court".

³⁷ ICC-01/04-01/07-692, *op. cit.*, para. 8.

statutory provisions governing it, including article 21. Accordingly, this analysis has the potential to assist your Chamber in its assessment of the substantial grounds.

United Nations and other reports

28. Regarding the use of UN or NGO reports, the Defence submits that it has been emphasised, *inter alia* in ICTY case law, that their admissibility is contingent on a preliminary demonstration concerning the reliability of the methodology used in the compilation of the information contained in the said reports, on account of the inherent nature of such reports, namely hearsay.³⁸ A control of this kind is essential, in that investigations in the field may vary greatly in terms of quality and are often far from meeting the criteria and guarantees governing criminal investigations.

29. The Defence points out that the Prosecution was unable to explain the methodology used and, hence, the reliability of these reports. Furthermore, the Defence also notes that the sources cited in the reports are neither identified nor

³⁸ See ICTY, *Prosecutor v. Milutinovic et al.*, *Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams*, Case No. IT-05-87, 1 September 2006, <http://www.un.org/icty/milutino87/trialc/decisione/060901.pdf>, para. 14: "Attachment Four, like the two reports, does not provide the Trial Chamber with any basis for assessing the reliability of its contents. Additionally, the attachment, like the reports, "do[es] not identify the persons interviewed, leaving the sources of [its] critical information largely anonymous." The Witness, like Ms. Mitchell, played "a supervisory role with regard to the collection and analysis of the information gathered from persons" and "did not state [in the letter] that [the Witness] ever took any of these statements". These similarities alone likely would be enough to preclude the Trial Chamber from finding Attachment Four reliable, but there is one salient dissimilarity which underscores the Prosecution's failure to establish the reliability of the attachment in question. Unlike the evidence proffered through Ms. Mitchell and Mr. Abrahams, Attachment Four is not presented along with a substantive description of the Organisation's "methods ... for recording the [testimonial] information contained in [the attachment]." The methods for calculating the attachment's statistical information are described but the Witness's letter simply states that the Kosovo Emergency "[u]dates set out *inter alia*, the reason refugees gave, when interviewed by our staff, for leaving Kosovo." There is no explanation of the conditions under which the interview occurred, the amount of time they lasted, the number of people interviewed, the questions asked, the consistency with which the questions were posed or any number of details which would enable the Trial Chamber to decide upon Attachment Four's reliability. In addition, the fact that the statements in the attachment constitute second-hand or even more removed, hearsay serious weakens whatever probative value they might otherwise possess. The Prosecution has therefore not demonstrated that the attachment meets the requirements of rule 89. Assuming for the sake of argument, that it were admissible, the Trial Chamber would decline to admit the attachment because under the circumstances fairness would require that those who have made the accusations concerning Serb forces – or, at the very least, those who claim to have heard such accusations made – appear for cross-examination, and that is not presented as an option".

identifiable. One very telling example of the low probative value to be given to such reports lies in the Prosecutor's stance on the alleged admission of the facts by Mr Mathieu Ngudjolo. Despite the fact that your Chamber ordered the Prosecution to modify the document containing the charges by striking out paragraph 92 citing Mr Ngudjolo's so-called admissions,³⁹ the Prosecution returned to these alleged admissions when presenting its case. Once again, the Defence points out that this is pure hearsay, whose sources are not identified in any way.

30. Thus, in its oral submissions, the Prosecution referred to the United Nations Secretary-General's report to the Security Council.⁴⁰ The Defence points out that this document does not *per se* constitute admissions by Mr Ngudjolo and can in no way be interpreted as such. The same applies to the MONUC report on the basis of which the Prosecution concludes that Mr Ngudjolo made admissions.⁴¹ Moreover, the Defence is of the opinion that, insofar as the circumstances of the MONUC investigation are unknown, there is no ground for according probative value to the information set out in the report in question. It should be noted that, if Mr Ngudjolo was being questioned as a suspect, article 55 of the Statute should have been applied, which was not the case.

31. Furthermore, it is common knowledge that field investigations relating to human rights are not comparable to judicial investigations *stricto sensu*. It is obvious that, for the abovementioned reasons, the information contained in the MONUC report is in no way admissible. The Defence thus has no wish to revisit the arguments set out at length by way of application⁴² – which, it recalls, led to the removal of paragraph 92 from the document containing the charges. On the other hand, it does wish to direct your attention to the inadmissibility of the documents

³⁹ *Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document*, Pre-Trial Chamber I, 25 June 2008, ICC-01/04-01/07-648, para. 35.

⁴⁰ DRC-OTP-0129-0267 at page 288.

⁴¹ DRC-OTP-0152-0286 at page 304, para. 67.

⁴² *'Requête de la Défense de Monsieur Mathieu Ngudjolo en vue de solliciter la suppression du paragraphe 92 du document relatif à la notification des charges en application de l'Article 61-3-a du Statut'*, Pre-Trial Chamber I, 10 June 2008, ICC-01/04-01/07-575-Conf.

relied on by the Prosecutor in a further attempt to provide evidence of admissions made by Mr Ngudjolo. Thus the Prosecution has founded its argument on the basic assumption that the MONUC report and the report of the Secretary-General to the Security Council are documents whose content is in no way in doubt, without taking the trouble to provide your Chamber with further details as to the manner and basis on which the information was gathered.

32. In the view of the Defence, the UN or NGO reports cannot be used as evidence, since they are essentially compilations of information – at the very most, assessments or commentaries on factual events but in no sense direct sources. In this regard, Knoop stated the following in an analysis of the Kordic case:⁴³

[...] it can be said that intelligence reports insofar as they transmit hearsay information, are eligible for exclusion from international criminal evidence unless the author of report obtained the intelligence information directly from the source or declarant and thus merely collated the materials in the report.⁴⁴

In the present case, there are no such safeguards.

33. The Defence is further of the opinion that your Chamber may legitimately be guided by the aforementioned judgment in *Parphat*, since the source of the information reported in the contested documents is entirely unknown. In the Defence's view, it is not enough to put faith in a report, albeit from the United Nations. Moreover, another parallel with the *Parphat* judgment can be drawn in relation to exculpatory documents, which must be disclosed in such a way as to enable the weight of information reported by hearsay to be fully assessed. In this regard, your Chamber is unable to assess these reports, since all of the exculpatory information which would counterbalance these arguments has not yet been disclosed to the Defence, on account of the Prosecution's extensive recourse to article 54(3)(e) of the Statute.

⁴³ See, *inter alia*, ICTY, *Prosecutor v. Kordic and Cerkez*, *Decision on the Prosecutor Application to Admit the Tulica Report an Dossier into Evidence*, Case No. 95-14/2, 29 July 1999, paras. 19-20, see <http://www.un.org/icty/kordic/trialc/decision-e/90729EV58864.htm>.

⁴⁴ G.J.A. KNOOPS, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer Law International, The Hague, 2005, page 230.

Witness statements

34. As stated above, certain witnesses are not direct witnesses of the acts, but are reporting what others allegedly experienced or heard. This is the case, *inter alia*, for Witness 166, whom the Defence is choosing by way of example.⁴⁵ His statement should be treated with caution for a number of reasons. First, the Defence notes that this individual enjoys a multiple status: as well as being a Prosecution witness, he was questioned as a suspect and has also been granted victim status in these proceedings.⁴⁶

35. Secondly, the witness compiled a list of people who allegedly died during the Bogoro attack⁴⁷ although he was not even present at the events. In the present case, the sources used by Witness 166 are unknown. This has resulted in a flood of hearsay evidence which cannot be considered admissible. No corroborating evidence is provided by the Prosecution on this matter. The Defence is of the view that your Chamber may legitimately be guided both by the jurisprudence in *Lubanga*⁴⁸ and by the abovementioned *Parphat* judgment, in particular since the source of the information is entirely unknown.

36. In this regard, the Defence submits that a reading of the documents relating to Witness 166⁴⁹ fundamentally contradicts the Prosecutor's conclusions at paragraphs 13 and 14 of his observations.⁵⁰ The initial sources of the information are unknown, the first lists having served as a basis for the compilation are not attached,

⁴⁵ The documents relating to this witness are: DRC-OTP-1007-0002, DRC-OTP-1007-0026, DRC-OTP-1007-0027, DRC-OTP-1007-0029, and DRC-OTP-1007-0083.

⁴⁶ On this issue, see point 9 below, "Dual witness-victim status".

⁴⁷ Document DRC-OTP-1007-0029.

⁴⁸ *Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges*, Pre-Trial Chamber I, 29 January 2007, ICC-01/04-01/06-803, para. 106: "Regarding Kristine Peduto's testimony, NGO reports, e-mails and press articles which contain anonymous hearsay evidence, the Chamber will determine their probative value in light of other evidence which was also admitted for the purpose of the confirmation hearing. However, mindful of the difficulties that such evidence may present to the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence."

⁴⁹ DRC-OTP-1007-0002, paras. 66-85.

⁵⁰ ICC-01/04-01/07-692, *op. cit.*, paras. 13 and 14.

and indeed it is not known whether they still exist. The Defence does not have any information on the exact date or location of these so-called interviews. No unredacted information is provided on the nature of one of the intermediaries (*Comité des rescapés de Bunia* [Committee of Survivors from Bunia]). The list on which the Prosecution relies to establish the incriminating acts is, in fact, only a compilation of three lists, whose original source is unknown. This is no longer simple hearsay, but second- or even third-hand hearsay – in respect of information which is of paramount importance for the confirmation or non-confirmation of the charges.

37. Furthermore, in his presentation relating to the charges of destruction of property and pillaging, the Prosecutor grounds his factual basis principally on Witness 166. The said basis is in reality a description presented by this witness. Mr Ngudjolo's Defence points out that the Prosecutor failed to present the context of his statement. Witness 166 states: "I learnt of the destruction in Bogoro through the accounts of the survivors and was able to see it for myself when I returned to Bogoro in August 2005".⁵¹ Hence, the list of property destroyed was established on the basis of hearsay relying on one or more unidentified sources. Witness 166 himself states that he did not return to Bogoro until August 2005, that is, more than a year and a half after the events. Moreover, various witnesses have reported several attacks on Bogoro, in 2001, 2002 and 2003 respectively.⁵² Therefore, it is impossible to establish a causal link – other than by resorting to suppositions – between the destructions and the 2003 attack on Bogoro.

38. In the view of the Defence, the failure to provide context for the statement of Witness 166 leads to a certain distortion of the truth. The Prosecution infers established facts on the basis of the accounts of one person, yet that person did not personally witness them. Furthermore, the arguments set forth by the Legal

⁵¹ Para. 93 of document DRC-OTP-1007-0002.

⁵² See, for example, the statement of Witness 233: DRC-OTP-1007-0061, paras. 26 ff.

Representative of Victims a/0327/07 *et seq.* are based on pure factual conjecture and lack any basis in law.⁵³

39. In light of the above submissions, the Defence is of the view that the documents related to Witness 166 cannot be declared admissible by your Chamber in its assessment of the substantial grounds.

2. Statements and documents relating to deceased persons

40. The Defence notes that Witnesses 258 and 167 are deceased. Firstly and generally, the Defence recalls that it is therefore impossible to test the credibility of their statements by means of cross-examination. Max and Powles have rightly stated that “[a]n ambiguity in a statement by a deceased person where there is no firm ground on which a jury can resolve the ambiguity will render such a statement inadmissible”.⁵⁴ The Defence is of the opinion that the documents related to deceased witnesses should be declared inadmissible *in limine* on the ground of the general impossibility of finding an alternative to cross-examination. Furthermore, in the Defence’s view, the lack of probative value attaching to the evidence of these two witnesses must render their testimony inadmissible pursuant to article 69(4) of the Statute and rule 122(9) of the RPE.

Submissions specific to Witness 258

41. This deceased witness was also interviewed as a suspect.⁵⁵ Mr Ngudjolo’s Defence concurs with the legal arguments set out by Mr Katanga’s Defence in its written submissions.⁵⁶ Furthermore, the Defence notes that the Prosecution has

⁵³ ICC-01/04-01/07-691, *op. cit.*, paras. 34 ff.

⁵⁴ R. MAY and S. POWLES, *Criminal Evidence*, 5th edition, Sweet & Maxwell, London, 2004, p. 195.

⁵⁵ Transcript of interview beginning at reference DRC-OTP-0173-0560.

⁵⁶ “Defence Written Submissions on Fact and Law pursuant to Rule 121(9)”, Pre-Trial Chamber I, 24 June 2008, ICC-01/04-01/07-641-Conf. More specifically, the Defence concurs with the legal arguments set out in paragraphs 31, 38 and 41 to 49 of the written submissions, which emphasise the lack of credibility of a witness who may be considered a co-perpetrator or participant in the common plan, and the problems linked to a suspect’s right to assistance from a lawyer and the right to remain silent.

provided no explanation as to the death of this witness. These factors are additional indications which call into question the reliability of this testimony, which is far from satisfying the basic conditions for admissibility. The Defence submits that, inasmuch as there can be no question of the confirmation hearing having junior status, there is no reason to accord unmerited admissibility to testimony which could not be accepted at trial – if there were to be a trial.

Submissions specific to Witness 167

42. In addition to the legal arguments set out by Mr Katanga's Defence in their oral and written submissions,⁵⁷ the Defence would recall that, in order to consider a document authentic, the Chamber must be satisfied that there are sufficient indications of reliability to warrant its admission,⁵⁸ that is, "some relevance" and

See also the ICTY case law on the admissibility of statements of a deceased person. *Prosecutor v. Milutinovic et al.*, *Decision on Prosecution motion for admission of evidence pursuant to rule 92 quater*, Case No. IT-05-87, Trial Chamber, 16 February 2007, para. 7,

<http://www.un.org/icty/milutino87/trialc/decision-e/070216.pdf>: "(a) the circumstances in which the statement was made and recorded, in particular (i) whether the statement was given under oath; or (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; and whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement that has never been subject to cross-examination, relates to events about which there is other evidence; and d) other additional factors, such as the absence of manifest or obvious inconsistencies in the statement";

See also in the same case *Decision on Prosecution's rule 92 bis Motion*, IT-05-87, Trial Chamber, 4 July 2006, paras. 20-22, <http://www.un.org/icty/milutino87/trialc/decision-e/060704.pdf>;

Prosecutor v. Kordic and Cerkez, *Decision on appeal regarding statement of a deceased witness*, Case No. IT-95-14/2, Appeals Chamber, 21 July 2000, para. 27 <http://www.un.org/icty/kordic/appeal/decision-e/00721EV313608.htm>;

Prosecutor v. Aleksovski, *Decision on Prosecutor's appeal on admissibility of evidence*, Case No. IT-95-14/1, Appeals Chamber, 16 February 1999

<http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm>.

⁵⁷ "Defence Written Submissions on Fact and Law pursuant to Rule 121(9)", Pre-Trial Chamber I, 24 June 2008, ICC-01/04-01/07-641-Conf, paras. 60 to 66.

Transcript of 2 July 2008, ICC-01/04-01/07-T41-ENG, page 10. More specifically, the Defence concurs with the arguments based on the absence of a signature or date and the lack of clarity about where the said manuscripts originate, which does not allow reliable authentication. These factors must lead to the witness statements being declared inadmissible.

⁵⁸ ICTR, *Prosecutor v. Bagosora et al.*, *Decision on Ntabakuze motion to deposit certain United Nations documents*, Case No. ICTR-96-7, Trial Chamber, 19 March 2007, para. 3;

see *Prosecutor v. Bagosora et al.*, *Decision on admission of tab 19 of binder produced in connection with appearance of witness Maxwell Nkole*, Case No. ICTR-96-7, Trial Chamber, 13 September 2004, para. 8, <http://69.94.11.53/default.htm>.

“some probative value”.⁵⁹ It is for the Prosecution to show that an item of evidence is *prima facie* reliable before it can be admitted⁶⁰ – which the Prosecution has failed to do in the present case.

43. Witness 167 presents an account of more than 400 pages, which is better characterised as a dissertation than a journal. This document was clearly intended for publication by its author.⁶¹ It is important to be mindful of this objective; in effect, the document was never produced with the intention of being used in judicial proceedings. In this respect, the Defence notes that the courts in England and the USA exclude the admission of books, journals and articles as evidence.⁶² Accordingly, it would not be proper to grant the document submitted by Witness 167 the same weight which would be granted to documents disclosed for judicial purposes. There is no point in spending any further time discussing the fictionalised, exaggerated or purely literary nature of this account.

44. The “dissertation” produced by Witness 167 is a discontinuous, somewhat contradictory account having no relation to the acts with which Mr Ngudjolo is

⁵⁹ ICTY, *Prosecutor v. Hadzihasanovic and Kubura*, Decision to Unseal Confidential Decision on the Admissibility of Certain Challenged Documents and Documents for Identification, IT-01-47, Trial Chamber, 2 August 2004, para. 38; <http://www.un.org/icty/hadzihas/trialc/decision-e/050802.pdf>.

⁶⁰ In this respect, see ICTY case law, in particular, *Prosecutor v. Naletilić & Martinović*, Decision on the Admission of Exhibits Tendered During the Rejoinder Case, Case No. IT-98-34, Trial Chamber, 23 October 2002, p. 2, see <http://www.un.org/icty/naletilic/trialc/decision-e/25163211.htm>;

Prosecutor v. Naletilić & Martinović, Decision on the Admission of Exhibits Tendered Through Witness Jadranko Martinović, Case No. IT-98-34, Trial Chamber, 3 September 2002, p. 2,

<http://www.un.org/icty/naletilic/trialc/decision-e/11111151.htm>;

Prosecutor v. Kordić and Čerkez, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, Appeals Chamber, 21 July 2000, paras. 18-28,

<http://www.un.org/icty/kordic/appeal/decision-e/00721EV313608.htm>;

Prosecutor v. Aleksovski, ‘Decision on Prosecutor’s Appeal on Admissibility of Evidence’, affaire IT-95-14/1-AR73, Appeals Chamber, 16 February 1999,

<http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm>

⁶¹ See the letter with reference DRC-OTP-0140-522.

⁶² D.D. BLINKA. ‘Practical Inconvenience’ or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703’, (1927) 20 *American Journal of Trial Advocacy* 467, referencing Henry Wade Rogers, *The Law of Expert Testimony* 2nd ed. (1991) (1891).

charged. Moreover, some paragraphs bear no relation to the history of the DRC itself.⁶³ Similarly, the Defence is unaware what the witness' source(s) were.⁶⁴

45. The Defence further notes that certain passages are illegible.⁶⁵ Moreover, the document contains several types of handwriting. Without wanting to set ourselves up as graphologists, we have no assurance as to the author of the account. No study was undertaken to authenticate these documents. The Defence nonetheless notes, following an in-depth examination which it respectfully submits to the Chamber, two main scripts⁶⁶ and two secondary scripts,⁶⁷ which appear to disclose the work of different authors.

46. Furthermore, the document was not prepared at the time of the events; its probative value is thus greatly diminished.⁶⁸ In general, before international criminal

⁶³ By way of example, see evidence referenced under the numbers DRC-OTP-0140-553 pp. 554, 556 and 558, DRC-OTP-0140-577, pp. 578 and 580, DRC-OTP-0140-604, p. 605.

⁶⁴ *Budlong v. Budlong* 136 Atl. 308 (R. I. 1927) "The plaintiff's right to inherit from her father depended on her legitimacy to prove that she was illegitimate the defendant offered a book entitled "Register Warwick Farm," which contained entries in chronological order from 1846 to 1896. The matron of the Warwick poor farm produced the book and testified that four years before the trial she found the book in a desk in the office. The lower court allowed the book in evidence. Held, on appeal, that admitting the book was error since there was no evidence to show the identity of the entrant or his source of knowledge, or that the entries were made pursuant to a duty, and because the entry, relevant to the case, was not made contemporaneously with the facts recorded" in 'Evidence--Admissibility of Book Entries', (1927) 36 *Yale Law Journal* 1184.

⁶⁵ See, *inter alia*, DRC-OTP-0140-664 p. 677, and DRC-OTP-0140-678, pp. 682 and 686.

⁶⁶ See for example DRC-OTP-0140-561 p. 571, DRC-OTP-0140-698 pp. 700, 703, 705, 707, 708, 719, 720, 723, 724, DRC-OTP-0140-839, pp. 842, 843, 844.

⁶⁷ DRC-OTP-0140-867, p. 881, and DRC-OTP-0140-900, p. 924.

⁶⁸ In this respect, Carla Del Ponte emphasised the importance of the contemporaneousness of a document, stating:

"In circumstances in which the Prosecution is reconstructing events sometimes years after the fact, evidence which originates from the time period when the crimes were committed is crucial. Though testimonial evidence could be included in this category of evidence, reference in this section is to contemporaneous documentary, audio or video tape records.[...] But access to contemporaneous records, notes, videos, minutes of meetings, orders, diaries, intercepts and photographs not only creates a clearer picture of what transpired but also provides a more accurate portrayal of the players at the time when viewed in light of the events on the ground.

"[...]Another valuable piece of contemporaneous evidence has turned out to be the personal diaries of those who have been involved, particularly those involved with the most senior political or military leaders. Often these diaries provide a detailed record of what transpired at particular meetings, who was present and what was said, especially when no official records or minutes are kept.[...]", (2006) 4(3) *Journal of International Criminal Justice* 539-558

courts, the contemporaneousness of documents – that is, that they are prepared at the time of the events – is decisive regarding the credibility of the information contained therein.

47. Following an analysis of case law, Knoops notes that the ICTY appears to have established four criteria for determining whether or not a war-journal-type document may be admissible as evidence in international criminal proceedings. These criteria may be presented as follows: (1) whether the document was produced contemporaneously; (2) whether its authenticity can be verified, for example, on the basis of the handwriting; (3) whether the document can be authenticated by verifying that it has not been falsified or altered; (4) the relevance of the content to the process of establishing the truth in respect of the charges.⁶⁹

48. Accordingly, in light of these clear criteria and the above-mentioned factors, the Defence requests that the documents relating to Witness 167 be withdrawn from the discussion on the confirmation of charges, since they are patently inadmissible.

<http://jicj.oxfordjournals.org/cgi/content/full/4/3/539#RFN60>, first published on the Internet on 28 July 2006, Journal of International Criminal Justice Advance Access; see also *Congo v. Uganda* before the International Court of Justice: “In the Congo v. Uganda case, the Court was faced with a very complex set of facts and vast amount of documentation provided by both Parties. It undertook a detailed evaluation of the evidence, examining the origin, authenticity and reliability of each source in addition to its substantive content. The Court stated that it would treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It would prefer contemporaneous evidence from persons with direct knowledge and give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them. *Democratic Republic of the Congo v. Uganda, Judgment*, ICJ Reports 2005, p. 201, para. 61.

⁶⁹ G.J.A. KNOOPS, *op. cit.*, p. 21. Moreover, the Defence notes that the indications of reliability applied for admission as evidence by the case law of the *ad hoc* tribunals include factors which, in the present case, are absent or unverifiable, that is: place where the document was drafted, chain of possession of the document, corroboration of the content of the document with other evidence, nature of the document, whether it is signed or stamped and the form of handwriting. See, *inter alia*, at the ICTR, *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Trial Chamber, 13 September 2004, paras. 8 and 22, <http://69.94.11.53/default.htm>; at the ICTY, *Prosecutor v. Delalić et al., Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence*, Case No. IT-96-21-AR 73.2, Appeals Chamber, 4 March 1998, para. 18, <http://www.un.org/icty/celebici/appeal/decision-e/80304a13.htm>.

3. Interviews with minors

49. The Defence does not challenge interviews with minors *per se*, as certain legal representatives seem to believe.⁷⁰ Rather, it wishes to draw the Chamber's attention to the circumstances of such interviews, which tend to cast doubt on their probative value. This issue is particularly crucial because these children were questioned for hours on end, over several days.

50. Article 54 of the Statute defines the duties and powers of the Prosecutor with respect to investigations. Article 54(1)(b) of the Statute states that he shall:

Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.

This article should be read in conjunction with article 68(1) of the Statute dealing with the protection of victims and witnesses and their participation in the proceedings, which provides:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The Defence considers that these articles clearly impose on the Office of the Prosecutor a duty of greater vigilance and the obligation to take precautionary measures when interviewing minors.

⁷⁰ Contrary to the contention by the Legal Representative of Victims a/0009/08 *et al*, the Defence has never challenged the authenticity of testimony from minors. See ICC-01/04-01/07-690, *op.cit.*, para. 15 ff.

51. In the instant case, the interviews with minors and the consent and/or presence of a responsible adult at such interviews raises problems. Witness 28 was interviewed without the consent of any responsible adult person.⁷¹ Witness 157 states in paragraph 9 of his statement: "I live in the home of [REDACTED] and he has given his consent for me to participate in this interview. However, I do not need him to be present during the interview"⁷².

Furthermore, Child Witness 279 was interviewed with the consent of an unknown person.⁷³ The Child Witness states: "[REDACTED] gave his consent for me to participate in this interview, in the absence of my father who could not accompany me to [REDACTED] for the interview". The Defence knows nothing about the status of this adult person, his relationship to the witness or whether he was present or absent during the interview.

52. In many systems in both 'common law' and 'civil law', interviews with minors are strictly regulated, *inter alia*, to ensure minimum discomfiture to the child and to reduce as far as possible any trauma from the interview.⁷⁴ It is clear that minors are vulnerable and, for that reason, readily influenced. The Defence considers that interviewing minors with the consent and in the presence of a responsible adult is a minimum requirement to guarantee the credibility of their testimony. May and Powles, analysing the conduct of interviews, have highlighted the vulnerability of children.⁷⁵ Similarly, in his writings on child victims of sexual abuse, Damien

⁷¹ Document DRC-OTP-0155-0106.

⁷² Document DRC-OTP-0164-0534.

⁷³ Document DRC-OTP-1007-1077.

⁷⁴ See 'Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children', Great Britain, Home Office Communication Directorate, see <http://www.homeoffice.gov.uk/documents/achieving-best-evidence/>; articles 91 bis to 101 of the Belgian Code of Criminal Procedure; articles 706(47), 706(52) and 706(53) of the French Code of Criminal Procedure; article 864 of the Romanian Code of Criminal Procedure.

⁷⁵ See R. MAY & S. POWLES, Op. cit., page 565. "Since the children, and some vulnerable witnesses, may be more open to suggestion and also more vulnerable to oppression than ordinary witnesses, particular care must be exercised in the conduct of any interviews with them. The mishandling of such an interview may affect a trial at which the witness subsequently gives evidence".

Vandermeersch has expressed views which are fully applicable to the above-mentioned interviews. Advocating the adoption of special techniques, he writes:

[TRANSLATION] Taking a statement from a child-witness poses special problems on account of his/her young age and position. Preparing a legal transcript of the statements and unspoken feelings of a child called before an investigator to give account of the abuse he/she allegedly suffered, is a particularly difficult exercise. The child's description of the events is a function of his/her memory and expression skills. It may also be loaded with feelings and fears that the child finds hard to control.⁷⁶

53. The Defence has many doubts with respect to the manner in which the interviews with Child Witnesses 28, 157 and 279 were conducted and the extent to which these vulnerable witnesses could or could not be influenced by the investigators. In any event, the Defence requests that your Chamber should accord only limited weight to their statements, since there is no clear evidence – if any evidence at all – that the consent of a responsible adult was obtained; nor is there a clear indication that the Office of the Prosecutor took adequate measures, if any, in order to conduct interviews with minors.

54. In his commentary on the Statute, Triffterer contends that "as envisaged in other parts of the Statute (article 42 and 36 para. 8 (b)), the Prosecutor must achieve his goals through the use of personnel/investigators with legal and psychological expertise on trauma and crimes against women and children."⁷⁷ It can legitimately be concluded from this comment that the presence of legal and psychological experts is highly recommended for the conduct of interviews with minors. Such a measure is in keeping with article 54(1)(b) of the Statute and, more precisely, with the Prosecutor's duty to prevent further trauma for victims and witnesses.⁷⁸

55. The Prosecutor made no oral submissions with respect to measures taken for interviews with minors. It was only after the event that he sought to provide some

⁷⁶ D. VANDERMEERSCH, 'La place de la parole de l'enfant dans la problématique des abus sexuels, le point de vue d'un juriste', in *La place de la parole de l'enfant, entre vérités et responsabilités*, P. COLLART and J. SOSSON (eds.), Academia Bruylant, Louvain-la-Neuve, 2007, p. 89.

⁷⁷ O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart and Nomos, Munich, 2008, 2nd ed., p. 1282.

⁷⁸ O. TRIFFTERER, *op.cit.*, p.1081.

clarification.⁷⁹ The Defence observes that an assistant expert in charge of victims from the Office of the Prosecutor was present at the beginning of Witness 28's interview;⁸⁰ a psychologist and assistant expert in charge of victims were present at the beginning of Witness 157's interview;⁸¹ and for Witness 279 reference is made to a forensic psychotherapist.⁸² While not wishing to criticize the Prosecution's motives, the Defence has no means of making any further checks on whether the interviews were conducted appropriately.

56. The Defence further submits that the presence of a legal representative (in the sense of a guardian) appears to have been envisaged by Trial Chamber I in the Lubanga case as a precondition for conducting interviews with minors.⁸³ Furthermore, the Defence submits that the Special Court for Sierra Leone (SCSL) has clearly stated that there is no legal basis for presuming *de facto* that there has been compliance with the rules or practices governing the recording of witness statements.⁸⁴ In the same decision, the SCSL recalled the need to examine this category of testimonies with vigilance.⁸⁵

57. In light of the aforementioned considerations, the Defence requests that only limited probative value be accorded to the testimonies in question. Nothing in the

⁷⁹ ICC-01/04-01/07-692, *op.cit.*, para. 15 ff.

⁸⁰ Para. 2 of witness statement referenced DRC-OTP- 0155-0106.

⁸¹ Para. 1 of witness statement referenced DRC-OTP-0164-0535.

⁸² Para. 1 of witness statement referenced 1007-1077.

⁸³ *The Prosecutor v. Thomas Lubanga Dyilo, Decision on Certain Practicalities Regarding Individuals who Have the Dual Status of Witness and Victim*, Trial Chamber I, 5 June 2008, ICC-01/04-01/06-1379, paras. 67 and 72.

⁸⁴ Special Court for Sierra Leone, *The Prosecutor v. Fofana and Kondewa*, 'Ruling on Defence Oral Application to Call OTP Investigators who Took Down in Writing Statements Of Prosecution Witness TF2-021', SCSL-04-14-T-328, Trial Chamber, 7 December 2004, Para. 15, see <http://www.scsl.org/Documents/CDF/SCSL-04-14-T-328.pdf>.

⁸⁵ *Ibid.*, para. 23: "It is important to mention that in this peculiar and almost extreme case we are confronted with the testimony and out-of-court statements of a prosecution witness, a child witness, who, without equivocation or hesitation, repudiated significant and highly contentious portions of his statements to the investigators, bearing in mind of course, that the testimonies of this category of witnesses should, either as a matter of law or practice, be examined with some degree of judicial vigilance in view of their particular susceptibilities."

arguments put forward by the Legal Representatives or in those advanced by the Prosecution would appear to preclude this request.

4. The use of uncorroborated summaries

58. The Defence is aware of article 61(5) of the Statute, which authorises the use of summary evidence during confirmation of charges hearings. Furthermore, the use of summary evidence is enshrined in the jurisprudence of your Chamber. The Defence notes that, pursuant to the *ex parte* decision of 3 April 2008, reclassified by Decisions 643 and 644 of 25 June 2008, the use of summaries for the statements of Witnesses 243⁸⁶ and 267⁸⁷ was authorised by the Pre-Trial Chamber. The summary of Witness 271⁸⁸ was also authorised by Decision 428 of 25 April 2008.

59. Nevertheless, the Defence would like to cite one of the introductory paragraphs on page 6 of the said decision:

CONSIDERING that, in the current case, [REDACTED] at this stage of the proceedings, the Single Judge is of the view that the use of summaries that corroborates other evidence is not prejudicial to, or inconsistent with the rights of the suspects [...].

An Appeals Chamber judgement rendered in the Lubanga case on 14 December 2006 further supports this paragraph.⁸⁹ Paragraph 40 of this Appeals Chamber judgment stated that:

the use of summaries of witness statements and other documents at the confirmation hearing in relation to witnesses of the Prosecutor whose identities have not been disclosed to the defence prior to the confirmation hearing is, in principle, permissible under the Statute and the Rules of Procedure and Evidence, provided that such summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

⁸⁶ DRC-OTP-1016-0089.

⁸⁷ DRC-OTP-1016-0106.

⁸⁸ DRC-OTP-1019-0223.

⁸⁹ *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision of the Prosecution Requests and Amended Requests for Redactions under Rule 81 of the Rules of Procedure and Evidence"*, Appeals Chamber, 14 December 2006, ICC-01/04-01/06-773.

In paragraph 51 of its judgment, the Chamber underscored the fact that:

this analysis of the European Court of Human Rights is relevant for the present appeal as well: where the Pre-Trial Chamber takes sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of such summaries is permissible. This will have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing. In cases like the present case, the Pre-Trial Chamber will have to take into account *inter alia* that the ability of the defence to challenge the evidence presented by the Prosecutor at the confirmation hearing is impaired not only by the use of anonymous witnesses but also by the use of summaries without disclosure to the defence of the underlying witness statements and other documents.

Consequently, it clearly follows that the use of summaries for facts or uncorroborated statements is inadmissible if, and to the extent that, such use is prejudicial to the interests of the Defence.

60. The Prosecutor has failed to explain why and how the information contained in the summary statements of Witnesses 243 and 271 is corroborated by other information. The only reference to Witness 243, for example, is found on page 25 of the transcript of the hearing of 4 July 2008, in which the Prosecution presents facts provided by this anonymous witness. Corroboration of the facts described by this witness is not demonstrated or even hinted at by the Prosecution. The same applies to the facts described in the summary statement of Witness 271: they are not corroborated. A similar experience, or similar events, undergone by one person does not constitute corroboration of events experienced by another person.⁹⁰ Corroboration of the conclusion at which the Prosecution intends to arrive is not the type of corroboration required. Such corroboration must be intrinsic to the facts presented by the witness.

61. Furthermore, in its written submission, the Prosecution cursorily propounds a new interpretation of corroboration, simply stating, on the one hand, that the information is confirmed by other witnesses (without providing the references for

⁹⁰ See trial transcripts of 4 July, ICC-01/04-01/07-T-43-ENG, pp. 20-32.

their statements), as well as by similarities between the two summaries.⁹¹ It goes without saying that such matters cannot, in any event, be considered corroborative.

62. Non-corroboration of the facts presented in summary statements is prejudicial to the rights of the defence, since none of the information is verifiable and the facts directly relate to the criminal responsibility of Mr Ngudjolo. The Defence considers that such summary statements should be declared inadmissible pursuant to the aforementioned Decision of 2 April 2008.

63. In his oral and written submissions, the Prosecutor argued that the Chamber cannot require corroboration by virtue of the principle laid down in article 66(3) of the Statute.⁹² The Prosecutor considers that the argument of the Defence is legally incorrect. However, such is not the case. The fact is that, in addition to denying the jurisprudence of this Chamber, the Prosecution is obviously confusing two notions, namely evidence under article 66(3) and the use of summaries. While it is true that article 66(3) does not impose any legal obligation to corroborate evidence of sexual crimes, the same does not apply to the use of summaries. Indeed, the use of summaries is permitted, but, as established by the aforementioned jurisprudence, such summaries have to be corroborated and must not be prejudicial to the rights of the defence. The Defence considers that summaries of uncorroborated statements of anonymous witnesses are highly prejudicial to the rights of the defence, *inter alia* because it clearly has no means of verifying the credibility or probative value of such summaries, since it has no information on the said witnesses⁹³ and has never had access to the complete versions of the statements. The Defence considers that, in its attempt to overcome this objection, the Prosecution is trying to usurp the role of final

⁹¹ ICC-01/04-01/07-692, *op. cit.*, para. 21.

⁹² Transcript of 15 July 2008, ICC-01/04-01/07-T-49-ENG, p. 12. and ICC-01/04-01/07-692, *op.cit.*, para. 21.

⁹³ The Defence does not know, for instance whether such persons have a criminal record, whether they were considered as suspects and questioned in accordance with article 55 of the Statute or not, whether they have been relocated, etc. - information that is needed in order properly to assess the evidence tendered by the Prosecutor.

arbiter, which, of necessity, belongs to this Chamber as regards the evaluation of evidence. Consequently, and in the alternative, even if you were to declare such summaries admissible, the Defence considers that only limited probative value should be accorded to them.

5. Photographs

64. The Prosecution presented a number of photographs in support of its case. According to May and Powles, when photographic material is used, "the inspection of the photograph may itself reveal what is sought to be proved".⁹⁴ The photographic documents must therefore help to prove the Prosecution's allegations. In the present case the photographic material has not only not been checked for consistency or potential inconsistency with the records (for instance, basic data such as the correspondence between ballistic impact and type of weapon used by combatants has not been proven by the Prosecutor),⁹⁵ but also cannot as such be regarded as evidence, for the reasons explained hereunder. Photographs of scars will be distinguished from photographs of the Bogoro Institute.

65. The Defence further submits that writers such as Marshall have stated that, before a photograph is admitted into evidence, its authenticity needs to be proven.⁹⁶ The photographer must therefore prove that that he indeed took the photograph and state when and where it was taken; it must also be possible to ensure that the photographs are printed from unretouched negatives. The Prosecution, on whom lies the burden of proof, gave no clarification in that regard during the hearing.

⁹⁴ R. MAY, S. POWLES, *Criminal Evidence*, 5th edition, Sweet & Maxwell, London, 2004, paras. 2-12, page 17: section on "Photographs as evidence".

⁹⁵ On this point, the Defence would emphasise the irrelevance of the analysis presented by one of the Legal Representatives during the confirmation of charges hearing. See transcript of 7 July, p. 11 in English (search for the page in the French version). Moreover, the Defence considers that the final submissions of the Legal Representative of Victims a/0327/07 *et al* are completely irrelevant to admissibility of the photographs. Cfr. ICC-01/04-01/07-691, para. 42 ff.

⁹⁶ *Ndson v. Ashby* [1896] 2 Ch. 1, 21, per A.L. Smith L.J.; Masqsd Ali [1966] 1 Q.B. 688 page 701, per Marshall J., in *Criminal Evidence*, *op. cit.*, 5th edition, paras. 2-11, page 17.

Photographs and scars

66. The Prosecution has presented several photographs of persons showing scars. These photographs particularly concern Witnesses 132⁹⁷ and 287⁹⁸. There are two problems with these photographs: their date and their causal link with the charges.

67. Thus the Defence notes that these photographs are not contemporaneous with the events.⁹⁹ Furthermore, the Prosecution submitted no forensic report supporting a scientific analysis. Hence, it is impossible either to date the origin of the injury or to determine its nature and cause.

68. The Prosecution has not in any way proven the causal link between these photographs and the injuries allegedly caused by the act of a combatant. In its written submissions, the Prosecution merely states that "the photographs are self-evidence" and explains that they illustrate the victims' injuries.¹⁰⁰ Obviously, these statements do not meet the most elementary standards of proof. Consequently, the Defence considers that your Chamber does not have the necessary material to accord any probative value to these photographs. They must therefore be excluded.

Photographs of the Bogoro Institute

69. In support of its case, the Prosecution has submitted photographs of the interior and exterior of the Bogoro Institute. These photographs were taken on 28 February 2007 and 1 March 2007.¹⁰¹ The Prosecution merely states its intention to relate these photographs to an appreciation of the size of the building, of its surroundings and of

⁹⁷ DRC-OTP-1016-0216, DRC-OTP-1016-0217, DRC-OTP-1016-0218, DRC-OTP-1016-0219, and DRC-OTP-1016-0220.

⁹⁸ DRC-OTP-1013-0252, DRC-OTP-1013-0253, DRC-OTP-1013-0254, and DRC-OTP-1013-0255.

⁹⁹ According to information disclosed by the Prosecution, they respectively date from 14 January 2007 and 29 July 2007.

¹⁰⁰ ICC-01/04-01/07-692, *op.cit.*, paras. 23-25.

¹⁰¹ DRC-OTP 1012-0011, 0014,0020, 0024, 0033, 0035, 0036, 0038, 0098, 0099, 0102, 0105 and DRC-OTP 1018-0202, 0203, 0204, 0205, 0206 and 0207.

the first classroom, where a witness was allegedly detained. Nevertheless, the Defence notes that one of the Legal Representatives attempted to present a ballistic analysis, devoid of any basis or relevance.¹⁰²

70. Both certain witnesses¹⁰³ and the Prosecution have spoken of several attacks on Bogoro in 2001, 2002, and 2003 respectively, and of the disturbed situation in Ituri both before and after the third attack on Bogoro on 24 February 2003. Since the Prosecution is unable to demonstrate that these photographs are unquestionably linked to the result of the attack on Bogoro on 24 February 2003, the Defence considers that there is no reason to grant them any probative value. Consequently, the said photographs have to be excluded from the proceedings.

6. Preventive relocation of witnesses by the Prosecutor

71. We would recall that the issue of the preventive relocation of witnesses by the Office of the Prosecutor is currently pending before the Appeals Chamber.¹⁰⁴ In the present case, the Office of the Prosecutor has organised preventive relocation for five witnesses. According to information provided by the Office of the Prosecutor, these are Witnesses 28, 132, 238, 250 and 287.

¹⁰² Transcript of 7 July 2008, ICC-01/04-01/07-T-44-ENG, p. 11-12.

¹⁰³ See, for instance, the statement of witness 233 referenced DRC-OTP-1007—0061, para. 26 ff.

¹⁰⁴ See, in particular, the following documents: "Prosecution's Application for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation", 28 April 2008, ICC-01/04-01/07-453; *Decision on the Requests for leave to appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*, Pre-Trial Chamber I, 20 May 2008, ICC-01/04-01/07-483-Conf; "Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation", 2 June 2008, ICC-01/04-01/07-541; "Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'", 12 June 2008, ICC-01/04-01/07-585; "Defence Response to Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation", 13 June 2008, ICC-01/04-01/07-591; "Observations of the Defence for Mr Mathieu Ngudjolo on the Prosecution Appeal relating to the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation", 3 July 2008, ICC-01/04-01/07-659; "Prosecution's Response to 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation''", 7 July 2008, ICC-01/04-01/07-664.

72. The Defence submits that the ICTR, in the case of *Bizimungu et al.*, handled this crucial question by ordering the Prosecution to produce records of all payments made to Witness D.¹⁰⁵ In the Martić case at the ICTY, both the Chamber and the Prosecution considered that the circumstances under which a witness was relocated cast doubt on the credibility of his testimony.¹⁰⁶ Consequently, the Defence considers, without wishing to question anyone's motives, that your Chamber cannot disregard considerations of this kind and is therefore bound to question the credibility of these witnesses, irrespective of the stage of the proceedings.

73. Furthermore, in its response to submissions made by the Victims and Witnesses Unit, the Prosecution explains that its investigators have ongoing contact with the witnesses and that it can call on field staff to conduct investigations if necessary.¹⁰⁷

¹⁰⁵ ICTR, *The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, Rule 68 of the Rules of Procedure and Evidence, Trial Chamber, Case ICTR-99-50-T, 28 September 2006, see <http://69.94.11.53/default.htm>.

¹⁰⁶ ICTY, *The Prosecutor v. Martić*, Judgment, Trial Chamber, IT-95-11, 12 June 2007, paras. 37-38, <http://www.un.org/icty/martic/trialc/judgement/mar-tjud070612e.pdf>: "Witness MM-003 testified from 8 to 10 March 2006. In its Final Trial Brief, the Prosecution accepted that the evidence of Witness MM-003 should be examined "with care" since "he sought and received assistance from the OTP in order to remain in the country where he is now living". The Defence submitted that this would be a factor negating the credibility of his testimony. On 9 April 2007, the Prosecution sent a letter to the Defence disclosing details of its assistance provided to Witness MM-003 in his asylum case. 37. Witness MM-079 testified on 31 March, 3 and 4 April 2006. In its Final Trial Brief, the Prosecution acknowledged that the evidence of Witness MM-079 should be "scrutinized with care" since "he said that he hoped to receive the assistance of the OTP to remain in the country where he is relocated." Witness MM-079 testified that after his lawyer had suggested that he contact the Tribunal to seek assistance with his asylum, he was interviewed by the Prosecution, and that he was subsequently informed that the Prosecution had written a letter to the authorities of the state where he currently lives to ask that he be allowed to stay there until he finishes testifying at the Tribunal. The Trial Chamber notes that the Defence did not raise objections as to the credibility of this witness. The Trial Chamber notes that both Witness MM-003 and Witness MM-079 sought assistance from the Prosecution, which also provided such assistance to both witnesses. The Trial Chamber therefore considers that there is significant doubt as to the credibility of both witnesses and has consequently given weight only to the parts of their respective evidence which are corroborated by other evidence".

¹⁰⁷ "Prosecution's Response to "Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'", 7 July 2008, ICC-01/04-01/07-664, paras. 12 and 13. In this response, the Prosecution clearly states that: "The Prosecution's adequate discharge of its legal obligations effectively means that it must necessarily have the responsibility to determine the need for protection. Furthermore, in practice, the Prosecution notes that best practices for the assessment of risk and need for protection require input from those closest to the relevant witnesses and their individual circumstances. As stated in the VWU's Observations, the Prosecution is, by default, the entity establishing the first contact with its witnesses. Being in charge of conducting the investigations, the Prosecution will also have the most complete information at its disposal and a full

The Defence finds these statements from the Office of the Prosecutor particularly disturbing and questionable, notwithstanding the Prosecution's submissions,¹⁰⁸ which provide no answer at all to the Defence argument. Knowing that they depend totally on the Office of the Prosecutor for their security, the witness will perforce be manipulated through such dependency ties.

74. It is clear that the preventive relocation measures and their impact on witnesses can only be prejudicial to Mr Ngudjolo's right to a fair hearing pursuant to article 67 of the Statute. On this point, the Prosecution argues that it is the Defence's responsibility to prove that the testimonies were "contaminated";¹⁰⁹ it is patently clear that the sole purpose of this argument is to reverse the onus of proof, such requirement being manifestly inconsistent with the obligations of the Prosecutor. At the very least, if your Chamber admits the testimonies of these witnesses, their probative value should be limited.

7. Contacts between various parties and the witnesses prior to their interviews.

75. Witnesses 28, 157, 161 and 166 in particular mention contacts prior to interview. With respect to Witness 161, the persons and/or institutions who questioned him/her have been redacted. The Defence cannot verify the extent to which these witnesses may have been influenced or even prepared for the statements they agreed to make. Witness 28, who was a minor at the time of the interview, also had prior contact with the investigators.

understanding of the individual circumstances of a witness and the broader context within which the particular witness lives and interacts with the surrounding environment. The Prosecution's investigators are the first point of contact and have ongoing contact with the witnesses and are thus most familiar with their individual circumstances and any change in these circumstances. 13. In addition, the Prosecution has permanent support staff in the field. Members of its Operational Support Unit are designing and executing necessary security procedures relating to the investigations in liaison with the Registry's Security and Safety Section and national and international authorities. Further, the investigators of the relevant case travel through regions where the witnesses reside, collecting information about the situation of the witnesses and those involved in the crimes. The information collected is analyzed in The Hague and conveyed to the Registry, including the VWU".

¹⁰⁸ ICC-01/04-01/07-692, *op.cit.*, para. 30.

¹⁰⁹ ICC-01/04-01/07-692, *op.cit.*, para. 32.

76. The Prosecution has provided no information on the manner in which these interviews and/or preliminary contacts were conducted, the content thereof and the institutions that supposedly conducted them. Yet this is a matter of crucial importance. In the Milutinovic case, the Trial Chamber of the ICTY, citing the jurisprudence of the Appeals Chamber, which interpreted “witness statement” in the broadest sense of the term – that is, notably by including all previous statements made to NGOs, for example – deemed it appropriate that such statements be disclosed to the Defence, since they form part of the Prosecution’s evidence.¹¹⁰

77. In any event, such concerns undoubtedly tarnish the credibility of these testimonies. It is important to bear this in mind in the consideration of substantial grounds, since the Prosecution has not provided proof of the credibility of these witnesses.

8. Dual witness-suspect status

78. The Prosecution presents as witnesses persons initially regarded as suspects and therefore questioned in accordance with article 55 of the Statute. These are, in particular, Witnesses 258, 166, 238 and 250. Witness 250, a key witness in the

¹¹⁰ See ICTY, *The Prosecutor v. Milutinovic et al*, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Findings of Violation of Rule 66(A)(ii)*, IT-05-87, Trial Chamber, 29 September 2006, <http://www.un.org/icty/milutino87/trialc/decision-e/060929a.pdf>. Para. 14: “The Appeals Chamber has held that the term “witness statement”, in relation to Rule 66(A)(ii), is to be interpreted as the “account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime”. This interpretation, read in the light of the Prosecution obligation stated in paragraph 13 above, is broad enough to include statements taken by humanitarian organisations for the purpose of recording allegations of human rights abuses, when these are passed to the Prosecution in order to assist it in identifying potential lines of inquiry which then result in the persons who gave the original statements becoming witnesses in Tribunal proceedings”. Also see para. 17 of the same decision: “In the present case, the OSCE, ICG, and HRW gathered information through the interview forms, which appear to record the actual words of the interviewees, and provided such information to the Prosecution, which then used it as leads. When the Prosecution decided to call as witnesses some of the persons that had previously been interviewed by the OSCE, ICG, and HRW, and included such persons on its witness list, the interview forms became “written statements” within the meaning of Rule 66’s disclosure obligation”.

Prosecution's version of events, was initially a suspect. At the beginning of his interview, he requests the assistance of a lawyer and then the investigators realise that he was a minor at the time of the events and the interview continues.

79. The Prosecution has in no way explained how persons initially regarded as suspects can give credible and accurate testimony while subject to an undoubted burden of suspicion and when, in any event, they would tend to downplay their role and exaggerate that of others.

80. The Defence is astonished that persons questioned as suspects are suddenly granted some sort of privileged witness status, without any attempt by the Prosecution to enlighten the Chamber on the reliability of such witnesses. The Defence accordingly requests that this Chamber accord only limited probative value to the evidence obtained from such witnesses.

9. Dual witness-victim status

81. The Defence is particularly concerned with the dual witness-victim status granted in proceedings before the Court. While there is no statutory provision prohibiting such dual status, does this constitute sufficient reason to accept as automatically admissible the statements of Prosecution witnesses who also enjoy victim status? Nothing could be less certain. Thought needs to be given to this point, and the Prosecution and Legal Representatives must cease repeating that, since it is not prohibited by the Statute, such dual status is permitted, and instead reflect on the consequences that it may have on proceedings before the Court, with respect to the rights both of the defence and of victims. It is not without reason that many centuries-old national systems exclude such dual status. Automatically granting such dual status may in fact result in propositions as dangerous as those submitted, for

example, by certain Legal Representatives, who present victims as witnesses *par excellence* in light of their experiences.¹¹¹ Mob justice is no idle threat.

82. In many national systems, combining the status of witness with that of victim is not accepted. In French law, for example, article 335 of the Code of Criminal Procedure provides that a civil complainant cannot testify under oath (unless both prosecution and defence do not object). The roles of plaintiff and witness are *per se* incompatible. As the French *Cour de cassation* has recalled “[TRANSLATION] [...] a person cannot be both witness and party in the same case”.¹¹² While the civil complainant may be heard, under article 335(6) of the Code of Criminal Procedure his/her statements serve as mere information, not evidence.

83. Similar provisions govern proceedings in other so-called civil law countries. Belgian law, for example, has the same kind of prohibitions and limitations as French law with respect to victims called to testify in a trial.¹¹³ Dual status is also excluded in principle.¹¹⁴ Hence, with respect to the taking of testimony from a civil complainant, Braas states:

[TRANSLATION] [S]uch testimony, being contrary to the very principles of complaint and defence before a court of law, would be irrelevant. The complainant is affected by the injury suffered and a sense of outrage. His/her impartiality is doubtful. Public order is itself opposed to such testimony, for it would tend to encourage perjury.¹¹⁵

Although jurisprudence has tempered these propositions, the fundamental incompatibility attaching to witness-victim status can be readily understood.

¹¹¹ See ICC-01/04-01/07-691, *op.cit.*, especially paras. 21 and 24.

¹¹² Judgment of the *Cour de Cassation*, Criminal Division, 28 January 1958, B. 709.

¹¹³ See article 322 of the Code of Criminal Procedure.

¹¹⁴ FRANCHIMONT, A. JACOBS and A. MASSET, *Manuel de procédure pénale*, 2nd edition, Larcier, Brussels, 2006, p.1049; H-D. BOSLY and D. VANDERMEERSCH, *Droit de la procédure pénale*, 3rd edition, La Charte, Brussels, 2003, p.1132.

¹¹⁵ A. BRAAS, *Précis de procédure pénale*, Bruylant, Brussels, 1950-1051, No. 701 cited by M. FRANCHIMONT, A. JACOBS and A. MASSET, *Manuel de procédure pénale*, 2nd edition, Larcier, Brussels, 2006, p.1049.

84. In Italian law, the testimony of a victim must also be viewed with suspicion and his/her participation has to be limited. As Henham and Mannozi have emphasised, the testimonies of victims must be viewed with suspicion, insofar as they are never neutral witnesses, since they have in particular a direct interest in obtaining redress for the injury suffered and may harbour a desire for revenge.¹¹⁶

85. With respect to compliance with its article 6(3)(d), the ECHR has also clearly defined the limits of victims' role in criminal proceedings. Indeed, in its Decision of 17 January 2006 relating to the situation in the DRC, the Pre-Trial Chamber echoed this jurisprudence in the following terms:

[...] the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on numerous occasions, victims participating in criminal proceedings cannot be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different".¹¹⁷

In endorsing the jurisprudence of the ECHR, the Pre-Trial Chamber was referring to *Berger v. France*¹¹⁸ and *Perez v. France*.¹¹⁹

¹¹⁶ Ralph HENHAM and Grazia MANNOZZI, 'Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis', (2003) 11 (3) European Journal of Crime, Criminal Law and Criminal Justice 289-290: "This type of witness is viewed with 'suspicion' by the judge; a suspicion which can be considered institutionalized since it derives from well-entrenched judicial practice in Italy. According to the jurisprudence of both the Supreme Court of Cassation and the lower Courts, the version of events provided by the witness/injured party must be carefully and prudently evaluated. The law asks that consideration be given to the fact that injured parties are never 'neutral' witnesses, since so far as the accused is concerned, they have a direct interest in compensation for damages or, in any event, a desire for revenge against an individual they consider to be an 'antagonist'. Thus, according to Italian law, the accounts of injured persons must above all else contain certain 'intrinsic' elements (completeness, coherence, congruity, sobriety) and, in addition be accompanied (if possible) by some form of 'independent verification' supporting their reliability".

¹¹⁷ *Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6*, Pre-Trial Chamber I, 17 January 2006, ICC-01/04-101 para. 51.

¹¹⁸ European Court of Human Rights, *Berger v. France*, "Judgment", 3 December 2002, Application No. 48221/99, 48221/99,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=berger&sessionid=11853906&skin=hudoc-fr>.

¹¹⁹ European Court of Human Rights, Grand Chamber, *Perez v. France*, "Judgment", 12 February 2004, Application No. 47287/99, para. 68, see

86. In the case of *Berger v. France*, the applicant complained *inter alia* of unfairness in criminal proceedings where she was a civil complainant before the Court of Cassation. The Government had observed at the outset that, irrespective of the possibilities available to civil complainants under the rules of criminal procedure, the primary purpose of the criminal law was not to compensate their loss, but to prosecute and punish criminal offenders.¹²⁰ The ECHR noted that the applicant could have acquainted herself with the rules governing appeals to the Court of Cassation by reading Article 575 of the Code of Criminal Procedure. That article provides for seven situations in which an appeal to the Court of Cassation by the civil party alone shall be admissible if the prosecution does not lodge an appeal. The restrictive effect of this provision on a civil party's ability to appeal to the Court of Cassation derived both from the nature of the judgments of indictment divisions and from the role accorded to a civil action in a criminal trial. The Court did not agree that civil parties should have an unlimited right to appeal to the Court of Cassation against judgments discontinuing the proceedings. In rejecting the application the Court stated:

In conclusion, the applicant's right to a court as guaranteed by Article 6 § 1 of the Convention was not infringed as a result of the conditions imposed on her for the admissibility of her appeal to the Court of Cassation. Having regard to the role accorded to civil actions within criminal trials and to the complementary interests of civil parties and the prosecution, the Court cannot accept that the equality-of-arms principle has been infringed in the instant case. In that connection the Court agrees with the Government that a civil party cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.¹²¹

87. In the case of *Perez v. France*, the ECHR¹²² recalled:

Nonetheless, the fact is that the Court of Cassation accepts the principle of civil proceedings for purely punitive purposes, which may explain why legal theory refers indiscriminately to “civil proceedings for punitive purposes” and to “civil-party complaints for punitive purposes”. The Court considers that in such cases the applicability of Article 6 has reached its limits. It notes that the Convention does not

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=perez&sessionid=11854368&skin=hudoc-fr>.

¹²⁰ Case of *Berger v. France*, *op.cit.*, para. 24.

¹²¹ *Ibid.*, para. 38.

¹²² Case of *Perez v. France*, *op.cit.*

confer any right, as demanded by the applicant, to “private revenge” or to an *actio popularis*.¹²³

88. In light of this jurisprudence, the Defence submits that dual witness-victim status remains an unnatural alliance. However, if your Chamber continues to endorse this dual status, the weight that should be accorded to the testimony of these witnesses in terms of probative value ought to be substantially limited.

10. Theory of similar facts

89. The Defence notes that the Prosecutor has attempted to make up for the weakness of his evidence by presenting facts that are unrelated to the charges against Mr Ngudjolo. This strategy brings to mind article 93 of the RPE of the *ad hoc* tribunals, an article that was not included in the provisions governing the Court. The references to the attacks on Mandro, Tchomia and Bunia are clear examples of this. In attempting to establish proof by analogy, the Prosecution causes harm to Mr Ngudjolo that far outweighs the probative value of the allegations it is making and which is therefore inconsistent with articles 66 and 69(4) of the Statute. It is indeed contrary to the principle of a fair trial to plead facts covered by the presumption of innocence and of which your Chamber is not seized.

90. While it is true that, in confirming the charges against Mr Lubanga, the Pre-Trial Chamber considered that “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”,¹²⁴ the Defence considers that in the present case the Prosecution, contrary to what it claims in its written submissions¹²⁵ has gone beyond enlightening your Chamber on the context of the conduct charged. This strategy infringes Mr Ngudjolo’s rights, since the facts

¹²³ Ibid., paras. 69 and 70.

¹²⁴ *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges*, Pre-Trial Chamber I, 29 January 2007, ICC-01/04-01/06-803, para. 152.

¹²⁵ ICC-01/04-01/07-692, *op.cit.*, paras. 38-39.

presented by the Prosecution do not constitute the subject of the warrant of arrest issued against him, nor do they feature among the charges against him in the document containing the charges. In the case of *Norman et al.*, the SCSL expressed this point in very clear and strong terms:

It would gravely undermine the procedural due process rights of accused persons and thereby bring the administration of justice into disrepute if, at every stage during the conduct of their trial, they are confronted with new pieces of evidence designed to prove factual allegations not specifically pleaded in the indictment, under the guise of a prosecutorial latitude to broaden the definitional scope of the statutory categories of offences chargeable, the effect of which is to bring about an alignment between such expanded category of criminality and evidence in respect of which no factual allegations have been specifically pleaded, on the grounds of a prosecutorial imperative to prosecute the entire spectrum of alleged culpable criminal acts.¹²⁶

The Defence requests that your Chamber should, in like manner, be guided by the principle enunciated by the ICTR in the Bizimungu case, which entails narrowing the indictment.¹²⁷

11. Final comments

Amendment of the document containing the charges

91. The Defence reiterates its oral submissions in regard to the request for amendment of the document containing the charges filed by the Prosecution on 4 July.¹²⁸

¹²⁶ Special Court for Sierra Leone, *The Prosecutor v. Norman et al.*, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, SCSL-04-14-T, Trial Chamber, 24 May 2005, para. 19(iv), <http://www.sc-sl.org/Documents/CDF/SCSL-04-14-T-434.pdf>.

¹²⁷ ICTR, *The Prosecutor v. Bizimungu*, Decision of Prosecutor's interlocutory appeal against Trial Chamber II Decision of 6 October 2003 denying leave to file amended indictment, Case No. ICTR-99-50-AR50, Appeals Chamber, 12 February 2004, para. 19: "On the other hand, amendments that narrow the indictment, and thereby increase the fairness and efficiency of proceedings, should be encouraged and usually accepted", see <http://69.94.11.53/default.htm>.

¹²⁸ See transcript of 4 July 2008, ICC-01/04-01/07-T43-ENG p. 56 lines 14-20 and that of 14 July 2008, ICC-01/04-01/07-T-48-ENG, p. 28.

Production of evidentiary material by victims at the pre-trial stage

92. In his oral and written presentation, the Legal Representative of Victims a/0015/08 *et al* cites evidence tendered by the Prosecutor and submits the claims of the victims he represents as corroboration; in so doing, he indirectly tenders evidence. The rights of victims at this stage of the proceedings do not permit this; nor can the claims of victims be regarded as evidence. The Defence requests that no conclusions be drawn by your Chamber from such material for the purpose of determining whether or not substantial grounds exist.¹²⁹

V. Conclusion

93. The Defence would clearly remind the Chamber, as stated in its oral presentation, that it reserves the right to challenge the charges, the common plan, the modes of responsibility and the involvement of Mr Ngudjolo in the attack on Bogoro. Subsequent challenges to the admissibility of evidence as well as to the Prosecutor's case and theory could follow, for example, if your Chamber should decide to send Mr Ngudjolo for trial. Hence, contrary to the argument that the Legal Representative of Victims a/0333/07 and a/0110/08¹³⁰ appears to be making, the fact that certain material has not been challenged does not in any way amount to acceptance of the facts, the points of law and the substantive issues presented by the Prosecution. Similarly, no conclusions can be drawn with respect to the non-submission of evidence by the Defence, contrary to the contention made by the Legal Representative of Victims a/0015/08 *et al*.¹³¹

94. Furthermore, the Defence would reiterate its concern regarding the role of victims at this stage of the proceedings. Your Chamber has been at pains to point out that the role of victims is not that of a second prosecution. We are bound to note, in light of their submissions, that the Legal Representatives are attempting to assume this role;

¹²⁹ See ICC-01/04-01/07-689, *op.cit*, especially from para. 14 ff.

¹³⁰ ICC-01/04-01/07-693, *op.cit*, p.6 ff.

¹³¹ ICC-01/04-01/07-689, *op.cit*, para. 22.

their viewpoints and concerns, which they are entitled to express, take on the tone of a real indictment. It is, moreover, worth re-stating that Mr Ngudjolo enjoys a presumption of innocence, and that the Defence has a number of rights enshrined in the Statute, including the right to challenge evidence at the confirmation hearing.

95. The Defence ventures to hope that, in light of the objections set out above, and of any other relevant arguments, your Chamber will be concerned to address the issue of whether there are substantial grounds to believe that Mr Ngudjolo committed the crimes with which he is charged in a spirit of total neutrality, independence and impartiality.

FOR THE ABOVE REASONS,

96. The Defence most respectfully requests your Chamber not to base its determination on evidence tendered by the Prosecution which is not reliable, relevant, probative, or indeed admissible, in examining the charges against Mr Ngudjolo.

And justice shall be done.

[signed]

Mr Jean-Pierre Kilenda Kakengi Basila
Permanent Counsel for the Defence of Mr Mathieu Ngudjolo

Done at Brussels, Belgium, on 28 July 2008.