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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

Defence Objections to Admissibility in Principal and in Substance

Source: Defence for Mr Germain Katanga

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

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Introduction

1. At the status conference of 2nd October 2009, the Trial Chamber ordered the Defence to make submissions on the admissibility of evidence.¹ As reflected in the Trial Chamber's invitation, this motion contains both submissions of substance and submissions in principal, meaning that while certain matters can be addressed constructively and completely, on some of the other matters addressed the parties may need to return to specific issues at a later stage. The motion is divided into three parts. Part I addresses the admissibility of statements of fact made by persons now dead whose names appear in the Prosecution's list of incriminating witnesses as W-258 and W-167. Part II addresses the admissibility of the *Procès-verbal d'audition à Kinshasa daté du 20 janvier 2006*. Part III sets out guidelines to assist the Chamber to determine the admissibility of documentary evidence in the course of the trial.

2. The Defence recognises that it has frequently and correctly been held that the jurisprudence developed at the ICTY, ICTR and SCSL is not binding on the ICC Chambers.² The Defence fully endorses Trial Chamber I's reasoning that the procedural rules and jurisprudence of the *ad hoc* tribunals are not "automatically applicable to the ICC without detailed analysis".³ The ICC can take a fresh approach which best suits the exigencies of these proceedings. At the same time, the Defence submits that comparative analysis is particularly relevant in the area of the admissibility of evidence, an area where *ad hoc* tribunals have a wealth of experience and where procedure at the ICC is similar to that adopted at the *ad hoc* tribunals, albeit based upon a different set of rules.

PART I: Statements Made by Persons now Dead

3. The Defence makes the following assertions:

- a. Rule 68 constitutes a bar to the proffering of the evidence of a witness otherwise than in court, save where the Defence has previously been afforded the opportunity to examine him. Accordingly, where the witness dies without

¹ ICC-01/04-01/07-T-72-ENG ET WT, pp. 53-54.

² *Prosecution v. Katanga and Ngudjolo*, ICC-01/04-01/07-648 (PTC1), Decision on the Three Defences' Requests Regarding the Prosecution's Amended, 25 June 2008, paras. 6-10.

³ *Prosecution v. Lubanga*, ICC-01/04-01/06-1049, (TC1) *Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial*, 30 November 2007, para. 44.

the Defence having had such an opportunity, his evidence cannot be adduced for the truth of its contents.

- b. In the alternative, where it is held that rule 68 is inapplicable, provisions regarding the admissibility generally of evidence apply in lieu of rule 68, but must be construed narrowly.
 - i. Rule 68 is *lex specialis*. A court cannot as a general rule of law, use a broad discretionary power to circumvent the specific requirements of a rule, such as the strict standard in rule 68. To do so would effectively render the safeguards of the more restrictive rule meaningless.
 - ii. Even where the said specific rule is inapplicable, evidence must not be admitted applying general rules in a manner which undermines the intentions of the drafters of the specific rule.
 - iii. A strict reading of provisions concerning the admissibility of evidence generally means that the Chamber has to satisfy itself that the rights of the Defence are respected. This includes the right to confront one's accusers and to examine or have examined the witnesses against one.
- c. Exceptions to live testimony are subordinate to the rights of the defence.
 - i. In essence, the Chamber's discretionary power in ruling on the admissibility of evidence is not unlimited, but subject to the rights of the defence. The Defence has not exercised its rights in an effective manner with regard to the unsworn, out-of-court interviews and documents of witness 258, or of the unsworn, out-of-court documents of witness 167. At the same time, these documents raise serious questions requiring the evidence to be tested through cross-examination, and should therefore be pronounced inadmissible.
- d. 'Reliability' and 'prejudicial effect' as components of admissibility.

- i. In the event that rule 68 does not apply, probative value must be strictly construed because it should be viewed in the light of the fact that the evidence will be untested through cross-examination. Probative value is then a component of the admissibility of the evidence in question, and not just its weight. What constitutes sufficient indicia of reliability for the purpose of admissibility will vary depending on whether the safeguard of cross-examination is available. Witness 167's evidence is so lacking in indicia of reliability that it cannot be considered to have sufficient probative value in the absence of cross-examination.
- ii. The prejudicial effect of the evidence of witness 258 (interviews containing the acts and conduct of the accused that cannot be tested through cross-examination) outweighs its probative value (diminished by his status as an accomplice).
- iii. Similarly, the prejudicial effect of the evidence of witness 167 (evidence containing assertions of cannibalism and a flying saucer, for example, that cannot be tested through cross-examination) also outweighs its probative value. These witness statements should therefore not be admitted.
- iv. In the alternative, references to the acts and conduct of the accused should be redacted unless they so significantly undermine the probative value of the remainder of the statement that it is no longer admissible.

Applicable Law

4. Article 69(2) of the Statute provides that:

The testimony of a witness at trial shall be given in person, except to the extent provided by measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may

also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, **as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.**

[our emphasis]

5. Rule 68(a) is designed to give effect to this article and governs the admission of prior recorded testimony. Rule 68 addresses ‘Prior recorded testimony’ and provides in relevant part:

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, **or the transcript or other documented evidence of such testimony:**

(a) **If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the prosecutor and the defence had the opportunity to examine the witness during the recording;**⁴ [our emphasis]

6. While article 64(9)(a) permits the Chamber to ‘rule on the admissibility or relevance of evidence’, this power ‘shall be exercised in accordance with [the ICC] Statute and the Rules of Procedure and Evidence’. According to sub-rule 2 of same, the Trial Chamber shall ensure *inter alia*, that a trial is fair ‘and is conducted with full respect for the rights of the accused’.

7. Similarly, the Court may pursuant to article 69(4), ‘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 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’.

8. The most important, fundamental, minimum guarantee which requires full respect in this context, and which article 69 (2) and rule 68 are partially designed to implement, is that enshrined in article 67(1)(e): ‘the right to examine, or have examined witnesses against him

⁴ No measures under article 56 were taken in the present case.

or her'. It is this principle that in the Defence submission, requires that the admission of statements of dead witnesses be permitted only in the most exceptional circumstances and under strict conditions. This is reflected in the text and purpose of article 69(2) and rule 68.

The Meaning and Applicability of Rule 68

9. In order for rule 68 to be applicable, the evidence in question must fall within the category of material envisaged by it. Textually, this rule refers to 'testimony', as in 'the transcript or documented evidence of such testimony'. The Defence concedes that the word 'testimony' in its ordinary meaning does not embrace all and any statements from a person, but generally refers to evidence given by a person for the purpose of official proceedings, though not necessarily court proceedings, and not necessarily during such proceedings. Black's Law Dictionary suggests a slightly narrower definition,⁵ and defines testimony as "Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition". However, while this reflects the common understanding of the word, it is capable of a broader meaning.

10. For example, the Shorter Oxford English Dictionary defines testimony as 'Personal or documentary evidence or attestation in support of a fact or statement; hence any form of evidence or proof'⁶ Perhaps a more pointed definition is provided by a 1946 edition of Webster's dictionary. It defines 'testimony' as 'a solemn declaration or affirmation made to establish a fact'.⁷ It also defines it more simply as 'evidence, esp. validating evidence; attestation. For its part, the *Petit Robert* defines the French equivalent 'témoignage' as 'déclaration de ce qu'on a vu, entendu, perçu, servant a l'établissement de la vérité'.⁸ It is submitted in light of these definitions, that the ordinary meaning of the word testimony can include written, as well as oral affirmations given for the establishment of the truth.

11. It is also submitted that rule 68 must not only be viewed according to its ordinary meaning, but should be interpreted in its context, and in the light of its object and purpose, as

⁵ Bryan A. Garner (ed.), *Black's Law Dictionary* (St. Paul, Minnesota: West Group), 1999, Seventh Edition, p. 1485.

⁶ Shorter Oxford English Dictionary, Vol II, OUP 1973

⁷ Webster's Collegiate Dictionary, fifth ed., G & C Merriam Co., Publishers, 1946.

⁸ Le Petit Robert 1, 1990.

enshrined in article 31 of the Vienna Convention on the Treaties⁹. While not a treaty *per se*, the Rules of Procedure and Evidence should nevertheless be interpreted in the same way, given in particular that it is a document both with international origin and application.

12. With regard to the context of rule 68, sight should not be lost of the fact that it is essentially an implementation of article 69(2) of the Statute. While setting out the basic premise that testimony at trial should be given in person, this latter provision refers to the possible admission of documents or written transcripts as an exception, without, however, confining such written evidence to testimony *strictu sensu*. Nor does it condition such admission upon any particular formal process in their production, other than the general proposition that admission should not be inconsistent with the rights of the accused.

13. It is in giving effect to this latter condition that rule 68 provides for the requirement that the Defence have had the opportunity to examine the witness. There is no suggestion in the text of article 69 that it only envisages written testimony in the strict sense when reviewing possible exceptions to live testimony. Given that rule 68 is clearly designed to give effect to the Statute, and must be considered subordinate to it, it must be deemed to apply to all forms of evidence from persons given as an assertion of the truth of its contents. This is particularly so with regard to interviews and declarations prepared for legal proceedings, whatever formalities are applied.

14. The object is also derived from article 69, which provides that testimony at trial shall be given in person, and that exceptions should not be prejudicial or inconsistent with the rights of the accused. A central right of the accused is the right to examine witnesses against him, as enshrined in article 67(1)(e) of the Statute. Rule 68 is therefore designed to ensure that the witnesses against the accused give their evidence in person, so that the accused can test that very evidence. In the light of this object, it is then artificial to draw distinctions based upon the formalities adopted when a person gives incriminating information against the accused. These distinctions would effectively drive a coach and horses through rule 68 if its effect could be avoided simply by reducing the procedural safeguards afforded to out of court statements such that they could be classified not to be testimony in the sense *stricto sensu*.

⁹ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

15. Witness 258 provided statements to the Prosecution specifically designed to incriminate the accused for the purpose of these proceedings. It would therefore crucially subvert the purpose of rule 68 to suggest that such statements do not fall within its purview. It is submitted that the transcripts of interview must be deemed to fall within the expression ‘or other documented evidence of such testimony’. While it is possible to take the expression ‘such testimony’ to refer back to its character as audio or video testimony, this is not the only possible interpretation. The expression ‘such testimony’ may simply refer to the testimony, without including its earlier characterisation in the sentence as video or audio. This would indeed make more sense in the context of a reference that envisages the existence of documents in the absence of available video or audio recordings thereof. In the face of this ambiguity, and in the light of the fact that it is possible to classify interviews in legal proceedings within one possible meaning of ‘testimony’, it is submitted that the context and object of rule 68 dictates that it must be taken to cover the interviews of witness 258.

16. The position with respect to witness 167 is a little more contentious to the extent that his evidence was not produced on the initiative of the Prosecution. Nonetheless, it constitutes a series of elaborate assertions produced for the truth of their contents, and now being adopted for the purpose of incriminating the accused in these proceedings. The Defence submits that, while falling into a less clear category than the incriminating statements of witness 258, the evidence of witness 167 also falls within the purview of rule 68. As such, it cannot be introduced into evidence without the Defence having an effective opportunity to challenge that evidence through cross-examination. The evidence of witnesses 258 and 167 must therefore be deemed inadmissible under rule 68.

The Application of General Rules of Evidence

A. Rule 68 as *lex specialis*

17. A court cannot as a general rule of law, use a broad discretionary power to circumvent the specific requirements of a relevant specific rule, such as the strict standard in rule 68.¹⁰ To do so would effectively render the safeguards in the more restrictive rule meaningless.¹¹

¹⁰ Donald K. Piragoff, ‘Article 69: Evidence’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Second Edition (München: C.H. Beck, Hart, Nomos, 2008), p. 1318.

18. In the event that the Chamber disagrees with the Defence on its primary submission on the applicability of rule 68 the *lex specialis*,¹² it is submitted that the general rules of evidence should nevertheless not be employed in a manner that undermines the underlying purpose of this specific rule. If it is the case, as provided in rule 68, that the Defence must have the opportunity to examine a witness in circumstances where he gives his written evidence under oath as a form of testimony for the court, *a fortiori*, where these procedural safeguards are absent. Admission of written evidence should therefore be refused as a matter of discretion if it would place the accused under a worse position than that created in terms of rule 68 where statements are deemed to be testimony.

B. The Evidence of a Proposed Witness Now Deceased is an Exceptions to Live Testimony and Subordinate to the Rights of the Defence

19. It is submitted that a possible exception to live testimony envisaged in article 69(2) is the death of a proposed witness. The drafting process of Article 69(2) reveals that the categories of evidence that the exception was intended to govern is testimony/evidence that was subject to protective measures, or the situation where a witness was unable to testify “because of death, illness, old age or other good cause”.¹³ So, it is irrelevant whether the

¹¹ *Prosecutor v. Kordić*, Case No. IT-95-14/2, Decision on Appeal Regarding the Admission Into Evidence of seven Affidavits and one Formal Statement, 18 September 2000.

¹² See ICC-01/04-01/06-1981, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Admission of Material from the “Bar Table”, 24 June 2009, para. 34 (“Article 69(7) of the Statute expressly regulates the admissibility of evidence obtained by means of a violation of the Statute or internationally recognised human rights. This provision is *lex specialis*, when compared with the general admissibility provisions set out elsewhere in the Statute. Furthermore, Article 69(7) represents a clear exception to the general approach [of the admissibility of evidence]”).

¹³ Donald K. Piragoff, ‘Article 69: Evidence’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (1999), p. 891, citing Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II U.N. GAOR, 50th Sess., Supp. No. 22 UN Doc A/51/22 (1996) pp 217 (Two proposals were submitted during the Prep Com referred to by Piragoff (Japan and France), which both emphasised the importance of live testimony, and that the exception should only pertain to testimony which was not available for trial as the result of exceptional reasons: “1. Procedure for depositions France [page 220 of Prep Com report] Article 122 (Testimony) 1. In principle, the Trial Chamber shall hear witnesses in person. However, in exceptional circumstances and in the interest of justice, the Trial Chamber may, of its own motion or at the request of the prosecutor or the accused, order that a deposition be taken for the purposes of the trial in the manner provided in article 118; Japan [page 217 of Prep Com Report] Evidence 1. The accused shall be permitted full opportunity to examine all witnesses, and he/she shall have the right of compulsory process for obtaining witnesses on his/her behalf at public expense. 2. A document, audio recording, or video recording containing a statement of a person other than the accused, which was given before a judge of the court of a State Party, is admissible in evidence when that person is not able to testify before the Court because of death, illness, injury, old age or other good cause”. Emphasis added.

evidence is currently classified as statements of a ‘witness’ for the purposes of the application of the article to the situation.

20. Reference in article 69(2) to the fact that the exception to live testimony, “is subject to this Statute” and that such measures “shall not be prejudicial to or inconsistent with the rights of the accused”,¹⁴ automatically subordinates the exceptions to the rights of the defence.¹⁵ The introduction of documents or written transcripts pursuant to same is also subordinate to the rights of the defence.¹⁶

21. Similarly, the Chamber’s general power to rule on admissibility or relevance of evidence pursuant to article 64(9)(a) is superseded by the requirement contained in article 64(2), to ensure ‘that the trial is fair’ and ‘is conducted with full respect for the rights of the accused’. The test here is a conjunctive one in that both requirements must be satisfied before admission is so granted. This priority is further confirmed by sub-rule (1), according to which the powers of the Trial Chamber set out in article 64 are to be exercised in accordance with the ICC Statute and Rules (i.e. in accordance with the governing texts, which favour the rights of the defence).

22. Whilst the Court may, pursuant to article 69(4), “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 evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness”, it must do so “in accordance with the Rules of Procedure and Evidence”. As noted above, the Court may only do so subject to the rights of the defence.

¹⁴ As noted by Piragoff, the phrases “prejudicial to” and “inconsistent with” the rights of the accused were resolved uniformly in a disjunctive manner. Donald K. Piragoff, ‘Article 69: Evidence’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Second Edition (München: C.H. Beck, Hart, Nomos, 2008), p. 1303. In other words, the measures to which Article 69(2) refers need not be prejudicial and inconsistent with the rights of the defence for their use to be denied.

¹⁵ See also ICC-01/04-01-1399, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Admissibility of Four Documents, 13 June 2008, para. 22 (“Article 68, which is expressly referred to in the first sentence of Article 69(2) as providing instances where there may be a departure from the expectation of oral evidence, deals directly with the particular exigencies of trials before the ICC, and most particularly there is an express recognition of the potential vulnerability of victims and witnesses, along with the servants and agents of a State, which may require ‘special means’ to be used for introducing evidence. The Court is enjoined to consider the range of possibilities that exist to afford protection, *subject always to the rights of the accused and the need for the trial to be fair and impartial*”). Emphasis added.

¹⁶ Article 69(2) reads in relevant part that the Court may permit “the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused”.

23. The discretion and exercise thereof given by articles 69(4) and 64(9)(a) is also limited by the requirement that the rules applied by a Chamber must be consonant with the spirit of the Court's Statute and Rules,¹⁷ as is rule 63(2).¹⁸

24. Reference to the giving of testimony in person, in the words of the commentary in Triffterer;

Reflects the desire that the primary source of evidence of a witness (i.e. his or her own testimony before the Court) should be available for the purposes of the trial. This permits the best opportunity for the parties to examine and cross-examine the witness and for the Court to ask questions and evaluate the demeanour and credibility of the witness. It also furthers the right of the accused "to examine, to have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her" as guaranteed by article 67 para 1(e).¹⁹

25. Indeed, The Preparatory Commission understood "without prejudice to the accused" in article 69(2) to mean without prejudice to the right of the accused to examine or have examined, prosecution witnesses.²⁰ This right is clearly enshrined in article 67 as a minimum guarantee, to be granted in full equality,²¹ and in rule 140(2)(b), pursuant to which "in all cases, [...] the prosecution and the defence have the right to question that witness about

¹⁷ Article 64 makes explicit reference no less than five times to the provisions of the Statute in general. Furthermore, and as noted by Bitti and indeed by the Working Group in its Report, Article 64(9) duplicates Article 69(4). Gilbert Bitti, 'Article 64', in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Second Edition (München: C.H. Beck, Hart, Nomos, 2008), p. 1217. See also *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-1412-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 20; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18(2).

¹⁸ According to Rule 63(2), "A Chamber shall have the authority, *in accordance with the discretion described in article 64, paragraph 9*, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69". Emphasis added.

¹⁹ Donald K. Piragoff, 'Article 69: Evidence', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), pp. 898-899.

²⁰ See for example, The Draft Proposal Concerning Protective Measures: Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II U.N. GAOR, 50th Sess., Supp. No. 22 UN Doc A/51/22 (1996) page 205 ("[As provided for in article X (A 38 (4) , 43 ILC) of the Statute a1 [the] Trial Chamber may *proprio motu* or] at the request of [either party, the Prosecutor, the accused for of the victim or the witness concerned [or of the Victims and Witnesses Unit] order appropriate measures to protect the privacy and security protection of victims and witnesses, provided the said measures are [consistent with] [not prejudicial to] the rights of the accused [as provided for in the Statute and the rules, in particular the right to examine, or have examined, prosecution witnesses]").

²¹ Article 67(1)(e) (Rights of the Accused) reads as follows, in relevant part: "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her".

relevant matters related to the witness's testimony and reliability, the credibility of the witness, and other matters".²²

26. Of particular note is that ICC article 69 was "very much influenced" by the ICTY Rules of Procedure and ensuing practice there.²³ In *Kupreskić*, the Appeals Chamber described the principle that witnesses as a general rule be heard directly by Judges of the Trial Chambers, as "one of the fundamental principles governing the giving of evidence before Trial Chambers". It held further that every accused person appearing before the Tribunal is granted as one of the "minimum guarantees, in full equality", the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

27. The practice at the *ad hoc* tribunals has demonstrated the importance of cross-examination of witnesses and how written statements are so often not a reliable source of information when compared to testimony *viva voce*. Indeed, former ICTY Judge Patricia Wald has noted in writing on the admission of unsworn and out-of-court witness statements,

I must admit that I find the use of previous witness statements as a substitute for live testimony troublesome. In my short time at the Tribunal I have seen too many instances in which witnesses on the stand have changed, reneged, or even repudiated earlier statements which though closer in time to the events, had not been tested in any way and were unsworn.....There is little doubt that it would be infinitely more efficient for witnesses merely to affirm prior statements than to give

²² This right is subject to Article 64(8)(b) and 64(9), Article 69(4), and to Rule 88. According to Article 64(8)(b), "At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute". Article 64(9) reads as follows: "The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to: (a) Rule on the admissibility or relevance of evidence; and (b) Take all the necessary steps to maintain order in the course of a hearing". For its part, Rule 88 (Special measures) governs special measures available to the Chamber in order to facilitate the testimony of a traumatised witness or victim. Emphasis added.

²³ Hans-Jörg Behrens, 'The Trial Proceedings', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp 244-245. As noted by Behrens, "[d]etailed proposals relating to the question of evidence were submitted in 1996 by various delegations and they were compiled in 1996 PrepCom Report, Vol. II at 207-221; they were then consolidated in an inter-sessional Meeting from 19 to 30 January 1998, in Zutphen, The Netherlands A/AC.249/1998/L.13) (4 February 1998)". *Idem*, fn 80, p. 242. At the relevant time, ICTY Rule 89 (Section 3 Rules of Evidence) (General Provisions) read as follows in relevant part: "(B) In cases not otherwise provided for in this Section, a Chamber shall apply the rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. (C) A Chamber may admit any relevant evidence which it deems to have probative value. (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial". ICTY Rules of Procedure and Evidence, IT/32, dated 14 March 1994.

their testimony and be cross-examined on it. But the excruciating process of facing one's own torturer, reliving awful times and defending one's account on cross-examination may sometimes be indispensable for the integrity of the Tribunal's final product. Certainly, I believe where the testimony is important to a critical issue it should be live.²⁴

28. It is submitted that admission into evidence of a deceased witness's statements, documents, or written transcripts can only occur if the defence has exercised its rights in an effective manner²⁵, or waived its rights (with respect to, for example, non-disputed background evidence, or with respect to moving to have admitted a deceased defence witness statement). As noted above, the Defence has not exercised its rights in an effective manner with regard to the unsworn, out-of-court interviews and documents of witness 258, or of the unsworn, out-of-court documents of witness 167. For this reason and as evidenced further below, the documents in question are inadmissible.

C. Reliability and Prejudicial Effect as Components of Admissibility

29. The Defence follows in part the guidelines set forth by the Trial Chamber in *Lubanga* regarding the admissibility of evidence other than direct oral testimony (i.e. its relevance, its probative value, and its probative value as weighed against its prejudicial effect).²⁶

30. The question of the reliability of evidence may in certain instances become relevant not only to its weight, but also, to the preliminary question of admissibility.²⁷ In the case of

²⁴ Patricia M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court', (2001) 5 *Washington Journal of Law and Policy* 87, at p. 112.

²⁵ *Artico v. Italy* [1981] 3 EHRR 1 para 3 (Fair trial rights should be exercised in a manner that is effective, and not theoretical or illusory).

²⁶ ICC-01/04-01/06-1399, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Admissibility of Four Documents, 13 June 2008, paras 26-31. The Defence duly note with regard to the first consideration, that the evidence in question is indeed relevant.

²⁷ *Prosecutor v. Tadić*, Case No. IT-94-I-T, Decision on Defence Motion on Hearsay, 5 August 1996, paras 15, 19 ("The Trial Chamber is bound by the Rules, which implicitly require that reliability be a component of admissibility. That is, if evidence offered is unreliable, it certainly would not have probative value and would be excluded under Sub-rule 89(C) ["A Chamber may admit any evidence which it deems to have probative value"]" [...]. Accordingly, in deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focussing on its reliability"); *Prosecutor v. Delalić et al.*, Case No. IT-96-21-AR73.2, Decision on Application

witnesses 258 and 167, the question arises whether their evidence can be proffered in written form in the absence of live testimony. Such a scenario closely impinges upon the basic rights of an accused. To the extent then that there is discretion to admit such evidence, this discretion must be exercised with extreme care. Where serious questions arise over the reliability of such evidence, it is submitted that this becomes relevant in the evaluation of the question of whether its prejudicial effect outweighs its probative value, and therefore its admissibility.

31. Whilst there may not be a “finite list of possible criteria that are to be applied” with regard to the indicia of reliability²⁸, the Defence submits that given the prejudicial effect arising out of an inability to cross-examine the maker of the statements, the probative value of the evidence in question must be construed narrowly.

32. In the case of *Aleksovski*, the ICTY Appeals Chamber expressed the view that in terms of the indicia of reliability of a written transcript sought to be so admitted, the Chamber at that time had to take into account whether it was given under oath, subject to cross-examination, or whether it was corroborated by other evidence.²⁹ Other indicia of reliability included for the purposes of admission whether the evidence proffered was given voluntarily, was truthful, and whether it was trustworthy.³⁰

of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, paras 19-21 (The Appeals Chamber, when refusing leave to appeal from a decision of a Trial Chamber, quoted with apparent approval the following observation made by the Trial Chamber: “[I]t is an implicit requirement of the Rules that the Trial Chamber give due considerations [*sic*] to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility”); *Prosecutor v Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 1; *Prosecutor v Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15 (Before hearsay evidence can be admitted, the Trial Chamber must be satisfied “that it is reliable for that purpose [to prove the truth of its contents], in the sense of being voluntary, truthful and trustworthy, as appropriate”); *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal regarding Statement of a Deceased Witness, 21 July 2000, para. 24; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002, para. 18(2).

²⁸ See ICC-01/04-01/06-1399, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Admissibility of Four Documents, 13 June 2008, paras 28-29.

²⁹ ICTY Rule 92bis(C) (Proof of Facts other than by Oral Evidence) of the Rules, IT/32/Rev.37, dated 6 April 2006 and as adopted 1 and 13 December 2000 reads in relevant part: “A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, [...] if the Trial Chamber: (i) is so satisfied on a balance of probabilities; and (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.” This is repeated verbatim in ICTR Rule 92bis(C). See *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal regarding Statement of a Deceased Witness, 21 July 2000, paras 18, 23-28.

³⁰ *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, paras 15-16; *Prosecutor v Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15 (Before hearsay evidence can be admitted, the Trial Chamber must be

33. The absence of the opportunity to cross-examine the person who made the statement, and whether the hearsay is first-hand or more removed, were also relevant to the probative value of the evidence.³¹ The ICTY Appeals Chamber has held that the probative value afforded to such evidence will usually be less than that given to the testimony of a witness who has given it under oath and who has been cross-examined.³²

34. Also, the Trial Chamber in *Kordić and Čerkez* held in relation to material based on anonymous sources or hearsay statements that were incapable of being tested by cross-examination after the close of the defence case, that “the probative value of the evidence is so reduced that it is ‘substantially outweighed by the need to ensure a fair trial’, i.e., to admit it at this stage of the proceedings would violate the accused’s right to a fair trial”.³³

35. In terms of the reliability of the evidence in question in the present case, the Defence notes that the evidence given by witnesses 258 and 167 was not given under oath, that it was not subject to cross-examination, that it has no way of assessing whether it is in fact truthful or indeed trustworthy, and that, based on out-of-court statements, it effectively amounts to hearsay evidence, which in this instance, is sometimes twice removed.

36. In respect of witness 167, the provenance of his evidence, which essentially consists of manuscript documents, is unclear. They are in a deplorable state, difficult to read. The Prosecution have produced them in their original manuscript state without any accompanying typed version. The writer or writers appear to have reused old manuscripts. For instance, the document DRC-OTP-0140-0526 appears to be a compilation of different documents - pages 1, 3, 5, 7, 9, 11, 13, 15, 17, 18, 20 seem to be hand-written - they are not signed nor dated. The documents DRC-OTP-0140-0664 also seem to be a compilation of different documents. In the documents DRC-OTP-0140-0787, 0140-0867, 0140-0964, old manuscripts are reused and some pages crossed out.

- pages 2, 4, 6 represents a table made on a computer;

- pages 8, 10, 12, 14, 16, 21 seem to correspond to previous accounts and are not

satisfied “that it is reliable for that purpose [to prove the truth of its contents], in the sense of being voluntary, truthful and trustworthy, as appropriate”).

³¹ *Prosecutor v Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

³² *Prosecutor v Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

³³ *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Decision On Prosecutor’s Submissions Concerning “Zagreb Exhibits” And Presidential Transcripts, 1 December 2000, para. 39.

signed nor dated;

- page 19 is a letter signed by several persons.

37. The Pre-Trial Chamber considered that the inconsistencies contained in the manuscript documents were such that they could impact upon the manuscript's probative value and, although it admitted them for the purpose of the confirmation, it held that it would “exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution”.³⁴

Evidence from now deceased W-167

38. In determining probative value – and apart from the context of the inability to test the evidence, as well as the rambling nature of his statements – it is further relevant in the case of W-167 to have regard to how his reliability is affected by the nature of some of his assertions. For instance, he states:

Possédant sa soucoupe volante, il se déplace la nuit quand il veut pour des rencontres mystiques avec ses subalterns dans une des grottes naturelles de son choix ou dans le profond lac Mobutuou encore sur diverses chaînes de montagnes et va en occident à la rencontre des Présidents hypnotisés.³⁵

39. At another point he states:

Les combattants Lendus, voulant la forcer, avaient été attaqués et repoussés par ces miraculeuses abeilles montant la garde. Quatre des combattants lendu, piqués par ces abeilles avaient laissé leur peau sur place (...) et ces cruelles abeilles avaient cédé la maison sans causer un autre dégât.³⁶

W-167 was plainly unwell at the time he was seen by the prosecutor and subsequently died. There are indications in his jottings and ramblings (still in manuscript form and barely legible) that his mental state was unsound.

Evidence from now deceased W-258

40. In the case of W-258, reliability must be viewed in the light of his status as an accomplice with self-interest, whose trustworthiness was put into doubt on more than one

³⁴ ICC-01/04-01/07-716-Conf, paras 116, 125.

³⁵ DRC-OTP-0140-0867, page DRC-OTP-0140-0892, handwritten note of Witness 167, undated.

³⁶ DRC OTP-0140-604, page DRC-OTP-0140-0604, handwritten note of Witness 167, undated.

occasion during his interviews. For instance, lead counsel for the Prosecution, who actually conducted the several interviews, stated at one point during interview:

Vous répondez. Quand ça vous touche de plus près ou quand possiblement il pourrait y avoir une implication de votre part, ou vous êtes très près des faits, là, vous êtes plus réticent à répondre. Là, ça semble être plus difficile pour vous de répondre. Votre implication à BOGORO. EMOI ... L'EMOI, je vous posais des questions sur l'EMOI, vous vouliez même pas ... EMOI, EMOI, il y a ...³⁷

41. Another example of such expressed doubts by Counsel is:

Pourquoi ? Mon impression, Monsieur, depuis le début, hein, je vous l'ai dit, depuis le début, mon impression est que ... justement ce qui vous touche, ce qui peut vous impliquer... soit vous protégez votre cousin, soit que vous vous protégez vous-même parce que vous avez des craintes et si c'est... vous avez des craintes, c'est normal. C'est normal et de vos craintes pour faire en sorte que vous n'ayez plus ces craintes-là.³⁸

42. Witness 258 is a person who gave a statement in accordance with Article 55; that is, in response to questioning about the fact that he himself was believed to have committed crimes within the jurisdiction of the Court. He can thus be described as an accomplice or as a co-perpetrator who may seek to inculcate others and exculpate himself.

43. It is submitted that the Court should exercise special diligence when considering the testimony of co-perpetrators. In this regard, the ICTY and ICTR prosecutors may enter into a *nolle prosequi* agreement with prospective witnesses, who are also suspects, which enables the suspect to freely testify without concern that they too, may be indicated by the prosecutor.

44. The ICC Prosecutor does not appear to formally possess the ability to assure a prospective witness that they will not be prosecuted for any offences which arise from their testimony. Nonetheless, the gravity criterion provides a *de facto* immunity, in the sense that since the Court is required to concentrate on those persons who bear the most responsibility, a witness who attributes greater responsibility to another will gain *de facto* immunity from prosecution before the ICC. As such, the testimony of a co-perpetrator must automatically be viewed with suspicion in the light of their clear incentive to maximise the role of others in order to minimise their own involvement.³⁹

³⁷ DRC-OTP-0173-0718, 1. 1191-1199, transcript of interview of Witness 258, dated 11 May 2007.

³⁸ DRC-OTP-0173-0813, 1. 980-985, transcript of interview of Witness 258, dated 12 May 2007.

³⁹ See also *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision On Prosecution's Motion For Clarification Of Oral Decision Regarding Admissibility Of Accused's Statement, 18 September 2003 (The

45. During the interview of witness 258, whilst informing him that the OtP had information confirming he had been a member of the FRPI, an organisation suspected of having committed crimes under the jurisdiction of the Court, the OtP interviewer also informed him of the fact that the Prosecution had a policy to prosecute only the most responsible for the most serious crimes under the jurisdiction of the Court. The interviewer mentioned Lubanga as an example, as if to say ‘don’t worry, we are merely interested in you as a witness’.⁴⁰ In the follow-up discussion, witness 258 firmly states that he indeed has a lot of information and shows a keen interest to be a witness seemingly in an attempt to escape being treated as a suspect.⁴¹ These circumstances are unsatisfactory and clearly undermine the credibility of the information given by him.

46. The *ad hoc* Tribunals have treated the testimony of co-perpetrators with suspicion,⁴² and have excluded such testimony unless the judges were provided an adequate opportunity to observe the demeanour of the witness in court; provided too, that their testimony could be tested through cross-examination.⁴³ The right to a fair trial under Article 6 of the European Convention on Human Rights may be infringed where evidence is given by an accomplice or a co-perpetrator driven by certain incentives, particularly where the witness in question cannot be adequately challenged by the defence.⁴⁴ The US Supreme Court has held “that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination”.⁴⁵

Chamber was seized of the admissibility of the suspect interviews of Dragan Jokić against himself and his co-accused (Blagojević). The Chamber noted that it “is reasonable to expect that any person appearing at such a questioning session may minimise his role in any criminal activities while highlighting or even exaggerating the role of others in order to deflect attention from himself. A suspect appearing for questioning is not required to make a solemn declaration, as is a witness testifying before this Tribunal. Without making any finding about the specific interviews with Mr. Jokić or seeking to make any observation on the character or truthfulness of Mr. Jokić, the Trial Chamber finds that the veracity of any such interview is inherently suspect, and would not be sufficient to establish any facts at issue before it as proven beyond a reasonable doubt”) (para. 24).

⁴⁰ DRC-OTP-0173-0912, page 0173-0918, lines 214-229

⁴¹ See in particular, DRC-OTP-0173-0920, lines 289-291.

⁴² E.g., *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, 2 December 2008.

⁴³ *Prosecutor v. Kordic & Cerkez* Case No. IT-95-14/2-T, 26 February 2001, Judgment. page 215 et seq; *Prosecutor v. Popović*, Case No. IT-05-88-T ‘Decision on the admissibility of the Borovčanin interview and the amendment of the 65 ter exhibit list’ 25 October 2007, especially at paras. 63-65. See also *Prosecutor v. Galić*, *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis (C), 7 June 2002.

⁴⁴ X v UK. No. 7306/75; *Menesis v. Italy*, Application No. 18666/91; *Flanders v. Netherlands*, Application No. 25982/94

⁴⁵ *Bruton v. US*, 391 US 123 (1968). See also *People v. Medina*, 116 Cal. Rptr. 133, 141-46 (Cal. Ct. App.

47. The prejudicial effect arises principally from the fact that witness 258's assertions will form part of the evidence – in the absence, no less, of an opportunity by the Defence to challenge it through cross-examination. It is, in the Defence submission, of concern that the material sought to be admitted is the product of extensive interviews conducted by the principle prosecuting counsel as part of the preparation of his case and not by a neutral questioner. It is of even greater importance that 'the other side' is given the opportunity to question the person in such circumstances. In the case of 258's interviews, these are further fraught with references to the acts and conduct of Mr. Katanga as charged in the Prosecution Charging Document.⁴⁶ In such circumstances, the risk of injustice is too high in the absence of an opportunity to test the evidence through cross-examination.

48. At both the ICTY and at the ICTR at the relevant time (i.e. when the Rome Statute was formally agreed)⁴⁷, the transcript of evidence given by a witness that directly addressed the acts and conduct of the accused could not be admitted in lieu of oral testimony.⁴⁸

1974), where it was stated that holding that "The effect of the condition appended to the immunity orders of each of the principal prosecution witnesses, therefore, was that each of said witnesses was thereby placed by the court in a position of dire peril."

⁴⁶ ICC-01/04-01/07-649-Anx1A, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, 26 June 2008. With regard to the acts and conducts of Mr. Katanga referred to by witness 258, see e.g., DRC-OTP-1015-0562, p. 6, para. 26 ; p. 7, paras 28, 29 ; p. 10, para 45 ; p. 17, para 90 ; p.18, paras 95, 98 ; p.21, para. 113 ; p. 22, para. 121 ; p. 25, para 145 ; p. 26, para 154 ; DRC-OTP-0173-0560, lines 824-825, 835-838 ; DRC-OTP-0173-0718, lines 1093-1097 ; DRC-OTP-0173-0616, lines 98-102 ; DRC-OTP-0173-0755, lines 33-37, 94-106, 213-232.

⁴⁷ Whilst the governing rules of the *ad hoc* tribunals have subsequently been amended, those of the ICC have not. Such amendments favouring a more relaxed approach to the admission of written testimony, including that which goes to the acts and conduct of an accused as charged in the indictment, have met with strong judicial criticism concerning the influence of political and budgetary concerns emanating from the completion strategy on the fairness of the judicial process. See Dissenting Opinion of Judge Hunt, *Prosecutor v. Slobodan Milošević*, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-chief in the form of Written Statements, 21 October 2003, para. 20. The ICTY Completion Strategy was endorsed as early as 2002. See Security Council Resolution 1503 (2003), dated 28 August 2003, in which the Security Council also urged the ICTR to formalise a completion strategy. The ICTR did so in September 2009. See S/2003/964, Letter dated 3 October 2003 from the Secretary General addressed to the President of the Security Council.

⁴⁸ ICTY Rule 92bis (A) (Admission of Written Statements and Transcripts in Lieu of Oral Testimony) (Adopted 1 December 2000 and 13 December 2000, amended 13 September 2006); ICTY Rule 92bis (D) (Proof of Facts other than by Oral Evidence), IT/32/Rev. 37, dated 6 April 2006 and as adopted 1 and 13 December 2000. These rules are reproduced verbatim in ICTR Rule 92bis (A) and 92bis (D), respectively. See *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, paras 10-11("Where the Prosecution case is that the accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92bis(A) excludes also any written statement which goes to proof of any act or conduct of the accused person upon which the Prosecution relies to establish: (g) that he participated in that joint criminal enterprise, or (h) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes. The 'conduct' of an accused person necessarily includes his relevant state of mind, so that a written statement which goes to proof of any act or conduct of the accused upon which the Prosecution relies to establish that state of mind is not admissible under Rule 92 bis"). Emphasis in original.

Furthermore, the ICTY Appeals Chamber has provided the following guidelines for the Trial Chamber in exercising its discretionary power under Rule 92*bis* whether to admit written statements of deceased witnesses that directly addressed the acts and conduct of the accused as charged in the indictment:

The Appeals Chamber provided guidelines for the Trial Chamber in exercising its discretionary power under Rule 92*bis* whether to admit the written evidence at all: “Where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statements describe is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form.”⁴⁹

49. In the alternative, the Defence submits that insofar as the evidence of witness 258 may be admitted pursuant to article 69(4), such admission should be subject to the portions relating to the acts and conduct of the accused being redacted from the statements. Where such redactions undermine the probative value of the remainder of the statement, then it should simply be declared inadmissible.⁵⁰

50. In *Nyiramasuhuko*, the ICTR Trial Chamber denied the Prosecution motion to admit into evidence statements of deceased witnesses that went to the acts and conduct of the accused as charged in the indictment based on the need to avoid prejudice to him.⁵¹ It reasoned that the purpose of the restriction in Rule 92*bis*(A) is to protect the right of the accused pursuant to Article 20(4)(e), “to examine, or have examined, the witnesses against him or her”. Furthermore, the Chamber held that the credibility of deceased witnesses cannot be challenged by the Defence through cross-examination.

⁴⁹ *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 14; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Admission into Evidence of Written Statement by a Deceased Witness, Hamdija Cavčić, and Related Report Pursuant to Rule 98BIS(C), 2 August 2002.

⁵⁰ See *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admission of Statements of Deceased Witnesses, 19 January 2005; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on the Prosecutor’s Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses, 22 January 2003, para. 25; *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Decision on the Prosecution Motion to Admit Hearsay Evidence Pursuant to Rule 89(C), or in the Alternative in Accordance With Rule 92 *bis* (C) of the Rules of Procedure and Evidence, 22 January 2007, para. 12.

⁵¹ *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamadunda’s Motion to Admit into Evidence two Statements by Witness Ger in Accordance with Rules 89(C) and 92*bis* of the Rules of Procedure and Evidence, 20 May 2002, para. 32.

51. The Chamber also recalled the finding by the ICTY Appeals Chamber in *Milošević*⁵², in which the latter observed that “prior statements made to Prosecution investigators by prospective witnesses for the purposes of legal proceedings raise serious issues of reliability that are most effectively tested through the process of cross-examination”.⁵³

PART II: Admissibility of *Procès-verbal d’audition à Kinshasa daté du 20 janvier 2006*

52. One of the documents on the Prosecution list of evidence is the *procès-verbal d’audition à Kinshasa daté du 20 janvier 2006*. The Defence objected to its admission at the confirmation hearing on the ground that the interrogation contained in this *procès-verbal* was conducted in absence of legal representation.⁵⁴ The Pre-Trial Chamber dismissed the objection on the grounds that the DRC has “taken the approach that the presence of defence counsel at preliminary stages of proceedings is not mandatory, an approach which, to date, has not been found inconsistent with the requirements of a fair trial.”⁵⁵ Moreover, the Pre-Trial Chamber held that “it has not been shown that this particular procedure amounted to a violation of internationally recognised human rights, Germain Katanga's lack of assistance by a defence counsel during the taking of the *procès-verbal* does not make the *procès-verbal* inadmissible as evidence per se.”⁵⁶ Accordingly, it found the *procès-verbal* admissible for the purposes of the confirmation hearing.⁵⁷

53. The Defence again challenges the admissibility of this *procès-verbal*. The Defence submits that the Pre-Trial Chamber’s justification for admitting this document contains a number of serious errors which render it unwarranted as a legal precedent. The Defence, therefore, requests the Chamber to consider its arguments previously raised independently of the Pre-Trial Chamber’s views on the matter. The Defence did not seek leave to appeal this particular issue because the Pre-Trial Chamber has made it explicit that “the admission of evidence at [the pre-trial] stage is without prejudice to the Trial Chamber’s exercise of its

⁵² *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002, para. 18.

⁵³ *Prosecutor v. Ntiramasuhuko et al.*, Decision on the Prosecutor’s Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses, 22 January 2003, paras 19-23.

⁵⁴ *Prosecutor v. Katanga & Ngudjolo*, Defence Written Submissions on Fact and Law pursuant to Rule 121(9), 24 June 2008, ICC-01/04-01/07-641-Conf, paras. 15-30.

⁵⁵ *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 97.

⁵⁶ *Ibid*, para. 98.

⁵⁷ *Ibid*, para. 99.

functions and powers to make a final determination as to the admissibility and probative value of any evidence, including, inter alia, (i) any ruling on evidence gathered under article 56 of the Statute as a result of a unique investigative opportunity; or (ii) any prior recorded testimony pursuant to rule 68 of the Rules.”⁵⁸

54. The Defence submits that the Pre-Trial Chamber’s reasoning is flawed for the following reasons:

- (1) It has given an erroneous interpretation to the DRC constitutional right to counsel;
- (2) In considering whether the interrogation of Mr. Katanga in absence of counsel amounted to a violation of internationally recognised human rights, it failed to consider all factual circumstances in which the interrogation was conducted;
- (3) In ruling the *procès-verbal* admissible, it failed to give any consideration to the position at ICC law and the law of the *ad hoc* tribunals in respect of the right to be represented by counsel.

(1) DRC constitutional right to counsel

55. It is respectfully submitted that the manner in which the *procès-verbal* was taken is in complete disregard of Articles 18 and 19 of the Constitution of the Democratic Republic of Congo (“DRC”),⁵⁹ the relevant provisions of which provide:

Article 18(3): "La personne gardée à vue a le droit d’entrer immédiatement en contact avec sa famille ou avec son conseil."

Article 19(3): « Le droit de la Défense est organisé et garanti. »

Article 19(4) : « Toute personne a le droit de se défendre elle-même ou de se faire assister d’un défenseur de son choix et ce, à tous les niveaux de la procédure pénale, y compris l’enquête policière et l’instruction pré juridictionnelle. »

⁵⁸ *Prosecutor v. Katanga & Ngudjolo*, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, 18 April 2008, ICC-01/04-01/07-412, page 5; with reference to ICC-01/04-01/06-774, para 90; reiterated in *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 193.

⁵⁹ I. CONSTITUTION DE LA R.D.C du 18 Février 2006 (<http://www.presidentrdc.cd/constitution.html>) (emphasis added).

56. In particular Article 19(4) clearly sets out the right of any person to be assisted by counsel of his choice at any stage of criminal proceedings including the police investigations and the pre-judicial phase. Pursuant to this provision, it appears evident that the interrogation of Mr. Katanga without giving him the opportunity to be assisted by counsel amounted to a violation of Mr. Katanga's constitutional right to have immediate access to counsel, and at every stage of the criminal proceedings.

57. It is respectfully submitted that the Pre-Trial Chamber's reading of the right to legal representation at all stages of criminal proceedings under the DRC Constitution as being a non-mandatory right was incorrect. Whilst it may not be mandatory on the accused to invoke his constitutional right to counsel at all stages of the proceedings, it would certainly appear to be mandatory upon the DRC authorities to respect the accused's wish to do so. It is his constitutional right. The constitution being the most authoritative legal instrument, embodying rights that cannot be violated, for instance, by relying on other contradictory legislation, the DRC would certainly have to respect the right of the accused to be legally represented at all stages of the proceedings.

58. The only source cited in support of the Pre-Trial Chamber's interpretation of the DRC constitution, is Mr. Diakiese. Mr. Diakiese was not called as an expert on DRC law but he was a victim representative and, thus, a participant in these proceedings. It is obvious that a participant in the proceedings is not supposed to give evidence. Mr. Diakiese has made two submissions to the effect that absence of counsel during the pre-trial phase of judicial proceedings has no impact on the validity of judicial proceedings.⁶⁰ In doing so, Mr. Diakiese made no reference to any authority. So we are left with a single interpretation of the DRC constitution by a Congolese victim representative. With all the respect to our learned colleague, the Defence is surprised that, in finding that the *procès-verbal* was admissible for the purpose of the confirmation hearing, the Pre-Trial Chamber relied solely on the submissions of a participant in the proceedings.

59. It is Mr. Katanga's position that he had wished to be represented by counsel during the interrogation but that his wishes were ignored. That Mr Katanga was unrepresented by counsel at the hearing is plainly reflected by the contents of the *procès-verbal*. This was in

⁶⁰ ICC-01/04-01/07-690-Corr, para. 36; ICC-01/04-01/07-697, para. 16.

violation of his constitutional right to legal representation, a right he has not voluntarily waived.

(2) Factual circumstances surrounding the interrogation

60. The Pre-Trial Chamber held that the right to legal assistance during the pre-trial stage, albeit desirable, does not amount to an internationally recognised human right. In making this determination, it referred to jurisprudence of the European Court of Human Rights (“ECtHR”), holding that “[...] although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.”⁶¹

61. The Defence is indeed aware of the above jurisprudence, which recognises the importance of legal representation at the initial stages of criminal proceedings but does not set it out in absolute terms. This is generally the approach adopted by the ECtHR in interpreting the provisions of the European Convention on Human Rights (ECHR). Rarely does the Court make absolute findings; rather, whether a violation did occur depends on the overall circumstances of the case. The ECtHR is not a Court of Appeal and has no power to order a State to amend its legislation or practice to comply with the standards set out in the Convention. The ECtHR further sets minimum standards, not maximum or desired standards. It should therefore not come as a surprise that the ECtHR has not defined the right to legal representation at all stages of criminal proceedings as an absolute right from which no departure can be made. The Defence never claimed it was an absolute right but requested the Pre-Trial Chamber to exclude the procès-verbal in light of all circumstances surrounding the interrogation. This, in the Defence’s respectful submission, the Pre-Trial Chamber failed to do.

⁶¹ ECtHR, *John Murray v. The United Kingdom*, para. 63. See also *Magee v. The United Kingdom*, para. 41; *Brennan v. The United Kingdom*, para. 45; *Yurttaş v. Turkey*, Judgment of 27 May 2004, Application No. 25143/94 and 27098/95, para. 73; *Ocalan v. Turkey*, Judgment of 12 March 2003, Application No. 46221/99, para. 140 - confirmed by the Grand Chamber in its Judgment of 12 May 2005, para. 131; *Salduz v. Turkey*, para. 22. Cited in *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 94.

62. The Defence submits that Mr. Katanga's right to legal representation during his interrogation on 20 January 2006 was restricted for no good cause. Mr. Katanga already had counsel at the time of this interrogation; it would have been a simple matter to call him. Moreover, the circumstances surrounding this interrogation were such that numerous of his rights were violated, the totality of which should lead to exclusion of the procès-verbal.

63. The hearing of 20 January 2006 was the first hearing since Germain Katanga was arrested on 25 February 2005 by the *Détection Militaire des Activités Anti-Patrie* and transferred to the Central Prison of Kinshasa on 10 March 2005. He had, therefore, been detained for over ten months before he was finally taken before a judge on 20 January 2006 (*la Haute Cour Militaire*). He was never officially notified of the charges against him, nor were they properly explained. Mr. Katanga was, therefore, completely in the dark about the case when he was asked to comment upon it during the hearing of 20 January 2006. Hence, Mr. Katanga was not only deprived of legal assistance when he was interrogated but also of any knowledge of the subject on which he was interrogated. The Defence submits that, in these circumstances, it would not be fair to admit the document. In addition, the document does not have much reliability given that Mr. Katanga's answers were uninformed.

(3) Failure to consider ICC law and law of ad hoc tribunals

64. It is not clear to the Defence why the Pre-Trial Chamber only considered whether the right to be assisted by counsel during a preliminary interview was recognised under the DRC constitution and the ECHR. It stopped its analysis there; it did not continue to consider the position under ICC law and the law of the *ad hoc* tribunals. This is surprising, particularly as far as the position under ICC law is concerned. Pursuant to Article 21(1)(a) of the Rome Statute, the Court shall apply "[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence". Hence, the Pre-Trial Chamber should have considered the ICC law on the issue of counsel.

65. Pursuant to Article 55(2), a person who is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 has the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) **To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.** (Emphasis added)

66. Thus, in ICC investigations, a suspect may only be questioned in the absence of counsel if he or she voluntarily waived his or her right to counsel. Strictly speaking, the Article does not apply to the situation of Mr. Katanga because he was not questioned by, or on behalf of the ICC Prosecutor. The significance of this provision can, however, not be ignored. It is the latest expression of a collective of States, which apply very different domestic legal standards, on the issue of counsel. It is striking that the drafters of the Rome Statute agreed to adopt a provision explicitly requiring that suspects be questioned in the presence of counsel even though, domestically, this right is not always guaranteed. It is therefore an indicator of the kind of standards expected from the ICC. It would be unfortunate if the ICC would have no objection in using evidence which was obtained in violation of the kind of standards it seeks to maintain for its own suspects.

67. Moreover, the admissibility of evidence collected by a State is determined on the basis of ICC law, not on the State's national law (Article 69(8) Rome Statute). Accordingly, the evidence should be collected in compliance with the ICC legal standards, which means that a suspect interview in a foreign country can only be held admissible if the suspect was represented by counsel or had voluntarily waived his or her right to counsel.

68. In this regard, the Defence submits that the ICC should take an example from the ICTY, where an interview was excluded because it was conducted in the absence of counsel notwithstanding that this was in accordance with Austrian law. In doing so, the Trial Chamber stressed that, in accordance with Rule 89(A), it was not bound by national rules of

evidence; and that the national rules of evidence must be considered within the context of the Tribunal law. The national law must be set aside in case of a conflict.⁶²

69. On the same grounds, Mr. Katanga's interrogation should have been conducted in accordance with the standards set out in Article 55 of the Rome Statute. Article 55 was not complied with because Mr. Katanga was not assisted by counsel during his interrogation. Hence, unless it can be established that he voluntarily waived this right, the *procès-verbal* should be excluded. Failure to respect the right to legal representation during preliminary interviews has resulted in exclusion of these interviews at the *ad hoc* tribunals pursuant to their Rule 95.⁶³

70. There is no jurisprudence yet on the definition of a voluntarily waiver. If a similar definition of voluntary waiver is adopted as that adopted by the *ad hoc* tribunals, it will not lightly be accepted that the waiver was voluntary.⁶⁴ In the case against Gratien Kabiligi, an Accused before the ICTR who had been interviewed by investigators of the Office of the Prosecutor ("OtP") without the assistance of counsel and whose interview was subsequently excluded because his waiver to the assistance of counsel was not held to be voluntary, the

⁶² *Prosecutor v. Delalic*, IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 Sept. 1997, paras. 48, 49, 50, 52.

⁶³ Rule 95 of ICTY and ICTR Rules provides: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

⁶⁴ Examples of cases where interviews were excluded because the defendants were not represented by counsel are:

- *Prosecutor v. Delalic*, IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 Sept. 1997, where Mr. Zdravko Mucic's interview taken by the Austrian police was excluded. In accordance with Austrian procedural law, pursuant to which a suspect is entitled to speak to counsel only after being questioned by the police, this interview was conducted in the absence of counsel. The Trial Chamber found that the Austrian procedural law in relation to this matter contravened the law of the Tribunal, which clearly set out the right of a defendant to the assistance of counsel during interviews (Article 18(3) ICTY Statute; Rule 42 ICTY Rules). Accordingly, the Trial Chamber excluded the interview pursuant to Rule 95 of the ICTY Rules (paras. 49-52).
- *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), 14 October 2004 (the interview of one of the Accused, Gratien Kabiligi, was excluded pursuant to Rule 95 despite him having signed a declaration indicating that he had read and understood the form listing his rights; that he was ready to respond to questions; that he did not wish to have counsel at that time; and that no threats or promises had been made against him to procure his consent. The Trial Chamber nonetheless held that the Prosecution had not discharged its burden of showing that the Accused voluntarily waived his right to the assistance of counsel, because it was apparent from the preliminary dialogue between the Accused and police investigators as recorded in the transcripts that the Accused had not understood that he had an immediate right to the assistance of counsel (para. 19). The Trial Chamber further held that the Accused did, in fact, attempt to invoke the right to counsel, be it in a confused manner. It was then up to the investigators to cease their questioning immediately (para. 20).

Trial Chamber highlighted the importance of the right to be assisted by counsel. The Trial Chamber explained the risks of interviewing unrepresented defendants as follows:⁶⁵

Along with the right to silence, this right is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.

71. The reliability of such statements given without legal consultation is, therefore, questionable. Accordingly, the Trial Chamber confirmed that the Prosecution has the burden to prove “convincingly and beyond reasonable doubt” that a waiver of the right to counsel was voluntary,⁶⁶ as already found by the Trial Chamber in the ICTY case of *Delalic et al.*⁶⁷

The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt.

72. Also the ECtHR demands as a general rule that, in order to be valid, all waivers of rights guaranteed by the European Convention be *unequivocal*.⁶⁸ The ECtHR further suggests that individuals may be unable to appreciate the nature of the right they intend to waive in the absence of counsel.⁶⁹

73. Applying those legal provisions and their interpretations to Mr. Katanga’s situation, it is submitted that the *procès-verbal* of his interview conducted in the DRC should be excluded. The aforementioned circumstances, in which Mr. Katanga “accepted” to answer the questions posed to him in the absence of counsel, certainly raise suspicion as to the voluntariness of his waiver of his constitutional right to counsel. The reliability of the *procès-verbal* of this interview being conducted in violation of the DRC constitution, international

⁶⁵ *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C), 14 October 2004, para. 16.

⁶⁶ *Ibid*, para. 17.

⁶⁷ *Prosecutor v. Delalic*, IT-96-21-T, Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence, 2 Sept. 1997, para. 42. See also para. 48.

⁶⁸ ECHR, *Pfeifer and Plank v. Austria*, 14 EHRR 692, para. 2.

⁶⁹ *Ibid*.

human rights standards, domestic legal standards, *ad hoc* Tribunal legal standards as well as the law of the ICC is highly questionable and the admission of the *procès-verbal* would be antithetical to and would seriously damage the integrity of the proceedings. Indeed, in *Delalic* and confirmed in the case of Gratién Kabiligi, it was stressed that “it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being “antithetical to, and would seriously damage, the integrity of the proceedings”.⁷⁰

74. Therefore, the Defence requests the Trial Chamber to disregard the Pre-Trial Chamber’s ruling on the admissibility of the *procès-verbal* and exclude this evidence pursuant to Article 69(7)(a) and/or (b) of the ICC Statute. The constitutional right to counsel is so fundamental that the interview cannot satisfy the threshold of admissibility of evidence for the purpose of the trial.

PART III: Observations on the Admissibility of Documents in the course of the Trial

General principles of admissibility of documentary evidence

75. In *Lubanga*, the Trial Chamber set out general principles of admissibility. It declared that it “must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims.”⁷¹

76. Trial Chamber I further held that, in order to be admissible, the evidence must have probative value, which includes consideration for its *indicia* of reliability.⁷² In addition, the Chamber held that, in determining its admissibility, it “must, where relevant, weigh the probative value of the evidence against its prejudicial effect.”⁷³ In doing so, “the Chamber

⁷⁰ *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C), 14 October 2004, para. 21; *Prosecutor v. Delalic*, IT-96-21-T, Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence, 2 Sept. 1997, para. 43.

⁷¹ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para 27.

⁷² *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para 29.

⁷³ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para 31.

must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case."⁷⁴ The *ad hoc* tribunals have adopted similar criteria for admission.⁷⁵

77. In general and subject to a wide range of exceptions, the Chambers of the *ad hoc* tribunals have adopted a minimalist approach towards the exclusion of evidence. In line with this approach, the Chambers of the *ad hoc* tribunals are inclined to admit evidence, provided the minimum conditions of admissibility are met. Any further concerns regarding the relevance, probative value, reliability and prejudice of the evidence are treated as issues affecting the weight of the evidence rather than the admissibility of the evidence, which is to be considered at the end of the trial in the context of the totality of the evidence.⁷⁶

78. This approach finds support in the fact that the proceedings at the international tribunals are conducted by professional judges, who will not give undue weight to evidence whose reliability or probative value is dubious.⁷⁷ Indeed, it has been held that, by virtue of their education and experience, professional judges "are able to ponder independently without

⁷⁴ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para 31.

⁷⁵ See rule 89(C) of the ICTY/ICTR/SCSL Rules holding that a Chamber "may admit any relevant evidence which it deems to have probative value" and the extensive jurisprudence on this rule: *inter alia*: *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 4; confirmed on appeal in: Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, December 19, 2003; *Prosecutor v. Rutaganda*, Appeals Judgment, May 26, 2003, paras 265 and 275; *Prosecutor v. Milutinovic et al.*, Decision on Prosecution Motion to Admit Documentary Evidence, October 10, 2006, para. 11.

⁷⁶ See, *inter alia*, *Prosecutor v. Blaskic*, Judgment, Trial Chamber, 3 March 2000, para. 34; *Prosecutor v. Musema*, Judgment, Trial Chamber, 27 January 2000, para. 41. There are, however, Chambers at the *ad hoc* tribunals that have taken a more rigorous approach. See, *inter alia*, the Trial Chamber in *Bagosora et al.*, holding that "[w]hile a Chamber is always free to disregard information which is unreliable or irrelevant, the purpose of rules of admissibility, including Rule 92bis, is to provide a preliminary threshold for the exclusion of irrelevant, unreliable or otherwise improper information" (*Prosecutor v. Bagosora et al.*, Decision on Admission of Statements of Deceased Witnesses, 19 January 2005, para. 17). Also see *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003, para. 8 where the Chamber held it had "an obligation to refuse evidence which is not relevant, or does not have probative value. Evidence whose reliability cannot adequately be tested by the Defence cannot have probative value."

⁷⁷ See, *inter alia*, *Statement by the President at a Briefing to Members of Diplomatic Missions concerning the Adoption of the Rules of Procedure and Evidence of the ICTY* (IT/29, 11 February 1994) in which ICTY President Cassese emphasized that the Tribunal "does not need to shackle itself to restrictive rules which have developed out of the ancient trial by jury system. There will be no jury sitting at the Tribunal, needing to be shielded from irrelevancies or given guidance as to the weight of the evidence they have heard. We, as judges, will be solely responsible for weighing the probative value of the evidence before us. All relevant evidence may be admitted at this Tribunal unless its probative value is substantially outweighed by the need to ensure a fair and expeditious trial." [original emphasis]

prejudice to each and every case which will be brought before them”.⁷⁸ In addition, the judges are mandated to promote a fair and expeditious trial and they “must have the flexibility to achieve this goal”.⁷⁹

79. At the ICC, judges are explicitly tasked to ascertain the truth. Pursuant to Article 69(3) of the Statute, the Court “shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth”. For this purpose, flexibility in applying principles of admissibility would be warranted.⁸⁰

80. Indeed, in *Lubanga*, the Chamber noted that “[t]here should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall.” Similarly, “the Chamber must be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness.”⁸¹

81. The Defence endorses the view that flexibility is needed. This, however, does not mean that judges should lean towards admission rather than exclusion of the evidence. In Defence’s submission, which is founded on the arguments of distinguished scholars,⁸² it is a myth to consider that the judges’ truth-ascertaining mandate would be best served by largely admitting any type of evidence and leaving the determination of its weight to a later stage when judges have an overview of the evidence as a whole.

82. Notwithstanding that the finders of fact and law at the ICC are professional judges, there are good grounds for rigorously applying the minimum requirements for admission, that is, relevance, probative value and no undue prejudice. If not, the judges may get

⁷⁸ *Prosecutor v. Brima et al*, Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 11 May 2004, para. 38; *Prosecutor v. Gbao*, Order on the Urgent Request for Direction on the Time to Respond and/or an Extension of Time for the Filing of a Response to the Prosecution Motions, 15 May 2003, p. 2; *Prosecutor v. Delalic*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 20; and *Prosecutor v. Ntakirutimana et al*, Decision on the Prosecutor’s Motion to Join the Indictments ICTR 96-10-I and ICTR 96-17-T, 22 February 2001, para. 26.

⁷⁹ *Prosecutor v. Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 19.

⁸⁰ See also Donald K. Piragoff, Article 69 in Triffterer, Commentary on the Rome Statute (Second Edition), page 1321, para. 35, where he holds that the inclusion of this provision necessarily means that the Court “is not bound by narrow rules regarding when and how evidence is presented.”

⁸¹ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para 29.

⁸² See, in particular, Peter Murphy, Circuit Judge (South Eastern Circuit), *Excluding justice or facilitating justice? International Criminal Law would benefit from rules of evidence*, 12 Int’l J. Evidence & Proof 2008.

overwhelmed by massive amounts of evidence merely going to side issues and lose track of the pivotal issues upon which they need to deliberate. In this regard it should be noted that, given the complexity of the cases in international criminal proceedings, the parties tend to present thousands of documents per case, some very lengthy. Having to search through so many documents for those matters which are probative, reliable and relevant to the charges does not facilitate the judges' important and difficult task of ascertaining the truth. In such a labyrinth of papers, it is very easy to lose sight of the main question in "a cloud of irritating and useless collateral issues".⁸³

83. Most importantly, allowing the admission of unnecessarily large amounts of evidence, whose relevance to the charges is minimal, is a waste of the Court's time and resources. This is the case, not only because the judges will have to spend much time assessing the relevance of the material, but also because it misdirects the efforts of other parties to the case and will require the Defence to meet issues only remotely relevant. The trial will not be expedited and the important issues clouded.

84. Based on his experience as a defence counsel before the ICTY, Judge Murphy came to the conclusion that "[t]he indiscriminate admission of any and all material claimed to be evidence, far from being the only means of promoting a successful search for the truth, tends to bury the genuinely probative evidence in a vast accumulation of evidential debris, resulting in long and inefficient trials, and frustrating rather than facilitating the task of judges trying to establish the truth."⁸⁴

85. In this regard, it is remarkable that, in the present proceedings, the Prosecution proposes to introduce 568 documents, as reflected in its list of incriminating evidence of 27

⁸³ See Peter Murphy, *ibid*, at page 25, citing the address of Sir James Fitzjames Stephen, a distinguished advocate and judge, to the Council of the Governor-General of India on 31 March 1871 (reprinted in P. Murphy (ed.), *Evidence, Proof and Facts: A Book of Sources* (Oxford University Press: Oxford, 2003) 65 *et seq*). See also Peter Murphy, *ibid*, page 22, where he expresses the need to protect fact-finders, even where professionally trained, against misleading evidence and to promote efficient trials.

⁸⁴ Peter Murphy, Circuit Judge (South Eastern Circuit), *Excluding justice or facilitating justice? International Criminal Law would benefit from rules of evidence*, 12 Int'l J. Evidence & Proof 2008, page 2; See also page 13 where he expresses a similar view that "far from furthering the search for truth through free proof, they actually frustrate their objective by making trials longer, more complex, and less efficient, and by tending to bury the truly important evidence in the midst of an enormous accumulation of evidential debris." See further pages 25-27, where he cites Sir James Fitzjames Stephen, *supra*, who says, *inter alia*: "No judge can possibly be expected, by the mere light of nature, to know how to set limits to the inquiries in which he is engaged, yet if he does not, an incalculable waste of time and energy, and a great weakening of the authority of his court, is sure to follow."

May 2009, plus potentially at least another 90 incriminating documents disclosed since.⁸⁵ Given the narrow scope of the charges relating to events which occurred on one day only, it is highly questionable whether such a large number of documents is necessary or warranted. Accordingly, the Defence submits for the consideration of the Chamber a number of suggestions pursuant to which the Chamber may determine the admissibility of documentary evidence to be introduced in the course of the trial. In so doing, the Defence seeks to facilitate the important tasks of the Chamber to establish the truth and to guarantee the fairness and expeditiousness of the proceedings.

86. The propositions presented here are not intended to be exclusive or to be a substitute for oral argument in the course of the proceedings. As previously submitted,⁸⁶ the Defence maintains that the admissibility of evidence can only properly be assessed on a case-to-case basis. This is where flexibility comes into play. Whilst, understandably, the Chamber may not favour wholesale exclusion, neither should it opt for wholesale admission.

87. Relevance, probative value, reliability and prejudice are concepts which cannot be determined in the abstract. They can only be properly considered on the basis of the circumstances in which the evidence is introduced. As was confirmed by Trial Chamber I, the party introducing the evidence must demonstrate its *prima facie* relevance and probative value.⁸⁷ The moving party must do so in as concise and precise a manner as possible. In addition, where documents are of a considerable length, the moving party should specify the passages within those documents which it contends are relevant to an issue in the case. As one ICTR Chamber held, the wholesale admission of entire, lengthy documents on the basis

⁸⁵ ICC-01/04-01/07-1174-Conf-Exp-AnxP.

⁸⁶ ICC-01/04-01/07-1002, Defence Observations on the possibility to examine all matters of relevance and admissibility before the start of the trial on the merits, 27 March 2009.

⁸⁷ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para. 29. See also the jurisprudence of the *ad hoc* tribunals confirming that the party seeking to introduce documentary evidence must demonstrate, on the balance of probabilities, that it has indicia of relevance, reliability and probative value. See, *inter alia*, *Prosecutor v. Brdanin & Talic*, Order on the Standards governing the admission of evidence, 15 February, 2002, para. 18, principle 3; *Prosecutor v. Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with the Appearance of Witness Maxwell and Nkole, 13 September 2004, para. 7; *Prosecutor v. Karemera et al.*, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, 2 November 2007, para. 2; *Prosecutor v. Bizimungu et al.*, Decision on Defence Motions to admit Church Records and School Records Pursuant to Rule 89(C), 2 June 2008; *Prosecutor v. Hadzihasanovic & Kubura*, Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic, 22 June 2005, para. 21.

of general pleadings as to their relevance would normally impede the expeditiousness of the proceedings and impose a heavy burden on the Chamber and the opposing parties.⁸⁸

88. The Prosecution must further clearly indicate the purposes for which it seeks the admission of the evidence. This would assist the Chamber in identifying which parts of particularly the lengthy documents go to proof of which elements of the charges. This indication is also important because it may well be the case that a document would be admissible for the purpose of demonstrating one or more of the constitutive elements but that reasons of fairness would preclude the admission of that same document for the purpose of directly implicating the Accused. In respect of the determination of fairness, the Chamber in Lubanga found that such a decision is a ‘fact-sensitive decision’,⁸⁹ which is accordingly a case-to-case determination.

89. It is further the case that a document whose authenticity is unclear on its surface may be admissible only if admitted through a witness who is able to provide the bench with the relevant details missing in the document. Accordingly, the Defence maintains its position that the admissibility of documentary evidence should be determined in the course of the trial.

Category 1: Bar Table Motions

90. The phrase ‘bar table motions’ has been used at the ICC to refer to documents containing statements of fact that are not produced by a witness.⁹⁰ In considering whether documentary evidence can be introduced in that way or must necessarily be introduced through a witness, a distinction should be made between evidence that goes directly to the acts and conduct of the accused, and evidence which goes to other matters, such as crime base, background material and context, or the constitutive elements of the crimes charged.

91. The Defence submits that for both categories of evidence it is preferable that evidence is introduced through a witness. In that way, the relevance and probative value of the

⁸⁸ *Prosecutor v. Karemera et al*, Interim Order for the Prosecution to Identify Relevant and Probative Passages of Certain Materials it Intends to Tender into Evidence Under Rule 89(C) of the Rules of Procedure and Evidence, 8 August 2007, para. 12.

⁸⁹ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para 32.

⁹⁰ *Prosecutor v. Lubanga*, Decision on the Admission from the "bar table", 24 June 2009, ICC-01/04-01/06-1981.

evidence to the charges, if any, would be clearer. It would become part of the story as recorded in trial. The bench, the parties and victim participants would be alerted to it at the relevant moment in time and given an opportunity to place the evidence in its proper context. The opposing party and victim participants may, where necessary, contemporaneously challenge its admissibility. It may further be necessary for a witness to explain the significance of a document or to authenticate it. A witness producing a document can be cross-examined on it. It provides focus and an opportunity for the defence to deal with matters in a way that will not otherwise be possible.

92. The Defence appreciates that many of those issues could be dealt with as issues of weight rather than admissibility of documentary evidence. It is, however, not unthinkable that an otherwise inadmissible document for lack of *indicia* of reliability or relevance may become admissible when it is identified and commented upon by a witness.⁹¹

93. In the ICTY case against *Prlic et al*, the Chamber adopted a general practice where the party seeking to tender evidence shall do so through a witness who can attest to its reliability, relevance, and probative value. The evidence had to be put to the witness at trial. Only exceptionally, and where a proper explanation was given, was the Chamber willing to depart from this practice. The Chamber explained its approach as follows:⁹²

[T]he admission of several thousand documents without prior discussions over them in court may unduly delay the proceedings, to the extent that the Chamber would not have the benefit of explanations from a witness who could help to put these documents in their context and establish their relevance and probative value ... [T]he Chamber would therefore be required to spend much of its resources examining and assessing thousands of documents, which could take several months and would delay the pronouncement of the judgment ... [T]he Prosecution therefore has a duty to make a choice and identify those documents which are strictly necessary to the determination of points in issue, and present those documents to a witness who is able to provide the Chamber information in court about the authenticity, relevance, and probative value of such documents..."

94. In the SCSL case against *Taylor*, the Chamber and Appeals Chamber have held that the party seeking to tender a document must establish a foundation and must do so through a

⁹¹ This may be the case, for instance, where it concerns someone's diary and the author is not called to testify (*Prosecutor v Delic*, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 14); or an audiotape of an interview of the accused by a journalist and the journalist is not called to testify (*Prosecutor v Mrskic et al*, Decision on Motion to Reopen Prosecution Case, February 23, 2007).

⁹² *Prosecutor v. Prlic et al*, Decision on Admission of Evidence, 13 July 2006.

witness who can be brought in connection with the document.⁹³ The Appeals Chamber considered that, in exercising its “unfettered discretion” to determine whether the proposed evidence is relevant for the purpose of its admission, a Trial Chamber “cannot properly do so in thin air. When determining the relevance of a document, the Trial Chamber must require the tendering party to lay a foundation of the witness’s competence to give evidence in relation to that document. ... Without a connection to the document, the witness is only capable of offering opinion evidence”.⁹⁴

95. The Defence would welcome such a practice to be adopted by this Chamber in relation to all documentary evidence because it would make a lot more sense out of the many and voluminous documents proposed for admission. The Defence would suggest that such a practice be made compulsory whenever a document goes directly to the acts and conduct of the accused.

96. In normal and preferred circumstances, accusations directly against the accused should be made only by *viva voce* witnesses who are available for cross-examination. This is founded on the right of the accused to confront his accuser. In this regard, the European Court of Human Rights held that “all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence.”⁹⁵

97. In the *ad hoc* Tribunals, the judges have introduced a specific Rule 92*bis* to regulate the admission of written statements made by persons who will not be called to testify. Such statements may be admissible only if they go to “proof of a matter other than the acts and conduct of the accused as charged in the indictment” (92*bis*(A)), and if certain conditions are met to guarantee their reliability (92*bis*(B)).⁹⁶ This Rule, being the *lex specialis* of the *lex*

⁹³ *Prosecutor v. Taylor*, Trial Transcript, 21 August 2008, page 14253; confirmed in *Prosecutor v. Taylor*, Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, 6 February 2009, paras. 34-35.

⁹⁴ *Ibid*, paras. 40-41.

⁹⁵ A.M. v. Italy, no. 37019/97, para. 25, ECHR 1999-IX.

⁹⁶ Please note that Rule 92*bis* of the SCSL and ICTY Rules has been amended to include both written statements and transcripts. In addition, the ICTY and SCSL have introduced a new Rule 92*ter* to facilitate the admission of statements or transcripts, including those going to proof of acts and conduct of the accused, provided that the witness is available for cross-examination. Only where the witness is dead, unable to testify by reason of his bodily or mental condition or untraceable could the bench consider admission of a statement without the witness’s availability for cross-examination. However, where the evidence goes to proof of acts or conduct of the accused, “this may be a factor against the admission of such evidence, or that part of it” (Rule 92*quater*).

generalis Rule 89(C), cannot be circumvented by relying on the general rule of admissibility.⁹⁷ Accordingly, written witness statements can only be introduced without a witness where the criteria under Rule 92*bis* are met.

98. The ICC Statute or Rules do not embody a similar provision. Notwithstanding this, the Defence submits that issues of fairness would require that documents relating to the acts and conduct of the accused should not be admitted unless the sources of the information are made available for cross-examination. Cross-examination is of fundamental importance where allegations are made directly against the accused. In such circumstances, it would be unfair to admit these allegations in written statements without putting the persons making the allegations to the test of cross-examination. Without it, the reliability of their allegations is also in question.

99. A distinction should be made between statements taken for the purpose of investigations of criminal matters with the eventual aim to identify perpetrators and statements made contemporaneously with events or with a wholly different purpose without knowledge that they may eventually be used as evidence in criminal proceedings. Whilst the latter may be admissible in certain circumstances without the makers of the statements being made available for cross-examination, the former may not.⁹⁸

100. The reality of the ICC investigations so far is that the Prosecution heavily relies on evidence gathered by NGOs and UN. Evidence collected by such organisations may qualify

The ICTR has not incorporated these new Rules and still relies on the initial version of Rule 92*bis*. See further footnote 46.

⁹⁷ *Prosecutor v. Milosevic*, Appeals Chamber's Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18; *Prosecutor v. Galic*, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, para. 31, confirming that statements prepared for legal proceedings must meet the requirements under Rule 92*bis* and cannot otherwise be admitted under Rule 89(C). See also the SCSL case against Taylor where the Appeals Chamber held that "[i]f a document is to be tendered without a witness, then the application should be made under [Rule] 92*bis* of the Rules", which implies that evidence can be admitted as documentary evidence in lieu of oral testimony only pursuant to Rule 92*bis* (*Prosecutor v. Taylor*, Trial Transcripts, August 21, 2008, page 14253; confirmed in: *Prosecutor v. Taylor*, Decision on "Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", February 6, 2009, para. 25).

⁹⁸ In *Lubanga*, the Trial Chamber admitted logbooks purporting to record the entrance and exit of child soldiers at a demobilisation centre and notebooks ostensibly recorded by social workers at the centre about alleged child soldiers, where the authors of the logbooks were unavailable to give evidence. One of the reasons for admitting those was that the logbooks were seemingly created contemporaneously with events, and whilst the notebooks were not, they recorded events which were '*prima facie*, of fundamental importance to the children who purportedly reported them' (*Prosecutor v. Lubanga*, Decision on the admissibility of four documents, June 13, 2008, ICC-01/04-01/06-1399, para 38).

as statements taken for the purpose of investigations of criminal matters with the eventual aim to identify perpetrators, provided it was collected either with a view to hand it over to the ICC Prosecution or for the purpose of its own investigations into violations of human rights.

101. A number of documents the Prosecution seeks to rely upon contain reports which draw many inferences from the evidence provided by numerous sources. Such reports include double, triple or even further remote hearsay. In order for such reports to be admissible, at the very least, the person who produced the report should be available for cross-examination in order to give an opportunity to the Defence to ask questions about the person's methodology in collecting the evidence and the foundation for the conclusions drawn from it. If such evidence goes directly to the acts or conduct of the accused, the source of the information should be made available.

102. Such matters may be viewed as affecting the weight rather than the admissibility of the evidence. However, they may also affect the admissibility. As the Chamber in Lubanga held,

‘if there are no adequate and available means of testing its reliability’ in the Chamber’s opinion ‘the court will need to consider carefully whether the party seeking to introduce it has met the test of demonstrating, *prima facie*, its probative value.’⁹⁹

103. The Defence reiterates that it is mainly concerned with the admission of such reports without being given the opportunity to test the evidence therein where they include allegations which go to proof of the acts and conduct of the accused. Reasons of fairness may require the judges to exclude such evidence.¹⁰⁰ Accounts given as part of general research into a problem without proper context or opportunity to challenge the contents and maker, may have a significant prejudicial effect, but because of these factors have far less probative value such that the prejudicial effect of their admission outweighs their probative value.

⁹⁹ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para 29. See also the ICTR case against *Bagosora et al.*, where the Trial Chamber affirmed that evidence "whose reliability cannot adequately be tested by the Defence cannot have probative value" (*Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003, para. 8).

¹⁰⁰ See the ICTR case against Ntagerura et al, where the Chamber found it had "a broad discretion to direct the course of the proceedings in accordance with its fundamental duty to ensure a fair and expeditious trial pursuant to Article 19(1) of the Statute. In pursuit of these goals, the Trial Chamber may choose to exclude otherwise relevant and probative evidence where its prejudicial effect will adversely affect the fairness or expeditiousness of the proceedings" (*Prosecutor v. Bagosora et al.*, Decision on Prosecutor's Interlocutory Appeals regarding Exclusion of Evidence, 19 December 2003, para 16)

104. It is well supported by the jurisprudence of the *ad hoc* tribunals that, where evidence touches upon a critical element of the Prosecution's case or goes to live and pivotal issue, fairness requirements would generally only allow its admission if the Defence has an opportunity to cross-examine the provider of the evidence.¹⁰¹ This may be so, even where highly relevant evidence does not go to the acts and conduct of the accused.¹⁰² The ICC has not yet explicitly ruled on this issue. The jurisprudence of the *ad hoc* tribunals may, therefore, serve as guidance.

105. It should be emphasised that the concept of "acts and conduct of the accused" is not limited to allegations directly implicating Germain Katanga. If the *ad hoc* jurisprudence on this issue were to be followed, and there is no good reason to depart from it, it may also include evidence which implicitly applies to him.¹⁰³ It would also include references to crimes committed by his alleged co-perpetrators, subordinates or executioners under his command in the common plan.¹⁰⁴ Overall, the evidence must be sufficiently proximate to Mr. Katanga.¹⁰⁵

¹⁰¹ *Prosecutor v Karemera et al*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List, 11 December 2006, paras. 14-16; *Prosecutor v Bizimungu et al*, Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony, 1 May 2008, para. 19; *Prosecutor v Karemera et al*, Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara, 9 July 2008, para. 4; *Prosecutor v Popovic et al*, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis, 12 September 2006, para. 16; *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, Decision on Prosecution's Rule 92 bis Motion, 4 July 2006, para. 18; *Prosecutor v Oric*, Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92 bis, December 6, 2005; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis, 13 September 2006, para. 6; *Prosecutor v Galic*, No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 13; *Prosecutor v Limaj et al*, No. IT-03-66-T, Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis, 7 July 2005, para. 5; *Prosecutor v Muhimana*, Decision on Prosecution Motion for Admission of Witness Statements, 20 May 2004.

¹⁰² *Prosecutor v Karemera et al*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List, 11 December 2006, paras. 19-20.

¹⁰³ *Prosecutor v Karemera et al*, Decision on Prosecution Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006, para. 9.

¹⁰⁴ *Prosecutor v Bagosora et al*, No. Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis, 9 March 2004; *Prosecutor v Sesay et al*, Decision on Defence Application for the Admission of the Witness Statement of DIS-129 Under Rule 92 bis or, in the Alternative, Rule 92 ter, 12 March 2008; *Prosecutor v Taylor*, Decision on Prosecution Notice Under Rule 92 bis for the Admission of Evidence Related to Inter Alia Kenema District and on Prosecution Notice under Rule 92 Bis for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, pages 4-5; *Prosecutor v. Galic*, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, paras. 10-16; *Prosecutor v Karemera et al*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List, 11 December 2006, paras. 12-13.

¹⁰⁵ *Prosecutor v Taylor*, Decision on Prosecution Notice Under Rule 92 bis for the Admission of Evidence Related to Inter Alia Kenema District and on Prosecution Notice under Rule 92 Bis for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, pages 4-5; *Prosecutor v Martić*, Decision on

Category 2: outside temporal and geographical scope of charges

106. The Defence for Ngudjolo has argued that evidence relating to any event other than Bogoro should be excluded. The Defence for Mr. Katanga understands its argument to be that such evidence is not relevant to the charges and its admission would be prejudicial because it would have the *de facto* effect of adding additional charges to the case, without proving them beyond reasonable doubt. In considering whether the guilt of the accused in respect of the crimes charged can be established beyond reasonable doubt, the Chamber may only assess the evidence that links the accused to the crimes charged and not to other alleged crimes. If, on the basis of the evidence relating to the participation of the accused in the alleged events at Bogoro on 24 February 2003, the Chamber is not persuaded beyond reasonable doubt that the accused is guilty as charged, it must acquit. It cannot subsequently look to evidence relating to other events to fill the gaps in the Prosecution's case.¹⁰⁶

107. The Defence for Mr. Katanga partly supports these submissions. With the exception of evidence relating to ongoing crimes that were rooted in Bogoro, such as sexual slavery of women abducted from Bogoro on 24 February 2003, or rape of women during or shortly after the attack, the Defence submits that any evidence dealing with events that did not occur on 24 February 2003 is *prima facie* inadmissible and it is for the Prosecutor to justify admissibility of such evidence on grounds of relevance should he wish to rely upon it.

108. The position of the Katanga Defence differs from that of the Ngudjolo Defence to the extent that it sees potential grounds for admission of evidence related to events prior- or post-the alleged Bogoro crimes committed on 24 February 2003, and in the geographical proximity of Bogoro. If such attacks are sufficiently part of the same story as the crimes charged, evidence thereof may be admissible to explain the context in which the crimes charged were allegedly committed.¹⁰⁷

Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis, 13 January 2006, para. 20.

¹⁰⁶ ICC-01/04-01/07-1522-Conf, *Requête de la Défense de Mathieu Ngudjolo tendant à obtenir le rejet de certaines pièces reprises dans le Tableau des éléments à charge élaboré par le Procureur* (ICC-01/04-01/07-1174), 12 October 2009

¹⁰⁷ This has been a ground for admitting evidence outside the scope of the jurisdiction of the ICTR. See, *inter alia*, *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003; *Prosecutor v. Ndlindiyimana et al.*, Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony, 30 March 2006, para. 22; *Prosecutor v. Simba*, Decision on the Defence Motion for

109. The Defence further submits that, in order to consider whether the constitutive element of “widespread or systematic” has been proved beyond a reasonable doubt, the Chamber will have to assess the context in which the alleged Bogoro attack occurred. This includes assessment of alleged similar attacks committed in close temporal and geographical proximity to the alleged Bogoro attack on 24 February 2003 and in particular, whether a sufficient nexus exists between the acts of the accused and the attack. For this purpose, evidence not directly related to the alleged Bogoro attack may be admitted.

110. The question is how to define the notion of ‘similar attacks’ and ‘close temporal and geographical proximity to the alleged Bogoro attack on 24 February 2003’. The Defence submits that this is mainly for closing argument and does not wish to go into great depth on this issue at this stage of the proceedings. The difficulty in defining the second notion is that there is no indictment, which normally sets a very clear geographical and time limit. What is clear is that in order to admit evidence not directly related to Bogoro, the Prosecution must convincingly demonstrate that there is a nexus between the proposed evidence and the charges.

111. If the Prosecution establishes that evidence relating to events outside the scope of the charges is *prima facie* relevant, due consideration must still be given to the undue prejudice that may arise from admitting such evidence. Admitting evidence implicating the accused in other attacks without establishing these acts beyond reasonable doubt clearly has a prejudicial effect on the Defence. In essence, it creates an air of suspicion against the accused and a presumption of guilt. Whilst the ICC judges are professional judges, they are also human, which means that they may be influenced by such evidence. Consequently, they may unconsciously or unwillingly build up a bias against the accused, which would affect their ability to objectively review the evidence that is actually relevant to the charges.

112. In order to avoid any such effect, it may be advisable to exclude evidence that is of limited relevance to the charges and whose prejudicial value is high. As the *Lubanga* Trial Chamber held, Chambers “must be careful to ensure that it is not unfair to admit the disputed

Preclusion of Prosecution Evidence, 31 August 2004, para. 3; *Prosecutor v. Nahimana et al*, Appeal Judgement, 28 November 2007, para. 315; *Prosecutor v. Rwamakuba*, Trial Judgement, 20 September 2006, para. 48.

material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case."¹⁰⁸

113. In addition, the Defence fully endorses the view of the ICTR Chamber in *Bagosora et al* that "dealing with evidence of past conduct may be unduly distracting and time consuming, leading to an unfocused trial that undermines the truth-finding function".¹⁰⁹ The same view should be taken of 'future' conduct.

114. The Prosecution should therefore clearly indicate for which purpose it seeks to admit evidence related to acts other than those specifically charged. This is necessary, not only to clearly delineate the relevance of such evidence to the charges, but also, to avoid that it be used for unwarranted purposes. While it may, for instance, be acceptable that such evidence be admitted for the purpose of explaining the background to the crimes charged, it cannot be used to show the accused's propensity to commit the crimes charged.¹¹⁰

Relief Sought

1. Accordingly, for the aforementioned reasons, it is requested that the Chamber rule inadmissible the evidence of W-258 and W-167, persons who are on the prosecution witness list, but who are dead.

2. It is further requested that the Chamber rule inadmissible the *Procès-verbal d'audition à Kinshasa daté du 20 janvier 2006*.

¹⁰⁸ *Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, para 31. Also see *Prosecutor v. Bagosora et al.*, Decision on Prosecutor's Interlocutory Appeals regarding Exclusion of Evidence, 19 December 2003, para 13, where it was held that the Chamber "may still decide to exclude the evidence in the interests of justice when its admission could lead to unfairness in the trial proceedings, such as when the probative value of the proposed evidence is outweighed by its prejudicial effect, pursuant to the Chamber's duty to ensure a fair and expeditious trial as required by Article 19(1) of the Statute of the International Tribunal."

¹⁰⁹ *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 12. This decision was confirmed on appeal: *Prosecutor v Bagosora et al.*, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003.

¹¹⁰ See *ad hoc* tribunal cases: *Prosecutor v. Kupreskic*, Decision on Evidence of Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999, para. 31; *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 12; *Prosecutor v. Nahimana et al.*, Decision on the Interlocutory Appeals, Separate Opinion of Judge Shahabuddeen, 5 September 2000, para. 20.

3. Finally, it is requested that the Chamber gives due consideration to the observations set out in Part III of this Motion in determining the admissibility of documentary evidence in the course of the trial. In particular, it is requested that the Trial Chamber consider whether in relation to certain categories of evidence the prosecution should not be compelled to provide specifics as to which parts are being relied upon and for what purpose in order to allow the Defence and the Chamber to properly evaluate their pertinence to the proceedings.

Respectfully submitted,



David HOOPER

Dated this 23rd of October 2009

At The Hague