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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra, Judge
Judge Christine Van den Wyngaert, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**with Confidential, *ex parte*, only available to the Office of the Prosecutor and the
Defence Annexes A and B and Public Annexes C and 1**

**Prosecution's Consolidated Response to "Defence Objections to Admissibility in
Principal and in Substance" (ICC-01/04-01/07-1558) and «Requête de la Défense en
vue d'obtenir une décision d'irrecevabilité des documents liés aux témoins décédés
référéncés sous les numéros T-167 et T-258» (ICC-01/04-01/07-1556)**

Source: Office of the Prosecutor

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

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Other

The Office of the Prosecutor (“Prosecution”) submits its consolidated response to the “Defence Objections to Admissibility in Principal and in Substance”¹ and its addendum² (« Katanga Motion »), and to the “Requête de la Défense en vue d’obtenir une décision d’irrecevabilité des documents liés aux témoins décédés référencés sous les numéros T-167 et T-258 »³ (« Ngudjolo Motion »), pursuant to Regulation 24(1) of the Regulations of the Court.⁴

Request for receipt of Annexes as Confidential

The Prosecution requests that Annexes A and B to this filing be received by Trial Chamber II (“Chamber”) as Confidential, *ex parte*, only available to the Office of the Prosecutor and the Defence since they relate to evidence.

Introduction

1. During the status conference on 2 October 2009, the Chamber stated that *“it should be possible before the commencement of the trial to deal with a number of challenges having to do with the admissibility and relevance of various items of evidence”*.⁵
2. The Chamber ordered the Defence for Germain Katanga and Mathieu Ngudjolo to file written submissions presenting the precise grounds on which they were challenging the admissibility of items of evidence,

¹ ICC-01/04-01/07-1558.

² ICC-01/04-01/07-1592.

³ ICC-01/04-01/07-1556.

⁴ See ICC-01/04-01/07-1617. On 10 November 2009 the Prosecution sought an extension of the page limit of an additional twenty pages to be able to adequately respond to both Defence motions. See ICC-01/04-01/07-1629. On 12 November 2009 the Chamber granted this request.

⁵ ICC-01.04-01/07-T-72-ENG ET WT, pp. 53-54.

including in relation to the deceased witnesses 258 and 167 (“Deceased Witnesses”).⁶

3. On 23 October 2009, the Defence for Mathieu Ngudjolo filed its Motion challenging the admissibility of the evidence of the two Deceased Witnesses (« Ngudjolo Motion »), and the Defence for Germain Katanga filed its Motion covering three main issues: the Deceased Witnesses; the Procès-Verbal d’Audition of Germain Katanga; and general challenges regarding admissibility of evidence (« Katanga Motion »).⁷
4. The Prosecution hereby submits its response to the Katanga and Ngudjolo Motions.

Part I

I. Admissibility of the evidence of the Deceased Witnesses

5. The Prosecution submits that the statement of Witness 258 and the manuscript of Witness 167, are admissible pursuant to Articles 69(2) and 69(4) of the Rome Statute (“Statute”). The statement and Manuscript are *prima facie* relevant to, and probative of issues to be decided upon by this Chamber. Nor would their admission be unfairly prejudicial to the Defence.
6. Witness 258 was interviewed by the Office of the Prosecutor (“OTP”) pursuant to Article 55(2) from 9 to 13 May 2007. His interview was audio-

⁶ ICC-01/04-01/07-T-72-ENG ET WT, pp. 53-54.

⁷ On 4 November 2009, the Defence for Germain Katanga filed an Addendum to its filing, see ICC-01/04-01/07-1592.

video recorded pursuant to Rule 112 of the Rules of Procedure and Evidence (“Rules”). On 5 September 2007, witness 258 died in hospital apparently of malaria. The Prosecution was not aware that witness 258 was in a life-threatening state.

7. On 17 January 2006, Witness 167 gave the OTP his written account of events (“Manuscript”) regarding the attack on Bogoro. Witness 167 explained that he had been writing this Manuscript since his departure from Bunia in 2004. He agreed that the OTP could copy the Manuscript but asked that the original be returned to him (see Annex A).⁸ Before the Prosecution had an opportunity to interview Witness 167, he died on approximately 27 January 2006 of unknown causes. Although Witness 167 had regular hospital visits, the Prosecution was not aware, prior to his death, that he had been in a life-threatening state.

A. Admissibility of a deceased person’s evidence under the Statute and Rules

8. As a preliminary matter, Article 69(4) allows the Trial Chamber to “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”. Thus, even out-of-court statements may be considered and admitted so

⁸ The investigator’s note from that meeting with ERN DRC-OTP-0150-0032 is attached as confidential Annex A to this filing. It was disclosed on 24 April 2008 in Pre-confirmation Rule 77 Package 12 and redisclosed on 3 April 2009 in Pre-Trial Rule 77 Package 39 and on 8 October 2009 in Trial Rule 77 Package 51.

long as the Chamber considers, among other factors, their probative value and prejudicial effect.

9. According to Article 69(2), the “*testimony of a witness at trial*” shall be given in person or *viva voce*. But testimony of witnesses is not the only means by which witness accounts may be introduced at trial. For example, Article 69(2) envisages the admission of evidence other than the testimony of a witness at trial, such as the “*introduction of documents or written transcripts*” but these exceptions are “*subject to this Statute and in accordance with the Rules*”.

10. Article 56 and Rule 68 contain exceptions as permitted by the Statute, but the Prosecution submits that contrary to the contention of the Defence, these exceptions relate to situations where a witness is alive or his/her death is foreseeable, neither situation being present in this case:
 - a. Article 56 can be triggered where the death of a witness whom the Prosecution seeks to interview at the investigation stage is foreseeable, constituting a unique investigative opportunity. The Prosecution can apply to the Pre-Trial Chamber to preserve the evidence.
 - b. Rule 68 provides for a witness’s testimony to be admitted at trial through prior recording rather than on a *viva voce* basis. Rule 68 applies to situations where the witness is alive but his or her presence is deemed either inconvenient or undesirable or his/her imminent death is foreseeable. Accordingly, arrangements can be

made for these witnesses to be questioned in the presence of the Prosecution and the Defence.⁹

11. The Prosecution submits that the exceptions enshrined in Article 69(2) are not limited to the situations contemplated in Article 56 and Rule 68. On the contrary, the Statute vests Chambers of this Court with the discretionary power to admit documents and written transcripts, unless doing so would contravene provisions of the Statute or the Rules. Since no specific admissibility rule bars the admission of evidence in the situation presented here, the Chamber has the discretion power to admit, in its search for the truth, their evidence pursuant to the general admissibility principles found in Article 69(2), (3) and (4) and Rule 63(2).

Article 69(4)

12. Article 69(4) and Rule 63(2) provide that a Chamber can “*assess freely all evidence submitted in order to determine its relevance or admissibility*”. The drafters intended that Chambers be granted flexibility and discretion when assessing the admissibility of any item of evidence.¹⁰

13. In the present case, Pre-Trial Chamber I recognised such discretionary power:

⁹ Trial Chamber I’s decision ICC-01/04-01/06-1603 must be distinguished from the situation of the deceased witnesses. This decision rejected an application by the Prosecution pursuant to Article 69(2) and Rule 68(b) for the admission at trial of written statements and of prior-recorded testimony taken from witnesses outside the presence of Defence counsel. The basis for the order rejecting the admission was that the witnesses were available to testify.

¹⁰ “The compromise in the Rome Statute was to eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system, provided that the Court has a discretion to ‘rule on the relevance or admissibility of any evidence’”, D.K. Piragoff, in Chapter 4 “Evidence”, in *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, R.S. Lee (ed), Transnational Publishers, at p. 351.

[...] under article 69(4) of the Statute the Chamber may exercise its discretion when determining the relevance and/or admissibility of any item of evidence. According to article 69(4) of the Statute, probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence. In the view of the Chamber, this means that the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent after such an analysis. Any other assessment of the probative value of any given item of evidence will be made in light of the whole body of evidence introduced at the confirmation hearing” (underline added).¹¹

14. Trial Chamber I also recognised the significant degree of discretion that Chambers enjoy when it found admissible notebooks and logbooks, even though the authors of those documents would not be available to give evidence or to be cross-examined by the Defence.¹² Trial Chamber I also referred implicitly to the example of the evidence of dead witnesses and concluded that it:

“enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider

¹¹ ICC-01/04-01/07-717, para. 77. See also ICC-01/05-01/08-492, para. 56: “The Chamber also examines the intrinsic coherence of each piece of evidence.”

¹² ICC-01/04-01/06-1399, para. 23. Trial Chamber I also noted that the “the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence “freely””, *Ibid.*, para. 24.

evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling – for credible reasons – to give evidence.”¹³

15. Trial Chamber I proposed a three-stage approach when the admissibility of evidence other than in-court testimony is challenged:

1. First, the Chamber must ensure that the evidence is *prima facie* relevant to the trial;
2. Second, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value, and
3. Third, the Chamber must, where relevant, weigh the probative value of the evidence against its prejudicial effect.¹⁴

16. The Prosecution submits that this three-stage approach should be followed as it encapsulates appropriately the wording and scope of Article 69(4).

17. Under that test, the Prosecution first submits that the statement of Witness 258 and 167 are *prima facie* relevant to the consideration of the charges against the accused.

- a. Witness 258’s statement provides evidence in relation to the attack at Bogoro on 24 February 2003, including: the supply of weapons

¹³ *Ibid.* Reaffirmed by Trial Chamber I in ICC-01/04-01/06-2135, 22 September 2009, para. 22.

¹⁴ *Ibid.*, para. 27 and following.

and ammunition, the events that occurred at Bogoro (including the death of civilians, abduction of women, destruction of property and pillaging); the issue of the presence of Mathieu Ngudjolo at Bogoro; and other information concerning abductions of women by the FNI-FRPI, the role of the accused in other attacks, the military structure of the FNI-FRPI and military camps, and role of foreign countries in the conflict.

- b. Witness 167's Manuscript includes information regarding the ethnic nature of the conflict between the Lendu and Hema groups; events at the Bogoro attack including numbers of victims reported killed and property destroyed and looted; the role of the accused within the FNI-FRPI; the role of the accused in other attacks; and the role of foreign countries in the conflict.

18. Next, both witnesses' evidence provides intrinsic or *prima facie* indicia of reliability that allow the Chamber to make a proper assessment of their probative value.

19. As regards Witness 258:

- a. Witness 258's evidence was audio-video recorded, so that the Defence and Chamber may view the tapes to assess his demeanour.
- b. The full verbatim record of the questions and answers are disclosed. His information can on its face be assessed for its internal consistency.

- c. Indeed, the witness was challenged on occasion to test his evidence¹⁵ which underscores that his interview was conducted impartially by the Prosecution pursuant to its obligations under Article 54(1)(a).

20. As regards Witness 167:

- a. The Manuscript can on its face be assessed for its internal consistency.
- b. When Witness 167 provided the Manuscript to the Prosecution he confirmed that he wrote the Manuscript shortly after or contemporaneously to the events¹⁶ - in effect, it was a contemporaneous diary account, though not formally designated as such - and that it reflects what he saw and what he learnt of during his time in Bunia. The practice before international criminal tribunals has been to admit contemporaneous diary accounts.¹⁷

¹⁵ See ICC-01/04-01/07-1558, p. 18. Citing: DRC-OTP-0173-0718, 1. 1191-1199, transcript of interview of Witness 258, dated 11 May 2007; DRC-OTP-0173-0813, 1. 980-985, transcript of interview of Witness 258, dated 12 May 2007. Pre-Trial Chamber III has rejected the argument that inconsistencies in a witness's evidence or issues regarding a witness's credibility meant the evidence should not be admitted. See ICC-01/05-01/08-492, para. 56: "The Chamber also examines the intrinsic coherence of each piece of evidence. As stated above, one piece of evidence may be used to prove more than one issue at stake. Therefore, inconsistencies contained within one piece of evidence have to be assessed in relation to a specific issue. Thus, inconsistencies in such a piece of evidence might be so significant as to bar the Chamber from using it to prove one specific issue, but might prove immaterial with regard to another issue, which, accordingly, does not prevent the Chamber from using it."

¹⁶ See Annex A.

¹⁷ See Judge R. May & M. Weir, *International Criminal Evidence*, Transnational Publishers, 2002 ("May & Weir"), pp. 248-250. The authors state that contemporaneous diaries were generally held to be admissible in the historical trials, referring to the example in the case against Kido before the International Military Tribunal for the Far East ("IMTFE") and a more modern example before the ICTY in *Prosecutor v. Kordic and Cerkez*, "Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts", 1 December 2000.

- c. Pre-Trial Chamber I rejected the Defence's arguments that Witness 167's Manuscript was too illegible.¹⁸
- d. Pre-Trial Chamber I also rejected the Defence arguments concerning the Manuscript's authenticity on the basis of allegations of different handwriting, and decided that the "challenge to the authenticity of the purported authorship does not affect the probative value accorded to the manuscript".¹⁹

21. Pre-Trial Chamber I held that the: "*assessment of the probative value of any given item of evidence will be made in light of the whole body of evidence introduced [...]*".²⁰

22. The third requirement is that the Chamber weigh the probative value of the evidence against its prejudicial effect. The *travaux préparatoires* indicate that the drafters of Article 69(4) deliberately chose not to include any explicit rule, such as that used at the ICTY, where the Chamber may exclude evidence if its prejudice "*substantially outweighs*" its probative value. Instead, the intention was to give the Court greater flexibility in

¹⁸ ICC-01/04-01/07-717, para. 105: "The Chamber recalls that regulation 26(4) of the Regulations of the Court provides that '[i]n proceedings before the Court, evidence other than live testimony shall be presented in electronic form whenever possible. The original form of such evidence shall be authoritative.'"

¹⁹ ICC-01/04-01/07-717, paras 112-113.

²⁰ ICC-01/04-01/07-717, para. 77. Pre-Trial Chamber I stated:

According to article 69(4) of the Statute, probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence. In the view of the Chamber, this means that the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent after such an analysis. Any other assessment of the probative value of any given item of evidence will be made in light of the whole body of evidence introduced at the confirmation hearing.

And as Judge May of the ICTY stated "[...] it is, after all, possible that a statement will be bolstered in its reliability after it is admitted by additional, corroborating evidence arising later during the trial." May & Weir, p. 226.

assessing the factors of probative value and of prejudice to a fair trial or fair evaluation of a witness.²¹ Trial Chamber I stated that when assessing these factors *“this will always be a fact-sensitive decision, and the court is free to assess any evidence that is relevant to, and probative of, the issues in the case, so long as it is fair for the evidence to be introduced.”*²²

23. It has been recognised by this Court, as well as other international criminal tribunals and various national jurisdictions,²³ that the right encapsulated in Article 67(1)(e) “to examine, or have examined, the witnesses against him or her”, is not an absolute right. This Court, for example, has allowed logbooks and notebooks to be admitted, even though the authors of those documents would not be available for cross-examination.²⁴

24. The inability to examine the Deceased Witnesses does not cause undue prejudice to the Defence. The Defence may challenge the evidence by means other than examination, such as contesting its intrinsic coherence, arguing factors that might undermine its reliability and arguing that it is

²¹ See D.K. Piragoff, ‘Article 69: Evidence’, in *Commentary on the Rome Statute of the International Criminal Court*, Second Edition, C.H. Beck, Hart, Nomos, 2008, p. 1305. Referring to Article 69(4), Piragoff observes: “No specific or rigid standard such as ‘substantially outweighed’ was included, due to the desire to state principles, permit flexibility and leave the details for the Rules or the Court’s own jurisdiction”. Rule 89(D) of the ICTY Rules provides that a Chamber may exclude evidence if its probative value is “substantially outweighed” by the need to ensure a fair trial.

²² ICC-01/04-01/06-1399, para. 32.

²³ See May & Weir, pp. 223-225, citing the Peleus case, British Military Court, Hamburg, Oct. 17-20, 1945, UNWCC Law Reports, Case 1, Vol. I, at 14, and *Einsatzgruppen, Ministries and High Command Cases*, XV NMT, at 850; *Prosecutor v. Prlic et al*, “Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92quater of the Rules (Hasan Rizvic)”, IT-04-74-T, 14 January 2008; France: *Pourvoi No 06-85783*, Cour de cassation chambre criminelle, Crim., 12 septembre 2007, Bull. 2007; UK: *Al-Khawaja* [2006] 1 WLR 1078; Canada: *R v Starr* [2000] 2 S.C.R. 144, 36 C.R. (5th) 1, 147 C.C.C. (3d) 449 *R v Smith* [1992] 2 S.C.R. 915; , *R v P (R)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.) ; ECHR – *Artner v. Austria*, Application No 39/1991/291/362; *Ferrantelli & Santegelo v. Italy*, Application No 48/1995/554/640; *Verdam v. The Netherlands*, Application No 35253/97; *Doorson v. The Netherlands*, Application No. 54/1994/501/583.

²⁴ ICC-01/04-01/06-1399.

not corroborated or supported by other evidence. Witnesses who provide similar evidence that corroborate or support the accounts of Witnesses 258 and 167 will be testifying and available to be examined by the Defence. There is also documentary evidence that supports or corroborates their evidence. In case of conviction, the Deceased Witnesses' evidence will not be the main or sole basis for any decision. Accordingly, the admission of their evidence will not be in breach of the ECHR case law.²⁵

25. The Katanga Motion argues that Witness 258's evidence should not be admitted because of his status as a suspect and as he may have been involved in the attack at Bogoro. Pre-Trial Chamber I rejected this argument finding that: *"the Chamber is of the view that any dispute about the credibility of such evidence could not arise from issues of admissibility but from issues related to the appropriate weight to accord to that evidence."*²⁶

26. The Prosecution submits that the Chamber should admit the whole of the evidence unredacted and leave any matters of reliability and probative value until the end of the trial, where the Chamber will be in a position to consider the totality of the evidence presented at trial by all parties and

²⁵ See *Artner v Austria*, Application No 39/1991/291/362; *Verdam v The Netherlands*, Application No 35253/97; *Doorson v The Netherlands*, Application No. 54/1994/501/583. See also *Prosecutor v Prlic et al*, IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92quater of the Rules (Hasan Rizvic), 14 January 2008;

²⁶ ICC-01/04-01/07-717, para. 191 to 194. Citing ICC-01/04-01/06-1399, para. 40; *Prosecutor v Blaskic*, Case No. IT-95-14, Trial Judgment, 3 March 2000, para. 36. Similarly Pre-Trial Chamber III in its 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (ICC-01/05-01/08-492), para. 55, stated that: "It should be noted that inconsistencies do not lead to an automatic rejection of the piece of evidence, and do not bar the Chamber from using it. Rather, in order to define its probative value, the Chamber assesses whether the inconsistencies cast doubt on the overall credibility and reliability of the evidence." Citing ICC-01/04-01/07-717, para. 116; *Prosecutor v Milutinovic et al.*, Case No. IT-05-87-T, 'Judgment', 26 February 2009, para. 49; *The Prosecutor v Kayishema and Ruzindanda*, Case. No. ICTR-95-I, 'Trial Judgment', 21 May 1999, paras. 135 and 323.

participants, including the Chamber itself. Alternatively, the Chamber may provisionally admit the evidence and revisit its admissibility, if needed, at the end of the Prosecution's case, once all of its evidence has been presented and tested, and the Chamber has had an opportunity to consider the Deceased Witnesses' evidence together with the testimony of other witnesses and the documentary evidence admitted during the presentation of the evidence of the Prosecution.²⁷

27. The Prosecution further disagree with the assertion of the Defence in relation to the approach of other international tribunal or other national jurisdictions. Contrary to the Katanga Motion, a Trial Chamber in the ICTY under Rule 92*quater*, now has a discretion to admit a deceased person's statement that goes to the acts and conduct of the accused. For instance, the Trial Chamber in the case of *Prlic* admitted a deceased person's statement with respect to the acts and conduct of the accused. The statement was not the sole or decisive basis for conviction, which mitigated the potential prejudice to the defence.²⁸

28. Similar to the *Prlic* decision, the ECHR has held, in cases where national jurisdictions allowed the admission of statements of deceased persons, that this does not violate the European Convention of Human Rights

²⁷ Moreover, the issue of whether it is fair to admit the Deceased Witnesses' evidence must be considered in the context of the whole of the proceedings. The approach of the ECHR in assessing the fairness of admitting pre-trial statements of unavailable witnesses has been to consider whether the proceedings as a whole were fair, see *Doorson v. The Netherlands*, Application No. 54/1994/501/583.

²⁸ *Prosecutor v. Prlic et al.*, "Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92*quater* of the Rules (Hasan Rizvic)", IT-04-74-T, 14 January 2008.

("Convention"), where their content was corroborated²⁹ and the defendant's conviction was not based solely on that evidence;³⁰

29. As Trial Chamber I confirmed, Rule 63(5) mandates the Chamber not to apply national laws governing evidence.³¹ The Chamber is also not bound by the practice or decisions of the other international criminal tribunals. Nevertheless, in Annex C, the Prosecution provides a list of cases from International Tribunals and National Jurisdiction that notwithstanding stricter rules of evidence have admitted statements of deceased persons who were not examined by the Defence.

30. The Ngudjolo Motion also contends that Witness 258's interview was not conducted in compliance with his rights pursuant to Article 55(2) and therefore, even without regard to the unavailability of the witness to testify at trial, his evidence should be inadmissible pursuant to Article 69(7) of the Statute.³² The Prosecution submits that Judge Steiner, acting as Single Judge, properly rejected this argument.³³

31. Contrary to the Defence's contentions, Witness 258's was informed of his right to remain silent and the voluntary nature of the interview. Moreover, he was advised that he could stop the interview at any time and seek legal

²⁹ *Verdam v. The Netherlands*, Application No 35253/97; *Doorson v. The Netherlands*, Application No. 54/1994/501/583.

³⁰ *Artner v. Austria*, Application No 39/1991/291/362; *Ferrantelli & Santegelo v. Italy*, Application No 48/1995/554/640.

³¹ Rule 63(5) provides that: « The Chambers shall not apply national laws governing evidence, other than in accordance with article 21.» See May & Weir, p. 226: "Excluding [a deceased witness's statement] at the admissibility stage is also contrary to the presumption in international criminal trials that professional judges are able to exclude unreliable evidence from their minds when formulating their judgment."

³² ICC-01/04-01/07-1556, par. 61 and following.

³³ ICC-01/04-01/07-496. p. 10.

advice. The recorded interview makes it clear that Witness 258 voluntarily waived his right to counsel.³⁴

32. The Ngudjolo Motion argues that because Witness 258 did not explicitly consent to the use of his evidence against the two accused, his statements should be deemed inadmissible.³⁵ The Prosecution refers the Chamber to another decision of Judge Steiner, acting as Single Judge, that noted: “Witness 258 expressly consented to the use of the transcript of his interview in proceedings before the Court.”³⁶

33. The Ngudjolo Motion additionally argues that Witness 258’s rights against self-incrimination were not properly explained to him. Pre-Trial Chamber I rejected a similar argument from the Defence for Germain Katanga that Witness 258 was not clearly told his evidence could be used against him concluding that any dispute about credibility does not relate to admissibility but to the weight to be afforded to that evidence.³⁷

II. Admissibility of the *procès-verbal d’audition* of Germain Katanga

34. The Prosecution submits that the *procès-verbal d’audition* should be admitted as evidence pursuant to the Chamber’s powers pursuant to Article 69(4) and Rule 63(2). The *procès-verbal d’audition* is relevant as Germain Katanga states his role within the FRPI and involvement in an

³⁴ DRC-OTP-0173-0912, 0921, lines 322-337. *See also* DRC-OTP-0173-0912, 0917, lines 166-194; 0918, lines 195-235; 0919, lines 236-275; 0920, lines 285-301: Witness 258 was informed that he may interrupt the interview and seek legal advice at any time.

³⁵ ICC-01/04-01/07-1556, par. 74 and following.

³⁶ ICC-01/04-01/07-412, p.8.

³⁷ ICC-01/04-01/07-717, para. 191 to 194.

attack at Bogoro. There are clear indicia of reliability (for instance it was signed by Germain Katanga), and his admission of involvement in the Bogoro attack is corroborated by other evidence, including that of Witnesses 12 and 160.

35. On 20 January 2006, Germain Katanga was interviewed in Kinshasa by the *Avocat Général des Forces Armées près la Haute Cour Militaire*. The *Avocat Général* took a statement (*procès-verbal d'audition*) from the Accused and both signed it ("*procès-verbal d'audition*").³⁸

36. The Defence for Germain Katanga contends that the *procès-verbal d'audition* should be ruled inadmissible because: Mr. Katanga was not granted immediate access to a lawyer pursuant to Article 18(3) of the Constitution of the Democratic Republic of Congo ("Constitution"), and Article 19(3) of the DRC Constitution requires that Mr. Katanga have the assistance and physical presence of a lawyer at his interrogation.

A. The Laws of the Democratic Republic of the Congo

37. Neither the Constitution nor the Military Judicial Code of the Democratic Republic of the Congo ("*Code judiciaire militaire*") envisage the automatic right of the physical presence of the lawyer for a suspect before a Military Tribunal during his or her initial interrogation.³⁹

³⁸ See DRC-OTP-0155-0318. Disclosed on 29 January 2008, in Preconfirmation List of Evidence; on 4 February 2008 in Pre-confirmation INCRIM Package 5; on 25 April 2008, eCourt Protocol Reissue. See also duplicate DRC-OTP-1016-0150, which is a clearer copy and is attached as confidential Annex B. Disclosed on 29 January 2008 in Preconfirmation List of Evidence; on 4 February 2009 in Pre-confirmation INCRIM Package 5; on 15 April 2008, in Pre-Trial Rule 77 Package 51; on 25 April 2008 and 20 June 2008, eCourt Protocol Reissue.

³⁹ See <http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf>.

38. The relevant provision of the Constitution is Article 19(3). Article 19(3) provides that: *“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 préjuridictionnelle. Elle peut se faire également assister devant les services de sécurité.”* (Emphasis added).

39. In other words, an individual has the right to defend himself or to have the assistance of a lawyer at all stages of proceedings. But where a suspect appears before the DRC’s security services, including the military, this right is not mandatory.

40. On 12 November 2009, the Office of the *Auditeur Général Militaire* informed the OTP that a suspect’s legal position before the DRC Military Tribunal is as follows ⁴⁰:

- a. Under the *Code judiciaire militaire* and the Constitution, during an interview of a suspect by an officer of the Military Tribunal at the investigation phase, the presence of a lawyer is not mandatory. It is only at the stage of judgment that the *Juge militaire* is then obliged, pursuant to Article 63 of the *Code judiciaire militaire*, to designate a lawyer for a suspect if he has not already chosen one.
- b. As a result, a suspect may have a lawyer present and may contact his/her lawyer for this purpose, but if a lawyer is not physically present during the interrogation it does not render the *procès-verbal d’audition* inadmissible nor prejudice the legal proceedings against the suspect.

⁴⁰ The Office of the *Auditeur Général Militaire* confirmed their information by email on 12 November 2009. The Prosecution will submit this email to the Chamber upon receiving the agreement of the Office of the *Auditeur Général Militaire*, which the Prosecution was not able to obtain before the date of this filing.

41. The Defence for Germain Katanga confirm that “Mr. Katanga already had counsel at the time of this interrogation [on 20 January 2006].”⁴¹ Accordingly, Germain Katanga had legal assistance before his interrogation on 20 January 2006.⁴² Moreover, Germain Katanga’s counsel apparently appeared on his behalf at later stages of the proceedings including in May 2006.⁴³

42. According to the Office of the *Auditeur Général Militaire*, Germain Katanga never asked to have his lawyer present during his interrogation on 20 January 2006.⁴⁴

43. The absence of a lawyer during the initial interrogation, on 20 January 2006, does not render the *procès-verbal d’audition* inadmissible and does not prejudice the legal proceedings against the suspect. According to the Office of the *Auditeur Général Militaire*, the requirement is for the *procès-verbal d’audition* to be prepared in writing and signed by the Military Officer and the suspect. This is what happened in the present case.

44. The Prosecution submits that even if Germain Katanga had requested his lawyer to be present, there is no legal requirement under either DRC law

⁴¹ ICC-01/04-01/07-1558, para. 62.

⁴² Article 18(3) provides, to the person in police custody, the right to immediate contact with his family or with his lawyer.

⁴³ DRC-OTP-1010-0031, p. 3. Disclosed 29 January 2008, Pre-confirmation List of Evidence. 4 February 2008 disclosed in Pre-confirmation INCRIM Package 5. 25 April 2008 and 20 June 2008, e-Court Protocol Reissue. In a letter dated 31 January 2007 from Germain. Katanga and his co-detainees, they state that they received notices for a hearing in early May 2006 which they were not involved in but in which their lawyers participated.

⁴⁴ The Katanga Motion alleges that he wished for his lawyer to be present and that those wishes were not respected (underline added), see ICC-01/04-01/07-1558, para. 59.

(or international human rights law) that a suspect must have his or her lawyer physically present during questioning, in particular in cases of serious alleged crimes.

B. Prior decision of Pre-Trial Chamber I on the admissibility of the *procès-verbal d'audition*

45. Pre-Trial Chamber I rejected a prior challenge to the admissibility of the *procès-verbal d'audition* and ruled that it was admissible. Pre-Trial Chamber I stated that “the right to legal representation applies not only to the trial but also to the pre-trial stages of the proceedings. However, that this right does not confer unlimited access to legal representation”.⁴⁵ Pre-Trial Chamber I also ruled that the absence of legal assistance during the preliminary stage of the proceedings did not amount to a violation pursuant to Article 69(7) of the Statute.

46. Pre-Trial Chamber I referred to jurisprudence of the ECHR, where the ECHR decided that:

- the absence of a lawyer, during interrogations, did not lead to a disadvantage likely to affect the Defence’s position at trial nor the outcome of those proceedings;⁴⁶
- the right to assistance of a lawyer at the initial stages of police interrogation may be subject to restriction for good cause;⁴⁷

⁴⁵ ICC-01/04-01/07-717, at para. 93, citing K. Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, 3rd ed., London, Sweet & Maxwell, 2007, p. 151.

⁴⁶ ICC-01/04-01/07-717, at para. 94, citing ECHR, *Imbrioscia v. Switzerland*, paras. 35-36;

⁴⁷ ICC-01/04-01/07-717, at para. 94, citing ECHR, *John Murray v. The UK*, paras. 62-63; *Magee v. The UK*, para. 41; *Brennan v. The UK*, para. 45; *Yurttas v. Turkey*, Judgment of 27 May 2004, Application No. 25143/94 and 270098/95, 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*

- there was no breach of Article 6(3)(c) of the Convention where a detained person was deprived of access to a lawyer at the early stages of proceedings, if the person was later represented, particularly at trial and appeals stages.⁴⁸

47. Pre-Trial Chamber I also concluded that the DRC authorities have taken the approach that the presence of defence counsel at preliminary stages of proceedings is not mandatory; and that this approach to date “has not been found inconsistent with the requirements of a fair trial.”⁴⁹

C. Article 55(2) of the Statute is not applicable to circumstances that led to the *procès-verbal d’audition*

48. The Defence for Germain Katanga also argues that the Chamber should be satisfied that the *procès-verbal d’audition* complies with the standards required pursuant to Article 55(2). The Prosecution submits that Article 55(2) is not applicable to the circumstances that led to the *procès-verbal d’audition*. Germain Katanga was interviewed by the *Avocat Général près la Haute Cour Militaire*. Germain Katanga was not interviewed by investigators of the OTP nor was he interviewed by the *Avocat Général* at the instigation of or on request of the OTP.

v. *Turkey*, Judgment of 26 April 2007, Application No. 36391/02, para. 22. The Chamber also referred to *Granger v. The UK*, Judgment of 28 March 1990, Application No. 11932/86, para. 44.

⁴⁸ ICC-01/04-01/07-717, para. 95; citing *Imbrioscia v Switzerland*, paras. 39-44; *Brennan v The UK*, para. 48; *Salduz v Turkey*, paras. 23-24. Citing also *Imbrioscia v Switzerland*, para. 38:

While [Article 6(3)(c) of the Convention] confers on everyone charged with a criminal offence the right to ‘defend himself in person or through legal assistance [...]’, Article 6 para. 3(c) (art. 6-3-c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court’s task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.

⁴⁹ ICC-01/04-01/07-717, para. 97.

III. Response to the general challenges regarding the admissibility of evidence

49. The Defence for Germain Katanga raise three general challenges regarding the admissibility of evidence: 1) regarding the general principles of admissibility of documentary evidence; 2) the use of bar table motions as a means of introducing evidence; and 3) the test for admitting evidence of attacks other than the attack on Bogoro of 24 February 2003 (the Defence for Ngudjolo have previously raised similar arguments on this third issue).⁵⁰

A. General principles of admissibility of documentary evidence

50. As demonstrated above in Part I, pursuant to Article 69(3) and (4) and Rule 63(2), the Chamber enjoys a “significant degree of discretion in considering all types of evidence”.⁵¹

51. The Defence for Germain Katanga provides no specific grounds for objecting to the introduction of any specific pieces of incriminatory documentary evidence, other than of the Deceased Witnesses and the *procès-verbal d’audition*. Instead they maintain their position that they may raise objections to the admissibility of individual items of evidence during the trial.

⁵⁰ The Defence for Mathieu Ngudjolo have previously raised similar arguments at the confirmation hearing, which were rejected by Pre-Trial Chamber I in its confirmation decision, see ICC-01/04-01/07-717, para. 225-228.

⁵¹ ICC-01/04-01/06-1399, para. 25.

52. The Prosecution submits that like the Defence for Mathieu Ngudjolo,⁵² the Defence for Germain Katanga should be required to specify in advance of trial all individual items of evidence which it alleges lack sufficient *prima facie* indicia of relevance or probative value, or which on balance should not be admitted due to any prejudice to a fair trial. The Defence has had sufficient time to review the evidence. As the Chamber stated, *"it should be possible before the commencement of the trial to deal with a number of challenges having to do with the admissibility and relevance of various items of evidence"*⁵³ to avoid the trial being delayed by such questions.⁵⁴

53. The Katanga Motion also suggests that the amount of incriminatory evidence is excessive and that cannot assess the pertinence of individual items of evidence without additional information from the Prosecution as to the relevance of each item and identification of the specific relevant passages being relied upon in that evidence.

54. The Prosecution submits that this argument is flawed. Contrary to allegations of the Katanga motion, the Prosecution's List of Incriminatory Evidence ("List") is not excessive. A large part of the material is related to witnesses, such as statements and transcripts of interviews that will be relied upon in limited cases (e.g. to refresh the memory of the witnesses). Other documents on the List are videos and respective transcripts and many photographs. In other words, the situation is very much different

⁵² See ICC-01/04-01/07-T-72-ENG ET WT, pp. 53-54. The Chamber ordered the Defence for Mathieu Ngudjolo to submit their specific challenges to individual items of evidence, with a document-by-document analysis: "So we are asking you to disassociate these two issues and to provide a separate application analysing document-by-document -- or perhaps you could put some documents in various categories, but basically explanations why you believe these documents are not relevant."

⁵³ ICC-01/04-01/07-T-72-ENG ET WT, p. 53, lines 14 to 16.

⁵⁴ ICC-01/04-01/07-T-72-ENG ET WT, p. 54, lines 1 and 2.

than the ICTY cases containing thousands of evidence to which the Defence of Germain Katanga makes reference.⁵⁵

55. The Prosecution has also provided detailed information regarding the *prima facie* relevance of all documentary evidence within the Table of Incriminating Evidence.⁵⁶ The Table presents the evidence and analyses it according to factual allegations and elements of the crimes ("Table of Incriminatory Evidence") This Table of Incriminatory Evidence also indicates key passages of relevance within each item of documentary evidence. Accordingly, the Defence has an unprecedented level of information to assess the relevance of each item of evidence in advance of trial.

B. Bar Table Motions

56. The Prosecution will seek to introduce part of the evidence through witnesses and there will be some items of evidence which it will seek to introduce by bar table motion. The Defence for Germain Katanga object to the use of bar table motions for the introduction of documentary evidence, arguing that generally evidence should always be introduced through a

⁵⁵ The Prosecution observes that from all the items of incriminatory evidence: 171 are witness statements, transcripts or interview notes; 51 are documents related to the Deceased Witnesses 258 and 167; and 65 are annexes to witness statements (such as witnesses' sketches). Nearly half of the documents are witness-related evidence. Out of the remaining 382 documents: 133 are photographs, 26 are videos and 67 are video transcripts and translations, 5 are maps, 6 are forensic reports, 2 are x-rays, and 4 are DVD visual presentations. This leaves only 139 documents that are not related to witness evidence, audio-visual evidence or forensic evidence.

⁵⁶ See "Mémoire aux fins de dépôt du tableau des éléments à charge, de la liste des témoins de l'Accusation et de la liste des pièces à charge" and its attached annexes ICC-01/04-01/07-1174, 27 May 2009. Moreover an updated Table of Incriminating Evidence is being filed simultaneously on the same day of this filing, on 16 November 2009.

witness and that any evidence related to the acts or conduct of the accused should never be introduced by bar table motion.

57. Nothing in the Statute and Rules provides that evidence must be introduced only through a witness. Indeed, the Statute and Rules do not expressly stipulate the manner in which documentary evidence should be introduced at trial. As seen in Part I above, Article 69(2) refers to the principle that a witness's testimony be given in person at trial (but allows exceptions to that, including for witness's documents or transcripts). There is no requirement that documentary evidence be introduced through a witness.

58. In the *Lubanga* case, Trial Chamber I acknowledged that "*notwithstanding the express reference to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate.*"⁵⁷ Trial Chamber I accepted the principle of introducing certain documentary evidence from the bar table rather than through a witness⁵⁸ and has ruled as admissible documents tendered from the bar table during the trial.⁵⁹

⁵⁷ ICC-01/04-01/06-1399, para. 22.

⁵⁸ See ICC-01/04-01/06-1981, Decision on the Admission from the 'bar table', 24 June 2009. See also ICC-01/04-01/06-T-104, p. 38, lines 24-25, p. 39, lines 1-8:

What we have in mind is requesting the Prosecution to supply the Chamber on a Friday with a list of the witnesses who are to be called during the week to come, together with an anticipated schedule as to which days during the week they will be called. Of course you cannot provide finality in relation to that because it depends on the length of question, but your anticipation, together with a list of any documents that as far as the Prosecution is concerned, are going to arise during the course of the evidence of those witnesses, **together with any documents that the Prosecution is going to seek to introduce from the bar table.**" (Emphasis added).

The practice of accepting documents introduced from the bar table has also been adopted by the ICTY. See *Prosecutor v. Vlastimir Dordevic*, "Decision on Prosecution's Motion to admit Exhibits from the Bar Table", 28 April 2009; *Prosecutor v. Milan Milutinovic et al.*, "Decision on Prosecution Motion to admit documentary evidence", 10 October 2006; *Prosecutor v. Blaskic*, Trial Chamber, "Judgment", IT-95-14-1, 3 March 2000; *Prosecutor v. Musema*, Trial Chamber I, "Judgment and Sentence", ITR-96-13-A,

Scope of evidence introduced by bar table motion

59. Contrary to the Defence argument,⁶⁰ the international criminal tribunals do not bar the introduction by bar table motion of documents relating to the acts and conduct of the accused or to any live or pivotal issue.⁶¹

60. Admitting documents from the bar table is grounded in law and is a useful tool to ensure the efficient use of court time,⁶² and enable the Chamber to freely access all relevant evidence⁶³ and determine the truth.⁶⁴

27 January 2000; *Prosecutor v. Bagosora et al.*, Trial Chamber I, “Decision on Admissibility of Proposed Testimony of Witness DBY”, ICTR-98-41-T, 18 September 2003. See also *Prosecutor v. Naletilic and Martinovic*, “Appeals Chamber Judgment”, IT-98-34-A, 3 May 2006, para. 402: “There is no separate threshold requirement for the admissibility of documentary evidence”; see more specifically *Prosecutor v. Delic*, “Decision Adopting Guidelines On The Admission And Presentation Of Evidence And Conduct Of Counsel In Court”, IT-04-83-T, 24 July 2007, para. 29: “There is no general prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify. Similarly, the fact that a document is unsigned or unstamped does not, *a priori*, render it void of authenticity.”

⁵⁹ See ICC-01/04-01/06-1981-Anx, 24 June 2009.

⁶⁰ The Defence relies upon the ICTY case of *Prosecutor v. Prlic* to argue that the ICC should adopt a general practice of introducing documentary evidence through witnesses. However, the Chamber in *Prlic* changed its practice subsequently and allowed admission of documents by the bar table. See *Prosecutor v. Prlic*, “Decision amending the decision on the admission of evidence dated 13 July 2006”, IT-04-74-T, 29 November 2006, p. 2. The Chamber in *Prlic* also stated that it “*subscribes to the Tribunal case law to the extent that a prima facie showing of a document’s reliability may be achieved in various ways, and does not necessarily require that the document be presented to its author at trial.*” See *Prosecutor v. Prlic*, “Decision on Admission of Evidence”, 13 July 2006.

⁶¹ Refer to paragraphs 22-24 for the Prosecution’s submissions regarding the fact that the right to cross-examine witnesses is not an absolute right. The Defence erroneously relies upon Rule 92bis of the ICTY Rules, which according to ICTY practice does not apply to documentary evidence, to argue that documentary evidence relating to the acts and conduct of the accused should never be admitted by bar table motion. Documentary evidence before the ICTY is governed by Rule 89.

⁶² See for example *Prosecutor v. Rasim Delic*, “Decision Adopting Guidelines On The Admission And Presentation Of Evidence And Conduct Of Counsel In Court”, IT-04-83-T, 24 July 2007, para. 19:

The Trial Chamber considers that it is not an efficient use of in-court time to read out large passages of a document which is subsequently tendered for admission into evidence. This is particularly so where the party does not ask concise and specific questions on the information contained in the document but merely requests the witness to verify what is written on the page in front of the witness. In this respect, counsel are reminded of the possibility of tendering such evidence from the bar table.

⁶³ Article 69(4) and Rule 63(2). Refer to paragraphs 11-13 for the Prosecution’s submissions regarding the Chamber’s mandate to take a flexible approach and freely assess evidence. See *Prosecutor v. Halilovic*, “Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table”, IT-01-48-AR73.2, 5 June 1997, para. 5 “Decisions relating to the admissibility of evidence and the general conduct of proceedings largely fall within the discretion of the Trial Chamber.”. *Prosecutor v. Delalic et al.*, “Decision on the prosecution’s Motion for the redaction of the Public Record”, IT-96-21-T, 5 June 1997, para. 59: “Judges have an unfettered discretion to determine what is admissible as evidence under the Rules.” The Chamber has broad discretion to admit any evidence provided on the basis of two

For instance, it may be appropriate to introduce a document by way of bar table in the following circumstances:

- a. Where the document is publicly available such as media articles or NGO reports;
- b. Where the witness is deceased (e.g. the evidence of the Deceased Witnesses);
- c. There may be categories of documents that would be more expedient to be introduced via bar table or by way of judicial notice, and where their authenticity could not be challenged (e.g. U.N. Security Council Resolutions);
- d. Where there is a large volume of material and/or the relevance and reliability of the documentation is sufficiently apparent from its face (e.g. the Manuscript of Witness 167).⁶⁵

criteria only: probative value and relevance. See to that effect *Prosecutor v. Karemera et al.*, “Decision on Admission of UNAMIR Documents”, ICTR-98-44-T, 21 November 2006, para. 11; *Prlic et al.*, “Decision on Admission of Evidence”, IT-04-74-T, 13 July 2006, p. 5. In *Musema*, the Trial Chamber of the ICTR stated that the principle for evaluating evidence is based on the “free assessment of evidence”: *Prosecutor v. A. Musema*, Trial Chamber I, “Judgment and Sentence”, ICTR-96-13-A, 27 January 2000, para. 75; see also *Prosecutor v. Rasim Delic*, “Decision Adopting Guidelines On The Admission And Presentation Of Evidence And Conduct Of Counsel In Court”, IT-04-83-T, 24 July 2007, para. 26: “Parties should always bear in mind the basic distinction that exists between the admissibility of documentary evidence and the weight that documentary evidence is given under the principle of free evaluation of evidence. The practice will be, therefore, in favour of admissibility.”

⁶⁴ Article 69(3).

⁶⁵ Bar table motions are designed to deal with large volume of materials and this is an accepted practice before the Tribunals. See *Prosecutor v. Stanisic and Zupljanin*, 2 October 2009, para. 7:

It is the duty of each party to present its evidence in a specific and concentrated manner. Except in exceptional circumstances, parties may not request the admission into evidence of very long documents, such as books, diaries or reports, when only certain passages thereof are relevant to the testimony of the witness through whom the document is presented. The parties are requested to seek the admission into evidence of any large collections of documents through bar table motions.

See *Prosecutor v. Boskoski & Tarculovski*, “Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E”, 14 May 2007, para. 13:

Further, it follows from these general observations, that, at least in some circumstances, the relevance and reliability of a document may be sufficiently apparent to justify its admission as an exhibit without the need for any evidence or any further evidence, relating to the document. This may be the case even though there is an objection to its admission. It is on this basis that the Prosecution has moved to admit 175 documents as exhibits.

See also *Prosecutor v. Vlastimir Dordevic*, “Decision on Prosecution’s Motion to admit exhibits from the bar table”, 28 April 2009, p. 2 (53 exhibits were admitted); *Prosecutor v. Gotovina et al.*, “Decision on

61. Accordingly, the Chamber has the discretion to admit documents by way of bar table motion, without requiring that there be a witness to offer the documents or testify about them.

62. In addition to the general objection to bar table motions, the Defence raises general arguments regarding categories of documents. These objections are also unfounded. First, contrary to the Defence's contention, the various NGO and UN reports on the List of Evidence were not created for the purpose of criminal proceedings. The reports were not prepared at the instigation of or request of the OTP. They were contemporaneous reports documenting human rights abuses.

63. The Defence for Katanga has raised other general concerns regarding the authenticity of categories of documents (such as NGO reports), but without referring to specific items of evidence or specific grounds for objections. In any event, there is no legal basis in the jurisprudence of the tribunals that proof of authenticity is a threshold requirement for the admissibility of documentary evidence.⁶⁶ And if objections are raised, the Chamber may admit the documents and later assess them for probative value, pursuant to Article 69(4) and Rule 63(2).

Additions of Documents to the Prosecution's Rule 65ter Exhibit List and the Admission of Documents into Evidence", 6 March 2009, in which the Chamber admitted 78 documents into evidence.

⁶⁶ See *Prosecutor v. Zejnil Delalic et al.* (Celibici Case), "Decision on Application of Defendant Zejnil Delalic for Leave to Appeal against the Decision on the Trial Chamber of 19 January 1998 for the Admissibility of Evidence", IT-96-21, AC, 4 March 1998.

C. Evidence of attacks other than the Bogoro Attack

64. The relevant test for admitting evidence of attacks or events other than the Bogoro Attack is not – as argued by the Defence – that there must always be a temporal or geographical nexus of those other attacks to the charges. Instead the question is whether that evidence is relevant because it “*relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused.*”⁶⁷

65. In this case, evidence related to other attacks or events, other than the Bogoro Attack is essential to prove the contextual elements of the charges. Further, it will corroborate or support other evidence of the accused’s knowledge and intent.

66. Accordingly, Pre-Trial Chamber I admitted evidence of other attacks that occurred before or after the Bogoro Attack, stating that “evidence which may assist it in establishing the overall context in which the crimes are alleged to have occurred is not only helpful to its understanding of the evidence supporting the charges but also highly relevant and probative in respect of the contextual elements of the crimes under articles 7 and 8 of the Statute” (underline added).⁶⁸

⁶⁷ See ICC-01/04-01/06-1399, para. 27.

⁶⁸ ICC-01/04-01/07-717, paras. 225-228. The other international criminal tribunals have also admitted evidence of events before and after those specified in the charges on the indictment, where it was relevant to the accused’s intent or knowledge (including evidence of prior conduct of the accused’s subordinates, or ongoing conduct of the accused), or to show the context in which crimes occurred. As regards examples of where the ICTR or ICTY have allowed evidence of other attacks relevant to the accused’s intent or knowledges, see *Prosecutor v. Pavle Strugar*, “Decision on the Defence Objections to the Prosecution’s Opening Statement Concerning Admissibility of Evidence”, IT-01-42-T, 22 January 2004, p. 3: “the evidence of events prior to 6 December 1991 is being offered to prove that on 6 December 1991 Strugar knew or should have known, based on prior conduct of his subordinates in similar circumstances, that his subordinates would commit criminal acts [...] [the Chamber] allows the admission of evidence concerning

67. Trial Chamber I has also admitted into evidence documents that did not come within the time period of the indictment, and justified doing so on the basis that the documents concern “issues and events (or information) that are of sufficient proximity to the charges the accused faces to be, *prima facie*, of potential assistance in this trial.”⁶⁹

68. Pre-Trial Chamber I in the *Lubanga* case rejected the Defence challenge to inclusion of facts outside the temporal scope of the charges, stating that “nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the acts or omissions with

prior shelling incidents, provided that this evidence is used solely for the purpose of proving the Accused’s state of mind in connection to the acts charged in the indictment.”

The ICTR Chambers have admitted this type of evidence related to incidents not specified in the charges in the indictment in the following situations: as proof of ongoing conduct which culminates after 1994; to place events that occurred in 1994 in context, and where it fulfils the requirements of Rule 93 a ‘similar fact evidence’. See *Prosecutor v. Bagosura et al.*, “Decision on Admissibility of Proposed Testimony of Witness DBY”, ICTR-98-41-T, 18 September 2003, para. 2; see also, *Prosecutor v. Nahimana et al.*, “Appeal Judgment”, ICTR-99-52-A, 28 November 2007, para. 315. Additional contextual evidence has been used to clarify the general atmosphere in which the charged crimes took place (See *Prosecutor v. Nahimana et al.*, para. 315); and has been used to show intent, motive, and to establish relationships between different parties to the case (See *Aloys Simba v. The Prosecutor*, “Decision on Interlocutory Appeal Regarding Temporal Jurisdiction”, ICTR-01-76-AR72.2, 29 July 2004, p.3. In *Bagosura*, the Chamber considered similar fact evidence could go “beyond showing a mere disposition to commit crime or a particular kind of crime”, and can “point in some other way to the commission of the offence in question” (para. 13) and may “prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to the common sense” (para. 20). For examples regarding context: The ICTR Chambers have admitted this type of evidence related to incidents not specified in the charges in the indictment in the following situations: as proof of ongoing conduct which culminates after 1994; to place events that occurred in 1994 in context, and where it fulfils the requirements of Rule 93 a ‘similar fact evidence’. See *Prosecutor v. Bagosura et al.*, “Decision on Admissibility of Proposed Testimony of Witness DBY”, ICTR-98-41-T, 18 September 2003, para. 2; see also, *Prosecutor v. Nahimana et al.*, “Appeal Judgment”, ICTR-99-52-A, 28 November 2007, para. 315. In *Prosecutor v. Vasiljevic*, “Judgment”, IT-98-32-T, 29 November 2002, paras. 53-56, 58: The ICTY Trial Chamber admitted evidence which referred to events “in those various neighbouring municipalities occurred approximately the same time” to provide an overview of events in the municipality under consideration.

⁶⁹ ICC-01/04-01/06-1981-Anx, “Public Annex to ‘Decision on the admission of material from the ‘Bar Table’”, 24 June 2009.

which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred.”⁷⁰

69. The Defence also argues that evidence of attacks other than the Bogoro Attack must be proven beyond reasonable doubt. This argument confuses the standard of proof underlying a finding of guilt with the degree of confidence that the Chamber must have in the admissibility of evidence. The Prosecution submits that it is incorrect, as the Defence seek to argue, that evidence of attacks other than the Bogoro Attack must be proven beyond reasonable doubt. When assessing the admissibility of a document, testimony or other material, Article 69(4) does not mandate the Chamber to apply a standard of relevance or of admissibility beyond reasonable doubt or even on a balance of probabilities. As demonstrated above (see paragraphs 12 to 14), when assessing the relevance or admissibility, the Chamber must determine if, on its face (*prima facie*), the evidence is relevant or admissible. “This means that the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent”.⁷¹

70. Article 66(3) requires that the “Court must be convinced of the guilt of the accused beyond reasonable doubt”. The Prosecution is required to prove the guilt of the accused of the *charges against them*, beyond reasonable doubt. The Prosecution is not required to establish, as a prerequisite to

⁷⁰ ICC-01/04-01/06-803, para. 152.

⁷¹ ICC-01/04-01/07-717, para.77.

admissibility, that each individual item of evidence prove the guilt of the accused beyond reasonable doubt.

Request

71. For the foregoing reasons the Prosecution requests that the Chamber declare admissible the evidence of deceased Witnesses 167 and 258, the *procès-verbal d'audition* of Germain Katanga, and evidence of other attacks and that it allow some documents to be tendered into evidence by bar table motions.



Luis Moreno Ocampo, Prosecutor

Dated this 16th day of November 2009

At The Hague, The Netherlands