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TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR**

v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI

**Public filing
with Annexes A, B and C – confidential**

**Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to
Article 64(9) of the Statute**

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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Pursuant to Articles 64(9) and 69(2), (3) and (4) of the Rome Statute and Rule 63(2) of the Rules of Procedure and Evidence (“Rules”), as well as Trial Chamber II’s Directions for the conduct of the proceedings and testimony in accordance with Rule 140, rendered on 1 December 2010,¹ the Prosecution hereby requests to tender into evidence one hundred and twenty-two (122) documents and video/audio recordings contained in the Prosecution’s Amended List of Evidence for the truth of their content and without calling their authors to testify.² These documents are relevant to the issues in this trial and are *prima facie* reliable.

In accordance with the Directions,³ the Prosecution has submitted to each of the Defence teams, a table depicting the content, the origin and the relevance of each of these documents, which are grouped under nine (9) categories (“Table”) in appended Annex A.⁴ Both the Katanga Defence and the Ngudjolo Defence commented on each document regarding their admission into the record from the bar table. These observations are filed together with this submission as Annex B and Annex C.

Confidentiality

The Prosecution requests that all Annexes (A-C) to this motion be classified as “Confidential” since they relate to confidential evidentiary material.

¹ ICC-01/04-01/07-1665-Corr.

² The amended List of Evidence was filed as Annex A to the “Prosecution’s Amended Table of Incriminating Evidence and Amended List of Evidence”, ICC-01/04-01/07-1643, on 16 November 2009.

³ ICC-01/04-01/07-1665-Corr, para. 102.

⁴ These documents are accessible in eCourt, as disclosed to the Defence.

Background

1. In its 14 August 2009 observations related to the Prosecution's Table of Incriminating Evidence, the Defence for Mathieu Ngudjolo sought to exclude 290 items of evidence from the Prosecution's List of Evidence.⁵
2. During the status conference of 2 October 2009, Trial Chamber II ("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"⁶ and invited the Defence for Mathieu Ngudjolo to "extend the scope of the application filed on 14 August".⁷ The Chamber further ordered the respective Defence teams to file written submissions explaining the basis for challenging the admissibility of evidentiary material, which included items pertaining to deceased witnesses 258 and 167 ("Deceased Witnesses").⁸
3. On 12 October 2009 the Defence for Mathieu Ngudjolo filed its *Requête de la Défense de Mathieu Ngudjolo aux fins d'exclusion d'éléments de preuve* ("Ngudjolo Admissibility Motion"), challenging the admissibility of a number of identified documents on the Prosecution's List of Evidence, as well as certain categories of material.⁹ The Prosecution responded to this request on 21 October 2009.¹⁰
4. On 23 October 2009, the Defence for Mathieu Ngudjolo filed a motion challenging the admissibility of the evidence related to the Deceased Witnesses ("Ngudjolo Motion").¹¹ On the same day, the Defence for Germain Katanga filed a single pleading addressing three main issues: the material related to the

⁵ *Observations de la Défense de Mathieu Ngudjolo relatives au Tableau des éléments à charge élaboré par le Procureur* (ICC-01/04-01/07-1174), ICC-01/04-01/07-1375, 14 August 2009.

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

⁷ *Ibid.*, p. 37.

⁸ ICC-01/04-01/07-T-72-ENG ET WT, pp. 53-54.

⁹ ICC-01/04-01/07-1522-Conf, 12 October 2009.

¹⁰ *Réponse de l'Accusation à la requête de la Défense de Mathieu Ngudjolo aux fins d'exclusion d'éléments de preuve* (ICC-01/04-01/07-1522-Conf), ICC-01/04-01/07-1548-Conf, 21 October 2009.

¹¹ *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*, ICC-01/04-01/07-1556, 23 October 2009.

Deceased Witnesses; the *Procès-Verbal d'Audition* of Germain Katanga; and general challenges regarding admissibility of evidence ("Katanga Motion").¹²

5. On 16 November 2009, the Prosecution responded to the Katanga Motion and the Ngudjolo Motion. The Prosecution indicated that it would tender a number of documents from the bar table and argued the basis for submitting evidence in such a manner.¹³
6. On the same day, the Prosecution filed its Amended List of Evidence, which contained 670 documents. It included all the documents listed in Annex A.¹⁴
7. On 1 December 2009, the Chamber rendered the Corrected version of the Directions for the conduct of the proceedings and testimony in accordance with Rule 140 ("Directions").¹⁵ In the Directions, the Chamber envisaged the introduction of documentary evidence without calling witnesses subject to certain conditions.¹⁶
8. On 26 May 2010, the Prosecution submitted to both Defence teams the Table and, as requested by the Defence for Mathieu Ngudjolo, it submitted a French translation of the Table on 16 June 2010. On 30 June 2010, the Defence teams submitted their observations on the Table in which they objected to the admission into evidence of most of the documents.

¹² "Defence Objections to Admissibility in Principle and in Substance", ICC-01/04-01/07-1558, 23 October 2009. On 4 November 2009, the Defence for Germain Katanga filed an Addendum to this filing, ICC-01/04-01/07-1592.

¹³ "Prosecution's Consolidated Response to "Defence Objections to Admissibility in Principle 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 référencés sous les numéros T-167 et T-258» (ICC-01/04-01/07-1556)", ICC-01/04-01/07-1645, in particular paras 54-63.

¹⁴ Since then, the Prosecution has added three more items to its List of Evidence. It currently comprises 673 items. From the 673 documents, the Prosecution is submitting 122 documents to be admitted into evidence from the bar table.

¹⁵ ICC-01/04-01/07-1665-Corr, 1 December 2010. The original version was filed on 20 November 2010.

¹⁶ ICC-01/04-01/07-1665-Corr, paras 98-102.

9. In their observations the Katanga Defence did not indicate the basis for their objections to any of the documents listed in the Table. In certain instances, the Katanga Defence team requests the name of the particular staff members considered as the “source” of the document which originates from an institution. In its submission the Katanga Defence team also takes the opportunity to request a typed and legible version of one document.¹⁷
10. The Ngudjolo Defence team’s objections can be grouped into the following points: 1) lack of relevance; 2) lack of probative value; 3) lack of knowledge by the accused of the elements contained in the documents; 4) partiality and lack of veracity of content of documents.
11. The Prosecution hereby submits this application and its annexes in accordance with the Chamber’s Directions and addresses the Defence’s objections.

Submission of Material as Evidence from the Bar Table

12. In accordance with Article 64 of the Statute, the Chamber can assess freely all evidence relevant to the case. Pursuant to Article 69(2), (3) and (4), the Chamber has the discretion to admit all evidence it deems necessary to establish the truth, including documentary evidence. As affirmed in the Directions, there is no requirement before the International Criminal Court that evidence must be tendered through a witness. Furthermore, the Statute and Rules do not expressly stipulate the manner in which documentary evidence must be introduced at trial. For the brevity of this submission, the Prosecution incorporates by reference the arguments developed in its 16 November motion.¹⁸

¹⁷ DRC-OTP-0029-0176.

¹⁸ ICC-01/04-01/07-1645, in particular paras 57-61 and 63; see also, generally, the arguments on admissibility of evidence developed in paras 50-55, and arguments concerning the evidence regarding attacks other than the Bogoro attack, para. 64 and following.

13. The Chamber has provided a non-exhaustive list of factors that it would consider when deciding on admissibility of documents directly from the bar table. These factors include: “a) nature and origin of documentary evidence; b) their relevance to the case; c) whether the content of the document is easily understandable; d) if the information contained in the document pertains exclusively to the historical background and/or contextual elements of the case; the nature and precision of the information contained in the document, as well as whether it is the only evidence on the matter or whether there are alternative sources of information on the same issue; e) the original purpose for which the document was created and to whom it was addressed; f) whether it is possible to ascertain from the content of the document itself what its sources are and whether they can be easily verified; g) whether it is possible to ascertain the method used to compile and process the information contained in the document; h) whether there are any doubts as to the authenticity of the document.”¹⁹

14. In fact, a similar procedure was adopted by Trial Chamber I²⁰ which the Prosecution supported before this Chamber in its 16 November submission on the matter.²¹ Trial Chamber I considers three principal factors when determining admissibility of evidence: a) *prima facie* relevance of documents; b) their *prima facie* probative value; and c) the balance between *prima facie*

¹⁹ ICC-01/04-01/07-1665-Corr, para. 100.

²⁰ ICC-01/04-01/06-1399. In the *Lubanga* case, Trial Chamber I accepted the principle of introducing certain documentary evidence from the bar table rather than through witnesses: see “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. Trial Chamber I expressly 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”; see ICC-01/04-01/06-1399, 13 June 2008, para. 22.

²¹ See “Prosecution’s Consolidated Response to “Defence Objections to Admissibility in Principle 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 référencés sous les numéros T-167 et T-258» (ICC-01/04-01/07-1556)”, ICC-01/04-01/07-1645, para. 15.

probative value of the evidence and any prejudicial effect.²² To assess *prima facie* reliability of evidentiary material, Trial Chamber I evaluates the elements affecting their authenticity, such as: its origin, the context in which it was created, the method with which the information contained therein was compiled and the availability of corroborative evidence.²³

15. All the documents attached to this request are relevant to the *Katanga/Ngudjolo* case and are *prima facie* reliable. In Confidential Annex A, the Prosecution explains the relevance of each document/video and addresses its admissibility as tested against each of the factors that form the basis for its reliability. In this annex, the Prosecution also identifies where it has relied on the proffered documentary or video material in the Amended Table of Incriminatory Evidence.
16. Having established in Confidential Annex A the conditions that would demonstrate the admissibility of each document, the Prosecution acknowledges that admissible evidence might be excluded if the probative value of the documents is outweighed by any prejudicial effect that they may cause. In this case, however, the potential prejudice does not require exclusion of the tendered documents.
17. This material was disclosed to the Defence teams with sufficient advance time to prepare for trial.²⁴ In addition, the documents listed under Categories 1-5, as well as items from other Categories identified herein below, are all publicly available, making them particularly appropriate for tendering from the bar table.

²² See ICC-01/04-01/06-1399, para. 27 and following. Other international courts and tribunals, notably the ICTY and the ICTR, have adopted a similar procedure in this regard; see ICC-01/04-01/07-1645, in particular para. 58 and footnote 58; para. 59 and footnotes 60, and 61; para. 60 and footnotes 62, 63, 65 and 66.

²³ See, for example, ICC-01/04-01/06-1399, paras 36-40.

²⁴ Apart from a few exceptions, the documents tendered through this motion have been disclosed to the Defence through various INCRIM packages in May 2009, at the latest.

18. Furthermore, as previously mentioned, the Defence has been given several opportunities to raise objections to the admissibility of documents on the Prosecution's List of Evidence. Interestingly, until the 30 June 2010 submissions on the Table, the Defence did not challenge the admissibility of a majority of these documents.²⁵
19. Many of the submitted documents and videos related to the historical contextual and background elements of the case, are not in dispute, and have been subject to an agreement – albeit partial-- between the parties. Nonetheless, the Defence remains in a position to challenge this evidence through means other than calling their authors to testify, such as the examination of other witnesses or adducing documentary evidence. Pursuant to the applicable law,²⁶ the fact that evidence is proffered without accompanying witness testimony does not cause *per se* a prejudice to the Defence. In fact, the Chamber has indicated that submission of evidence from the bar table is in principle permissible in this case, subject to the Chamber's assessment of the factors outlined *supra*, at para. 13.
20. For the brevity of this motion, the Prosecution will merely reiterate, in response to the Defence's objections, principles that were further developed in its prior motion on admissibility of evidence.²⁷ First, this court is governed by the principle of free assessment of evidence under Article 69 of the Statute and Rule 63(2) of the Rules. Second, regarding relevance and probative value to accord to the documents in contention, the Prosecution refers to the findings made by

²⁵ The Defence has merely made some general objections to certain categories of documents on the Prosecution's List of Evidence. The Prosecution responded to these objections in its submission ICC-01/04-01/07-1645. In fact, in Annex A to this motion, as well as in its Amended Table of Incriminating Evidence, the Prosecution provided information on the relevance of each and every document. Regarding document DRC-OTP-0029-0176, the Prosecution points out that this document was first disclosed to the Defence on 18 April 2008. At the time of its disclosure or since then, the Katanga Defence did not raise the issue of its illegibility. Although handwritten it does not appear to be illegible to the Prosecution. The Prosecution is, nonetheless, prepared to go over this document together with the Defence so as to agree on its content.

²⁶ Article 69(2), which allows for exceptions to the principle of orality; see Trial Chamber I's affirmation of this provision in ICC-01/04-01/06-1399, para. 22 *supra* note 17.

²⁷ See ICC-01/04-01/07-2254

Pre-Trial Chamber I in its Confirmation Decision which the Prosecution explored in details in its prior filing:

Pre-Trial Chamber I, in its Decision on the Confirmation of charges in the Katanga case, articulated its discretion under Article 69(4) to determine relevance and/or admissibility of evidence and that it would look at the intrinsic coherence of any item of evidence and 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).²⁸

21. Therefore, on this basis, the Prosecution argues that the submitted material is admissible since the information provided satisfies the required indicia of reliability and each document presents an intrinsic coherence and *prima facie* probative value, in light of the whole body of evidence introduced in this case, in support of the charges levelled against the accused.
22. In response to the Katanga Defence’s request for the identity of the UN staff (MONUC or OLA)²⁹ or the TGI staff³⁰ depicted as “source”, the Prosecution refers the Defence to the oral decision of 2 November 2009³¹ in response to ICC-01/04-01-07-1076, which granted the redaction to the identity of the source for these documents.³² The Katanga Defence requests the communication of the identity of the Prosecution source that provided two documents to the OTP.³³ The 2 November 2009 oral decision also authorized the redaction of such information. As for the request for the identity of the source from the Bunia TGI

²⁸ PTC I, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 1 October 2008, para. 77 in ICC-01/04-01/07-2254, at para. 7.

²⁹ DRC-OTP-0016-0097; DRC-OTP-0026-0194; DRC-OTP-0026-0195; DRC-OTP-0026-0205 and DRC-OTP-0043-0201.

³⁰ DRC-OTP-0035-0076.

³¹ ICC-01/04-01/07-T-75-CONF-EXP-ENG ET, pp.3-10.

³² DRC-OTP-0016-0097 ; DRC-OTP-0026-0194 ; DRC-OTP-0026-0195; DRC-OTP-0026-0205; DRC-OTP-0035-0076; DRC-OTP-0043-0201; DRC-OTP-0138-0239.

³³ DRC-OTP-0126-0411 and DRC-OTP-0126-0478.

regarding other identified documents,³⁴ or the ICC OTP-ID staff member³⁵ who provided the identified documents, the Prosecution does not have such information in its possession regarding the former and does not disclose such information in the latter situation. In any event, the Prosecution submits that the identity of a particular staff member of an institution which provided or authored a document is irrelevant for the purposes of admissibility. Rather, it is for the institution authoring such documents to satisfy the necessary indicia of reliability, not one of its agents. The reliability of such institutions has not been challenged by the Katanga Defence in its observations.

Bar Table Documents

23. In accordance with the Chamber's Directions,³⁶ Annex A contains a table listing the documents to be submitted from the bar table. It also contains a summarized description of the content of each document, its source and relevance, as well as the basis for its probative value. An index identifying the most relevant parts of the documents is also provided in Annex A. Finally, the table indicates where each document or video is referenced in the Table of Incriminating Evidence. The 122 documents are grouped according to 9 categories described below.

24. In **Category 1**, the Prosecution submits as evidence eight (8) Resolutions of the United Nations Security Council ("UN Resolutions"). The UN Resolutions relate to the armed conflict in Ituri from 1999 to 2004, the involvement of foreign troops in the DRC, the peacekeeping efforts and the deployment of the MONUC during this period. As indicated in Annex A, these documents are submitted in support of the contextual elements of war crimes, namely the existence of an armed conflict in the DRC and in Ituri, in particular, at the relevant time. Some

³⁴ DRC-OTP-0028-0356; DRC-OTP-0028-0421; DRC-OTP-0028-0463; DRC-OTP-0029-0046; DRC-OTP-0029-0072; DRC-OTP-0029-0075; DRC-OTP-0029-0076.

³⁵ DRC-OTP-0195-0277.

³⁶ ICC-01/04-01/07-1665-Corr, para. 101.

of the facts contained in these documents regarding the armed conflict in Ituri are hardly contentious since they have been the object of an agreement between the parties.³⁷

25. **Category 2** includes ten (10) reports emanating from the United Nations organs or agencies (“UN Reports”). Similarly to the UN Resolutions, the UN Reports relate to various aspects of the conflict in Ituri, including the conflict between the Hema and the Lendu and violations of human rights committed there from 1999 to 2004. Some reports provide specific information on individual attacks, such as on Drodro, Tchomia and Bogoro, which are relevant³⁸ to the *Katanga/Ngudjolo* case.³⁹

26. **Category 3** comprises twenty-three (23) reports emanating from the UN MONUC (“MONUC Reports”). For the most part, the reports compiled in Bunia are daily, weekly, monthly or special reports describing events which occurred in Ituri. The MONUC Reports support the contextual elements of war crimes and crimes against humanity in the current case. They provide evidence regarding attacks including the February 2003 attack on Bogoro as well as other incidents which resulted in human rights violations in the Ituri area. The documents shed light on the contacts various MONUC representatives had with Germain Katanga, Mathieu Ngudjolo or their political and military associates. For that reason, these Reports constitute evidentiary material regarding the authority of the accused, the hierarchical structure of the FNI and the FRPI, as well as the accused’s intent and knowledge.

³⁷ “Prosecution’s Observations on Agreements as to Evidence”, ICC-01/04-01/07-1609, 6 November 2009 and Confidential *ex parte* Annexes A and B.

³⁸ The Prosecution reiterates its position that evidence regarding the role and/or presence of the accused in other attacks both before and after the Bogoro attack, should be deemed admissible as it is relevant and of probative value, not only in terms of the context and elements of crimes against humanity and war crimes but also as regards the intent or knowledge of the accused for the conduct charged. See ICC-01/04-01/07-T-98-CONF-ENG ET, p. 50, ll 8-15 ; ICC-01/04-01/07-T-99-CONF-ENG ET, p. 9, ll. 17-25, p. 10, ll. 1-24 , p. 29, ll 23-25, p. 30, ll 1-25, p. 31, ll 1-15; ICC-01/04-01/07-692, paras 38-39; ICC-01/04-01/07-1548, para. 10; ICC-01/04-01/07-1645, paras 64-70.

³⁹ The Defence for Mathieu Ngudjolo previously objected to the report referenced as ERN DRC-OTP-0130-0273. See the Prosecution’s arguments for admission of material into evidence in ICC-01/04-01/07-1583, at paras 108-111 and in Annex A to this submission.

27. **Category 4** contains ten (10) reports issued by Non-governmental organisations (“NGO Reports” and “NGOs”, respectively).⁴⁰ These reports were issued by the following international NGOs: Human Rights Watch, Amnesty International, the FIDH, the International Crisis Group and the Réseau Européen Congo. The NGO Reports also concern the Ituri conflict and the commission of human rights abuses in that region.⁴¹
28. The NGO and UN Reports on the Prosecution’s List of Evidence documented human rights abuses contemporaneously to their occurrence. These reports were prepared exclusively with the view to inform the public, as well as national and international decision-makers, about human rights violations. Therefore, the even-handed approach adopted by these organisations when compiling and presenting the collected information into reports militates for their admission from the bar table.⁴²
29. **Category 5** contains the 2003 annual report “Country Reports on Human Rights Practices” produced by the United States Department of State, detailing human rights abuses in the DRC in 2003.
30. **Category 6** contains fourteen (14) media articles from Congolese or international news agencies. While some of the articles generally touch upon the Ituri conflict and attacks on the civilian population, others relate to the facts linked to the individual charges in this case, such as the killings committed in the village of

⁴⁰ Report DRC-OTP-0074-0215 is the English translation of the French original DRC-OTP-0130-0409. Another report on the list, CAR-OTP-0005-0074 is the French version of the portion of the report bearing the ERN DRC-OTP-0100-0314. All four reports are part of this motion.

⁴¹ The Ngudjolo Defence team objected to admission into evidence of the Report of the International Crisis Group (DRC-OTP-1015-0592). See the Prosecution’s arguments in ICC-01/04-01/07-1583, paras 114-117 and in Annex A to this submission.

⁴² NGO reports are generally based on fact-finding missions in the field and interviews of government officials, victims, militia leaders or other persons. Frequently, the methodology and references used in compiling a report are included in the report. Finally, the reports that the Prosecution wishes to tender into evidence were generated by reputable NGOs in the field of human rights protection. These factors support their reliability.

Bogoro or the presence of child soldiers in the armed forces.⁴³ These press articles are available to the public from open sources.

31. In **Category 7**, The Prosecution seeks to tender into evidence five (5) video and audio recordings,⁴⁴ as well as their transcripts and translations.⁴⁵ The video recordings submitted with this motion are *prima facie* reliable: the images they show are clear and understandable; the date and location of filming, as well as the individuals captured on them, are easily discernible.⁴⁶ These videos depict, for the most part, the aftermath of attacks or show various political actors active in Ituri. They are relevant to establish the historical context of the armed conflict.⁴⁷ Finally, some of the video and audio recordings originate from MONUC or Radio Candip/RTNC and were either publicly broadcast or are otherwise publicly available.⁴⁸

32. The Prosecution also moves to tender into evidence eleven (11) non-ICC court documents listed in **Category 8**. This category includes the Judgment of the International Court of Justice, documents from the *État-major général du FRPI* itself, as well as documents which originate from DRC judicial authorities. This category includes eight statements.

⁴³ Documents DRC-OTP-0077-0429 (Copy of the Congolese newspaper *le Millénaire*); DRC-OTP-0077-0345 (*La Colombe Plus*) and DRC-OTP-1018-0171 (Press article from Reuters entitled “UN Panel targets Congo militia over child soldiers”) have already been the subject of litigation between the Prosecution and the Defence of Mathieu Ngudjolo. The Prosecution hereby incorporates by reference the arguments on the relevance and probative value of these documents developed in its “Response to the Request of the Defence of Mathieu Ngudjolo for Exclusion of Certain Items of Evidence” on 21 October 2009, ICC-01/04-01/07-1548; for DRC-OTP-0077-0429 see paras 29-31; for DRC-OTP-1018-0171, see paras 47-50; for DRC-OTP-0077-0345, see paras 101-103; see also Annex A to this submission.

⁴⁴ Certain recordings were already challenged by the Ngudjolo Defence in prior motions. The Prosecution hereby incorporates by reference the arguments on the relevance and probative value of these video and audio recordings developed in ICC-01/04-01/07-1548: for video DRC-OTP-0035-0076, see paras 67-69; for video DRC-OTP-0124-0014, see paras 83-85; for video DRC-OTP-0036-0194, see paras 86-88; for video DRC-OTP-0124-0008, see paras 118-120. See also Annex A to this submission.

⁴⁵ For each video one transcript and its translation, 10 documents in total.

⁴⁶ In particular, these principles apply to the videos DRC-OTP-0035-0076, DRC-OTP-0036-0194, DRC-OTP-0124-0008, DRC-OTP-0124-0014. The commentary to these videos is also submitted: although such text provides additional information regarding the images depicted in these videos, it does not replace the images, which are the best evidence on the matter.

⁴⁷ In particular, this applies to the videos with the ERNs DRC-OTP-0116-0002, DRC-OTP-0035-0076, DRC-OTP-0036-0194, DRC-OTP-0124-0008 and DRC-OTP-0124-0014. The Prosecution notes that the accused Mathieu Ngudjolo is visible in videos DRC-OTP-0116-0002 and DRC-OTP-0035-0076.

⁴⁸ In particular, this applies to videos DRC-OTP-0116-0002 and DRC-OTP-0035-0076.

33. Several of these documents are part of the criminal investigation file (“dossier”) opened against Mathieu Ngudjolo before Congolese courts⁴⁹ and include two of Ngudjolo’s *procès-verbaux d’audition* (DRC-OTP-0039-0058 and DRC-OTP-0039-0013).⁵⁰ Two documents in this category relate to an investigation of Germain Katanga and include his *procès-verbal d’audition* (DRC-OTP-1016-0150). These documents contain incriminating evidence regarding the involvement of Katanga and Ngudjolo in the crimes committed at Bogoro in February 2003, as well as their involvement in other attacks. As the Prosecution has previously stated,⁵¹ these documents are relevant, *inter alia*, to establish the individual criminal responsibility of the two accused. Since these are official documents from the judicial authorities of the DRC, their authenticity should not be disputed.

34. Admission of the documents containing the statements of Mathieu Ngudjolo and Germain Katanga does not unduly prejudice the Defence. The responses made by the accused containing the information regarding the attacks in which they participated were made spontaneously and in the context of lawful judicial proceedings in the DRC.⁵² The Defence has received prior notice that the Prosecution intends to rely on material on attacks prior and subsequent to the Bogoro attack to satisfy the contextual elements of war crimes and crimes against humanity, but also to prove the accused’s intent and knowledge. Moreover, professional judges can assess the totality of evidence that is part of

⁴⁹ Document DRC-OTP-0039-0294 concerns charges against Ngudjolo and others for the murder of Lokana Lipi on 21 September 2003; documents referenced as ERN DRC-OTP-0039-0013 pertain to charges against Ngudjolo for the murder of a group of Hema civilians allegedly committed in an area between the villages of Bogoro and Aveba; DRC-OTP-0039-0051 is a statement of Lebe Zanamusi relating to the attack on Tchomia implicating both Katanga and Ngudjolo; statement of Ngudjolo DRC-OTP-0039-0058 pertains to various attacks including these led on Tchomia, Bogoro and Bunia. Two more statements (DRC-OTP-0039-0060 and DRC-OTP-0039-0076) relate to the Tchomia attack but do not directly implicate Katanga or Ngudjolo.

⁵⁰ Document DRC-OTP-0039-0294 was challenged by the Ngudjolo defence. The Prosecution hereby incorporates by reference the arguments on the relevance and probative value of this document developed in ICC-01/04-01/07-1548, paras 134-137. See also Annex A to this submission.

⁵¹ See *supra* footnote 24 re evidence concerning the accused’s participation in attacks other than the Bogoro attack.

⁵² The Prosecution refers to its submission ICC-01/04-01/07-1645, in particular to paras 37-44, relating to the extent of the legal requirements in the DRC for a suspect to have his lawyer present during initial interrogation.

the record without leading to any prejudice to the Defence. As the Chamber has indicated, evidence regarding the role or presence of the accused in other attacks may be elicited from witnesses, and determining whether the Defence has suffered prejudice may be effectuated at the end of the trial, once all evidence has been heard.⁵³ The Defence is not precluded from making submissions disputing the truth, relevance or probative value of such evidence in light of the evidence as a whole.

35. Previously, and pursuant to challenges made by the Katanga and Ngudjolo Defence teams, the Prosecution extensively argued the relevance and submission as evidence of the *Procès-Verbal* of Germain Katanga, dated 20 January 2006⁵⁴ as well as the *Procès-Verbal* of Mathieu Ngudjolo, dated 17 June 2004.⁵⁵ The reasoning applied to the admission of the statements of the two accused should also apply to the admission of other statements in this category; the statements are *prima facie* reliable since they are judicial documents emanating from the Congolese authorities and have probative value since they are relevant to the charges laid against Katanga and Ngudjolo.

36. In **Category 9**, the Prosecution submits as evidence thirty (30) documents that originate mainly from Ituri political parties and their members, or from the DRC Government. For ease of reference, the detailed arguments regarding their relevance and probative value are developed in Annex A.⁵⁶ These documents are relevant to prove the individual criminal responsibility of the two accused:

⁵³ ICC-01/04-01/07-T-99-CONF-ENG ET. p. 33, ll. 2-16. See also ICC-01/04-01/06-1399, 13 June 2008, paras 29-30. The Chamber stated 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” and clarified that “if there are no adequate and available means of testing its reliability” or “if evidence is demonstrably lacking any apparent reliability the Chamber must equally carefully decide whether to exclude the evidence at the outset or whether to leave that decision until the evidence overall is considered by the Chamber at the end of the case.”

⁵⁴ ICC-01/04-01/07-1645, paras 34-48. The *procès-verbal d’audition*, signed by Katanga, is relevant since it contains Katanga’s acknowledgement of his role within the FRPI and involvement in an attack at Bogoro.

⁵⁵ ICC-01/04-01/07-1548, paras 89-91.

⁵⁶ Document referenced as ERN DRC-OTP-0102-0011, a compilation of nine letters addressed by the representatives of the Hema community to the UN Secretary General and to the Head of the MONUC Mission in Bunia was also addressed in the Ngudjolo Defence request. The Prosecution refers to the arguments already made in its 21 October response; see ICC-01/04-01/07-1548, paras 58-60 and in Annex A to this submission.

they relate to the position of authority held by Katanga and Ngudjolo within the FRPI and FNI, respectively;⁵⁷ their control and power over these groups; the chain of command and the overall organization of these two groups. Some of the documents pertain to the knowledge and intent of the accused with respect to the crimes with which they are charged. The documents provide information on the daily functioning of the FNI and FRPI. Finally, most of the documents, under this category, support the existence of an armed conflict in Ituri at the relevant time. They also reveal the widespread and systematic nature of the attacks against the civilian population.

37. Furthermore, the documents in this category were authored by the accused, their close associates, or other members of the FNI or FRPI. A substantial number contain stamps and/or official headings of the FNI or FRPI, and signatures of the authors, which, for some, are those of the accused. The paper and the form used when drafting these documents are consistent with other material produced by these groups which support their authenticity. The contextual information contained in these documents is corroborated by other material on the Prosecution's List of Evidence and by the evidence given by witnesses already called to testify by the Prosecution (i.e. Witness P-250) or who will be called. The objects of these internal communications, which may be of a prosaic nature relating to the daily running of a military camp, further attest to their veracity and authenticity.

⁵⁷ In some documents, Mathieu Ngudjolo is referred to as the Chief of Staff of the FRPI (and not the FNI). This supports the alliance existing between the FNI and the FRPI, in light of the time when they were created: after the Bogoro attack.

Conclusion

38. For the foregoing reasons, the Prosecution requests that the Chamber admit into evidence the one hundred and twenty-two (122) items listed in Confidential Annex A and assign them EVD numbers.



Luis Moreno-Ocampo, Prosecutor

Dated this 16th day of July 2010

At The Hague, The Netherlands