

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-01/07
Date: 30 August 2010

TRIAL CHAMBER II

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

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

Public

Katanga Defence Response to Prosecution Bar Table Motion

With Confidential Annex 1

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain Katanga

Mr David Hooper Q.C.
Mr Andreas O'Shea

Counsel for the Defence for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Registrar

Ms Silvana Arbia

Introduction

1. This is a response to the Prosecutor's bar table motion (hereinafter "the motion") filed on 16 July 2010.¹ Pursuant to an oral decision of the 15th July 2010,² the time limit for the filing of this response was extended by 21 days.
2. The expression 'bar table' describes the exceptional situation where documents or other material is put into evidence directly, without being produced by or through a witness in the course of testimony. The Prosecutor seeks to admit 122 documents and audio/video recordings in this manner.³ The Defence for Mr Katanga ("the Defence") does not oppose 35 out of the proposed 122 documents. It opposes the remaining 87 documents. The Defence wishes to acknowledge the help and assistance it has received from the OPCD by way of the latter's extensive research into the general area of bar table motions.

¹ ICC-01/04-01/07-2290, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, with Annexes A, B and C – Confidential, 16 July 2010.

² ICC-01/04-01/07-T-173-CONF-ENG ET, 15 July 2010, p. 77.

³ ICC-01/04-01/07-2290, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, with Annexes A, B and C – Confidential, 16 July 2010, para. 3, paras 6, 23, 28.

3. Having set out a brief procedural history, this response first outlines the general considerations with respect to the possible admission of documents from the bar. It then addresses the 9 categories of documentary evidence as classified by the Prosecutor in his motion.⁴ In respect of each category the reasons for caution in the admission of such evidence are set out in general terms. Finally, Annex A to this motion contains a table setting out, in respect of each individual item objected to by the Defence, a succinct explanation for opposing such admission. This methodology is required because of the large number of items sought to be admitted.

Procedural History

4. At the pre-trial status conference of 2 October 2009, the Trial Chamber ordered the parties to make submissions on the issue of the admissibility of evidence.⁵ On the 23rd October 2009, the Defence filed its submissions in this regard.⁶ The co-accused also filed submissions on this date, but had earlier made filings on the issue on 14 August and 12 October 2009, respectively.⁷ The Prosecutor responded to the co-accused on 21 October 2009 and to the defence submissions of the 23 October on the 16th November 2009.⁸ A decision on these pleadings is still pending.
5. The Prosecutor communicated to the Defence on 26th May 2010 the documents that it intended to seek admitted as bar table documents⁹. On the 30th June 2010, the Defence informed the Prosecutor, in tabular form, the documents to which it would object, and those to which the Defence would raise no objection in the event that the Prosecutor filed a bar table motion.¹⁰ The Defence table, as well as that for the co-

⁴ ICC-01/04-01/07-2290, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, with Annexes A, B and C – Confidential, 16 July 2010, para. 23.

⁵ ICC-01/04-01/07-T-72-ENG ET WT 02-10-2009, p. 53 l. 23 - p. 54 l. 2.

⁶ ICC-01/04-01/07-1558, Defence Objections to Admissibility in Principle and in Substance, 23 October 2009. On 4 November 2009, the Defence filed an Addendum to this filing, ICC-01/04-01/07-1592.

⁷ ICC-01/04-01/07-1556, *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*, 23 October 2009 ; ICC-01/04-01/07-1375, *Observations de la Défense de Mathieu Ngudjolo relatives au Tableau des éléments à charge élaboré par le Procureur* (ICC-01/04-01/07-1174), 14 August 2009 ; ICC-01/04-01/07-1522-Conf, *Requête de la Défense de Mathieu Ngudjolo aux fins d'exclusion d'éléments de preuve*, 12 October 2009.

⁸ ICC-01/04-01/07-1548-Conf, *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), 21 October 2009 ; ICC-01/04-01/07-1645, 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), 16 November 2009.

⁹ Email from the Prosecution to the Defence and to the Co-accused entitled, Submission of List for Defence observations pursuant to paragraphs 101 and 102 of Decision ICC-01/04-01/07-.May 2010 26 ¶1665

¹⁰ Email from the Defence to the Prosecution entitled, Submission of List for Defence observations pursuant to paragraphs 101 and 102 of Decision ICC-01/04-01/07-.June 2010 30 ¶1665

accused, have been annexed to the Prosecutor's motion as 'Annex B'.¹¹ The Defence did not intend, nor expect, that these *inter partes* discussions would be disclosed to the Chamber as part of the motion and does not consider itself bound by this document in its current submissions to the Chamber.

6. Given that the Prosecutor has disclosed the Defence discussions to the Chamber, it is opportune to note that the Defence on that occasion indicated that it would not object to 24 out of the 122. It requested further particulars in relation to 13 items. No further information has been provided by the Prosecution with regard to any of these items.

General Considerations

7. The principle of the right to a fair trial¹² requires in principle that all items of evidence should be tendered in a manner that is procedurally fair to the accused and affords him a proper opportunity to test the evidence, and to contest the charges against him under at least equal conditions to the prosecuting authorities.¹³
8. Corresponding fundamental rights, designed to give effect to the right to a fair trial, are the right to examine witnesses¹⁴ and the right to a public hearing.¹⁵ The former suggests that incriminating testimony should be given live in court, and the latter that the trial should, to the extent possible, be in public view and transparent. A person's trial should not be substantially based on written material that is never discussed in the public forum.¹⁶
9. These rights and principles are given full effect in the provisions of the International Criminal Court (« ICC ») in Articles 64 and 69 of the Statute. In terms of Article 69(2), the principle of live testimony holds a special place in the legal framework for criminal proceedings before the court.

¹¹ ICC-01/04-01/07-2290, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, with Annexes A, B and C – Confidential, 16 July 2010.

¹² Article 67(1).

¹³ Article 67(1)(e).

¹⁴ Article 67(1)(e).

¹⁵ Article 67(1).

¹⁶ ECHR, *Werner v. Austria*, Judgement of November 24, 1997, para. 45

("protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial"). See also UN Human Rights Committee (HRC), CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, §6.

10. As a result, it is submitted that the admission of evidence in the form of documents or video and audio cassettes directly from the bar, and not through an appropriate witness, constitutes the exception rather than the rule, and should only be done within strict parameters. As so held in *Karadzic*,

The bar table should not generally be the first port of call for the admission of evidence. It is, rather, a supplementary method of introducing evidence, which should be used sparingly to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings. [...] Notwithstanding that it may result in the saving of time inside the courtroom, in the circumstances of the present case, the Chamber considers that it is essential to view the bar table as mechanism to be used on an exceptional basis and not simply as another means by which evidence may be introduced wholesale into the court record.¹⁷

11. This is certainly the case before the *ad hoc* tribunals. This type of exercise is governed by Rule 92*bis* of the respective rules of procedure and evidence of the International Criminal Tribunal for Rwanda (hereinafter « ICTR ») and the International Criminal Tribunal for the former Yugoslavia (hereinafter « ICTY »), in correlation with the jurisprudence interpreting this provision (which is slightly differently drafted in these two sets of rules). The Appeals Chamber of the Special Court for Sierra Leone (hereinafter « SCSL ») has excluded all possibility of bar table motions in the interests of the fairness of the trial for an accused.¹⁸

12. It is accepted by the Defence that the bar table motion is an established portal for the admission of evidence at the ICC.¹⁹ The Trial Chamber has already addressed, in general terms, the applicable principles to the admission of such evidence in its decision 1665 of 20 November 2010, as amended.²⁰ The Chamber has indicated that in the consideration of such a motion it would take into account, *inter alia*: the nature and origin of documentary evidence; the relevance to the case; whether the content of the document is easily understandable; whether 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 if there are alternative sources of information on the same issue; the original purpose for which the document was

¹⁷ *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Prosecution First Bar Table Motion, 13 April 2010, paras 9, 15; *Prosecutor v. Prlic et al.*, Case No. IT-04-74, Decision on Admission of Evidence, 13 July 2006, p. 6.

¹⁸ *Prosecutor v. Taylor*, Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents”, 6 February, 2009.

¹⁹ See e.g., ICC-01/04-01/07-1665-Corr, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2010, paras 98-102.

²⁰ ICC-01/04-01/07-1665-Corr, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2010.

created and to whom it was addressed; whether it is possible to ascertain the method used to compile and process the information contained in the document; whether there are any doubts as to the authenticity of the document.²¹

13. In *Lubanga*, the Trial Chamber has opined against the admission of documents of unknown source and origin.²² It will focus first, on the relevance of the material to the case; second, on whether or not it has probative value (bearing in mind, for instance, the “indicia of reliability”); and third, balance this against its prejudicial effect.²³

14. At the ICTY, in the case of exhibits that have not been tendered through a witness, there is a greater burden on the Prosecutor to prove both their reliability and probative value.²⁴ Moreover, in the event that it is not possible to test the reliability or provenance of the evidence or statement, the Chamber will reject it.²⁵

Specific Categories of Evidence Sought to be Admitted

15. The Defence addresses below the principles applicable to the various categories of evidence sought to be admitted by the Prosecutor. The nature of the objections to individual documents is briefly explained in Annex A to this response.

16. The Defence is concerned that the fair trial rights of an accused will be damaged by the overuse by a prosecutor of bar table material. The Defence requests the Chamber to be cautious in admitting the disputed material, bearing in mind the arguments advanced against admission, the limited jurisprudence at the ICC and the early stages of the institution. The Defence also values a degree of certainty as to the kind of evidence that is capable of being held against the accused. Admission of material on

²¹ ICC-01/04-01/07-1665-Corr, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2010, para. 100.

²² ICC-01/04-01/06-T-170-ENG WT 07-05-2009 1/100 NB T, pp 17-19.

²³ Prosecution v. Lubanga, ICC-01/04-01/06-1981, Decision on the admission of material from the “bar table”, 24 June 2009, para. 33. Indicia of reliability that have justified admission of documents in the jurisprudence of the *ad hoc* Tribunals include: the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting. *Prosecutor v. Delalic*, Case No. IT- Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18 ;

²⁴ *Prosecutor v. Oric*, Case No. IT-03-68-T, Judgement, 30 June 2006, para. 29.

²⁵ *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Decision on Motion for Exclusion of Statement of the Accused, 8 July 2005. This was confirmed on appeal. See *Prosecutor v. Halilovic*, Case No. IT-01-48-A, Judgment, 16 October 2007, paras 39-40.

the basis that it will be given appropriate weight at a later time places the Defence in a position of uncertainty.

Category 1: Security Council Resolutions

17. The following Security Council Resolution referred to in Annex A, and the only one opposed out of the seven, is sought to be admitted by the Prosecutor: 1493 (2003).

18. Security Council Resolutions have been used sparingly in international courts. The ICC has cited them only twice, without dispute.²⁶ They have been controversial at the ICTR and at the SCSL;²⁷ Their very contents have not been admitted due to the questionable reliability of the facts and statements contained therein. A resolution represents “invariably a mixture of posited facts, propositions of law, and opinions of the Secretary General or the powers that be in the Security Council.”²⁸

Category 2: United Nations Reports

19. The following UN Reports referred to in Annex A are sought to be admitted by the Prosecutor: DRC-OTP-0005-0074; DRC-OTP-0100-0314; DRC-OTP-0129-0437; 0131-0175; 0044-0333.

20. The Defence incorporates here its references made in sub-heading 4, NGO Reports, which apply *mutatis mutandis* to UN Reports.

21. The Prosecution must either tender UN reports through their author, or it must establish the reliability and probative value of each document – the fact that they

²⁶ See *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07, Decision on the Conditions of the Pre-Trial Detention of Germain Katanga, 21 April 2008, p. 8, n 27; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Public Redacted Version of the Decision on Confirmation of Charges, 29 January 2007, p. 235 n. 305. See also *Id.* at n 295, 305, 311, 336, and 385 (The resolution in question was used together with several Reports of the Secretary General on the UN Mission in the DRC by the Pre-Trial Chamber as evidence of country conditions).

²⁷ See *Prosecutor v. Fofana*, Case No. SCSL-2004-14-AR73, Fofana – Decision on Appeal Against “Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence,” 16 May 2005, para. 49. *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali* (ICTR-97-21-T), *Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo* (ICTR-97-29A and B-T), *Prosecutor v. Joseph Kanyabashi* (ICTR-96-15-T), *Prosecutor v. Elie Ndayambaie* (ICTR-96-8-T) (Case No. 98-42-T), Decision on the Prosecutor’s Motion for Judicial Notice and Admission of Evidence, 15 May 2002, para 133.

²⁸ *Id.* at pp. 13, 28.

emanate from the UN does not suffice.²⁹ It must also establish that it is an official document.

22. The SCSL has also held that any documents – including UN reports – that are admitted in lieu of oral testimony must meet the criteria set out in rule 92*bis* (i.e. they must be limited to background issues/cumulative evidence, and not evidence relating to acts and conduct of the defendant).³⁰ It also refused to admit a document that contained information in connection with UNICEF Kigali, since it was not an official document.³¹ The document must specify which UN office or agency produced it, or it will be inadmissible at the SCSL due to lack of information concerning the source.³²

23. The Eritrea Ethiopia Claims Commission has also noted why UN documents should be viewed with scepticism.³³ This analysis was not only in regard to reports from UN bodies, but also, to reports from the ICRC, the U.S. State Department, the British Home Office, and international human rights NGOs.³⁴

24. With regard to the credibility of the facts contained within a Resolution, M. Cherif Bassiouni details the deficiencies in UN human rights reports. To begin with, the “UN was established as a political organization, and, as such, it is largely governed by political considerations [...] the Security Council is unbridled in its determination of peace and security issues. These considerations are elevated above judicial or other forms of review, although always subject to self-review whenever considerations of power and interest require it.”³⁵

²⁹ See *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Admission of UNAMIR Documents, 21 November 2006, paras 10-12.

³⁰ See *Prosecutor v. Taylor*, Decision on Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies, 20 February 2009, paras 20-25. See also *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic, 22 June 2005, at para. 22 (The Chamber will also utilise a more relaxed standard of admissibility if the exhibits are being introduced to establish the context of the events, rather than the guilt or innocence of the accused).

³¹ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T Decision on the Nahimana Defence’s Motion to Admit into Evidence Certain Materials and the Prosecution Objection thereto, 5 June 2003, para. 11.

³² *Prosecutor v. Taylor*, Decision on Prosecution Motion for Admission of Documents of the United Nations and United Nations Bodies, 20 February 2009, para. 133.

³³ Partial Award, Civilian Claims – Eritrea’s Claims 15, 16, 23 & 27-32 (Eth. V. Eri), p. 34, Eritrea Ethiopia Claims Commission, 17 December 2004 (“[...] the Parties also noted the potential pitfalls and limitations of uncritical reliance on such materials, which were not prepared as evidence in legal proceedings . . . Third-party reports may indeed be based on incomplete or inaccurate information that the reporting entity cannot test or verify, including information provided by one or the other of the Parties. Such reports may reflect the interests or agendas of the reporters or those who provided them with information”).

³⁴ Partial Award, Civilian Claims – Eritrea’s Claims 15, 16, 23 & 27-32 (Eth. V. Eri), p. 33, Eritrea Ethiopia Claims Commission, 17 December 2004.

³⁵ M. Cherif Bassiouni, *The UN and Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions*, 5 Wash. U. J.L. & Pol’y 35, 37-38 (2001).

25. Because the UN is process-driven, the emphasis is then on processes as opposed to on substantive outcomes.³⁶ Justice has become so intertwined with politics, that it is actually just “another card for the *realpolitician* to play and eventually barter away, in a mostly hidden manner, when in pursuit of achieving a political goal.” Thus, according to Bassiouni, fact-finding missions are in reality efforts designed not to achieve politically-unwanted results while appearing to be efforts at truth and justice. The relevant players have devised ways to accomplish this.
26. At the time of Bassiouni’s writing in 2001, there was “no standard operating procedure for fact-finding missions.”³⁷ This lack of standardized methods precludes any way to test the validity of the research and conclusions. Missions rely heavily on NGOs, government reports, and the media. Reports on human rights violations in South Africa, Iran, Iraq and Israel were made by people who had never set foot in the country.³⁸
27. Accountability of the missions has been given little attention. It “has yet to be clearly established as one of the goals of fact-finding missions. Indeed, to date the UN has not promulgated guidelines for accountability.”³⁹

Category 3: MONUC Reports

28. The following MONUC Reports in Annex A are sought to be admitted by the Prosecutor: DRC-OTP-0004-0085; DRC-OTP-0005-0012; DRC-OTP-0005-0276; DRC-OTP-0009-0372; DRC-OTP-0011-0452; DRC-OTP-0026-0179; DRC-OTP-0028-0421; DRC-OTP-0052-0173; DRC-OTP-0111-0147; DRC-OTP-0111-0163; DRC-OTP-0111-0730; DRC-OTP-0202-0682; DRC-OTP-0202-0785; DRC-OTP-0111-0730.
29. The ICJ in *DRC v Uganda* declined to rely on a MONUC report tendered by DRC government, because of its use of second hand hearsay.⁴⁰ Similarly, the ICTY has held in relation to evidence from members of international organizations (i.e, peacekeeping missions), that their impartiality cannot be verified, that their knowledge of events was limited and contradictory in nature; that their information came from what was learned from representatives of warring factions; that they did not have access to the relevant

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, para. 159, December 19.

headquarters or camps; that they were unable to observe the warring parties' combat operations up close; and that their knowledge of how events unfolded was at times limited.⁴¹

Category 4: NGO Reports

30. The following NGO Reports in Annex A are sought to be admitted by the Prosecutor:

DRC-OTP-0019-0153, DRC-OTP-0163-0232, DRC-OTP-0074-0526, DRC-OTP-0074-0797, DRC-OTP-0154-1245, DRC-OTP-0154-1301, DRC-OTP-0159-0099, DRC-OTP-0163-0357, DRC-OTP-1015-0592, DRC-OTP-0074-0045.

31. The reports must not already have been addressed in oral evidence and admitted in documentary form, and their contents must be directly relevant to the charges against the accused in order to be admitted. Also, their conclusions must not be controversial and open to legitimate criticism, and their probative value must not outweigh their potential prejudicial effect.⁴²

32. In *Bemba*, the Chamber decided, with regard to the admissibility of NGO reports or portions thereof, that their provenance and reliability is entirely uninvestigated and untested, and as such, that these materials carry little, if any, evidential weight.⁴³ This decision is notable as it was issued in the context of an abuse of process motion, in which the Chamber held that the relevant burden of proof was balance of probabilities rather than beyond reasonable doubt. It follows that if uninvestigated/untested NGO reports are not reliable for this lower standard, they would then not meet the more rigorous standard required in a determination of guilt.

33. The ICTY has also emphasised that given the hearsay nature of UN and NGO reports, their admissibility would be contingent on a prior demonstration that the methodology employed in compiling the report is sufficiently reliable to justify their admission. It will then be particularly difficult for the Prosecution to do so if the sources cited in the report are anonymous. In addition, the ability to cross-examine the person who

⁴¹ *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47, Trial Chamber Judgment, 15 March 2006, paras 303, 578-579.

⁴² See *Prosecutor v. T Lubanga*, ICC-01/04-01/06-2135, Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence, 22 September 2009, paras 33-34.

⁴³ *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, paras. 235, 254-255.

compiled the report does not necessarily cure the fact that the other party has been deprived of the opportunity to cross-examine the persons whom the investigator/NGO/witness interviewed whilst compiling the report. The Chambers are particularly reluctant to admit such material if it was prepared for the purposes of litigation by an agent of the prosecutor (i.e. an investigator).⁴⁴

34. For this type of document to be admitted, the Appeals Chamber held that it has to be considered “whether the summary is ‘first hand’ hearsay (that is, whether the persons who made the statements summarised personally saw or heard the events recorded in their statements), and whether the absence of the opportunity to cross-examine those persons affects the reliability of their statements. Contrary to the submission of the prosecution, the opportunity to cross-examine the persons who summarised those statements does not overcome the absence of the opportunity to cross-examine the persons who made them.”⁴⁵

35. Whilst generally, the threshold for admission of evidence is low, the Chamber in *Milutinovic et al.* denied the admission of OSCE reports (hearsay evidence) because it lacked sufficient indicia of reliability.⁴⁶

⁴⁴ *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006. See also *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92Bis, 13 September 2006, para. 14 (“The Chamber has found that reports contained no explanation of the conditions of interviews, duration of interview, number of interviewed persons and similar details, and that they constituted second hand hearsay which weakens any probative value they might have”).

⁴⁵ *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 20, referring to *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.2, Appeal Chamber Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002, para. 22

⁴⁶ *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 21 (The reasons *inter alia* include: (a) the methods of these organizations can at best assure the accuracy of the process for recording the information, not the reliability of material; (b) the reports do not identify the persons interviewed, leaving the sources of the critical information largely anonymous; (c) the witness to testify on these reports was in supervisory role with respect to collection and analysis of information, but she never took any of these information herself; (d) the other witness to testify on the report, although personally interviewed some of the persons, it was not possible to determine, which portions of the report were based on his interviews; (e) most of the tendered excerpts of the reports set forth allegations of criminal conduct made by persons who claimed to be the victims of, or witnesses to these crime, and the court had no opportunity of hearing any of these persons upon whose statements these entries were based; and the Chamber was not in position to assess the reliability of factual connections contained therein). See also, *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, Decision on Lukic Defence Motions for Admission of Documents from Bar Table”, 11 June 2008, para. 120 ; *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 22 (In relation to another report, the Chamber stated *inter alia* the following reasons: (a) a bulk of tendered excerpts of the report were based on “statement of one person only”; (b) the other information was “hearsay, rather than the statement of a direct victim or witness”, and (c) there were certain “inconsistencies in the details given by different interviewees about particular incidents.” The Chamber concluded that such issues “go directly to the reliability of the assertions” and the Chamber did not have sufficient materiality to be satisfied about the general

Category 5: US State Department Report

36. The following US State Department Report in Annex A is sought to be admitted by the Prosecutor: DRC-OTP-0019-0111.

37. US State Department Reports are prepared by gathering information from various organizations (US embassies and consulates abroad, foreign government officials, non-governmental organisations, and intergovernmental organizations).⁴⁷ Critics note that the reports are prepared by persons trained primarily in diplomacy as opposed to human rights advocacy,⁴⁸ which supports the idea that the reports have political objectives.

38. Several circuits in the US have noted the criticism that “ [...] the State Department reports soft-pedal human rights violations by countries with which the United States seeks good relations.”⁴⁹ The Second Circuit has similarly noted that a report produced by a government entity could not be completely objective and accurate.⁵⁰

reliability of information contained therein). See also *Prosecutor v. Milutinovic et al*, Trial Chamber “Decision on Evidence Tendered Through Fuat Haxhibeqiri”, 8 September 2006, para. 7-12 (Denying the admission of an NGO report because the statements therein were not prepared for the purposes of litigation before the tribunal and that there was no sufficient indicia of reliability); *Prosecutor v. Milutinovic et al*, Case No. IT-05-87, Decision on Lukic Defence Motions for Admission of Documents from Bar Table, 11 June 2008, para. 35, 37-38 (OSCE documents for which there was no indication as to who generated documents as well as no explanation is given why the documents were not used with witnesses who could have commented on it were not admitted).

⁴⁷ Overview and Acknowledgements, Country Reports on Human Rights Practices for 2009, released by the Bureau of Democracy, Human Rights and Labor March 2010, available at <http://www.state.gov/g/drl/rls/hrrpt/2009/frontmatter/135935.htm>.

⁴⁸ Phillip R. Trimble, Human Rights and Foreign Policy, 46 St. Louis U.L.J. 465, 466 (2002); see also L. Kathleen Roberts, The United States and the World: Changing Approaches to Human Rights Diplomacy under the Bush Administration, 21 Berkeley J. Int’l L. 631, 634 (2003).

⁴⁹ *Gramatkov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997); *Manzoor v. U.S. Dep’t of Justice*, 254 F.3d 342, 348 (1st Cir. 2001); *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000); *Gonahasa v. INS*, 181 F.3d 538, 542 (4th Cir. 1999). See also State Department Country Reports on Human Rights Practices: Roadmap for Budgeting of Democracy and Human Rights Programs of the State Department: Hearings and Markup Before the Comm. on Int’l Relations House of Representatives and the Subcomm. on Int’l Operations and Human Rights, 107th Cong. 171, 202 (Mar. 7, 2001) (statement by Elisa Massimino, Director, Lawyer’s Committee for Human Rights, Washington Office) (“The initial years of reports evidenced a strong “tendency to shield strategic allies [...] from plain-spoken criticism [...] even when the record of their violations was clear.””).

⁵⁰ *Chen v. INS*, 359 F.3d 121, 130 ([...] the immigration court cannot assume that a report produced by the State Department – an agency of the Executive Branch of Government that is necessarily bound to be concerned to avoid abrading relations with other countries, especially other major world powers - presents the most accurate picture of human rights in the country at issue. We note the widely-held view that the State Department’s reports are sometimes skewed toward the governing administration’s foreign-policy goals and concerns”).

39. Various NGOs have criticized these reports over the years for their inaccuracy.⁵¹ With regard to the use of the reports at the *ad hoc* tribunals, it is virtually non-existent.⁵² In the rare cases where they were cited, they were not relied on in any substantive way.⁵³

Category 6: Media Reports

40. The following Media Reports in Annex A are sought to be admitted by the Prosecutor:

DRC-OTP-0074-0058, DRC-OTP-0074-0002, DRC-OTP-0074-0128, DRC-OTP-0077-0345, DRC-OTP-0077-0429, DRC-OTP-0134-0094, DRC-OTP-0154-0433, DRC-OTP-0163-0287, DRC-OTP-0107-0782, DRC-OTP-1013-0298, DRC-OTP-1013-0300, DRC-OTP-1013-0302, DRC-OTP-1018-0171, DRC-OTP-1018-0172.

41. Newspaper articles are generally not considered as reliable sources of evidence, and are often excluded for lack of probative value.⁵⁴ Admission is far more likely if they deal with background matters only.⁵⁵

42. In *Kupreskic*, the Trial Chamber did not accept newspaper articles as reliable sources on the basis that “newspapers and other kinds of media are very often a highly unreliable source of information is common knowledge. Their reports, unsubstantiated by other material, cannot by themselves be sufficient evidence for a court of law.”⁵⁶

⁵¹ Lawyer’s Committee for Human Rights, *Holding the Line: A Critique of the Department of State’s Annual Country Report on Human Rights Practices*, p. ii-iii (2003) (The Lawyer’s Committee for Human Rights (present-day Human Rights First) promulgated several critiques of the Reports. It recently has noted that while the reports reflect objectivity and a commitment to international standards, there are “serious omissions and distortions” that appear “to reflect political pressure.”)

⁵² At the ICTY, the reports have been cited seven times. See *Prosecutor v. Gotovina*, Case No. IT-06-90-AR 72.1, 13 April 2007, Prosecution Book of Authorities n. 121; *Prosecutor v. Gotovina*, Case No. IT-06-90-PT, Bibliography of Defendant Ante Gotovina’s Response to Prosecution’s First Motion for Trial Related Protective Measures Witness 136, 28 February 2008); *Prosecutor v. Gotovina*, Case No. IT-06-90, Defendant Ante Gotovina’s Motion to Strike Appendices 11, 12, 13, 14, 15, 16, 17 and 18 from the Prosecution’s Response Opposing Gotovina’s Motion for Provisional Release, 28 August 2007, para. 15; *Prosecutor v. Jadranko Prlic*, Case No. IT-04-74, Public Transcript of Hearing 02 April 2009, 2 April 2009); *Prosecutor v. Gotovina*, Case No. IT-06-90, Prosecution’s Third Motion for Trial-related Protective Measures, Witness 6, 20 March 2008; *Prosecutor v. Boskoski et al*, Case No. IT-04-82, CD Rom: 2001, the Calm Before the Storm: the Influence of Cross-Border Networks, Corruption and Contraband on Macedonian Stability and Regional Security, 18 March 2008; *Prosecutor v. Milosevic*, Case No. IT-02-54, U.S. Senate Republican Policy Committee Press Release, August 12, 1998, 9 September 2004.

⁵³ The use of the Reports at the ICTR is even more scant – they were cited in two footnotes within the same report published by a Special Rapporteur. See Gay J. McDougall, Special Rapporteur, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict: Update to the Final Report*, E/CN.4/SUB.2/2000/21, n. 7, 14, 6 June 2006).

⁵⁴ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Decision on Exhibits, 19 July 2001.

⁵⁵ May and Wierda, *International Criminal Evidence*, 2002, para. 10.59, p. 346

⁵⁶ *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16, Decision on the Registrar’s Withdrawal of the Assignment of Defence Counsel, 3 September 1999, para. 7.

43. Similarly, the Chamber in *Norman* before the SCSL noted that newspapers are not generally considered as sources of reliable evidence, and are often excluded for lack of probative value.⁵⁷ Eligibility “will depend on the particular circumstances for the occasion and the significance of the evidence”; such evidence will not be accepted, however, “if it (is) related to some crucial issue in the case.”⁵⁸ It will instead be more readily accepted if it deals with matters by way of background.⁵⁹

Category 7: Video/Audio Recordings

44. The following Video/Audio Recordings in Annex A are sought to be admitted by the Prosecutor: DRC-OTP-0035-0076, DRC-OTP-0036-0194, DRC-OTP-0116-0002, DRC-OTP-0124-0008, DRC-OTP-0124-0014; B: DRC-OTP-0173-1369, DRC-OTP-0175-0310, DRC-OTP-1048-0663, DRC-OTP-1048-0674, DRC-OTP-1042-0167, DRC-OTP-1042-0115, DRC-OTP-1050-0633, DRC-OTP-1050-0212, DRC-OTP-1043-0583, DRC-OTP-1041-0377.

45. Video recordings should be used with the witnesses that can comment on them.⁶⁰ And whilst videos may be admitted into evidence, the oral and/or written commentary should not form part of that evidence.⁶¹ With regard to the authenticity of the videos, mention must be made of their date, their author, their source, and their chain of custody. Also, the footage must be complete insofar as it must not be an extract (if extracted, the Prosecution must show whether the full footage is available and who extracted the parts).⁶²

⁵⁷ *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Reasoned Majority Decision on Prosecutor Request to Admit into Evidence Certain Documents Pursuant to Rules 92 bis and 89 (C), 14 July 2005, para. 4.

This state coming from ‘*May and Wierda*, para. 7.105, p. 248; see also *Prosecutor v. Kvočka et al.*, Decision on Zoran Zigic’s Motion for Rescinding Confidentiality of Schedules Attached to the Indictment Decision on Exhibits, 19 July 2001

⁵⁸ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Decision on Zoran Zigic’s motion for rescinding confidentiality of schedules attached to the indictment decision on exhibits, 19 July 2001. See also May and Wierda, International Criminal Evidence, 2002, par. 10.59, p. 346

⁵⁹ May and Wierda, International Criminal Evidence, 2002, par. 10.59, p. 346

⁶⁰ See *Prosecutor v. Djordjevic*, Case No. IT-05-87/1, Decision on Prosecutor’s Motion for Admission of Video-Recording MFI P1575, 30 March 2010, para. 13.

⁶¹ *Prosecutor v. Hadzihasanovic and Kubura*, Case No. IT-01-47, Decision to Unseal Confidential Decision on the Admissibility of Certain Challenged Documents and Documents for Identification, 2 August 2004, paras 76-77. See also *Prosecutor v. Djordjevic*, Case No. IT-05-87/1, Decision on Prosecutor’s Motion for Admission of Video-Recording MFI P1575, 30 March 2010, para. 15 (No reliance was placed by the Chamber on the words spoken by the individuals in the videos admitted); *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, Rule 89(C) of the Rules of Procedure and Evidence, 25 January 2008, para. 35 (The Chamber disregarded the comments made by the journalist in the video admitted into evidence).

⁶² See *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, Rule 89(C) of the Rules of Procedure and Evidence, 25 January 2008, para. 22

46. The Prosecution must also show *prima facie* relevance of the videos to the charges⁶³, that they are within the temporal scope of the charges, and that they concern the accused or issues at trial.⁶⁴

Category 8: Non-ICC Court Documents, Transcripts, Witness Statements

Statements of the co-defendant

47. The following Statements from the accused in Annex A are sought to be admitted by the Prosecutor: DRC-OTP-0138-0236, DRC-OTP-0039-0294, DRC-OTP-0039-0013, DRC-OTP-0039-0051, DRC-OTP-0039-0058, DRC-OTP-0039-0060, DRC-OTP-0039-0076, DRC-OTP-0138-0780, DRC-OTP-0141-0349, DRC-OTP-0180-0656, DRC-OTP-1016-0150.
48. Statements by a defendant are not permitted to be introduced from the bar table as evidence against another defendant under article 69(2) of the ICC Statute. There is no explicit provision in the ICC Statute or Rules of Procedure and Evidence related to the admission of an accused's statement into evidence. The principles set out in article 69(2) concerning the admissibility of witness statements in general should therefore apply.⁶⁵
49. Article 69(2) enshrines the principle of orality and emphasises that the general rule should be live, in-court testimony; any exceptions to this rule should be construed narrowly and in accordance with the clear terms of the governing text. In this connection, it has been observed that the reference to the giving of testimony in person "reflects the desire that the primary source of evidence of a witness (i.e. his or her own testimony before the Court) should be available for the purposes of the trial. This permits the best opportunity for the parties to examine and cross-examine the witness and for the Court to ask questions and evaluate the demeanour and credibility of the witness. It also furthers the right of the accused "to examine, to have examined, the witnesses against him or her and to obtain the attendance and examination of

⁶³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, Rule 89(C) of the Rules of Procedure and Evidence, 25 January 2008, para. 26.

⁶⁴ *Prosecutor v. Boskoski*, Case No. IT-04-82, Decision on Boskoski Defence Motion to Amend Its Rule 65ter List and Admit Exhibits from the Bar Table, 20 March 2008, para. 10

⁶⁵ The ICTY has followed the same reasoning in that it applied rule 89(F) of the RPE, which deals with the evidence of a 'witness', to the accused's statement. *See The Prosecutor v. S. Halilovic*, Case No. IT-01-48-AR73.2, Decision on interlocutory appeal concerning admission of record of interview of the accused from the bar table, 19 August 2005.

witnesses on his or her behalf under the same conditions as witnesses against him or her” as guaranteed by article 67 para 1(e).⁶⁶

50. Trial Chamber I in *Lubanga* has similarly recalled the advantages of *viva voce* testimony, “particularly when evidence of significance is challenged or requires comprehensive investigation.⁶⁷ The documents in question before it were “of central significance” and would require “comprehensive investigation.” Accordingly, it was not appropriate to admit such testimony in a written form rather than as *viva voce* evidence.

51. In addition, the reference in article 69(2) to the fact that the exception to live testimony is “subject to this Statute”, and that such measures shall not be prejudicial to or inconsistent with the rights of the accused, automatically subordinates the exception to the rights of the defence. This therefore presumes that the exception to live, in-court testimony can only be invoked if the defence has either exercised these rights in an effective manner,⁶⁸ or waived these rights (for example, with respect to non-disputed background evidence). It is notable that during the discussions of the preparatory committee and in their proposals, the phrase “without prejudice to the accused” was taken to mean, in particular, ‘without prejudice to the right of the accused to examine or have examined, prosecution witnesses’.⁶⁹

52. The only exceptions to article 69(2) for witness testimony is article 68 (protective measures –which do not apply here) and article 56 and rule 68 – both of which stipulate that the defence must have had the opportunity to examine the witness either when the statement was taken, or subsequently in court. In this instance, counsel for

⁶⁶ Donald K. Piragoff, ‘Article 69: Evidence’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart, Nomos, 2nd edition, p. 1331.

⁶⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1603, *Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses*, 15 January 2009 (“The live questioning of a witness in open court on all aspects of his or her evidence can have a material impact on the Chamber’s overall assessment of the evidence, since oral testimony is, for obvious reasons, of a different nature to a written statement: most importantly the evidence can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part by observing the conduct and demeanour of the witness.”)

⁶⁸ Fair trial rights should be exercised in a manner which is effective, and not theoretical or illusory: *Artico v Italy* [1981] 3 EHRR 1 para. 3.

⁶⁹ See, for example, the draft proposal concerning protective measures: Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II U.N. GAOR, 50th Sess., Supp. No. 22 UN Doc A/51/22 (1996) page 205 [*As provided for in article X (A 38 (4) , 43 ILC*) of the Statute a1 [the] Trial Chamber may proprio motu or] at the request of [either party, the Prosecutor, the accused for of the victim or the witness concerned [or of the Victims and Witnesses Unit] order appropriate measures to protect the privacy and security protection of victims and witnesses, provided the said measures are [consistent with] [not prejudicial to] the rights of the accused [as provided for in the Statute and the rules, in particular the right to examine, or have examined, prosecution witnesses].

Mr. Katanga has not had an opportunity to examine Ngudjolo. The pre-requisites are therefore not met.

53. In addition, since Rule 68 should only be utilized in a manner that is “consistent with the rights of the defence and a fair and impartial trial”, it should not be used for testimony going to the acts and conduct of the defendant or issues in controversy – only background/corroborative evidence.

Inadmissibly of Mr. Katanga’s Statement Pursuant to Article 69(7)

54. Under Article 69 (7) of the ICC Statute, “Evidence obtained by means of a violation of this Statute *or* internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; *or* (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

55. Article 69(7) applies irrespective of whether the violations were committed by the Prosecution or by national authorities⁷⁰

56. In terms of what constitutes a violation of the Statute, D. K. Piragoff states that “A violation of the Statute is a relatively straightforward concept which could include a violation of any of the rights of an accused”⁷¹ (reference in footnote is expressly made to article 55 of the ICC Statute.) In this case, the accused’s rights under article 55 were violated. It is also possible to argue in the alternative that the evidence was taken by means of a violation of internationally recognized human rights.⁷²

57. Indeed, the human rights afforded to a suspect, such as the right to remain silent, the right to counsel, and the right to be questioned in the presence of counsel unless a voluntarily waiver, are internationally recognized human rights recognized in instruments of international criminal courts and of internationalized courts. Indeed, in addition to the ICC Statute, the ICTY Rules, the ICTR Rules, the Sierra Leone Rules, the UNTAET Reg. 2000/25 and the Law of the Cambodia Extraordinary Chambers

⁷⁰ D. K. Piragoff “article 69” in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart, Nomos, 2nd edition, p. 1331.

⁷¹ D. K. Piragoff “article 69” in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart, Nomos, 2nd edition, p. 1334.

⁷² D. K. Piragoff “article 69” in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart, Nomos, 2nd edition, p. 1333.

enshrined such rights, which have been defined further by the practices of these international criminal courts and internationalized courts.

58. Article 55 (2) (b) of the ICC Statute provides that a person suspected of a crime “shall be informed before being questioned either by the Prosecutor or by national authorities pursuant to a request to do so under Part 9 of the right (...) to remain silent, without such silence being a consideration in the determination of guilt or innocence”. As stated by C.K.Hall, “The right to silence is a component of the presumption of innocence and of the right not to be compelled to testify against oneself or to confess guilt”⁷³.

59. As for Mr. Katanga’s right to counsel, which was clearly violated when he was interviewed, the Defence relies on its arguments previously set out in *Defence Objections to Admissibility in Principle and in Substance*, filed on 23 October 2009.⁷⁴

Statements of Deceased Witnesses

60. The Prosecutor has submitted the statements of individuals for admission from the bar without indicating if they are alive or dead. The Defence submits this must be clarified. In the case where they are alive, they should have been called ; and where dead, the following considerations apply. In *Karadzic*,⁷⁵ the Chamber found that testimony of a deceased witness was relevant but noted, with regard to its reliability, that a number of factors may be considered.⁷⁶ Ultimately, the witness’s evidence did not meet the relevant standards for admission⁷⁷ because the accused had no opportunity to cross-examine the witness in question. The Chamber held that it must approach this evidence with the utmost caution. Taking into account all the relevant

⁷³ C.K.Hall “article 55: rights of persons during an investigation”, in O. Trifftener, *Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart, Nomos, 2nd edition, p.1098.

⁷⁴ ICC-01/04-01/07-1558, ICC-01/04-01/07-1592.

⁷⁵ *Prosecutor v. Karadzic*, DECISION ON PROSECUTION’S MOTION FOR ADMISSION OF THE EVIDENCE OF KDZ297 (MIROSLA V DERONJIC) PURSUANT TO RULE 92 *QUARTER*, Case No. IT-98-S/IS-T, 23 March 2010, para. 7.

⁷⁶ The circumstances under which the evidence was generated; whether the evidence was subject to cross-examination; whether there is other evidence which relates to the same event described by the witness; whether it was given under oath; and other factors, including whether there are manifest inconsistencies in the evidence. See *Popovic et al.* Appeal Decision, para. 44.

⁷⁷ The evidence of an unavailable witness may be submitted in written form if the Chamber finds that: the witness unavailable within the meaning of Rule 92 *quater*(A); from the circumstances in which the statement was made and recorded that it is reliable; the evidence is relevant to the proceedings and of probative value; and that the probative value of the evidence, which may include evidence pertaining to acts and conduct of an accused, is not outweighed by the need to ensure a fair trial.

factors, the Chamber was convinced that the probative value of the evidence in question was outweighed by the need to ensure a fair trial.⁷⁸

61. At the Eritrea Ethiopia Claims Commission, the Chamber similarly excluded statements from deceased witnesses.⁷⁹ It referred to ECHR case law, which indicated that the right to examine a witness as a part of the rights to a fair trial normally presupposes that the evidence be produced at a public hearing, in the presence of an accused, with a view to adversarial argument. While there are exceptions to this general principle, the accused must be given an adequate and proper opportunity to challenge and question a witness against him.⁸⁰ The Chamber reviewed the practice of the ICTY and SCSL, and excluded the deceased witness statements on the basis that ; the accused lacked the opportunity to confront the witnesses; the witnesses were not heard before the OCIJ; both statements referred to the accused's alleged criminal acts and conduct; their statements were excluded due to their origins, content, their contested character and the inability of the accused to challenge their veracity.⁸¹

62. In addition, the Defence relies on its arguments set out in *Defence Objections to Admissibility in Principle and in Substance*, filed on 23 October 2009.⁸²

Category 9: Other Documents

63. The following other documents in Annex A are sought to be admitted by the Prosecutor: DRC-OTP-0172-0007, DRC-OTP-0172-0005, DRC-OTP-0136-0068, DRC-OTP-0093-0119, DRC-OTP-0102-0011, DRC-OTP-0102-0022, DRC-OTP-1012-0132, DRC-OTP-1012-0134, DRC-OTP-0104-0089, DRC-OTP-0029-0176, DRC-OTP-0126-0478, DRC-OTP-0138-0239, DRC-OTP-0017-0217, DRC-OTP-0016-0097, DRC-OTP-0028-0463, DRC-OTP-0028-0356, DRC-OTP-0126-0411, DRC-OTP-0195-0277, DRC-OTP-0029-0046, DRC-OTP-0029-0072, DRC-OTP-0029-0075, DRC-OTP-0026-0194, DRC-OTP-0026-0195, DRC-OTP-0026-0205, DRC-OTP-0041-0104,

⁷⁸ *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjic) Pursuant to Rule 92 Quarter, 23 March 2010, para. 7, para. 33. See also *Prosecutor v. Popovic et al.*, Case No. IT-05-88, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table, Motion to Amend the Bar Table Motion, and Oral Motion for Admission of Additional Exhibit, 14 March 2008, para. 42.

⁷⁹ ECCC, Decision in the Admissibility of Material on the Case File as evidence Case File/dossier No. 001/18-07-2007/ECCC/TC, 16 May 2009, para. 6.

⁸⁰ See e.g., *Bonev v. Bulgaria*, ECHR 60018/00 (2006), para. 43 ; *Gossa v. Poland*, ECHR 47968/99 (2007), para. 53 ; *Ludi v. Switzerland*, ECHR 12433/86 (1992), para. 47 ; *Doorson v. The Netherlands*, ECHR 20524/92 (1996), para. 76.

⁸¹ ECCC, Decision in the Admissibility of Material on the Case File as evidence Case File/dossier No. 001/18-07-2007/ECCC/TC, 16 May 2009, para. 16.

⁸² ICC-01/04-01/07-1558, ICC-01/04-01/07-1592.

DRC-OTP-0043-0201, DRC-OTP-0093-0052, DRC-OTP-0132-0245, DRC-OTP-0136-0171, DRC-OTP-0029-0076.

64. Many of the documents in category 9 are political statements or statements made by representatives of communities involved in the war. Given the partiality of the makers of such statements, their reliability is questionable. The ICJ has held that statements by state officials may or may not be reliable, depending on the circumstances in which they were made, but that such statements should be viewed with caution.⁸³

Conclusion

65. Accordingly, it is requested that the Prosecutor's motion be dismissed save in respect of the items which have not been the subject of an objection from the accused.

Respectfully submitted,



David Hooper, Q.C.
Lead Counsel for Mr. Germain Katanga

Dated this 30th August 2010

At The Hague

The Netherlands

⁸³ ECCC, Decision in the Admissibility of Material on the Case File as evidence Case File/dossier No. 001/18-07-2007/ECCC/TC, 16 May 2009, para. 16.