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Criminal
Court

Original: **English** | No.: **ICC-01/09-02/11**
Date: **25 July 2013**

TRIAL CHAMBER V(B)

Before: **Judge Kuniko Ozaki, Presiding**
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA

Public
Victims' Submissions on the Conduct of the Proceedings

Source: **Common Legal Representative for Victims**

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

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Introduction

1. In accordance with the Trial Chamber's "Order requesting submissions on the conduct of the proceedings" of 3 July 2013 ("Order"),[1] the Common Legal Representative for Victims ("Legal Representative")[2] hereby provides his submissions on issues (i), (v), and (viii)(a) to (g) of that Order.

Opening Statements

2. The Legal Representative intends to make an opening statement of no longer than one hour and fifteen minutes. He anticipates that he will show some video footage and photographs during that opening statement.

Submissions of "No Case to Answer"

3. The Legal Representative submits that the Trial Chamber should not allow a motion of "no case to answer". The procedure has no clear basis in the Rome Statute ("Statute") or the Rules of Procedures and Evidence ("Rules"). On the basis of the experience of the ICTY and ICTR, it is unlikely to enhance the fairness or expeditiousness of the trial. Rather, a "no case to answer" procedure would amount to a "confirmation *bis*", requiring the preparation of lengthy written and oral submissions by the parties and participants, an extensive review of the evidence by the Trial Chamber to a low but currently undefined standard of proof, and the preparation of a complex decision, which would likely give rise to lengthy interlocutory appellate litigation. All of this would delay the timely conclusion of the present trial. The Trial Chamber risks creating an unfortunate precedent which would not enhance the fairness of the Court's proceedings.

4. The "no case to answer" procedure was known to the Assembly of States Parties ("ASP") when it adopted the Rules in September 2002, but was not included in the Rules. The procedure had been codified as Rule 98 *bis* in the Rules of Procedure and Evidence of the ICTY over four years earlier, in July 1998. If the

[1] ICC-01/09-02/11-769.
[2] References to the "Legal Representative" include Ms Walter of the OPCV when she is acting on his behalf.

ASP had considered that a "no case to answer" procedure was a vital component of a fair trial, it would have included such a procedure in the Rules.

5. The procedure is borrowed from jury trials in common law jurisdictions. Its core purpose, as explained by the Trial Chamber in the *Slobodan Milošević* trial, is to shield the accused from a situation where a jury might enter a conviction on the basis of evidence which is incapable of supporting a conviction.[3] This consideration does not apply where the trier of fact is a panel of professional judges. In a separate opinion appended to the 134-page Rule 98 *bis Slobodan Milošević* judgement, the presiding judge questioned the utility of the procedure:

> [W]hen this procedure is transposed to the Tribunal in the form of Rule 98 *bis*, it has to be applied and construed in the context of a Statute which provides for a Trial Chamber performing the dual functions of tribunal of law and tribunal of fact; there is no separate, lay jury to be given directions by the judge; there is instead a Chamber of professional judges perfectly capable of sifting evidence to determine what items could lawfully sustain a conviction and what items could not. Thus, in principle, there is far less danger of an unjust conviction at the Tribunal than in criminal proceedings in common law jurisdictions; there is certainly less need to insulate judges of a Trial Chamber from evidence which can not lawfully sustain a conviction.[4]

6. The utility of the procedure is even more doubtful at the ICC, which has a more rigorous confirmation process than that in place at the *ad hoc* tribunals, and which is similar in intent[5] to the "no case to answer" procedure, albeit at an earlier stage; this itself raises the question as to whether it is really necessary to incorporate a "confirmation *bis*" procedure into the trial structure of the Court.

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[3] 'The main rationale for the "no case to answer" procedure is that an accused charged with a crime should not be called upon to answer that charge if, at the end of the prosecution case, there is insufficient evidence on which a jury acting reasonably could convict him. Crucial to an understanding of the "no case to answer " procedure in common law jurisdictions is the differing roles of the judge and jury in criminal trials: the judge being the tribunal of law and the jury, the tribunal of fact. ... Thus an essential function of the procedure is to ensure that at the end of the Prosecution's case the jury is not left with evidence which cannot lawfully support a conviction; otherwise, it may bring in an unjust conviction.' *Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, IT-02-54-T, 16 June 2004, paragraph 11.

[4] *Ibid.*, Separate Opinion of Judge Patrick Robinson , paragraph 11. See also paragraphs 12f.: "the need to screen the trier of fact from evidence which could not lawfully support a conviction is not as urgent as it is in domestic common law jurisdictions where the tribunal of fact is a jury. […] surely the fact that a Trial Chamber is composed of professional judges, whose need to be insulated from weak evidence is not as great as a lay jury, must make a difference to the application of the "no case to answer" procedure at the level of the Tribunal?"

[5] The purpose of the confirmation procedure "is primarily to protect the suspect against wrongful prosecution and ensure judicial economy by distinguishing between cases that should go to trial and those that should not." *Muthaura and Kenyatta*, Confirmation Decision, ICC-01/09-02/11-382-Red, 23 January 2012, paragraph 52.

7. The experience of the ICTY and the ICTR, where the "no case to answer" procedure has been applied in respect of dozens of accused, suggests that the procedure has not enhanced the fairness or efficiency of the proceedings. As far as the Legal Representative is aware, no trial at the ICTY or ICTR has been halted and the accused released as a result of the Rule 98 *bis* "no case to answer" procedure. This is almost certainly due to the low evidentiary threshold which applies at that stage of the trial. Instead, the procedure has generated many thousands of pages of written filings before the trial chambers and appeals chambers of the *ad hoc* tribunals, thereby consuming vast quantities of the limited resources of the parties and the Chambers, which might have more profitably have been devoted to the timely conclusion of trials. In short, the "no case to answer" procedure, whether written or oral,[6] has done little to enhance the fairness or expeditiousness of trials at the *ad hoc* Tribunals and appears to have delayed the conclusion of many trials.

8. For example, in *Hadžihasanović & Kubura*, the Rule 98 *bis* procedure and a related appeal consumed considerable resources[7] but did not enhance the fairness or expeditiousness of the trial of the two accused.[8] The ICTR provides examples of accused who were acquitted and released at the trial judgement stage after a

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[6] On 8 December 2004, ICTY Judges made substantial amendments to Rule 98 *bis*. In particular, the old Rule 98 *bis* procedure had allowed the parties to file submissions relating to whether the Prosecution had proven specific incidents contained within counts. The amended Rule 98 *bis* clarified that the procedure was to be confined to consideration as to whether a *count* (rather than an underlying incident) should be dismissed. Further, the procedure, which had previously required written filings and resulted in a written judgement, was amended to provide that all submissions before the Trial Chamber, as well as the Trial Chamber's decision on the matter, were to be oral.

[7] The litigation in *Hadžihasanović & Kubura* demonstrates the resources consumed by the procedure under the original form of Rule 98 *bis*. In that case, the prosecution closed its case on 23 July 2004. The defence filed their Rule 98 *bis* pleadings on 11 August 2004, to which the prosecution responded on 1 September 2004. The defence filed briefs in reply on 6 September 2004. The Trial Chamber rendered its written decision on 27 September 2004. The defence then sought certification to appeal the Rule 98 *bis* Decision. After hearing from the parties on the issue of certification, the Trial Chamber decided this issue (granting a certificate as to some issues, but denying it as to others) on 19 October 2004, with a written decision filed on 26 October 2004. The defence case commenced on 18 October 2004, with the appeal proceedings running concurrently: the defence filed an appeal on 2 November 2004, to which the Prosecution responded on 15 November 2004. The Appeals Chamber rendered its written decision, dismissing the appeal, on 11 March 2005. See *Hadžihasanović & Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *bis* Motions for Acquittal, IT-01-47-AR73.3, 11 March 2005.

[8] The initial appearance of the two accused was in August 2001. Following their conviction at trial and a subsequent appeal, the Appeals Chamber in April 2008 reduced their sentences to 3½ years' for Hadžihasanović and two years' imprisonment for Kubura, by which time they had already served those sentences.

decade or more in ICTR custody;[9] the Rule 98 *bis* procedure did nothing to bring forward their day of release. In these cases, the questions naturally arises as to whether it might have been more in the interest of justice to have avoided the "no case to answer" procedure entirely, freeing up the parties and the Trial Chamber to devote their resources to bringing the trial and (where applicable) any related appeal of the final verdict to a more expeditious conclusion.

9. Any "no case to answer" decision in the present case would likely give rise to an appeal by the one or both parties, which might well overlap with the presentation of the Defence case, and could give rise to procedural complexities. If the Trial Chamber orders the removal of a count from the charges and, following a successful appeal by the Prosecution, the Appeals Chamber orders the count to be reinserted into the charges, a question will arises as to how to deal with that reinserted count. This situation has recently occurred in the *Karadžić* case at the ICTY, where, nine months after the commencement of the Defence case, the Appeals Chamber reinstated in the indictment a count which had been removed by the Trial Chamber at the Rule 98 *bis* stage over a year earlier.[10] After 13 months of complex Rule 98 *bis* proceedings, the parties were back where they started in respect of the content of the charges.

10. If the Trial Chamber were to import the "no case to answer" procedure into the trial structure in the present case, it must define the evidentiary threshold to be employed. As the Pre-Trial Chamber noted at the confirmation stage, there are

[9] Gratien Kabiligi spent 10 years and 10 months in ICTR custody and was acquitted of all charges at the trial judgement stage and released. (*Bagosora et al*., Judgement, ICTR-98-41-T, 18 December 2008). Casimir Bizimungu and Jérôme-Clément Bicamumpaka were also acquitted of all counts against them and released on the day of the trial judgement. By then, each had spent over 13 years in ICTR custody. (*C. Bizimungu et al.*, Judgement, ICTR-99-50-T, 30 September 2011).

[10] The Appeals Chamber was seised of Rule 98 *bis*-related appeals by both the Prosecution (in respect of the removal of one count from the indictment) and by the Defence (in respect of the non-removal of a different count). Each of the two appeals gave rise to extensive written and oral submissions before the Appeals Chamber. The defence appeal was denied: *Karadžić*, Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, IT-95-5/l8-AR73.9, 11 December 2012. The Prosecution appeal in relation to count 1 of the indictment was granted. The Rule 98 *bis* proceedings stretched over a period of 13 months: On 11 June 2012, the Accused and his Legal Adviser made oral submissions pursuant to Rule 98 *bis*. On 28 June 2012, the Chamber partially granted the 98 *bis* motion and acquitted the accused on count 1. Following an interlocutory appeal by the Prosecution, the Appeals Chamber on 11 July 2013 allowed the appeal, reinstated count 1 of the indictment, and remanded "the matter to the Trial Chamber for further action consistent with this Judgement." *Karadžić*, Judgement, 11 July 2013, IT-95-5/18-AR98bis.1. The accused had begun his defence case on 16 October 2012.

four progressively higher evidentiary thresholds in articles 15, 58(1), 61(7) and 66(3) of the Statute.[11]

11. To introduce a "no case to answer" procedure would require the Trial Chamber to devise a *fifth* standard of proof, higher than that applicable at the confirmation stage but lower than that applicable at the conclusion of trial. It is not clear what that standard should be, and it is not obvious that the standard to be met at confirmation is "of course, lower than that applicable to "no case to answer" motions at the *ad hoc* Tribunals,[12] as suggested by the Defence.[13] Rather, the standard to be met at confirmation at the ICC is not dissimilar to that employed by the *ad hoc* Tribunals at the Rule 98 *bis* stage.

12. Furthermore, procedural solutions already exist within the ICC framework to deal with the hypothetical and rare situation discussed in *Kordić* and cited by the Defence, where "the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case."[14]

13. Should this happen in the present case, there are a number of avenues available. First, the Trial Chamber can and should order the presentation of all evidence that it considers necessary for the determination of the truth in accordance with Article 69. Second, the Prosecution can, with the permission of the Trial Chamber, withdraw the charges under Article 61(9). Third, the Defence, if convinced of the weakness of the Prosecution's evidence, can elect to call no evidence and proceed without delay to the conclusion of trial, where it would benefit from the application of a standard of proof ("beyond reasonable doubt") which is likely to be far more favourable to the Defence than that applicable in any "no case to answer" procedure. Fourth, if no lesser remedy is available, the Trial Chamber

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[11] ICC-01/09-02/11-382-Red, paragraph 52.
[12] The applicable test at the ad hoc tribunals is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question, rather than it *would* be satisfied.
[13] *Ruto and Sang*, 3 July 2013, ICC-01/09-01/11-795, paragraph 17; adopted by the Kenyatta Defence.
[14] *Kordić and Cerkez*, Decision on Motion for Judgement of Acquittal, 6 April 2000, paragraph 28, cited by the Ruto Defence at paragraph 18 of the Ruto submissions and adopted by the Kenyatta Defence.

retains the discretion to stay the proceedings.[15] In light of these remedies, it is unnecessary to incorporate the "no case to answer" procedure.

14. Any unnecessary delay in bringing this trial to an expeditious conclusion negatively impacts on the right of the victims to know the truth about the crimes committed against them, and to reparation within a reasonable time. Further, if a 'no case to answer' hearing were to take place, and the case dismissed, before the Legal Representative had been provided with an opportunity to call witnesses and/or victims and to enable them to present their views and concerns before the Judges[16], this would suppress an important statutory component of victims' participation at trial. It would also deprive the Chamber of valuable information that "may help the Chamber to have a better understanding of the facts"[17] and would prevent the victims from effectively making "a genuine contribution to the ascertainment of the truth".[18] By recalling the fundamental principle of victims' participation developed by this very Court, the Legal Representative is mindful of the limits attached to that participation and in particular of the necessity that it take place in an expeditious manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[19]

15. Creating a new mid-trial procedure, unforeseen in the Statute, which will undoubtedly delay the conclusion of trial, and might also result in dismissal of charges before giving the victims the opportunity to effectively exercise their rights, would negatively affect the proper exercise of victim participation as conceived in the Statute and jurisprudence of the Court.

[15] *Lubanga*, Redacted Decision on the Public "Defence Application Seeking a Permanent Stay of the Proceedings", ICC-01/04-01/06-2690-Red2, 8 March 2011, paragraph 168.
[16] Victim participation "will only [be] allow[ed] after the Prosecution has concluded its case." See ICC-01/04-01/07-1665, 20 November 2009, paragraphs 19-30; and ICC-01/05-01/082138, 22 February 2012, paragraphs 23-25.
[17] See ICC-01/04-01/07-1665, 20 November 2009, paragraphs 19-30; ICC-01/05-01/08-2138, 22 February 2012, paragraphs 23-25; ICC-01/04-01/07-1788-tENG, 22 January 2010, paragraphs 86-93; and ICC-01/04-01/07-1788-tENG, 22 January 2010, paragraphs 86-93.
[18] *Ibid*; and "Accordingly, the Chamber is of the view that the appearance of Victims […] would contribute significantly and effectively to the search for the truth and the process of establishing the facts. It notes further that these victims' testimonies may be of use in the future if it should need to assess the entirety of the harm suffered by the victims." ICC-01/04-01/07-2517, 9 November 2010, paragraphs 6, 8, 14-20.
[19] *Ibid*.

The order, among the parties and participants, and manner in which witnesses should be questioned

16. The Legal Representative suggests the following order:

17. Witnesses called by the Prosecution: 1) Prosecution; 2) Legal Representative; 3) Defence; 4) re-examination by the Prosecution; 5) with leave, further questions by the Legal Representative; 6) Defence.

18. Witnesses called by the Legal Representative: 1) Legal Representative; 2) Prosecution; 3) Defence; 4) re-examination by the Legal Representative; 5) with leave, further questions by the Prosecution; 6) Defence.

19. Witnesses called by the Defence: 1) Defence; 2) Prosecution; 3) Legal Representative; 4) Defence.

20. Witnesses called by the Trial Chamber: 1) Trial Chamber; 2) Prosecution; 3) Legal Representative; 4) Defence.[20]

21. The presumption, set out in *Lubanga*, is that the Legal Representative will employ a neutral style of questioning, but there are "undoubted exceptions to this approach, for instance when leading questions are not opposed".[21] In addition, the presumption may be displaced "in favour of a more closed form of questioning, along with the use of closed, leading or challenging questions, depending on the issues raised and the interests affected".[22]

22. For example, in respect of witnesses who are evasive, disingenuous or display an unwillingness to tell the truth, the Legal Representative will, on a case-by-case basis, seek leave from the Trial Chamber[23] to question the witness in the manner appropriate for adverse witnesses, discussed further in the section below. It will do so in an effort to assist the Trial Chamber in its search for the truth. As the *Lubanga* Trial Chamber noted, "questioning by the victims' legal representatives

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[20] The Trial Chamber has discretion to put questions to any witness, at any time, under Rule 140(2)(c).
[21] *Lubanga*, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, ICC-01/04-01/06-2127, 16 September 2009, paragraph 25.
[22] *Ibid*, paragraph 29.
[23] In accordance with ICC-01/09-02/11-498, 3 October 2012, paragraph 75.

has been linked in the jurisprudence of the Trial and the Appeals Chambers to a broader purpose, that of assisting the bench in its pursuit of the truth".[24]

23. The use by the Legal Representative of a more searching style of questioning for adverse or evasive witnesses is entirely consistent with the approach of the *Lubanga* Trial Chamber, which recognised that in certain circumstances "it may be fully consistent with the role of the victims' legal representatives to seek to press, challenge or discredit a witness, for example when the views and concerns of the victim conflicts with the evidence given by that witness, or when material evidence has not been forthcoming. Under such circumstances, it may be appropriate for the victims' legal representative to use closed, leading or challenging questions, if approved by the Chamber".[25]

24. In respect of cross-examination, many victims tend to perceive a cross-examiner's probing questions as a personal insult and as an expression of disrespect to their traumatic experiences.[26] Cross-examination of a victim witness should therefore be conducted with due regard for the witness's suffering and, as far as possible, in a manner which will not exacerbate the pain already suffered by the witness. The cross-examining party, as a matter of courtesy, should indicate to the Trial Chamber and to the witness if it does not contest that the events in question (such as the rape or sexual assault of the witness; or the murder of a close relative of the witness) took place.[27] Cross-examination of victims of sexual violence is governed by Rules 70-72 of the Rules.

Permissible scope of questioning by the parties and participants

25. The Legal Representative agrees with paragraph 21 (a) to (d) of the Defence submissions subject to the observations below.

Cross-examination

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[24] *Lubanga*, 'Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, ICC-01/04-01/06-2127, 16-09- September 2009 1/18 CB T , paragraph 25, paragraph 27.
[25] *Ibid*, paragraph 28.
[26] *See* P.M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court', (2001) 5 *Washington University Journal of Law & Policy* 87, pages 104-109.
[27] See for instance Trial Chamber III's oral directions atin *Bemba*, ICC-01/05-01/08-T-61-Red-ENG CT WT, 8 February 2011.: Transcripts of hearing of 8 February 2011, No. ICC-01/05-01/08-T-61-RED-ENG ET.

26. The Legal Representative submits that the Trial Chamber should permit questioning on the areas identified in *Lubanga*: *i.e.* matters which impact on the guilt and innocence of the accused such as the credibility or reliability of evidence;[28] sentencing issues (mitigating or aggravating factors); and reparation issues (properties, assets and harm suffered). Further, as the *Lubanga* Chamber said, the parties should put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily.[29]

27. In respect of whether a question may be repeated,[30] the Legal Representative submits that a question may be repeated if the witness has given an answer which is evasive and not responsive to the question that has been asked.

Re-examination and re-cross-examination

28. Re-examination should ordinarily be limited to matters arising directly from the cross-examination.

29. While the Defence retains the option under Rule 140(2)(d) to question the witness last, it is in the interest of expeditiousness that Defence re-cross-examination should be kept to a minimum lest it give rise to oral applications by the Prosecution or the Legal Representative for further questioning on matters arising out of the re-cross-examination. Where the Defence chooses not to cross-examine, "it waives the right to ask final questions of the witness, unless new matters are raised by additional questions of the Chamber or the participants after the examination-in-chief".[31]

Questioning by the Legal Representative generally

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[28] This is subject to the observations concerning the cross-examination of victim witnesses set out above.
[29] *Lubanga*, "Decision on various issues related to witnesses' testimony during trial", ICC-01-04-01/06-1140, 29 January 2008, paragraph 32.
[30] 'Defence Submissions on the Conduct of Proceedings ("Defence Submissions"), ICC-01/09-02/11-775-Conf, 19 July 2013, , paragraph 21 (e).
[31] *Katanga & Ngudjolo Chui*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-1665-Corr, 1 December 2009, paragraphs 79-80.

30. In respect of the historical, social and economic context of the crimes committed, the Chamber should be guided by an oral decision in *Lubanga.*[32] The *Lubanga* Chamber held that participating victims had 'an undoubted interest in setting their personal experiences, and the harm it is said they individually experienced, in their true historical, economic, and social context'.[33] The Chamber authorized the victims' representatives to 'explore such aspects of these background matters as are relevant to each of them provided, and to the extent, that the areas are relevant to, and are of assistance in, establishing the context in which the alleged crimes have been committed'.[34] The Chamber also addressed the Defence's argument that the 'personal interests' must be distinguished from the general or public interests. In keeping with its previous position that the mere 'general interest' would not suffice,[35] the Trial Chamber noted that the possible coincidence between the victims' interests with the interests of many others did not preclude the opportunity for them to question witnesses, because to remain 'personal' it does not necessarily have to be 'unique or singular'.[36]

31. In addition, the Legal Representative proposes to ask, where appropriate, questions to elicit evidence relating to reparations. The Chamber will be able to hear such evidence during the trial under Regulation 56 of the Regulations. As the *Lubanga* Trial Chamber noted, that Regulation enables the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice.[37] Further, the Chamber will be able to hear such evidence without any element of prejudgement on the issue of guilt or innocence of the Accused.[38]

Questioning by the calling party and by the Legal Representative of 'hostile' witnesses

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[32] *Lubanga*, ICC-01/04-01/06-T-193-ENG, T. Ch. I, 17 June 2009, at lines 3-10.
[33] *Ibid.*, at 8.
[34] *Ibid*.
[35] *Lubanga*, 'Decision on victims' participation' ("*Lubanga* Decision on victims' participation"), ICC-01/04-01/06-1119, 18 January 2008,, paragraph 96.
[36] *Ibid.*, at 9.
[37] *Lubanga* Decision on victims'participation, paragraph 120.
[38] *Lubanga* Decision on victims'participation paragraph 121.

32. It appears likely that some of them most revealing evidence at trial will come from those witnesses to be called by the Prosecution, and possibly by the Defence, who fall within the category of "insider witnesses". These witnesses are capable of presenting valuable evidence which will inevitably be of great assistance to the Chamber in determining the level of the criminal responsibility of the accused. It is manifestly in the interest of justice, and will assist the Trial Chamber in its search for the truth, to fully understand their evidence.

33. While the association of such witnesses with the Accused or his close associates places them in position to provide unique evidence to the Trial Chamber, it can also provide them with a motive to testify in a manner that is at least partly favourable to the Accused and entirely protective of their own interests. This is particularly so in the present case, which has already been characterized by allegations of intimidation and bribery of key witnesses.

34. It is possible if not likely that some insider witnesses will disclaim at trial any memory of key events, offer information different to that which they have previously given in recorded interviews, or otherwise offer evidence that must be confronted as not credible. The Trial Chamber, composed as it is of professional judges, will be able to decide for itself those parts of the testimony of these witnesses which it finds credible and reliable, and those which it does not, provided that it has an opportunity to know the extent to which such testimony is contradicted by previous statements or other evidence.

35. Furthermore, when the Trial Chamber is faced with the question of whether a witness can be described as "hostile", it is important to keep in mind that adverse (or "hostile") witnesses do not typically present overt displays of hostility towards the party calling them: clever witnesses who attempt to veer from the truth will normally hide any overt animosity.[39]

36. The *Katanga* Chamber ordered that the calling party may cross-examine the witness where the witness is hostile.[40] It is important for the Trial Chamber in the

[39] *Examination of Witnesses in Criminal Cases*, Earl J. Levy QC, Ontario (1994), page 244.

[40] "if a party declares that the witness it has called has become adverse and the Chamber allows that party to continue questioning the witness, it may be appropriate for that party to cross-examine the witness. In such case,

present case to adopt a similar position, but to permit any party or the Legal Representative to press, challenge or discredit the witness on any relevant matters, and not just "issues raised during the initial part of the interrogation or contained in the witness' previous statements", as ordered in *Katanga*. The calling party and the Legal Representative should be free to 'assist[..] the bench in its pursuit of the truth'[41] by exposing those parts of the testimony of any insider witnesses which might be unreliable, and to elicit accurate information on key issues. To do so, the questioning party or the Legal Representative should be free to refresh the memory of the witness, to ask leading questions of the witness, and to partially impeach the witness.

The Timing and Manner in which the Legal Representative should Request Authorisation from the Chamber in order to Question a Witness or Present Evidence at Trial (Rule 91(2) of the Rules)

37. Where the Legal Representative wishes to question a witness, he proposes to submit to the Trial Chamber at least a week in advance of the anticipated start of the examination-in-chief a written application indicating the general areas (including, where appropriate, reparations) on which he proposes to put questions to the witness or witnesses and how these areas are related to the personal interests of the victims. He will also indicate, as clearly as possible in the circumstances, any documents he might wish to use.[42]

38. The Legal Representative assures the Trial Chamber that he will not put questions to a witness which are clearly repetitive of questions already put to the witness by a prior party, or otherwise redundant as a result of the witness's oral evidence. However, he submits that it would be of little assistance to the Chamber or to the parties to provide to the Chamber the precise formulation of

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cross-examination must be limited to issues raised during the initial part of the interrogation or contained in the witness's previous statements."*Katanga & Ngudjolo Chui*, 'Directions for the conduct of the proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-1665-Corr, 1 December 2009, paragraph 67. See also 'Decision on the "Prosecution's Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility, ICC-01/04-01/07-1958, March 2010, paragraph 1.

[41] *Lubanga*, ICC-01/04-01/06-2127, 16 September 2009, paragraph 27.

[42] Depending on the circumstances, it may be more efficient for all concerned for the Legal Representative to submit an application dealing with several witnesses at the same time.

the questions he intends to ask before the witness has even started to give oral evidence-in-chief. The Defence has argued that "it is entitled to consider the precise scope and remit of cross-examination during the initial questioning by the Prosecution and any questioning by the Legal Representative".[43] The Legal Representative agrees, and submits that, similarly, it is only during the initial questioning by the calling party that the Legal Representative can properly consider the precise scope and remit of his own questions. This is particularly so if the witness is adverse to the calling party. Additionally, the requirement to submit precise questions to the Chamber has proved to be cumbersome and inefficient in practise in other cases.

39. While the questioning by the Legal Representative will always be subject to the discretion and control of the Trial Chamber, he assures the Trial Chamber that he and the representative of OPCV acting on his behalf will exercise sound judgement in respect of the questions to be asked, and in particular will seek to use courtroom time as efficiently and helpfully as possible.

40. The Legal Representative therefore requests the Trial Chamber to accept an advance indication of the *general areas* on which he seeks leave to question a witness, and not to require the advance submission of the *precise questions* to be put to the witness by the Legal Representative. Should the Trial Chamber find this arrangement unsatisfactory after the first batch of witnesses has testified, it may order the Legal Representative under Rule 91(3)(a) to submit to it a written note of the questions to be asked from then on.

41. Further, the Legal Representative will orally seek leave to explore areas outside those notified, and to put documents other than those notified, to the witness, if unforeseen areas arise during the examination-in-chief of the witness.

42. In accordance with paragraph 76 of the 3 October 2012 Decision, the Legal Representative will submit an application for the presentation of evidence. He proposes to do so before the end of the Prosecution case. The number of victims which the Legal Representative will seek leave to call to testify, or to present

[43] Defence Submissions, paragraph 24.

their views and concerns, will depend on the nature and extent of the evidence admitted by the Trial Chamber during the Prosecution's case. He does not propose to seek to call "anonymous" witnesses but, where necessary, will seek protective measures in order to withhold their identities from the public. Further, the Legal Representative anticipates that he might seek leave to call certain witnesses to testify by audio-visual link. The Legal Representative anticipates that he might seek leave to call non-victim witnesses, including expert witnesses, who are able to give evidence relevant to the interests of the victims and who will assist the Chamber in its pursuit of the truth.

The procedure for the use of material during questioning (including advance notification thereof and procedure for objections)

43. The Legal Representative submits that the party calling the witness should provide the opposing party and the Legal Representative with a list of material to be used during examination-in-chief at least three days prior to the commencement of the examination-in-chief.[44] Where a party wishes to use other material not notified three days in advance, it should notify that additional material to the opposing party and to the Legal Representative as soon as possible thereafter, but should generally endeavour to avoid late notification. The Legal Representative will observe the same notification deadlines as those imposed on the parties for any witnesses which he is permitted to call to testify.

44. Generally, the Legal Representative submits that a party, or the Legal Representative, should object to the admission of an exhibit put to a witness at the moment that the document is tendered for admission by the calling party.[45]

45. The cross-examining party should make any documents which it proposes to use available to view in e-court by the opposing party and by the Legal Representative/OPCV at the commencement of cross-examination.

[44] *Bemba Gombo*, 'Decision on Directions for the Conduct of the Proceedings', ICC-01/05-01/08-1023, 19 November 2010 , paragraph 16.

[45] It is only after the exhibit has been shown to a witness that it becomes clear whether the witness has been able to offer any useful information relating to the exhibit. Further, objections put forth when the exhibit is tendered, rather than in writing in advance of the witness's testimony, would avoid the investment of resources in framing written objections to exhibits which are not ultimately put to a witness.

The procedure for admission of material tendered through witnesses as evidence in the case (including assignment of evidence numbers)

Admission of material tendered through a witness generally

46. The Trial Chamber should generally admit evidence which is relevant and probative in relation to the charges in this case, including the historical and socio-economic context of the crimes committed; or will otherwise assist the Chamber in its search for the truth; or is relevant to reparations.

47. Generally an exhibit should only be admissible through a witness if the witness has been able to comment on the exhibit in a meaningful way. Merely confirming that a document says what is written on it, for example, would be insufficient to justify its admission. However, if the witness claims to know nothing of an exhibit which, on any reasonable view, the witness should be able to comment on (for instance, if the witness is the author of a document shown to him or her or if the witness appears in a video in which he or she speaks, and yet disclaims all knowledge of it), it should be admitted for all purposes, and not merely to assess the witness's credibility.

48. In respect of authenticity, the Legal Representative submits that, as a general matter, a party should only put to a witness material which the party in good faith believes to be authentic. If the party has any reason to doubt its authenticity, it should say so when showing it to the witness. The opposing party may object to the authenticity of any material shown to a witness, indicating its reasons for its doubt, and if it does so the Trial Chamber may mark the exhibit for identification and may order the producing party to tender further information relating to its authenticity. If there is no objection to its authenticity, the Trial Chamber should admit the material if it is relevant for the reasons given above.

Prior inconsistent statements should be admissible for the truth of their contents

49. Given that the present case has taken place in a context of unprecedented levels of witness intimidation as well as allegations of bribery, the Trial Chamber

should be particularly vigilant when observing the testimony of witnesses for signs that they might have been affected by intimidation or bribery.

50. In such cases, the Trial Chamber should use its general powers, under Article 64(9)(a), 69(2), 69(3) and 69(4), to admit in evidence for the truth of its content any prior statement of the witness which is inconsistent with the oral evidence of the witness and which appears to be closer to the truth than that oral evidence.

51. The Trial Chamber should also be guided by developments at the ICTY and in domestic jurisdictions. At the ICTY, particularly serious cases of witness intimidation became apparent in some trials. For example, the Trial Chamber in *Limaj et al.* said that the 'context of fear, in particular with respect to witnesses still living in Kosovo, was very perceptible throughout the trial',[46] and noted that some witnesses who had been members of the Kosovo Liberation Army had given oral evidence at trial considerably less favourable to the Prosecution than that given in their prior written statements.[47] The ICTY later adopted Rule 92 *quinquies*, allowing the admission of a written statement or a transcript of a person who has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect.[48]

52. But even before the adoption of this rule, the ICTY Appeals Chamber had held that a Trial Chamber may rely on a prior inconsistent statement of a witness for the truth of its contents, and not merely for the sole purpose of assessing the credibility of the witness.[49] This mirrors developments in many common law jurisdictions, which generally employ rules of evidence far more restrictive than those set out in the Statute and the Rules. Canada, for example, has adopted a rule sanctioning admissibility of the pre-trial statement where the trial judge is satisfied that it constitutes a reliable account of the relevant events.[50] Ireland amended its law to permit the admission of a pre-trial statement by a witness

[46] *Limaj et al.*, TC, ICTY, 30 Nov. 2005, paragraph 15.
[47] *Limaj et al.*, TC, ICTY, 30 Nov. 2005, paragraph 13.
[48] Rule 92*quinquies* ICTY RPE. The failure of the person to attend or to give evidence must have been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion. Evidence that goes to proof of the acts and conduct of the accused as charged in the indictment may be admitted under this procedure.
[49] *Popović et al.*, AC, ICTY, 1 Feb. 2008, paragraph 31.
[50] See *R v. B (KG)*, [1993] 1 S.C.R. 740 (SC).

who during the trial either refuses to give evidence, denies having made the pre-trial statement, or give evidence materially inconsistent with the account provided in that statement.[51] In the United States, the traditional common law rule prohibiting the admission of a pre-trial statement was abolished in the Federal Rules of Evidence.[52] In Australia, the Evidence Act 1995 permits prior inconsistent statements to be taken as evidence of their truth.[53] In England and Wales, a previous inconsistent statement may be admissible as evidence of any matter stated in it of which oral evidence by the witness would be admissible.[54] It would contrary to Court's duty to uncover the truth, and its liberal approach towards the admission of evidence, if the Statute's provisions were to be applied in a manner more restrictive than those in place in these jurisdictions.

53. The Court must send forth a strong signal that it is not powerless at trial in the face of intimidation and bribery of witnesses. Where it appears from all the circumstances[55] that a witness who has given a pre-trial statement has been intimidated or bribed after providing that statement, the pre-trial statement should be admitted for the truth of its contents, even if the witness cannot be produced for cross-examination. The Trial Chamber under Rule 63(2) may then freely assess that statement and give it such weight as it deems appropriate.

[51] Section 16, Criminal Justice Act, 2006. Admission of the statement is subject to an exclusionary discretion in the trial judge to reject the statement where its admission would be 'unfair to the accused', contrary to 'the interests of justice', or unnecessary, having regard to other evidence given in the proceedings.

[52] Rule 801(d), Federal Rules of Evidence.

[53] Section 60, Evidence Act 1995; *Adam v. The Queen* (2001) 207 CLR 96 at 37: 'No longer were tribunals of fact to be asked to treat evidence of prior inconsistent statements as evidence that showed no more than that the witness may not be reliable. The prior inconsistent statements were to be taken as evidence of their truth.'

[54] Section 119, Criminal Justice Act, 2003 (England and Wales)c. 44, 20 November: '(1) If in criminal proceedings a person gives oral evidence and (a) he admits making a previous inconsistent statement, or (b) a previous inconsistent statement by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c.18), the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.' See also *R v. Joyce*, [2005] EWCA Crim 1785; *R v. K N*, [2006] EWCA Crim 3309.

[55] That is, not merely from the witness' answer to the question: have you been intimidated? It is a truism that there are two kinds of witnesses who will say that they have not been intimidated: those that have not been intimidated, and those that have.

Other procedures for admission of other material as evidence in the case

54. The Chamber should welcome the submission of relevant material from the bar table, adopting the guidelines set out in *Katanga*,[56] and should also permit the submission of a limited number of relevant documents in this way by the Legal Representative.

Rule 68 submissions

55. The Trial Chamber should also welcome the tendering of relevant and probative material under Rule 68(b),[57] and may wish to adopt the relevant guidelines from *Katanga*.[58] It might be particularly useful to enable the Trial Chamber to admit the evidence-in-chief of particularly vulnerable witnesses in writing, rather than requiring the witness to describe once again the horrors they have endured.

Respectfully submitted,

Fergal Gaynor
Common Legal Representative of victims

Dated this 25th of July 2013

At Nairobi, Kenya

[56] *Katanga & Ngudjolo Chui*, 'Directions for the conduct of the proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-1665-Corr, 1 December 2009, paragraphs 98-102.

[57] In respect of adverse witnesses, Rule 68(b) does not prevent the Trial Chamber from admitting a prior statement of an adverse witness, for the truth of its contents, under its general powers set out in Articles 64(9)(a), 69(2), 69(3) and 69(4), and Rule 63(2), even where the witness objects: see discussion above.

[58] *Katanga & Ngudjolo Chui*, 'Directions for the conduct of the proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-1665-Corr, 1 December 2009, paragraphs 92-94.