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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public Document

Response of the Common Legal Representative of the group of victims of the attacks to the *“Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014”* dated 16 June 2014

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 2 December 2013, the Single Judge of Pre-Trial Chamber II (the “Chamber”) issued the “Decision Concerning the Organisation of the Common Legal Representation of Victims”,¹ appointing two counsel from the Office of Public Counsel for Victims (the “OPCV”) as common legal representatives of the two groups of victims identified in the “Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings”.²

2. On 15 January 2014, the Single Judge of the Chamber (the “Single Judge”) rendered the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”,³ admitting 825 victims applicants listed in annex C thereof and falling in Group 2 as victims of the attacks of UPC/FPLC troops in the confirmation of charges hearing and in the related proceedings⁴ and deciding to appoint Mr Dmytro Suprun as the common legal representative of said group of the victims.⁵

3. On 7 February 2014, the Single Judge issued the “Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related

¹ See the “Decision Concerning the Organisation of the Common Legal Representation of Victims” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-160, 2 December 2013.

² *Idem*, paras. 10, 23 and 25. See also the “Decision Requesting the VPRS and the OPCV to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-150, 20 November 2014.

³ See the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-211, 15 January 2014.

⁴ See the “Annex C to the Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-211-AnxC, 15 January 2014.

⁵ See the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, *supra* note 3, paras. 78, 79 and p. 37.

Proceedings”,⁶ admitting further 155 victims applicants falling in Group 2 as victims of the attacks of UPC/FPLC troops in the confirmation of charges hearing and in the related proceedings⁷ and deciding that the appointment of Mr Dmytro Suprun as common legal representative of victims in Group 2 shall extend to the victims of the attacks admitted by the decision.⁸

4. From 10 until 14 February 2014, the Chamber held the confirmation of charges hearing in the present case.

5. On 7 February 2014, the Defence filed its “*Requête [...] relative à l’admissibilité de certains éléments de preuve que le Procureur entend présenter à l’audience de confirmation des charges et en radiation de certaines parties du Document contenant les charges*” (the “Defence Request for inadmissibility of evidence”), wherein it requested to exclude a number of evidence presented by the Prosecution during the confirmation of charges hearing on the ground that they are inadmissible.⁹

6. On 9 June 2014, the Chamber issued the “Decision on Admissibility of Evidence and other Procedural Matters” (the “Decision on admissibility of evidence”), by which it rejected the Defence’s requests for exclusion of evidence.¹⁰

7. On the same day, the Chamber issued the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco

⁶ See the “Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-251, 7 February 2014.

⁷ *Idem*, pp. 19-20.

⁸ *Ibid.*, p. 20.

⁹ See the “*Requête de la Défense relative à l’admissibilité de certains éléments de preuve que le Procureur entend présenter à l’audience de confirmation des charges et en radiation de certaines parties du Document contenant les charges*”, No. ICC-01/04-02/06-250-Conf, 7 February 2014 (reclassified as public on 9 June 2014) (the “Defence Request for inadmissibility of evidence”).

¹⁰ See the “Decision on admissibility of evidence and other procedural matters” (Pre-Trial Chamber I), No. ICC-01/04-02/06-308, 9 June 2014 (dated 8 June 2014), p. 15 (the “Decision on admissibility of evidence”).

Ntaganda" (the "Decision"),¹¹ in which it decided to confirm the charges brought against the suspect and to commit him to a Trial Chamber for trial on the charges as confirmed.¹²

8. On 16 June 2014, the Defence filed its *"Requête [...] sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014"* requesting for leave to appeal the Confirmation Decision (the "Defence Request" or the "Request").¹³

9. Pursuant to regulation 65 of the Regulations of the Court, the Common Legal Representative of the group of victims of the attacks (the "Common Legal Representative") submits the following response to the Defence Request.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

1. The criteria contained in article 82(1)(d) of the Rome Statute

10. Article 82(1)(d) of the Rome Statute limits the possibility to file an appeal against *"a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings"*.

¹¹ See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda" (Pre-Trial Chamber II), No. ICC-01/04-02/06-309, 9 June 2014 (the "Decision").

¹² *Idem*, p. 63.

¹³ See the *"Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014"*, No. ICC-01/04-02/06-312, 16 June 2014 (the "Defence Request" or the "Request").

11. The jurisprudence of the Court established the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.¹⁴

12. In this regard, the Appeals Chamber determined that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.¹⁵ The Appeals Chamber also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁶ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹⁷ Accordingly, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason to be granted leave to appeal.¹⁸

13. The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹⁹

14. Moreover, pursuant to the constant jurisprudence of the Court, “the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is

¹⁴ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

¹⁵ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 14, para. 8.

¹⁶ *Idem*, para. 9.

¹⁷ *Ibid.*

¹⁸ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

¹⁹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 14, para. 10.

not sufficient to warrant the granting of leave to appeal”,²⁰ and “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.²¹

15. Furthermore, a Chamber presented with an application for leave to appeal must not enter into examining or considering “*arguments on the merits or the substance of the appeal*” because said arguments are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal is granted.²²

16. Consistent with said jurisprudence, Pre-Trial Chamber I found that applications for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s) “*by way of indicating a specific factual and/or legal error*”.²³ Therefore, revising generally the thrust of previous arguments without demonstrating relevant conditions for leave is not sufficient for a party to satisfy the requirements set forth in article 82(1)(d) of the Rome Statute.

17. According to the established jurisprudence, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of “fairness” must be understood as making reference to situations “*when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations*

²⁰ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the “Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

²¹ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *supra* note 20, para. 4. See also the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

²² See the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, *supra* note 14, para. 22.

²³ See the “the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), para. 70.

and evidence submitted to the Court that might influence its decision”.²⁴ In turn, “expeditiousness” must be read as “closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”.²⁵

18. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²⁶

2. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Defence Request

19. The Defence seeks leave to appeal the Decision regarding the following “issues”:

- i. “La Chambre préliminaire peut-elle avoir exclusivement recours à des éléments de preuve que la défense ne peut valablement contester, tels que des témoignages indirects, anonymes ou des témoignages de témoins décédés, pour confirmer les charges relativement aux lieux visés au paragraphe 13 des présentes?”²⁷ (the “First issue”); and
- ii. “L’article 8-2-e-viii impose-t-il au procureur la démonstration d’un ordre spécifique donné par l’auteur visant le déplacement illégitime de la population civile”²⁸ (the “Second issue”).

²⁴ See e.g. the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.

²⁵ *Idem*, para. 18.

²⁶ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 14, para. 13.

²⁷ See the Decision, *supra* note 11, p. 4.

²⁸ *Idem*, p. 9.

20. The Common Legal Representative submits that the Defence Request does not satisfy the requirements of article 82(1)(d) of the Rome Statute. The Defence neither shows the existence of an “issue” which could arise from the Decision and could be the subject of an interlocutory appeal, nor shows how any of the alleged “issues” would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

a. No “issue” arises from the Decision

21. The Common Legal Representative submits that the Defence fails to identify an “issue” that arises from the Decision, as required by article 82(1)(d) of the Rome Statute. Most arguments contained in the Defence Request were already considered and dismissed by the Chamber in the Decision. Moreover, the arguments contained in the Request were already raised by the Defence in earlier submissions and were subsequently considered and dismissed by the Chamber in a previous decision. In fact, the Defence reiterates or makes arguments similar to those previously advanced before the Chamber concerning most of the subjects addressed in the Request, without presenting additional submissions. Consequently, the contentions raised by the Defence in the Request simply reflect a mere disagreement with the conclusions of the Chamber and therefore do not meet the requisite threshold for leave to appeal to be granted.

22. Indeed, regarding the First issue, the Defence submits that it intends to challenge the Chamber’s reliance on indirect evidence, on evidence emanating from anonymous sources as well as on statements of deceased witnesses, to conclude that there were substantial grounds to believe that the crimes committed during the *first* and *second attacks* took place in the localities specified in the charges.²⁹

²⁹ See the Defence Request, *supra* note 13, paras. 6-13.

23. The Common Legal Representative submits in this regard that the Defence already raised the same contentions regarding said categories of evidence in its Request for inadmissibility of evidence.³⁰ These arguments were subsequently considered and dismissed by the Single Judge in her Decision on admissibility of evidence.³¹

24. The Common Legal Representative contends that the Defence did not request leave to appeal the Decision on admissibility of evidence. The Defence's insistence on arguments already considered and disregarded by the Chamber resembles a request for reconsideration of the Decision, rather than a request for leave to appeal under article 82(1)(d) of the Rome Statute.

25. In this regard, Chambers already clarified, on numerous occasions, that a motion for reconsideration is not a legal remedy foreseen in the legal texts of the Court and, consequently, they have dismissed *in limine* many such requests.³² A limited number of motions for reconsideration have been exceptionally entertained. However, said motions have mostly concerned formal issues and have been evaluated against a very strict test, namely that "[i]rregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory".³³

³⁰ See the Defence Request for inadmissibility of evidence, *supra* note 9, paras. 12 and 16-28.

³¹ See the Decision on admissibility of evidence, *supra* note 10, paras. 23-31.

³² See the "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification" (Pre-Trial Chamber II), No. ICC-02/04-01/05-60, 28 October 2005, paras. 18 and 21; the "Decision on the Prosecution Motion for Reconsideration" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-123, 23 May 2006, p. 3; the "Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-166, 23 June 2006, para. 10; and the "Decision on the « *Requête de la Défense aux fins d'obtenir de la Chambre de Première Instance III des décisions appropriées avant l'ouverture du Procès prévue pour le 22 Novembre 2010* »" (Trial Chamber III), No. ICC-01/05-01/08-1010, 16 November 2010, para. 9.

³³ See the "Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010" (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, para. 18 ("[i]rregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory"). See also the "Decision on the request to present views and concerns of victims on their legal representation at the trial phase" (Trial Chamber V), No. ICC-01/09-01/11-511, 13 December 2012, para. 6.

26. The Common Legal Representative submits that the Defence Request, if not dismissed *in limine* by the Chamber, cannot be granted because it does not meet the applicable test for reconsideration quoted in the preceding paragraph. The decision actually targeted by the Request cannot be said to be “*manifestly unsound*” and giving rise to “*manifestly unsatisfactory*” consequences.

27. The Common Legal Representative further submits that, at most, the Defence Request reflects a mere disagreement of the Defence with the conclusions of the Chamber, which as such does not suffice for leave to appeal to be granted pursuant to article 82(1)(d) of the Rome Statute.³⁴ The Request cannot be seen as the proper course for submissions regarding a mere dispute over the correctness of the Chamber’s reasoning, and should therefore be dismissed.³⁵

28. Regarding the Second issue identified in the Defence Request, the Common Legal Representative submits that, like the First one, the Second issue does not arise from the Decision, as required by article 82(1)(d) of the Rome Statute. Indeed, the Defence’s arguments in this respect amount to no more than a mere disagreement or a difference of opinion as to the approach applied by the Chamber to interpret the relevant provisions of the legal texts of the Court.

29. First, the Defence advocates for its own interpretation of article 8(2)(e)(viii) of the Elements of Crimes. In doing so, the Defence makes selective references to the Elements of Crimes and appears to give no effect to the clear language of paragraph 8 of the General introduction to the Elements of Crimes.

30. Second, the Defence fails to address with sufficient clarity the core issue arising from the Decision, which concerns the applicability of the modes of liability laid down in the Rome Statute to the war crime provided for in article 8(2)(e)(viii). Even though the Defence submits that the Chamber’s interpretation conflates the

³⁴ See *supra* note 17.

³⁵ See *supra* note 18.

modes of liability with the specific elements of the war crimes of displacing civilians,³⁶ it does not clarify how the modes of liability set out in articles 25 and 28 of the Rome Statute should be applied to article 8(2)(e)(viii). In particular, the Defence does not specify whether or not these modes of liability should be disregarded because of the specific elements of article 8(2)(e)(viii) of the Rome Statute. By failing to address this issue in the Request, the Defence falls short of identifying an appealable issue. In this regard, this Chamber held that if an issue is not formulated “*with sufficient clarity*”, it cannot be deemed to arise from the impugned decision.³⁷

31. Finally, the Defence appears to misrepresent the reasoning adopted by the Chamber in the Decision.³⁸ Indeed, contrary to the Defence’s assertion, nowhere in the Decision did the Chamber negate the fact that one of the constitutive elements of the crime under article 8(2)(e)(viii) of the Rome Statute is that “*the perpetrator ordered a displacement of a civilian population*”. Instead, the Chamber simply clarified, using the terms “*is not limited to*”, that the suspect’s criminal responsibility for said crime may also be established through different *modus operandi*.³⁹ In this regard, according to the jurisprudence of the Court, should an issue be based on a mischaracterisation of the impugned decision, the Chamber does not need to consider whether it amounts to an appealable issue in accordance with article 82(1)(d) of the Rome Statute.⁴⁰

32. Consequently, the Common Legal Representative submits that the two “issues” identified by the Defence in its Request do not arise from the Decision, as

³⁶ See the Defence Request, *supra* note 13, para. 22.

³⁷ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 19.

³⁸ See the Defence Request, *supra* note 13, para. 24.

³⁹ See the Decision, *supra* note 11, para. 64.

⁴⁰ See the “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’” and the ‘Prosecution’s Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’” (Trial Chamber II), No. ICC-01/04-01/07-1088, 1st May 2009, para. 35.

required by article 82(1)(d) of the Rome Statute, and therefore leave to appeal should not be granted on the basis of said provision.

b. The “issues” raised by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

33. If, by extraordinary, the Chamber were to find that the two “issues” identified by the Defence arise from the Decision, the Common Legal Representative submits that none of these issues has an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial, as required by article 82(1)(d) of the Rome Statute.

34. Indeed, as submitted *supra*,⁴¹ in the Decision on admissibility of evidence, the Single Judge dismissed all the challenges made by the Defence in relation to the admissibility of evidence presented by the Prosecution during the confirmation of charges hearing, stating in particular that “*Mr Ntaganda does not suffer any prejudice as he can advance any of the challenges regarding the ‘relevance’ or ‘admissibility’ of evidence at the trial stage*” and noting “*in agreement the statement of the Defence to avail itself of this right at a later stage, as the case may be*”.⁴² Likewise, with respect more specifically to materials pertaining to deceased persons, the Chamber held that “*article 61(5) of the Statute [...] allows the Prosecutor to present at the pre-trial stage documentary or summary evidence*” and that “*statements and material pertaining to deceased persons can be considered as any other documentary evidence*”.⁴³ Moreover, the Chamber already dismissed the specific challenge put forward by the Defence regarding the purported unfairness arising from the Chamber’s reliance on materials that may not be used at

⁴¹ See *supra* para. 23.

⁴² See the Decision on admissibility of evidence, *supra* note 10, para. 28.

⁴³ *Idem*, para. 31. In this regard, the recent amendment to rule 68 of the Rules of Procedure and Evidence which took effect on 27 November 2013 specifically provides for the admission of the prior statements of deceased individuals at trial, which is equally applicable at the confirmation of charges stage. See Resolution No. ICC-ASP/12/Res.7, Amendments to the Rules of Procedure and Evidence.

trial,⁴⁴ by ruling in this respect that “*article 61(5) of the Statute does not make the presentation of such evidence contingent upon the availability of the witnesses concerned at trial*”.⁴⁵

35. More specifically, regarding the First issue, the Common Legal Representative recalls the Single Judge’s finding according to which Mr Ntaganda will be able to advance any of the challenges regarding the relevance or admissibility of evidence presented by the Prosecution at the trial stage, and therefore he does not suffer any prejudice in this regard at the current stage of the proceedings.⁴⁶

36. In this regard, the Common Legal Representative submits that both Pre-Trial Chambers I and II have so far shown a consistent approach in understanding the limited scope of the confirmation of charges hearing. In particular, both Chambers have agreed on the fact that this stage should not be interpreted as being a “*mini-trial*” or a “*trial before the trial*”,⁴⁷ and that the evidentiary threshold at pre-trial stage is lower than the one applicable at trial.⁴⁸

⁴⁴ See the Defence Request for inadmissibility of evidence, *supra* note 9, para. 27. In particular, according to the Defence, “*il serait inéquitable de renvoyer à procès une affaire sur la base d’éléments qui ne pourraient être utilisés au procès*”.

⁴⁵ See the Decision on admissibility of evidence, *supra* note 10, para. 31.

⁴⁶ See *supra* para. 34.

⁴⁷ See the “Decision on the Schedule for the Confirmation of Charges Hearing (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-02/11-321, 13 September 2011, para. 8; the “Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-01/07-412, 18 April 2008, p. 4; the “Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses” (Pre-Trial Chamber II), No. ICC-01/09-01/11-221, 25 July 2011, para. 9 and the “Corrigendum of the ‘Decision on the Confirmation of Charges’” (Pre-Trial Chamber I), No. ICC-02/05-03/09-121-Corr-Red, 7 March 2011, para. 31.

⁴⁸ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II), No. ICC-01/05-01/08-424, 15 June 2009, para. 28. See also See the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 30 September 2008, para. 63; “[t]he purpose of the confirmation hearing is to ensure that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges”. See also para. 64.

37. In the case of *The Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I further developed said principle.⁴⁹ In the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Pre-Trial Chamber I added that “[a]t no point should Pre-Trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction. Such a high standard is not compatible with the standard under article 61(7) of the Statute”.⁵⁰ It further clarified that “given the limited purpose of the confirmation hearing, the evidentiary threshold at the pre-trial stage is lower than that applicable at the trial stage. Accordingly, article 61(5) of the Statute expressly provides that the Prosecutor may, for the purposes of the confirmation hearing, ‘rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial’. In more general terms, the Prosecutor is not required to tender into the record of the case more evidence than is, in his view, necessary to convince the Chamber that the charges should be confirmed”.⁵¹

38. The Common Legal Representative submits that the categories of evidence adduced by the Prosecution at the current stage of the proceedings are appropriate and sufficient in light of the nature and the limited purpose of the confirmation of charges hearing.

39. Indeed, as already submitted *supra*,⁵² the use of documentary or summary evidence, without calling witnesses to testify, is in line with the requirements of article 61(5) of the Rome Statute, does not infringe upon the rights of the Defence and complies with the requirements attached to the expeditiousness of the proceedings.

⁴⁹ See the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/05-02/09-243-Red, 8 February 2010, para. 39.

⁵⁰ *Idem*, para. 40. See also the “Corrigendum of the ‘Decision on the Confirmation of Charges’”, *supra* note 47, para. 40.

⁵¹ See the “Corrigendum of the ‘Decision on the Confirmation of Charges’”, *supra* note 47, para. 40.

⁵² See *supra* para. 34.

40. The above-mentioned provision has been consistently applied throughout the jurisprudence of the Court relevant to the confirmation of charges stage.

41. In particular, in the *Katanga and Ngudjolo Chui* case, Pre-Trial Chamber I, in assessing whether the attack against the civilian population of Bogoro was part of a widespread campaign of military attacks against civilians in the large geographical area of Ituri, heavily relied on NGOs and UN reports.⁵³ Said reports were deemed to constitute sufficient proof of the necessary context to establish an “*attack against any civilian population*”. Indeed, in said case it is mainly through facts stemming from NGO reports and official UN documents that the Pre-Trial Chamber reached the conclusion that there was sufficient evidence to establish substantial grounds to believe that the attack against the civilian population of Bogoro was part of a systematic attack directed against the civilian population in the region of Ituri in the DRC.⁵⁴

42. In the *Bemba* case, Pre-Trial Chamber II in establishing the existence of a widespread attack against the civilian population relied upon witness statements, several reports, radio broadcasts and press articles.⁵⁵

43. In the case of *The Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II attributed sufficient probative value to NGOs reports and press articles to establish at least three “*incidents*”, which took place in three different places, when assessing the contextual elements of the crimes against humanity of which Mr Ruto and Mr Sang were suspected.⁵⁶

⁵³ See the “Decision on the confirmation of charges”, *supra* note 48, paras. 409-411.

⁵⁴ *Idem*, para. 411.

⁵⁵ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, *supra* note 48, para. 94, footnote 118.

⁵⁶ See the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. ICC-01/09-01/11-373, 23 January 2012 paras. 176-180; footnotes 254-256.

44. Furthermore, in the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II referred to only two statements by two Prosecution witnesses, one non-ICC witness statements placed before it in form of a summary⁵⁷ and heavily relied on reports.⁵⁸

45. Likewise, as submitted *supra*,⁵⁹ the use of prior statements of deceased individuals is permissible within the legal framework of the Court. Moreover, Pre-Trial and Trial Chambers have repeatedly stated that there is nothing in the legal texts of the Court which expressly provides that hearsay evidence from anonymous sources is inadmissible *per se*.⁶⁰ They specified that objections pertaining to the use of anonymous hearsay evidence do not go to the admissibility of the evidence, but only to its probative value.⁶¹

46. On the other hand, in accordance with the legal texts of the Court, the Chamber has broad discretion to freely assess all evidence submitted,⁶² to rule on the relevance or admissibility of evidence taking into account its probative value relative to any potential prejudice,⁶³ and to request any evidence necessary to determine the truth.⁶⁴

47. The Common Legal Representative submits that given the broad discretion the Chamber enjoys in seeking and assessing evidence brought before it, and taking into consideration that “*fairness of the proceedings implies the evaluation of the*

⁵⁷ See the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. ICC-01/09-02/11-382-Red, 23 January 2012, para. 120.

⁵⁸ *Idem*, paras. 120-122.

⁵⁹ See *supra* para. 34.

⁶⁰ See the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tEN, 14 May 2007 (dated 29 January 2007), paras. 101 and 103; the “Decision regarding the Protocol on the practices to be used to prepare witnesses for trial” (Trial Chamber I), No. ICC-01/04-01/06-1351, 23 May 2008, para. 41; the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, *supra* note 48, para. 46; the “Decision on the confirmation of charges”, *supra* note 48, para. 118.

⁶¹ See the “Decision on the confirmation of charges”, *supra* note 60, para. 103.

⁶² See rule 63(2) of the Rules of Procedure.

⁶³ See article 69(4) of the Rome Statute.

⁶⁴ See article 69(3) of the Rome Statute.

proceedings of a particular case as a whole”,⁶⁵ the Defence fails to provide sufficient grounds to demonstrate that the Chamber should have requested additional evidence – other than the one adduced by the Prosecution – for the purpose of the confirmation of charges against the suspect. Furthermore, requesting additional evidence beyond the one which is necessary and sufficient for the limited purpose of confirmation of charges would be burdensome and would not be in compliance with the requirements attached to the expeditiousness of the proceedings.

48. Regarding the Second issue, the Common Legal Representative contends that this issue does not affect the fairness of the proceedings, since the Defence will have ample opportunity to address the matters in question, along with other relevant matters, during trial. On the other hand, the triggering of appellate proceedings at this stage would only result in delaying the proceedings, even though the Defence does not request for suspensive effect.

49. The Common Legal Representative submits that since none of the two “issues” identified by the Defence in its Request affects the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these issues may materially advance the proceedings.⁶⁶

⁶⁵ See the “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges” (Trial Chamber I), No. ICC-01/04-01/06-915, 24 May 2007, para. 24.

⁶⁶ See the “Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing” (Pre-Trial Chamber I), No. ICC-02/11-01/11-530, 8 October 2013, para. 42.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber to reject the Defence Request.

A handwritten signature in black ink, appearing to read 'D. Suprun', with a long vertical stroke extending downwards from the bottom of the signature.

Dmytro Suprun
Common Legal Representative
of the Group of Victims of the Attacks

Dated this 20th June 2014

At The Hague, The Netherlands