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Date: **21 May 2015**

TRIAL CHAMBER I

Before: **Judge Geoffrey Henderson, Presiding Judge**
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt

SITUATION IN COTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

Public

Defence observations on the conduct of proceedings

Source: **Defence of Mr Charles Blé Goudé**

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

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I. Introduction

1. During the Status Conference of 21 April 2015, in the case of *The Prosecutor v. Laurent Gbagbo & Charles Blé Goudé*, Trial Chamber I ('the Chamber') directed the parties and the participants to file their observations on the conduct of the proceedings and the modalities of the victims' participation by 21 May 2015.[1] Pursuant to that order, the Defence of Charles Blé Goudé ('the Defence') files its observations on the conduct of the proceedings. The Defence files separately its observations on the modalities of the victims' participation.

2. Since the Prosecution filed its submissions on 8 May 2015,[2] the Defence hereby provides its observations, responding to each section of the Prosecution's proposals in the same order as these sections were presented by the Prosecution in its observations,[3] and in the Proposed Protocol provided in annex.[4] Unless otherwise stated, the Defence accepts the proposals of the Prosecution. The Defence disagrees with the Prosecution in the instances where the proposals run the real risk of curtailing Mr. Blé Goudé right to a fair trial.

II. Submissions

A. The timing and procedure of a "no case to answer" motion

3. The Defence does not object to the Prosecution's proposal that a "no case to answer" motion follow the same principles as outlined in *The Prosecutor v. Ruto & Sang*.[5] However, the Defence respectfully would like to underscore the appropriateness of allowing a "no case to answer" motion in the instant case.

4. In *Ruto & Sang*, the Court reasoned that while there was no express rule like in the ICTY, which provided for a "no case to answer" motion, such a motion was consistent with the Court's "general obligation, pursuant to article 64(2) of the Rome Statute ('the Statute') to ensure that the trial is fair, expeditious and conducted in a

[1] ICC-02/11-01/15-T-1-CONF-ENG, p. 56 lines 20-25, p. 57, lines 1.
[2] ICC-02/11-01/15-59, para. 6.
[3] ICC-02/11-01/15-59
[4] ICC-02/11-01/15-59-AnxA.
[5] ICC-01/09-01/11-1334, paras. 32,

manner which respects the rights of the accused and has due regard for the protection of victims and witnesses."[6]

5. Moreover, while as the Prosecution mentions, the Court did find that it is within the discretion of individual Trial Chambers to determine whether a "no case to answer" motion is apposite for the proceedings before it, it is important to place this proposition in its proper context.[7] In *Ruto & Sang*, the Court found that the proceedings followed the general practice in the administration of international criminal justice, meaning that the Defence presentation of evidence followed that of the Prosecution, thereby making a "no case to answer" motion appropriate in the proceedings.[8] Similarly, in the instant case, the Court has determined that the Defence presentation of evidence should follow that of the Prosecution,[9] and thus like in *Ruto & Sang*, the Chamber should find that a "no case to answer" motion is apposite in the current proceedings.

B. The scope of an unsworn statement by the accused persons during trial

6. The Defence finds no objection to the Prosecution's proposal. [10]

C. Alibi or grounds excluding criminal responsibility

7. The Defence avers that under Rule 79(2) of the Rules of Procedure and Evidence ('the Rules'), the Prosecution must be afforded sufficient time to prepare adequately to respond to any alibi or grounds excluding criminal liability. However, the rule in no way imposes a specific time limit in which the Defence must raise grounds excluding criminal responsibility or an alibi. The Prosecution's proposal clearly infringes on the Defence's right not to disclose its strategy before the close of the Prosecution's case and any presentation of evidence made by the LRV.[11] Therefore, the Defences proposes that the Chamber adopt the same procedure as in *The Prosecutor v. Bemba* where the Court authorised the Defence to raise such a defence or alibi two weeks before the Defence's presentation of evidence.[12]

[6] ICC-01/09-01/11-1334, para. 16.
[7] *Ibid.*, para. 17.
[8] *Ibid*.
[9] *See* ICC-02/11-01/15-58, para. 16.
[10] ICC-02/11-01/15-59, paras. 7-8.
[11] ICC-01/05-01/08-2141, para. 33.
[12] *Ibid.*

D. Defence disclosure

8. Similar to Defence's aforementioned submissions in regards to raising grounds excluding responsibility and alibi, the Defence submits that the Prosecution's proposal unduly infringes on the Defence's right not to disclose its strategy before the start of its case.[13] In both *The Prosecutor v. Katanga* and *the Prosecutor v. Bemba*, the Court found that disclosures pursuant to Rule 78 of the Rules could be made two weeks prior to the start of the Defence's case, which would allow the Prosecution a reasonable amount of time to prepare.[14] Thus, in *Bemba*, the Court did not order the Defence to submit its "Filing on Preliminary Information on the Defence Case" until one year *after* the Prosecution had already begun its presentation of evidence.[15] The Defence finds that any submissions made prior to the commencement of trial would be premature, and that the matter can be discussed after the Prosecution has begun its presentation of evidence.

E. Opening statements

9. The Defence raises no objection to the Prosecution's proposal whereby the Defence makes its opening statement both after the Prosecution and the LRV, and where each individual party is allocated a maximum of four hours.[16] The Defence and the Defence for Mr. Gbagbo ('*Gbagbo* Defence') have agreed that the *Blé Goudé* Defence shall present its opening statement after the *Gbagbo* Defence. Lastly, while the Defence agrees with the Prosecution's proposal allowing for the LRV to have a 30 minute opening statement, the Defence wishes to emphasise that the LRV does not have an automatic right to give one, and as such the Chamber must give its authorisation.[17]

10. Additionally, the Defence respectfully requests that in the exercise of its discretion under article 64(8)(b) of the Statute, the Chamber allow the Defence to use its allotted time by beginning its opening statement in November 2015 and completing it at the start of the Defence case. The Defence respectfully notes that the allocated time between the appointment of the new defence team and the commencement of trial is

[13] *See ibid*.
[14] ICC-01/05-01/08-2141, para. 17; ICC-01/04-01/07-2388, paras. 50-51
[15] *Compare* ICC-01/05-01/08-3155, para. 1 *with* ICC-01/05-01/08-987-tENG, para. 5.
[16] ICC-02/11-01/15-59-AnxA, paras. 3-4.
[17] Rule 89(1) of the Rules.

significantly shorter than the absolute minimum time the Defence submitted it would need in order to be effectively prepared for trial.[18] The Defence kindly requests the Chamber to take into account when determining the timing of the Defence opening statement its objective calculations indicating that April 2016 would be a realistic trial start date.[19]

F. Sequence of the presentation of evidence

11. While the Defence raises no objection to the sequence of the presentation of evidence, it notes the following: pursuant to discussions with the *Gbagbo* Defence, the Defence has agreed to begin its presentation of evidence after the conclusion of the *Gbagbo* Defence's presentation.

G. Scheduling of the witnesses

12. The Defence agrees with the Prosecution's proposal, and would like to add the following three provisions, which are consistent with the Court's practice in the *Kenya* cases,[20] and *The Prosecutor v. Katanga*.[21] Firstly, it is the position of the Defence that if the Chamber decides to follow the precedent set by the *Kenya* cases and require regular witness schedules on a monthly basis as suggested by the Prosecution,[22] then the Chamber should also direct the Prosecution, just as the Court did in the *Kenya* cases, to provide an updated and complete list of witnesses in the expected order of call, excluding the first 20 witnesses, whose call order is accounted for by the "Order on the Commencement of Trial."[23] The Defence submits that the monthly notice will not be sufficient unless the Chamber directs the Prosecution to communicate to the Defence the complete list of witnesses in the expected order of call. The Defence kindly requests it be disclosed one week prior to the commencement of opening statements. [24]

13. Secondly, the Defence notes that pursuant to the Chamber's "Order on the Commencement of Trial," the Prosecution shall include in its list of witnesses "the

[18] ICC-02/11-01/15-33, paras. 32-33.
[19] *Ibid*.
[20] ICC-01/09-01/11-847-Corr, para. 11; ICC-01/09-02/11-867, para. 17.
[21] ICC-01/04-01/07-1665-Corr, para. 5
[22] ICC-02/11-01/15-59-AnxA, para. 7.
[23] ICC-02/11-01/15-58, para. 25.
[24] *See* ICC-01/09-01/11-847-Corr, para. 11.

summary of the main facts on which each witness is expected to testify."[25] The Defence suggests to add that such summaries must contain sufficient detail so as to put the Defence on notice as to the main points on which the witness will testify.

14. The Defence maintains that such provisions are necessary in order for the Defence to properly prepare for trial. In the instant case, the Prosecution plans on calling three times as many witnesses as in *Ruto* & *Sang*, and thus it increases the necessary time the Defence needs to establish, investigative priorities and allocate its time and resources.[26] The Defence avers that departing from the Court's precedent in the *Kenya* cases would violate Mr. Blé Goudé's right to a fair trial by allowing the Prosecution to effectively bury the Defence in hundreds of witness statements without providing it with notice as to the relevance of these statements and the complete witness order of the Prosecution witnesses.

H. Order of questioning the witnesses

15. The Defence proposes the following three changes to the Prosecution's proposal: (1) the Chamber should ask questions of the witnesses after the calling party has completed its re-examination, (2) the Defence teams should not be obligated in every circumstance to coordinate jointly when calling the same witness, (3) the Defence who called the witness should be the last to question him or her under rule 140(2)(d) of the Rules, and in no case should the Defence waive its right in the event it does not cross examine a witness.

16. The Defence takes the view that in the interest of the expeditious conduct of proceedings, the Chamber should wait for the calling and cross-examining parties to finish the logical development of their questioning. Secondly, while the Defence teams will coordinate to the extent possible when calling the same witness, the protocol should take into account that such coordination will not always be possible since the strategy in regards to the same witness may differ greatly between the two Defence teams. Such flexibility would be consistent with rule 136 of the Rules, which guarantees that each accused is afforded the same rights as if the accused were being tried separately.

[25] ICC-02/11-01/15-58, para. 25.
[26] In *Ruto & Sang* , the Prosecution estimated calling 46 witnesses. ICC-01/09-01/11-847-Corr, para. 9.

17. Lastly, the Defence submits that paragraph 14 should be deleted in its entirety for two primary reasons. Firstly, while the Prosecutor's proposal borrows language from *Katanga* regarding 140(2)(d), it directly conflicts with the Court's findings in that case. In *Katanga*, the Court determined that in the event a witness is called on behalf of only one accused, the accused calling that witness shall be the last to question him or her.[27] The Defence submits that the procedural posture adopted by *Katanga* is consistent with the right of the Defence to remedy any potential damaging effects of cross-examination.

18. Secondly, the Defence submits that the Prosecution's submissions regarding waiver of its right to ask final questions discourages the parties from coordinating with one another to designate one of them to conduct the cross-examination of a witness.[28] If both Mr. Blé Goudé and Mr. Gbagbo waive their rights to ask final questions of a witness in the event they do not cross-examine him or her, then neither of them will ever agree to have one Defence team conduct the cross-examination on behalf of both accused. They will have to each cross-examine individually to preserve their right under rule 140(2)(d) of the Rules. Adopting such a proposal would be contrary to the expeditious and fair conduct of the proceedings.

I. In-Court protective measures

19. Given that the LRV may be granted access to confidential material, the Defence suggests that paragraph 17 be changed to *ex parte* Prosecution and *Gbagbo* and *Blé Goudé* Defence only.

J. Self-incrimination

20. The Defence would only like to make one addition to the Prosecution's proposal. Paragraph 20 should include the other parties in addition to the Prosecution.

K. Use of documents during the examination of witnesses

21. The Defence suggests the following change to the Prosecution's proposals- the parties should not be required to submit a formal filing to object to the use of a

[27] ICC-01/04-01/07-1665-Corr, paras. 33-36, 38-41.
[28] ICC-02/11-01/15-59-AnxA, para. 14.

particular document. Instead, parties should communicate its substantiated objections *via* e-mail to the Chamber and the parties.

a. Disclosure of documents for use during examination-in-chief

22. The Defence raises no objection to the Prosecution's proposals and suggests that similar to *Ruto* & *Sang*, the Chamber add that any change to the list of documents intended for use should only be allowed if the calling party shows good cause for requesting the change.[29] Such a provision would ensure that the non-calling party may prepare its cross-examination to the best of its ability.

b. Disclosure of documents for use during cross-examination

23. The Defence submits that the Court should not adopt the Prosecution's proposal, which creates requirements that will be highly improbable for the cross-examining party to meet. The Defence submits that the Chamber adopt the same procedure as found in the *Kenya* cases. Both decisions directed the cross-examining party to provide no later than 24 hours before the commencement of cross-examination a list of such documents on which it intends to rely and which are not in evidence to the Chamber, the other parties, and the participants.[30] The cross-examining party should simultaneously make sure that the Chamber is provided with e-court access to each of the documents on which it intends to rely.[31] In light of the parties and the Prosecution agreeing to some form of substantive witness preparation until the time of the witness' testimony, the Defence respectfully advises the Chamber not to require the Defence to submit documents to be used during cross-examination three days prior to the commencement of cross examination.

c. Usual disclosure applications continue to apply

24. The Defence raises no objection to the Prosecution's proposals.

L. Questioning of Witnesses

25. The Defence would like to propose one addition and one change to the Prosecution's proposals. Firstly, the Defence suggests adding that hearsay evidence is only

[29] ICC-01/09-01/11-847-Corr, para. 22.
[30] ICC-01/09-01/11-847-Corr para. 24; ICC-01/09-02/11-867, para. 31.
[31] ICC-01/09-02/11-867, para. 31.

admissible to the extent that it is probative, relevant, and not unduly prejudicial to the Defence. Secondly, the Defence submits that the absolute prohibition of revealing another witness' identity to a witness on the stand is unreasonable. A cross-examining party must reveal the identity of a previous witness in order to properly examine the witness on the stand. Ensuring an effective cross-examination is essential for the Court to fulfil its mandate to seek the truth.[32] Moreover, protective measures could be applied in the event such identity had to be revealed.

a. Examination-in-chief

26. The Defence suggests there be an absolute prohibition of leading questions, except where on a case-by-case basis the Chamber allows it.

b. Cross-examination

27. The Defence only raises one objection, which concerns paragraph 39. The Defence takes the view that the requirement of a cross-examining party to put to the witness the nature of its case that is in contradiction with the witness's evidence will detract from the spontaneity of the witness' testimony, and goes beyond the requirements of fairness established by *The Prosecution v. Bemba,*[33] the *Kenya* cases, [34] and *Katanga*.[35] Putting witnesses on notice as to the exact nature of the cross-examining party's case, entails the real risk that the witnesses will not answer spontaneously, but instead will try to reconcile their previous statements with the contradictions expressly mentioned by the cross-examining party. Such a result would not serve the Court's truth finding function. In the interest of fairness, the Defence proposes to adopt the same procedure as in *Katanga* where the Court determined, that " [t]o the extent that the case of the cross-examining party is in contradiction with the evidence given by the witness during examination- in-chief, that party shall state this clearly to the witness before putting questions on that topic."[36]

[32] *See* Article 69(3).
[33] *See* ICC-01/05-01/08-1023, para. 13.
[34] *See* ICC-01/09-02/11-867, para. 28; ICC-01/09-01/11-900, para. 19.
[35] ICC-01/04-01/07-1665-Corr, para. 70.
[36] *Ibid.*

28. In addition to this change, the Defence suggests adding to paragraph 38, which closely mirrors the language in *Katanga*, a clause that is taken directly from the *Katanga* decision.[37] Thus, the sentence should read:

> "Cross-examination shall be limited to matters raised during examination-in-chief and matters affecting the credibility of the witness, and where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case, even if it was not raised during examination-in-chief."

The Defence posits that such a rule should apply only to the parties, and not the participants. Where the Chamber authorises the LRV to cross-examine a witness, such an exceptional occurrence should be circumscribed by not allowing the LRV to go beyond the scope of the examination-in-chief. [38]

c. Re-examination

29. The Defence raises no objection to the Prosecution's proposal, but suggests adding the following sentence to paragraph 42:

> After the Prosecution has conducted its re-examination, the Defence pursuant to rule 140(2)(d) shall have the right to question the witness last.[39]

d. Questions under rule 140(2)(d)

30. The Defence raises one objection to the Prosecution's proposal, namely that the rules that apply to examination-in-chief shall apply. The Defence opines that the rules that applied to the Defence at its first opportunity to question the witness shall apply at its last opportunity to question the witness.

e. Questions by the LRV

31. The Defence proposes the following additions to the Prosecution's proposals. The Defence firstly recalls that the LRV is not a second prosecutor,[40] and the extent of possible questioning of the LRV should take into account this fact. Therefore, the

[37] ICC-01/04-01/07-1665-Corr, para. 69.
[38] The Defence kindly refers the Chamber on its submissions on the modes and modalities on victims' participation.
[39] *See* ICC-01/05-01/08-1023, para. 9
[40] ICC-01/0401/07-1665-Corr, paras. 82-91.

Defence suggests adding to paragraph 45 that the LRV may only be permitted to question witnesses at critical junctures involving victims' interests. Such an addition is consistent with the approaches adopted in the *Kenya* cases. Secondly, the Defence proposes adding additional limitations to the LRV's ability to question witnesses.

32. Firstly, the LRV should not be permitted as the Prosecution suggests in paragraph 46, to elicit additional facts. Such an addition would be inconsistent with the LRV's role in the proceedings, which only allows the victims to adduce evidence in limited circumstances.[41] Secondly, the Defence proposes that more restrictive rules apply to the LRV when it challenges the witness' reliability. Since the Defence in the aforementioned paragraphs proposes that the cross-examining party be permitted to ask questions beyond the scope of the examination-in-chief, then it must also emphasise that such a rule should only be applicable to parties. The LRV should not be permitted to go beyond the scope. The Defence kindly refers the Chamber to its submissions on the modes and modalities of the victims' participation in the proceedings, in which it further substantiates these proposals.

M. Refreshing the memory of a witness

33. The Defence strongly opposes the Prosecution's proposal. It is the position of the Defence that it would allow the Prosecution to circumvent the prohibition on leading questions in the examination-in-chief. This prohibition is of utmost importance since in principle, witnesses are to testify on what they remembered and observed.[42] In the alternative, there should be strict limitations as to the use of documents to refresh memory. The Defence suggests using the same procedure as in *Katanga* where the Chamber determined that documents may be used to refresh memory, but only in so far as:

    a) The documents in question contain the personal recollections of the witness, and

    b) Copies of the document have been made available to the opposing party, who may rely on the parts referred to by the witness during cross-examination.[43]

[41] ICC-02/05-03/09-545, para. 24.
[42] ICC-01/04-01/07-1665-Corr, para. 109.
[43] *Ibid.*

34. The Defence suggests adding an additional requirement- the document used to refresh memory, if allowed, may only relate to statements already submitted into evidence.

N. False testimony under solemn declaration

35. The Defence raises no objection to the Prosecution's proposals.

O. Hostile or adverse witnesses

36. The Defence raises no objection to the Prosecution's proposals.

P. Testimony of expert witnesses

37. The Defence strongly disagrees with the Prosecution's proposal. The Defence maintains that even when *assuming arguendo* it would be allotted 30 days after the Chamber adopted the protocol to submit its objections to expert statements/reports, such a deadline would not permit the Defence to properly examine and make its own investigations necessary to object to such reports. Therefore, the Defence proposes to file its objections 30 days before any expert is called to testify. Such a deadline would both ensure the rights of the Accused and give timely notice to the Prosecution and the Chamber so as to change the schedule without causing delay to the proceedings.

Q. Admission of Evidence

38. The Defence submits that the Prosecution's proposal is not clear, and must contain additional information. The Defence submits that there are only two decisive criteria: that of admissibility and that of probity, which requires at the trial stage a showing of probative value on its face. The Defence finds that the true probity of an item a party wishes to admit into evidence cannot be truly assessed until the party has presented its case. Moreover, the Defence submits that if an item's probative value is substantially outweighed by the prejudice to the Accused, it shall not be admitted.[44]

a. Admission of Evidence tendered through a witness

[44] *See* Rule 89(d) of the Rules of Evidence and Procedure of the International Criminal Tribunal of the former Yugoslavia ('ICTY').

39. The Defence proposes that the Chamber adopt the same procedure as in the *Kenya* cases where the Court decided that in principle each item of evidence should be introduced through a witness.[45] The Prosecution's proposal is vague- the difference between a connection and a clear connection between a document and the substance of a witness' testimony is subject to many interpretations, which could lead to arbitrary rulings on admissibility.

40. The Defence further submits that paragraph 59 should be deleted in its entirety and replaced by the following sentence:

> "In the event the parties are not able to tender evidence through a witness, any such evidence shall be submitted through a bar table motion."[46]

The Defence submits that the Prosecution's proposal as a rule erodes the requirements of authenticity.

b. Admission of the previously recorded testimony of a witness not attending

41. The Defence raises two objections to the Prosecution's proposal, which allows for applications to admit evidence pursuant to this provision to be made at any time during trial. The Defence kindly recalls the "primacy of orality," which has been found to be "one of the cornerstones of the proceedings under the Rome Statute."[47] The reason for its primacy is that it gives the Chamber the opportunity to observe and evaluate the witness' credibility as he or she takes the stand. Thus, any applications made under rule 68(2) of the Rules should be granted sparingly. Moreover, the excessive use of such evidence would deprive Mr. Blé Goudé of his right to confront the witnesses testifying on behalf of the Prosecution. Therefore, the Defence requests the Chamber to require that the party file an application under rule 68(2) of the Rules 21 days before the witness is scheduled to appear.[48] The only objection the Defence finds with the proposed procedure to admit such evidence is the ten day time limit a party has to raise any objections. The Defence takes the view that a 15 day time limit would provide the Defence with sufficient time to file a timely and substantiated objection.

[45] ICC-01/09-01/11-847-Corr, para. 26; ICC-01/09-02/11-867 para. 33.
[46] *See* ICC-01/09-01/11-847-Corr para. 27.
[47] ICC-01/05-01/08-2833 *citing* ICC-01/05-01/08-1028, para. 8.
[48] ICC-01/09-01/11-847-Corr, para. 28; ICC-01/09-02/11-867, para. 35.

c. Admission of the previously recorded testimony of an attending witness

42. The Defence raises the same primary objections mentioned in the aforementioned paragraphs. The admission of any previously recorded testimony should be used sparingly because it violates the "primacy of orality" and runs the real risk of prejudicing the Accused. The Defence raises no objection to the proposed procedure to be followed. The 15 day time limit to raise objections following notification of the application to use such evidence should also apply to this provision.

d. 'Bar table' Applications

43. The Defence disagrees with the Prosecution's proposal. Since in principle all evidence should be tendered through a witness, then any deviation therefrom should require that the parties submit evidence through a bar table.[49] Moreover, the bar table should include in addition to the paragraphs mentioned by the Prosecution's proposal, paragraphs which include the reasons for not tendering the document through a witness, and an index of the most relevant portions of the document.[50]

Q. Evidence of a consistent pattern of conduct

44. The Defence strongly opposes the adoption of any such rule for three primary reasons: (1) unlike the Rules of Procedure and Evidence at the *ad hoc* tribunals, the Rules of Procedure and Evidence at the ICC contain no provisions relating to the admissibility of evidence pertaining to past conduct, (2) the applicability of such a rule would allow the Chamber to hear evidence that is outside the scope of the facts and circumstances confirmed by the Pre-Trial Chamber, (3) the evidence is highly prejudicial and irrelevant as to the Accused's purported involvement in the crimes charged.

45. The Prosecution's proposal greatly departs from the standard practice at this Court; not a single protocol on the conduct of proceedings has ever contained such a rule. If applied, it would cause irreparable prejudice to Mr. Blé Goudé by rendering his trial fundamentally unfair. While potentially prejudicial to the accused, rule 93 of the *ad hoc* tribunals' Rules of Procedure and Evidence, contains numerous safeguards that

[49] ICC-01/09-01/11-847-Corr para. 27; ICC-01/09-02/11-867, para. 34.
[50] *Ibid.*

are completely lacking in the Prosecution's proposal. Firstly, the rule states that evidence of past conduct may be admitted if it is relevant to serious violations of international humanitarian law- such evidence is not at issue in the instant case. Secondly, the jurisprudence of the ICTR has further limited the admissibility of such evidence by finding that the following factors must be considered:

1.) Proximity in time of the similar acts;
2.) Extent to which the other acts are similar in detail to the charged conduct;
3.) Number of occurrences of the similar acts;
4.) Any distinctive feature(s) unifying the incidents;
5.) Intervening events;
6.) Any other factor which would tend to support or rebut the underlying unity of the similar acts.[51]

46. Since the Prosecution's proposal contains no safeguards, it would allow for the presentation of evidence that is both remote in time and place. The Defence would then be obligated to call witnesses to rebut such evidence, which relates to events which are far removed from the charged incidents. This will lead to an unnecessary swelling of the number of witnesses in the instant case, which is already unprecedented.

47. The extremely limited circumstances in which evidence of past conduct may even be considered as admissible at the *ad hoc* tribunals demonstrates the undue prejudice the use of such evidence entails. Most importantly, the confirmation of charges proceedings, which are completely absent in the *ad hoc* tribunal system also prevents the Prosecutor to adduce evidence, which goes beyond the scope of the facts confirmed by the Pre-Trial Chamber.

R. Judicial Notice

48. The Defence finds no objection with the Prosecution's proposal.

S. Site visit

[51] Bantekas, Ilias and Susan Nash, "International Criminal Law", (3rd ed. 2007), p.523 *citing The Prosecutor v. Bagosora et al*, No ICTR-98-41-T, Decision on admissibility of proposed testimony of witness DBY (18 September 2003) paras. 12-28.

49. The Defence finds no objection with the Prosecution's proposal.

T. E-Court

50. The Defence finds no objection with the Prosecution's proposal.

U. Recourse to private/closed session

51. The Defence proposes that recourse to private session will also at times be unavoidable when the information is subject to a form of privilege (including physician-patient privilege) or when such information could put the life of the accused in danger.

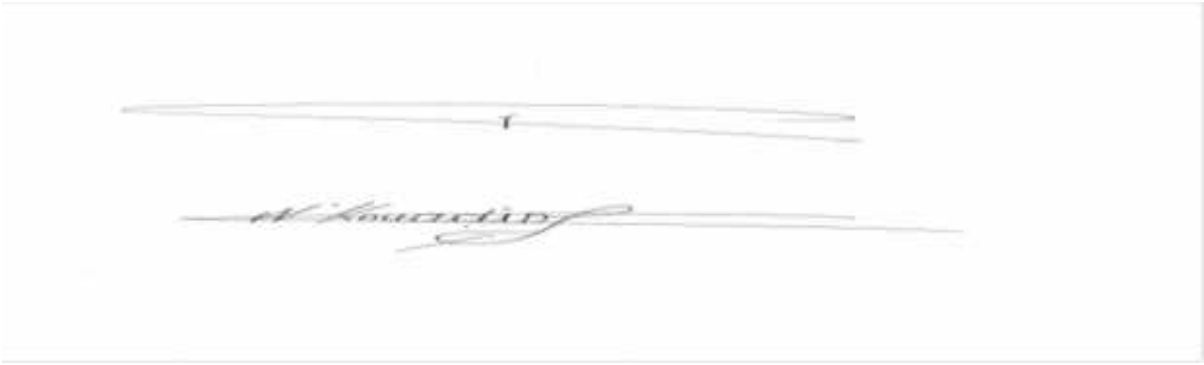
V. Public redacted transcripts of hearings

52. The Defence finds that the Prosecution's proposed timelines are unattainable. Firstly, as the Prosecution proposed in *The Prosecution v. Ntaganda*, the parties should have four weeks to propose public redacted versions of any confidential transcripts.[52] Secondly, the Defence needs at least 10 working days to request for corrections to any transcripts. Given that the working language of the Chamber is English, and most of the witnesses will be testifying in French, proper translation will be of critical importance.

III. Conclusion

53. The Defence respectfully submits the aforementioned submissions pursuant to the Chamber's order, and prays that the Chamber adopt its proposed modifications.

[52] ICC-01/04-02/06-547, para .80-81.



Mr. Knoops, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this 21 May 2015.

At The Hague, the Netherlands