

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 13 March 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

**IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

**Order concerning the Presentation of Incriminating Evidence and the E-Court
Protocol**

No. ICC-01/04-01/07

1/19

13 March 2009

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Mr Eric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
 Mr Andreas O'Shea
 Ms Caroline Buisman

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
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Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
 Mr Joseph Keta
 Mr Jean-Louis Gilissen
 Mr Hervé Diakiese
 Mr Jean Chrysostome Mulamba
 Nsokoloni
 Mr Fidel Nsita Luvengika
 Mr Vincent Lurquin
 Ms Flora Ambuyu Andjelani

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

HAVING REGARD to articles 64, 67 and 69 of the *Rome Statute* ("the Statute"), rules 63, 64, 121 and 134 of the *Rules of Procedure and Evidence* ("the Rules"), and regulations 43 and 54 of the *Regulations of the Court* ("the Regulations"), Trial Chamber II ("the Chamber") of the International Criminal Court ("the Court"), hereby makes the following order.

Issues

This order deals with the proposal submitted by the Prosecution regarding the presentation of incriminating evidence in table format. It also deals with the applicable E-Court Protocol.

I. BACKGROUND AND SUBMISSIONS

1. The Chamber recalls that on 27 November 2008,¹ at its first public status conference, it requested the Prosecution to submit a proposal for "an ordered and systematic presentation of [its] evidence".² This request was reiterated in the Chamber's decision of 10 December 2008, in which it directed the Prosecution to submit a proposal for a table linking the charges confirmed by Pre-Trial Chamber I and the modes of responsibility with the alleged facts as well as the evidence on which it intends to rely at trial.³

2. On 9 January 2009, the Prosecution submitted its proposal,⁴ and on 23 January 2009, the Defence responded.⁵

3. In its submissions, the Prosecution proposed a table template incorporating some elements of the *E-Court Protocol* adopted by Pre-Trial Chamber I.⁶ In Annex 1

¹ ICC-01/04-01/07-T-52-ENG, p. 79, lines 19-23.

² ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 56, lines 9-0.

³ *Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires*, 10 December 2008, ICC-01/04-01/07-788, par. 7.

⁴ ICC-01/04-01-07-813.

⁵ ICC-01/04-01-07-844, ICC-01/04-01-07-845.

of the proposal, the Prosecution submitted a copy of the list of metadata fields already accessible through the *eCourt* portal for all of the incriminating documents on which it relied at the confirmation of charges hearing. The Prosecution proposed to the Chamber and the other parties that they prepare their own table by selecting the fields relevant to their purposes using the *Ringtail* database and attached Annex 2 as an example.

4. On 12 March 2009, the Defence for Mr. Germain Katanga filed an application, in which it requested the Chamber to order the Prosecution “to file an amended document containing the charges that reflects the position following the Decision on the Confirmation of Charges, does not go beyond the provisions of the Charging Document of 26 June 2008, and which, in light of the said decision, removes impermissible references.”⁷

II. TABLE PRESENTING THE PROSECUTION’S INCRIMINATING EVIDENCE

A. Purpose of presenting incriminating evidence in a table format

5. The Chamber emphasises the two-fold purpose of presenting all the incriminating evidence on which the Prosecution intends to rely at trial in a table format. First, the table is necessary to ensure that there is no ambiguity whatsoever in the alleged facts underpinning the charges confirmed by the Pre-Trial Chamber. Second, the table is necessary for a fair and effective presentation of the evidence on which the Prosecution intends to rely at trial.

6. The table will ensure that the accused have adequate time and facilities for the preparation of their defence, to which they are entitled under article 67(1)(b) of the Statute, by providing them with a clear and comprehensive overview of all

⁶ ICC-01/04-01/07-5, p. 9 and ICC-01/04-01/06-360

⁷ “Defence Application for an Amended Document Containing the Charges”, 12 March 2009, ICC-01/04-01/07-954, in fine.

incriminating evidence and how each item of evidence relates to the charges against them. In this respect, the Chamber appreciates the concern expressed by both Defence Counsel that the amount of evidence in this case is such that, without the assistance of a structured preliminary analysis of the evidence by the Prosecution, the Defence will need more time to prepare. The Chamber further agrees with the Defence that it is entitled to be informed – sufficiently in advance of the commencement of the trial – of the precise evidentiary basis of the Prosecution case.⁸ Indeed, although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence. This is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of the trial.

7. In this respect, unless the Defence can demonstrate the contrary, it seems to the Chamber that a well-structured table can fulfil the function of an amended document containing the charges. Indeed, if the table is filled in appropriately, it will provide the same information as a narrative document containing the charges, with the added benefit of additional detailed information and more precision.

8. In addition, having such a table will not only enable the Chamber to exercise its responsibilities under article 64(2) of the Statute, rule 134 of the Rules and regulation 54 of the Regulations, but will also enable the Presiding Judge to give appropriate directions under article 64(8)(b) of the Statute for the conduct of the proceedings.

⁸ ICC-01/04-01/07-954

B. Inadequacy of the Prosecution's proposal

9. Whilst the Chamber welcomes the suggestions of the Prosecution, it is of the view that the proposed template does not meet the needs of the Chamber and the Defence. The information provided by the proposed table would be largely outdated and would not enable the parties or the Chamber to have an ordered, systematic and sufficiently detailed overview of the incriminating evidence. This conclusion is based on the following considerations:

First, the template submitted does not show clear and particularized links between the charges, the elements of the crime, the alleged facts, and the relevant parts of the item of evidence. Because the proposed template is organized around single pieces of evidence, to which all subjective fields are related, it does not enable the Chamber to identify the relevant parts within the evidence.

Second, the 'subjective field' linking the evidence with the factual statements (i.e. GEN – Element of Statement of Facts), does not allow the evidence to be sorted out on the basis of its relevance to a particular factual statement.

Third, the Chamber notes that the 'subjective field' linking the evidence with the factual statements (i.e. GEN – Element of Statement of Facts) does not seem to correlate the factual allegations with any specific charge and/or elements of a crime; as such, it inhibits any real assessment of the link sought between the charges, their constituent elements, the alleged facts and the corresponding evidence.

Fourth, most of the relevant metadata is now outdated, as the point of reference for the trial proceedings is no longer the (Amended) Document Containing the Charges, but the *Decision on the Confirmation of Charges*.⁹

Fifth, the Prosecution continued its investigation after the confirmation of charges hearing and has since gathered new evidence. At the status conference of 27 November 2008, the Prosecution indicated that it might substitute new witnesses to certain witnesses whose statements were used during the pre-trial phase.¹⁰ This information cannot be obtained from the fields of the *E-Court* protocol.

10. In addition, the proposed template is based on the 'subjective fields' of the *E-Court* Protocol as it was applied by Pre-Trial Chamber I during the pre-trial phase. For the reasons explained below, the Chamber in this order adopts the *E-Court* Protocol of Trial Chamber I, which does not include any 'subjective fields'. The template proposed by the Prosecution will therefore be rendered obsolete, as the information on which it is based will no longer be available in *Ringtail*.

C. Table of Incriminating Evidence

11. In order to better assist the Chamber and to enable each Defence Counsel to prepare their case effectively, the Prosecution is hereby ordered to submit an analytical table of all the evidence it intends to use during the trial. The table shall be based on the charges confirmed and follow the structure of the *Elements of crimes*. An example is attached in Annex A to this decision. This table will be referred to as the 'Table of Incriminating Evidence'.

12. The Chamber emphasises that the Prosecution shall only enter into the Table those items of evidence which it has decided to use during the trial. Without

⁹ ICC-01/04-01/07-717.

¹⁰ ICC-01/04-01/07-T-52-ENG-ET, 27 November 2008, p. 44, lines 2-7.

prejudice to the Chamber's prerogatives in this regard, it is for the Prosecution to determine how to demonstrate its factual case and to select the evidence it considers to be most appropriate for that purpose. The Prosecution therefore remains master of its case and has full control over the selection and presentation of evidence in the Table. The Table of Incriminating Evidence should be considered as nothing more than a tool to structure the presentation of the evidence and to ensure that the Prosecution's evidentiary case is easily accessible and comprehensible.

13. As far as format is concerned, the Table of Incriminating Evidence breaks down each confirmed charge into its constituent elements – contextual circumstances as well as material and mental elements – as prescribed by the *Elements of crimes*. For each element, the Prosecution shall set out the precise factual allegations which it intends to prove at trial in order to establish the constituent element in question. For each factual allegation, the Prosecution shall specify which item(s) of evidence it intends to rely on at trial in order to prove the allegation. Within each item of evidence, the Prosecution shall identify the pertinent passage(s), which are directly relevant to the specific factual allegation.

14. If a particular item of evidence is relied upon in relation to more than one factual allegation, the Prosecution shall indicate in each instance where the evidence is mentioned and to which other factual allegation it relates. This may be done by way of reference to the "Claim number" of the other factual allegation(s), to which the item of evidence pertains, in the column entitled "Other References."

15. The Chamber is aware that the task of filling in the Table of Incriminating Evidence might entail an additional administrative burden on the Prosecution. However, the Chamber is of the opinion that at this late stage of the proceedings, the Prosecution must know its case in full detail and be able to present it in the format requested by the Chamber. Moreover, the Chamber is convinced that the supplementary investment of time and resources, required by the Prosecution for

preparing the Table of Incriminating Evidence, will facilitate the subsequent work of the accused and the Chamber and thereby expedite the proceedings as a whole.

16. With regard to the alleged mode of responsibility, the Chamber is mindful that there is no document equivalent to the *Elements of crimes*. There is thus no authoritative definition of the constituent elements of the modes of responsibility on which the Chamber and the parties can rely. The Chamber is further mindful that the mode of responsibility under which the Pre-Trial Chamber confirmed the charges in this case¹¹ has been challenged by the Defence,¹² and will likely be the subject of further litigation before this Chamber.¹³ However, as Pre-Trial Chamber I has confirmed the charges on the basis of a particular theory of individual criminal responsibility, the Prosecution is bound to follow the structure of the *Decision on the Confirmation of Charges* in presenting the evidence that relates to the alleged mode of responsibility. To provide guidance, the Chamber has distilled a number of elements from the *Decision on the Confirmation of Charges*, which are set out in Annex A to this decision.

D. E-Court Protocol

17. The Chamber recalls that in its order of 13 November 2008, it asked the parties and participants to indicate whether they had any comments about the *E-Court Protocol*.¹⁴ In response to this question, the Prosecution averred that it was satisfied with the system adopted for the confirmation of charges and that it did not wish to make any amendment proposals.¹⁵ No substantial proposals were forthcoming from any of the other parties and participants either.¹⁶ It therefore

¹¹ ICC-01/04-01/07-717, pp. 156 et seq.

¹² ICC-01/04-01/07-698, paras. 13-32

¹³ ICC-01/04-01/07-692, par. 44 and ICC-01/04-01/07-698, par. 15.

¹⁴ Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute), ICC-01/04-01/07-747, par. 13(2)

¹⁵ ICC-01/04-01/07-764, p. 15

¹⁶ The Defence for Mr. Katanga only requested that the protocol include the level of confidentiality of each document (ICC-01/04-01/07-763, p. 7). The Defence for Mr. Ngudjolo argued generally that the

seems that all those involved in these proceedings were content to continue using the *E-Court* Protocol as defined by Pre-Trial Chamber I.

18. However, the Chamber observes that Trial Chamber I, in the *Lubanga* proceedings, has modified the *E-Court* Protocol as defined by Pre-Trial Chamber I,¹⁷ in light of the submissions of the parties and participants in that case and especially following the consultation of an expert.¹⁸ Pre-Trial Chamber III has subsequently adopted the same *E-Court* Protocol, at least as far as the format and type of metadata are concerned, with only a few minor corrections and amendments of pure form.

19. The Chamber agrees with Trial Chamber I that it would be beneficial if there was one *E-Court* Protocol for the entire Court, which would be applied consistently and universally before all chambers.¹⁹ As was pointed out by the expert, the protocol used by Trial Chamber I is ideal for introduction as a standard across the Court.²⁰ Moreover, adopting the same protocol as Trial Chamber I in this case would have the added benefit for the Prosecution that it can use evidence relied upon in the *Lubanga* case without the need for reprocessing.²¹

20. For these reasons, the Chamber decides to adopt the same *E-Court* Protocol as Trial Chamber I. However, as the Chamber has been made aware of a number of suggestions to refine the protocol, which Trial Chamber I could not implement in

protocol should permit larger access to the evidence (ICC-01/04-01/07-758, par. 18). The legal representatives of the victims stated that they did not intend to make any amendment proposals or that they had not had sufficient training on the electronic system to have any real opinion on the adequacy of the *E-Court* protocol (ICC-01/04-01/07-762, par. 11; ICC-01/04-01/07-761, p. 4; ICC-01/04-01/07-759, p. 3; ICC-01/04-01/07-767, p. 5).

¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the *E-Court* Protocol", 24 January 2008, ICC-01/04-01/06-1127. The actual protocol can be found as Annex 1 to the Registry's Consolidated *E-Court* Protocol, 4 April 2008, ICC-01/04-01/06-1263

¹⁸ *Prosecutor v. Thomas Lubanga Dyilo* "Report to Trial Chamber I on the e-court", 12 November 2007, ICC-01/04-01/06-1024; "Addendum to "Report to Trial Chamber I on the e-court"", of 7 December 2007, ICC-01/04-01/06-1062 and "Second Addendum to Report to Trial Chamber I on the e-court", 18 February 2008, ICC-01/04-01/06-1182

¹⁹ ICC-01/04-01/07-1127, par. 29

²⁰ ICC-01/04-01/06-1024, par. 100

²¹ ICC-01/04-01/06-1024, par. 103

time before the start of the trial proceedings, the Chamber instructs the Registry to review the protocol in light of these suggestions, in consultation with the competent technical staff of the Office of the Prosecutor, and to submit a revised version to the Chamber for approval. If any of the Defence Counsel, the Office of Public Counsel for the Defence or the Office of Public Counsel for Victims wishes to make any specific proposals for technical improvement, they are hereby instructed to communicate directly with the Division of Court Services of the Registry. The Chamber stresses, in this regard, that the sole purpose of this procedure is to iron out any small errors and imprecision in the protocol.

21. Once the technical revisions to the *E-Court* Protocol have been approved by the Chamber, the parties are ordered to apply the protocol from then onwards.

22. With regard to the protection of the identity of persons who have been granted protection, the Chamber agrees with Trial Chamber I that the *E-Court* Protocol should not create variations or exceptions to the general approach to disclosure.²² Accordingly, where the Chamber has authorised the non-disclosure of an identity, this authorisation also applies to the *E-Court* Protocol. However, if any of the metadata provided contains other information which, in the submission of the Prosecution requires protection, the latter shall apply to the Chamber, following the normal procedure for redactions as determined by the Chamber in its Decision on the Redaction Process of 12 January 2009.²³

E. Filing of all evidence contained in the Table of Incriminating Evidence

23. The Chamber recalls that the approach towards the disclosure of evidence in this case has been largely *inter partes*. However, for the Chamber to be able to assume its responsibilities under article 64, paragraphs 2, 6(d) and 9(a), prior to the

²² *Prosecutor v. Thomas Lubanga Dyilo*, "Second Decision on the E-Court Protocol", 13 March 2008, ICC-01/04-01/06-1223, par. 11 et seq.

²³ ICC-01/04-01/07-819-tENG

commencement of the trial, it needs to have access to all the evidence on which the Prosecution intends to rely.

24. The Chamber notes that, in accordance with Rule 121 (10), it already has access to the record of all the proceedings before the Pre-Trial Chamber, including all the evidence that was submitted during those proceedings.²⁴ However, since the end of the pre-trial proceedings, the Prosecution has continued to disclose evidence to the accused on an *inter partes* basis. At the same time, the Chamber observes that the Prosecution continued to release further evidence to the Chamber in *Ringtail* on an *ex parte* basis, without providing any metadata. As a result, the Chamber has an incomplete overview of the incriminating evidence in the present case. This is an undesirable situation, which hampers the Chamber in fulfilling its responsibilities and obligations regarding the preparation of the trial.

25. In order to remedy this situation, the Prosecution shall, when submitting the Table of Incriminating Evidence, file all the evidence referred to in the Table with the Registry. There is no need to re-file any particular item of evidence that was filed during the pre-trial phase. However, if a particular item of evidence has previously been disclosed in a format (e.g. summary or redacted versions) other than the one the Prosecution intends to use at trial, the Prosecution shall file the evidence in the format it intends to use at trial.

26. The Prosecution shall ensure that all the relevant metadata is provided in accordance with the *E-Court* Protocol. With regard to evidence submitted during the pre-trial phase, the Prosecution shall update the metadata provided in accordance with the *E-Court* Protocol adopted by this Chamber.

²⁴ The record of the pre-trial proceedings was transmitted to the Trial Chamber on 27 October 2008, see Presidency, *Transmission à la Chambre de première instance II de la décision confirmant les charges et du dossier de la procédure*, ICC-01/04-01/07-730.

27. Once the Prosecution has filed all the evidence in the format it intends to use at trial, it shall submit a complete list to the Chamber, indicating clearly when each item of evidence was disclosed to the Defence in the form the Prosecution intends to use at trial. For each item of evidence, the list shall also indicate whether it is still subject to redactions and/or other protective measures and the legal basis thereof.

F. Filing of list of prosecution witnesses

28. At the same time as when the Prosecution files the Table, it shall also file a Witness Information List for all witnesses the Prosecutor intends to call to testify, in accordance with rule 76(1). This list shall be filed with the Registry and contain all the metadata about the witness in accordance with the *E-Court* protocol.

29. In this regard, the Chamber draws attention to the requirement of rule 76(3) that statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

III. PERMISSION TO ADD OR REMOVE EVIDENCE FROM THE TABLE OF INCRIMINATING EVIDENCE

30. After the Table of Incriminating Evidence has been filed and notified to the Defence, the Prosecution shall not add new prosecution witnesses or other incriminating evidence to the table, except with leave of the Chamber. Also, the Prosecution shall inform the Chamber and the Defence immediately if it decides to retract any item of evidence included in the Table. Similarly, if the Prosecution wishes to rely on a different version of an item of evidence included in the Table of Incriminating Evidence, it shall inform the Chamber and the Defence immediately.

IV. PROCEDURE FOR CHALLENGING THE ADMISSIBILITY OF EVIDENCE

31. The Chamber notes that Pre-Trial Chamber I, in its Decision on the Confirmation of Charges devoted considerable attention to what it called "matters

relating to the admissibility of evidence and its probative value”.²⁵ Under this heading, it discussed a number of questions, raised by the accused, pertaining to a “process-verbal d’audition” of a hearing (because Mr. Germain Katanga was not represented by counsel during the interview),²⁶ information originating from a deceased person,²⁷ a fragment of a video (because only a fraction of it was translated in one of the Court’s working languages),²⁸ statements of witnesses about the events at Bogoro, but who were not present during the events²⁹, reports from the United Nations and NGO’s,³⁰ statements of witnesses who were minors when they gave their statement,³¹ uncorroborated testimony (in summary form) of anonymous witnesses,³² contemporary photographs (on the grounds that they were not authenticated),³³ the statements of certain witnesses (on the grounds that they were included in the Prosecution’s ‘preventive relocation’ programme,³⁴ the statement of other witnesses (on the grounds that the Prosecution had been in contact with the witnesses prior to the giving of their statements),³⁵ the statements of witnesses who were also suspected of having committed crimes,³⁶ and a number of specific issues related to witness 166³⁷ and 258³⁸.

32. The Chamber further notes that Pre-Trial Chamber I explicitly stated that “any ruling on the admissibility of a particular item of evidence for the purpose of

²⁵ ICC-01/04-01/07-717, par. 71 *et seq.*

²⁶ ICC-01/04-01/07-717, par.79-99

²⁷ ICC-01/04-01/07-717, par. 100-125

²⁸ ICC-01/04-01/07-717, par. 126-130

²⁹ ICC-01/04-01/07-717, par. 136, (witness W-166)

³⁰ ICC-01/04-01/07-717, par. 131-141

³¹ ICC-01/04-01/07-717, par. 142-153, (witnesses W-28, W-157 and W-279)

³² ICC-01/04-01/07-717, par. 154-160 (witnesses W-243, W-267, W-271)

³³ ICC-01/04-01/07-717, par. 161-165

³⁴ ICC-01/04-01/07-717, par. 166-170 (witnesses W-28, W-132, W-250, W-287)

³⁵ ICC-01/04-01/07-717, par. 171-175 (witnesses W-28, W-157, W-161, W-166)

³⁶ ICC-01/04-01/07-717, par. 176-185 (witnesses W-166, W-238, W-250, W-258)

³⁷ ICC-01/04-01/07-717, par. 196-224

³⁸ ICC-01/04-01/07-717, par. 186-195

the confirmation hearing and the present decision will not preclude a subsequent determination of the admissibility of that same evidence later in the proceedings".³⁹

33. Accordingly, although Pre-Trial Chamber I already decided on a number of matters relating to the admissibility of evidence, it did so only for the purposes of the confirmation proceedings. Consequently, it cannot be excluded that the accused may wish to raise them again before the Trial Chamber. Moreover, the Chamber recalls that Trial Chamber I, in its decision of 13 December 2007, held that "evidence before the Pre-Trial Chamber cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, *de novo*."⁴⁰

34. Nevertheless, the Chamber cannot simply ignore the decisions by the Pre-Trial Chamber, considering that the latter is bound to apply the same criteria as the Chamber in evaluating the relevance and admissibility of evidence.⁴¹ Accordingly, even though the Chamber is not bound by any evidentiary rulings made by the Pre-Trial Chamber, the Chamber will only depart from a previous ruling on a challenge to the admissibility of a particular item of evidence where there are compelling reasons to do so.

35. With regard to challenges pertaining to new items of evidence that were submitted by the Prosecution since the confirmation of charges, the Chamber wishes to emphasise that the evidentiary regime under the Statute and the Rules is neither one of complete freedom of proof, nor does it create any pre-defined categories of

³⁹ Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 26 September 2008, ICC-01/04-01/07-717, par. 71. Emphasis added.

⁴⁰ Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, 13 December 2007, ICC-01/04-01/06-1084, par. 8. Trial Chamber I added that "Therefore, the record of the pre-trial proceedings (and all the evidence admitted for that purpose) transmitted to the Trial Chamber by virtue of Rule 130 is available mainly to be used as a "tool" to help with preparation and the progress of the case."

⁴¹ In this regard, the Chamber notes that rule 63(1) of the Rules states that the provisions relating to evidence, including article 69, "shall apply in proceedings before all Chambers."

information that are systematically inadmissible as evidence. Rather, rule 63(2) of the Rules grants the Chamber full discretion to “assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69”. This means that the Chamber must evaluate each challenge on its individual merits, taking into account the specific characteristics and provenance of the item of evidence that is being challenged. Only if the Chamber identifies serious problems with a particular item of evidence, which render it epistemologically unsound or prejudicial to the fairness or integrity of the proceedings, it may, under article 69(4) of the Statute, rule the item inadmissible. The Chamber stresses, in this respect, that it will not entertain general arguments based on the category to which a specific item of evidence allegedly belongs. Consequently, if a party wants to challenge the admissibility of a specific item of evidence, it must establish specific and substantial grounds that could reasonably lead the Chamber to find that the item of evidence in question is epistemologically unsound or that its admission would be prejudicial to the fairness or integrity of the proceedings in the sense of article 69(4) or (7).

36. The remaining question, therefore, is to determine the most appropriate moment for the Chamber to consider any questions relating to the admissibility of evidence. The Chamber notes, in this respect, that rule 64 determines that “an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to the Chamber”. The term ‘submitted to the Chamber’ must be interpreted with respect to the Chamber’s overall responsibility to ensure that the proceedings are fair and expeditious, in accordance with article 64(2). Therefore, in light of the large number of items of evidence in this case and in order to avoid the congestion of the trial proceedings, the Chamber considers that a reasonable and appropriate interpretation of rule 64(1) is that the inclusion of an item of evidence in the Table of Incriminating Evidence amounts to its being ‘submitted’ to the Chamber within the meaning of rule 64(1) of the Rules. It follows from this interpretation that any issue relating to the relevance or admissibility of an item of evidence contained

in the Table must be raised within a reasonable delay after the Table has been notified.

37. The Chamber hereby invites the parties to submit their observations on the possibility, outlined in the previous paragraph, to examine all issues of relevance and admissibility, which are already known to the parties, before the start of the trial on the merits.

FOR THESE REASONS,

The Chamber

REJECTS the proposal by the Prosecution presenting a summary of the incriminating evidence in table format;

ORDERS the Prosecution to submit a Table of Incriminating Evidence following the above guidelines and Annex A no later than Friday, 3 April 2009, at 4 p.m.;

ORDERS the Prosecution to submit a list of all the witnesses it intends to call, together with a Witness Information List for each witness, no later than 3 April 2009, at 4 p.m.;

ORDERS the Prosecution to file all the items of evidence listed in the Table of Incriminating Evidence with the Registry, no later than Friday, 3 April 2009, at 4 p.m.;

ORDERS the Prosecution to submit a detailed list of all the incriminating evidence included in the Table of Incriminating Evidence, indicating clearly for each item of evidence when it was disclosed to the Defence and whether it is still subject to redactions and/or other protective measures. This List of Incriminating Evidence shall be filed no later than Friday, 3 April 2009, at 4 p.m.;

DECIDES that, after filing the Table of Incriminating Evidence, the Prosecution shall seek leave of the Chamber before adding any new item of evidence, providing reasons why the item is being submitted at that stage, why it could not have been submitted earlier and how it intends to use it at trial;

ORDERS the Prosecution to immediately inform the Chamber and the Defence if it decides not to rely on an item of evidence included in the Table of Incriminating Evidence;

ORDERS the Prosecution to submit an updated Table of Incriminating Evidence, every time an item of evidence is added or removed, and indicate clearly which changes have been made;

ORDERS the Registry to revise the *E-Court* Protocol of Trial Chamber I, ICC-01/04-01/06-1263-Anx1, in order to eliminate any technical errors and imprecision, and submit a revised version for approval by the Chamber no later than Friday 27 March 2009 at 4 p.m. The Registry is authorised to consult directly with the appropriate services of the Office of the Prosecutor, who are hereby ordered to provide their cooperation and input within the shortest possible delay;

INVITES the accused, the legal representatives of the victims as well as the Office of Public Counsel for the Defence and the Office of Public Counsel for the Victims to communicate any specific proposals relating to the technical improvement of the *E-Court* Protocol directly to the Registry, no later than Monday 23 March at 4 p.m.;

ORDERS all parties and participants, as of the moment the Chamber has approved the revised *E-Court* Protocol, to apply it when they submit or disclose evidence;

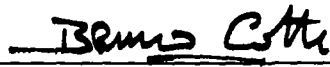
ORDERS the Prosecution to update the metadata of all the items of evidence included in the Table of Incriminating Evidence, no later than Friday 24 April at 4 p.m. For all other items of evidence, previously disclosed to the Defence *inter partes*,

the Prosecution shall endeavour to update the metadata as soon as possible after the Chamber has approved the revised *E-Court* Protocol. The Prosecution shall report to the Chamber when the updating of the metadata has been finalised. If there are any issues of redaction within the metadata, which require special authorisation by the Chamber in accordance with paragraph 22 of the present order, the Prosecution shall make the appropriate request no later than Thursday 9 April 2009 at 4 p.m.;

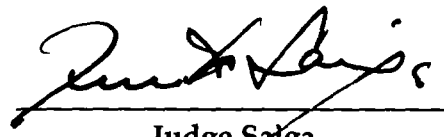
INVITES the Prosecution and the Defence to submit their observations on the possibility to examine all matters of relevance and admissibility before the start of the trial on the merits, as outlined in paragraph 36, no later than Friday 27 March 2009 at 4 p.m.;

DECIDES to postpone the ruling whether the legal representatives of the victims will be granted access to the Table of Incriminating Evidence and the List of Evidence.

Done in both English and French, the English version being authoritative.


 Judge Bruno Cotte,
 Presiding Judge


 Judge Diarra


 Judge Salga

Dated this Friday, 13 March 2009

At The Hague

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I. Article 7 - Crimes against humanity**A. Contextual Elements****1. Attack**

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

2. Widespread or systematic

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

3. Directed against a civilian population

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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B. Specific Charges**1. Article 7 (1) (a) – Murder****a) The perpetrator killed one or more persons**

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

b) The conduct was committed as part of a widespread or systematic attack directed against a civilian population

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

c) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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2. Article 7 (1) (g)-1 – Rape

a) The perpetrator invaded¹⁵ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

b) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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c) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

d) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

3. Article 7 (1) (g)-2 - Sexual slavery

a) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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b) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

c) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

d) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Claim	Factual allegation		Source	Location	Other
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#		Textual fact in the element of proof	(start ERN)	(precise ERN)	References

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II. Article 8 – War crimes**A. Contextual elements****1. Armed conflict**

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

2. International

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

3. The conduct took place in the context of and was associated with an international armed conflict

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

B. Specific elements of crimes

1. Article 8 (2) (a) (i) – Wilful killing

a) The perpetrator killed one or more persons.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

b) Such person or persons were protected under one or more of the Geneva Conventions of 1949.

Claim	Factual allegation		Source	Location	Other
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#		Textual fact in the element of proof	(start ERN)	(precise ERN)	References

c) The perpetrator was aware of the factual circumstances that established that protected status.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

2. Article 8 (2) (b) (i) - Attacking civilians

a) The perpetrator directed an attack.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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b) The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

c) The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

3. Article 8 (2) (b) (xiii) - destroying or seizing the enemy's property**a) The perpetrator destroyed or seized certain property.**

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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b) Such property was property of a hostile party.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

c) Such property was protected from that destruction or seizure under the international law of armed conflict.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

d) The perpetrator was aware of the factual circumstances that established the status of the property.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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e) The destruction or seizure was not justified by military necessity.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

4. Article 8 (2) (b) (xvi) - Pillaging**a) The perpetrator appropriated certain property.**

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

b) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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				ERN)	

c) The appropriation was without the consent of the owner.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

5. Article 8 (2) (b) (xxii)-1 - Rape

a) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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b) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

6. Article 8 (2) (b) (xxii)-2 – Sexual slavery

a) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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b) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

7. Article 8 (2) (b) (xxvi) – Using, conscripting or enlisting children**a) The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.**

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

b) Such person or persons were under the age of 15 years.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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c) The perpetrator knew or should have known that such person or persons were under the age of 15 years.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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III. Individual criminal responsibility

Article 25 (3)(a) – Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible

A. Objective elements for commission of the crime through another person, regardless of whether that other person is criminally responsible

1. Organised and hierarchical apparatus of power

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

2. Automatic compliance with the orders of superiors

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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3. The perpetrator exercised authority and control over the organisation

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

4. The perpetrator used his authority and control over the organisation to execute the crime(s)

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

Annex A - Table of Incriminating Evidence (template)

B. Objective elements of joint commission of a crime**1. Existence of an agreement or common plan between two or more persons.**

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

2. Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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C. Subjective elements

1. General mental element: The objective elements were committed with intent and knowledge (*dolus directus* of the first or second degree).

a) *Dolus directus* of the first degree: The perpetrator knew that his actions or omissions would bring about the objective elements of the crime and undertook such actions and omissions with the express intent to bring about the objective elements of the crime.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

b) *Dolus directus* of the second degree: The perpetrator was aware that in the ordinary course of events the objective elements of the crime would occur as a consequence of his actions or omissions.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

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2. Specific mental element for co-perpetration: The perpetrators must be aware of the factual circumstances enabling them to control the crimes jointly.

a) The perpetrators were mutually aware and mutually accepted that implementing their common plan would result in the realisation of the objective elements of the crimes.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

b) The perpetrator must be aware of the factual circumstances enabling them to control the crimes jointly.

(1) The perpetrator was aware of his essential role in the implementation of the common plan.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

(2) The perpetrator was aware of his ability – by reason of the essential nature of his task – to frustrate the implementation of the common plan and hence the commission of the crime.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

Annex A - Table of Incriminating Evidence (template)

3. Specific mental element for co-perpetration of a crime through another person¹: The perpetrator was aware of the factual circumstances enabling them to exercise control over the crime through another person.

a) The perpetrator was aware of the organised and hierarchical character of his organisation.

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

b) The perpetrator was aware of his authority within the organisation

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References

¹ According to the Decision on the Confirmation of Charges, this mental element is not required for the charge of using, conscripting or enlisting children (Article 8 2) b) xxvi)), see ICC-01/04-01/07-717, 26 September 2008, par. 535

Annex A - Table of Incriminating Evidence (template)

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c) The perpetrator was aware of the factual circumstances enabling near-automatic compliance with his orders

Claim #	Factual allegation	Textual fact in the element of proof	Source (start ERN)	Location (precise ERN)	Other References