

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 22 September 2009

TRIAL CHAMBER I

**Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann**

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE
OF THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public

Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Chrysostome Mulamba Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

Ms Paolina Massidda

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

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Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the Request by legal representatives of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence:

I. Background and Submissions

1. During the hearing of 18 June 2009,¹ the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 referred to several paragraphs of the Final Report of the Panel of Experts (“Report”) on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo (“DRC”)² during his questioning of the expert called by the Chamber, Mr Roberto Garretón. In particular, the legal representative referred to paragraphs 118 to 123 of the Report,³ and thereafter he submitted that the entire document should be admitted into evidence.⁴
2. The defence opposed this request on the grounds that the Report, in the course of covering many events, fails to specify the relevant sources, and therefore its reliability has been insufficiently demonstrated.⁵ Moreover, it submitted that Mr Garretón “himself pointed out that the concerns dealt with in the Report were beyond the scope of his remit”.⁶

¹ Transcript of hearing on 18 June 2009, ICC-01/04-01/06-T-194-ENG.

² DRC-V01-0001-0039.

³ ICC-01/04-01/06-T-194-ENG, page 17, lines 1-6.

⁴ *Ibid.*, page 84, lines 4-7.

⁵ *Ibid.*, page 82, lines 1-5.

⁶ *Ibid.*, page 82, lines 10-12.

3. The Chamber invited the parties and the participants to file written submissions as to whether this evidence should be admitted from the bar table.⁷

Legal Representative of victims

4. In an application submitted on 7 July 2009,⁸ the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 developed its request for the Chamber to admit the Report into evidence.
5. The representative submitted that the Chamber may permit victims to introduce evidence relating to the guilt or innocence of the accused (as well as advancing submissions on the admissibility or relevance of such evidence), so long as it affects their personal interests.⁹
6. The representative referred to the criteria for assessing the admissibility of evidence as established by Trial Chamber I in its “Decision on the admissibility of four documents” on 13 June 2008,¹⁰ which include an assessment of a) its *prima facie* relevance, b) its *prima facie* probative value, and c) its probative value as against its prejudicial effect.¹¹
7. As regards the relevance of this evidence, the legal representative asserted that the Report deals with the network of States, companies and private individuals responsible for fuelling the various conflicts in the DRC and in Ituri. The representative suggested that this material is covered by the Trial Chamber’s oral

⁷ *Ibid.*, page 84, lines 13-21.

⁸ Demande d’admission du rapport final du Groupe d’Experts sur l’exploitation illégale des ressources naturelles et autres formes de richesse de la République démocratique du Congo comme élément de preuve, 7 July 2009, ICC-01/04-01/06-2029.

⁹ *Ibid.*, paragraph 3.

¹⁰ Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, paragraphs 27-31.

¹¹ *Ibid.*, paragraph 5.

decision of 17 June 2009, in which it indicated that it is appropriate to explore the context of the conflict, if necessary outside the time-frame of the charges.¹²

8. Addressing its probative value, the legal representative submitted that the Report contains clear indications of reliability¹³ because i) the Panel had been established with a precise mandate from the Security Council;¹⁴ ii) the Report explained the methodology adopted therein;¹⁵ iii) it was based on direct and identifiable sources;¹⁶ iv) there is intrinsic coherence between the information in the report and other evidence already admitted in the case;¹⁷ v) it was corroborated by Roberto Garretón's¹⁸ report, as filed with the Trial Chamber;¹⁹ vi) during the hearing Mr Garretón agreed with various matters set out in the Report²⁰ and, moreover, he expressed the view that some of the assessments set out therein coincided with his own conclusions;²¹ and vii) even though Mr Garretón was referred only to paragraphs 118-123 of the Report during the hearing, his answers touched upon the general issues contained in that document.²²

9. Turning to the probative value of the Report as opposed to its prejudicial effect, the legal representative suggested i) its relevance and probative value as regards the context of the Ituri conflict outweigh any possible prejudicial effects;²³ ii) Pre-Trial Chamber I referred to various reports of the Organization of the United Nations ("UN") on the situation in Ituri in its decision on the confirmation of charges (absent defence objections);²⁴ iii) Trial Chamber I has approached UN documents on the basis that they are reliable sources, given that on 13 June 2008

¹² *Ibid.*, paragraphs 6 and 7.

¹³ *Ibid.*, paragraph 10.

¹⁴ *Ibid.*, paragraph 11.

¹⁵ *Ibid.*, paragraph 12.

¹⁶ *Ibid.*, paragraph 13.

¹⁷ *Ibid.*, paragraph 14.

¹⁸ *Ibid.*, paragraph 10.

¹⁹ ICC-01/04-01/06-1655-Anx-tENG 20-02-2009, page 16.

²⁰ ICC-01/04-01/06-2029, paragraph 17.

²¹ *Ibid.*, paragraphs 19-21.

²² *Ibid.*, paragraph 22.

²³ *Ibid.*, paragraph 29.

²⁴ *Ibid.*, paragraph 30.

it decided to stay the proceedings because the Office of the Prosecutor (“prosecution”) had failed to disclose UN materials to the Defence;²⁵ iv) the defence has relied on documents of this type (e.g. EVD-OTP-00014), and the representative suggested the defence has failed to justify its suggestion that the Report contains fewer safeguards as regards reliability than other material before the Chamber.²⁶

Defence

10. The defence filed its response on 19 August 2009;²⁷ it asserted that although there is no dispute as to the authenticity of the Report, it should not be admitted as evidence.²⁸

11. The defence submitted that the relevance of the Report is limited because it deals with events prior to the time-frame of the charges,²⁹ and it does not contain any information about the Union des Patriotes Congolais, the accused or the use of child soldiers.³⁰

12. As regards its reliability, the defence argued: i) even if Annex 4 of the Report lists its sources, these are not sufficiently linked to the information in the report, and it does not precisely explain the methodology used (therefore, the Chamber is unable to test, on a *prima facie* basis, the reliability of the information);³¹ ii) Mr Garretón was not in a position to assess the reliability of the Report because, as he recognised himself, he had never personally dealt with or studied the issues

²⁵ *Ibid.*, paragraph 31.

²⁶ *Ibid.*, paragraph 32.

²⁷ Réponse de la Défense à la “Demande d’admission du rapport final du Groupe d’experts sur l’exploitation illégale des ressources naturelles et autres formes de richesse de la République démocratique du Congo comme élément de preuve”, 7 July 2009, ICC-01/04-01/06-2085.

²⁸ *Ibid.*, paragraph 3.

²⁹ *Ibid.*, paragraph 4.

³⁰ *Ibid.*, paragraph 5.

³¹ *Ibid.*, paragraph 12.

addressed by the Panel of Experts;³² iii) the mere fact that the Report comes from the UN is in itself an insufficient verification of its reliability.³³

13. Moreover, the defence rehearsed that it has consistently resisted the introduction of reports of this kind and has only utilised them in cross-examination, without requesting their admission into evidence.³⁴ Additionally, it submitted that reports admitted by the Pre-Trial Chamber should not automatically be introduced into evidence at trial, and, moreover, the Chamber has itself expressly refused to admit a Report entitled "Individual stories Bunia (Ituri) Child Soldiers".³⁵

II. Relevant provisions

14. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions:

Article 64(9) of the Statute

Functions and powers of the Trial Chamber

[...]

The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

- (a) Rule on the admissibility or relevance of evidence. [...]

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the Proceedings

[...]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Article 69 of the Statute

³² *Ibid.*, paragraph 13.

³³ *Ibid.*, paragraph 14.

³⁴ *Ibid.*, paragraph 16.

³⁵ *Ibid.*, paragraph 17.

Evidence

[...]

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

Rule 63 of the Statute**General provisions relating to evidence**

[...]

2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

3. A Chamber shall rule on an application of a party or on its own motion, made under article 64, subparagraph 9 (a), concerning admissibility when it is based on the grounds set out in article 69, paragraph 7.

Rule 64 of the Rules of Procedure and Evidence (“Rules”)**Procedure relating to the relevance or admissibility of evidence**

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

Rule 91 of the Rules**Participation of legal representatives in the proceedings**

[...]

2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

3.

(a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victims' legal representative.

III. Analysis

A. General remarks

15. Article 68(3) establishes the right of victims to present their views and concerns when their interests are affected. However, this must not operate in a manner that is prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial. Accordingly, the subject-matter of their interventions and the circumstances of participation by victims must not undermine the integrity of the proceedings.

16. The Trial Chamber has dealt with the right of victims to present evidence in its Decision of 18 January 2008:³⁶

108. The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute. Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant). The Rule does not limit this opportunity to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has

³⁶ Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119.

"requested" the evidence. Furthermore, for the reasons set out above, the Chamber will not restrict questioning by victims to reparations issues, but instead will allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration.³⁷

17. The Appeals Chamber, in approving this approach, emphasized the necessary preconditions for allowing victims to tender and examine evidence, as follows:³⁸

4. The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is not inconsistent with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial. In so doing the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.³⁹

18. Turning to the merits of these requests, a written application has been appropriately submitted and notified to the parties. Therefore, the first two requirements, as approved by the Appeals Chamber (see paragraph 17 above), have been satisfied.

19. As to whether the personal interests of the victims are sufficiently engaged by background matters, the Trial Chamber, albeit in other circumstances, has indicated that:

Given these issues are to be investigated in this case, the participating victims, in the judgment of the Chamber, have an undoubted interest in setting their personal experiences, and the harm it is said they individually experienced, in their true historical, economic, and social context, which is, *inter alia*, the underlying circumstances in which the alleged crimes of enlisting, recruiting, or using child soldiers were committed. Therefore, the victims are entitled to explore such aspects of these background matters as are relevant to each of them

³⁷ *Ibid.*, paragraph 108.

³⁸ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paragraphs 4 and 104.

³⁹ *Ibid.*, paragraph 4.

provided, and to the extent, that the areas are relevant to, and are of assistance in, establishing the context in which the alleged crimes have been committed.⁴⁰

[...]

In particular, the Chamber is persuaded, put generally, that these victims have demonstrated that they have a general interest in exploring the following matters within the framework of the charges (to the extent that they have not already been covered by the witness's earlier testimony): The economic, ethnic, and political underpinnings of the conflict in Ituri, and its origins; the economic interests of those principally involved, the role they played, and the identities of the relevant armed groups; the extent to which individuals profited from the conflict and the destination of any financial or other gains, together with the exploitation of natural resources in this context; the general practice of recruiting child soldiers in the DRC, including Ituri, whether it was voluntary or enforced and the living conditions in the training camps; the role of foreign powers in the use of child soldiers, and the extent to which the conflict was national or international; and the damage caused by the conflict (including the psychological harm inflicted on children), particularly in the Mahagi region.⁴¹

[...]

Accordingly, this examination by participating victims will be confined to: (i) the issues and areas in which the victims have a personal interest; (ii) the context and history which is relevant to the charges the accused faces; and (iii), the matters within the expertise of Mr. Garreton.⁴²

20. The Report (summarised hereafter) addresses some of these issues, and, as just rehearsed, the Chamber has determined they can affect the personal interests of the victims; therefore, the content of the Report, in this general sense, is relevant to the charges brought against the accused. Although this issue is developed further below, it is important therefore to note at this stage of the analysis that these are issues which are of relevance to the victims.

21. The Statute and the Rules set out the principles to be applied to the admissibility of evidence, other than witness evidence, in various provisions.⁴³ These provided the basis for the Chamber's general approach to the admissibility of documents, as described in its "Decision on the admissibility of four documents on 13 June 2008".⁴⁴ The Chamber ruled that it will focus, first, on the **relevance** of the

⁴⁰ Transcript of hearing on 17 June 2009, ICC-01/04-01/06-T-193-ENG, page 8, lines 15-25.

⁴¹ *Ibid.*, page 9, lines 10-25 and page 10, line 1.

⁴² *Ibid.*, page 10, lines 7-14.

⁴³ See Section II Relevant Provisions above.

⁴⁴ ICC-01/04-01/06-1399, paragraphs 27-31.

material (*viz.* does it relate to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims); second, on whether or not it has **probative value**; and third, on the **probative value of the evidence as against its prejudicial effect**.

22. Additionally, the Chamber indicated that:

[...] the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited - at the outset - the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to "apply national laws governing evidence". For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence.⁴⁵

23. Therefore, when assessing the admissibility of evidence other than direct oral testimony, the Chamber has followed the approach set out above.

B. The Panel of Experts' Final Report

24. If the right of one or more victims to tender evidence on the context and history of the conflict in Ituri relevant to the charges faced by the accused is established (which, for the reasons described above, undoubtedly is the position in this case), it is then necessary to examine whether the Report fulfils the criteria established by the Chamber for evidence other than direct oral testimony (see paragraphs 21 and 22 above).

25. The Bench has already indicated that the responses of the expert to the questions put to him on the basis of the paragraphs quoted by the legal representative form

⁴⁵ *Ibid.*, paragraph 24.

part of the evidence in the case.⁴⁶ Therefore, the instant question is whether the Report as a whole is to be introduced as evidence from the bar table.⁴⁷

26. The Report contains a detailed and context-specific analysis of the illegal exploitation of natural resources and other forms of wealth within the DRC. The Panel of Experts considers the utility of such activities in financing the conflict and they further attempt to assess the potential impact, should this continue, on the economic and humanitarian situation in the DRC. This 'plundering' of natural resources has been considered in the context of politically and economically powerful groups, referred to by the Panel as the "elite networks." The Panel has notionally divided the DRC into three areas, from within which it is alleged that different elite networks originate or operate. These areas are, namely; the "Government controlled area"; the "Rwanda controlled area" and the "Uganda controlled area". These form the three principle avenues of exploitation in the DRC and represent the channels through which various, smaller elite networks may operate. The Panel contextualises current instances of conflict in the course of smaller "micro conflicts" that are fought over minerals, farm produce, and land and tax revenues. In a situation where the overall regional conflict has diminished in intensity, it is considered that various elite groups from within the three main areas have "changed their tactics" to ensure that, in spite of impending troop withdrawals, they can still exercise significant territorial economic and political control. These new tactics include the introduction of economic control mechanisms, contractual agreements and the use of organised systems of embezzlement, tax fraud, extortion and so on. In the case of Ituri in particular, the Ugandan Peoples Defence Front continues to provoke ethnic conflict as a way of ensuring a need for its own continued presence. The Report considers in some detail the nature and modus operandi of the elite groups in each of the three principle areas, offering illustrations that

⁴⁶ ICC-01/04-01/06-T-193-ENG, page 84, lines 14-19.

⁴⁷ *Ibid.*, page 83, lines 19-25 and page 84, lines 1-3.

range from organised theft to the use of corporate facades as a cover for more covert activities. In each case consideration is given to the various consequences of such activities in the affected area and indeed particular reference is made to the problematic relationship between economic exploitation and ethnic conflict as occurred between the Hema and Lendu clan stems. It was to this particular aspect of the Report – at paragraphs 118 through 123 – that the legal representative of victims referred in his questioning. The latter third of the Report deals with the collaboration of the Panel with the Porter Commission in Uganda, the notion of transit and end-user countries in the chain of exploitation and the role of international and regional organisations. In conclusion, the Panel considers that an embargo or moratorium banning the export of raw materials from the DRC is not a viable solution. Nonetheless, it advocates placing restrictions on the activities of those individuals and companies who are involved in the supply of arms and who plunder resources. The establishment of a transitional government and the phased withdrawal of foreign troops is also viewed as a necessary step. In an effort to alter the economic status quo, strong incentives and disincentives may also be useful. In the main, the Panel recommends the use of a peace dividend, institutional reform, the use of financial and technical measures and regulation and the introduction of a monitoring process.

27. In his application, the legal representative has suggested, but in a general sense only, that the content of the Report is relevant to the charges brought against the accused in the present case, because it refers to particular aspects of the context of the conflict, and it illuminates the network of States, companies and private individuals who fuelled the various conflicts in the DRC and in Ituri.⁴⁸

28. It is to be observed that during the trial to date, the Chamber has heard other evidence, and has considered a variety of documents, relating to the context of

⁴⁸ ICC-01/04-01/06-2029, paragraphs 6 and 7.

the conflict in Ituri. Furthermore, as submitted by the legal representative, the subject of the economic exploitation of the conflict in Ituri by locals and foreign States has been admitted into evidence in another UN report entitled “Special report on the events in Ituri January 2002 – December 2003”.⁴⁹ This latter report covers the issue of Congolese and international involvement in a manner that is less concerned with the pervasiveness of wealth and resource exploitation. The issues of poor governance and disputes over land are offered as the contextual underpinnings for the Hema – Lendu conflict, and the consequences of foreign intervention, by heightening the severity of the fighting, is clearly addressed. There is brief reference to the interest of foreign governments and individuals in resources that “exist in a political vacuum”, and there is allusion to Mongbwalu as a case-study town “to conquer for its natural resources”. Discussion on the role of Kinshasa, Rwanda and Uganda, although not couched in economic terms, similarly reflects the notion of the elite networks described in the Expert Panel Report.

29. Additionally, whilst Mr Garretón did not refer in detail to the issue of resource exploitation in his report, he did refer extensively to the role and exacerbating presence of foreign interests in the DRC. When pressed in evidence on the specific issue of resource exploitation, he indicated that he had “decided not to deal with that issue from a human rights point of view because they [the Secretary-General's experts] were much more well-versed in that particular matter than myself.”⁵⁰

30. To the extent that Mr Garretón’s report referred to resource exploitation, he agreed that the views he had expressed coincided with those of the Expert Panel.⁵¹ Where certain statements mentioned in the Expert Panel Report were not mentioned in his own report, Mr Garretón similarly agreed with their validity,

⁴⁹ ICC-01/04-01/06-2029, paragraph 14. See also EVD-OTP-00014.

⁵⁰ ICC-01/04-01/06-T-194-ENG, page 16, lines 6-10.

⁵¹ *Ibid.*, page 18, line 1 and lines 4-6.

although he submitted that in certain instances the conclusions of the Expert Panel were perhaps “too generic.”⁵²

31. The prosecution expert witness, Mr Gerard Prunier, noted that the Report caused a lot of controversy because it was very critical of the political, military, and economic action of Uganda and Rwanda.⁵³ He was of the view that “it did not actually correspond or tally with the attitude adopted by the UN up to then.”⁵⁴ Mr Prunier in dealing with the Report, indicated that it referred to Kivu and not Ituri, as suggested by counsel, and that as a whole, it surprised the UN.⁵⁵ The issue of resources was dealt with only in passing in the Report, in that it was observed that the volume of resources looted in Province Orientale was less than that looted from the Kivu; generally, however, this was not the focus of the Report.⁵⁶

32. Addressing the contention of the defence in its response that the Chamber has previously refused to admit another UN report entitled “Individual stories Bunia (Ituri) Child Soldiers”,⁵⁷ the Chamber notes that the prosecution sought to rely on that report to demonstrate the working methods of a particular witness, as opposed to its highly sensitive contents.⁵⁸ The Chamber weighed the need to protect the identities of potentially vulnerable children along with the limited purpose for seeking to introduce it (*viz.* the work of a particular individual rather than the Report’s content). In those particular circumstances, the Chamber resolved the issue, without addressing the criteria for admissibility, by ruling that the prosecution’s purpose could be achieved by other means, without admitting the report and thereby protecting the sensitive information contained therein.

⁵² *Ibid.*, page 33, lines 1-2.

⁵³ Transcript of hearing on 26 March 2009, ICC-01/04-01/06-T-156-ENG, page 86, lines 13-18.

⁵⁴ *Ibid.*, page 86, lines 15-16.

⁵⁵ *Ibid.*, page 86, lines 23-25.

⁵⁶ *Ibid.*, page 87, lines 8-12.

⁵⁷ ICC-01/04-01/06-2085, paragraph 17.

⁵⁸ Transcript of Hearing on 7 July 2009, ICC-01/04-01/06-T-205-ENG, page 3, line 5-6.

IV. Conclusions

33. It is apparent that this Report concerns some areas or issues that have already been canvassed in oral evidence or which have been admitted in documentary form (*e.g.* the involvement of armed groups or forces from outside the DRC), and to an important extent, therefore, it is repetitive of evidence currently before the Chamber. There are clear indications from Mr Prunier, and to a lesser extent from Mr Garreton, that at least some of the conclusions of the Panel of Experts are controversial and are open to legitimate criticism. Against that background, it needs to be emphasised that there is no suggestion that the authors of the Report are to be called to give evidence, and, moreover, none of its contents are directly relevant to the charges faced by the accused.
34. Addressing the admissibility criteria established by the Trial Chamber in its “Decision on the admissibility of four documents” of 13 June 2008, although the Report, at least in part, is relevant in that it provides general background evidence, the Chamber must weigh its potential prejudicial effect as against its probative value. The broad historical background to the events covered by the charges has been dealt with in other evidence before the Court, introduced in the main via the two experts referred to above (whose evidence was tested by questioning), and this further material is likely to provide little additional relevant evidence for the Chamber’s consideration. Therefore, the probative value of the Report is likely to be small. Moreover, as highlighted above, the authors of the Report are not to be called, and counsel will be unable, through questioning, to investigate the significant criticisms that have been made of its contents (see paragraph 31 above). It follows that, if admitted, this document is likely to cause material prejudice to the parties. In all the circumstances, weighing the slight relevance and the low probative value of the Report and its real prejudicial potential, the Chamber is at this stage unpersuaded that it should be admitted.

35. For these reasons, the application of the legal representative is refused.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 22 September 2009

At The Hague, The Netherlands