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No.: **ICC-01/04-01/06**
Date: **28 April 2011**

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
Redacted Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005

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

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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 Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005 ("Witness 5").

I. Background

1. This Decision concerns an application by the Office of the Prosecutor ("prosecution") to admit evidence at the end of this trial from Witness 5.[1] The material in question concerns, in particular, whether certain Hema self-defence groups were independent of, or incorporated into, the UPC; the use of child soldiers by those groups; and whether the UPC executive committee discussed demobilising young combatants. In order to rule on this application, it is important to consider certain elements of the history to this issue.

2. During the closing stages of the defence evidence, on 30 March 2011, Witness DRC-D01-WWWW-0019 ("Defence Witness 19") testified about the creation and operation of "self-defence committees" in Ituri beginning in 2000.[2] According to the witness, the self-defence forces comprised "people of all ages", including children under the age of 15, as "[t]here was no reason for anyone not be involved" in the self-defence effort.[3] This witness gave details about the relationship between the self-defence

[1] Transcript of hearing on 14 April 2011, ICC-01/04-01/06-T-350-CONF-ENG ET, page 18, line 25 to page 19, line 2 and page 19, lines 23 – 25; Email communication from the prosecution to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.
[2] Transcript of hearing on 30 March 2011, ICC-01/04-01/06-T-340-ENG CT, page 69, line 22 to page 70, line 4.
[3] ICC-01/04-01/06-T-340-ENG CT, page 70, lines 5 – 13.

committees and the UPC.[4] He stated, *inter alia*, that "the self-defence groups did not necessarily represent the policy of the UPC at the time".[5]

3. Shortly thereafter, Witness DRC-D01-WWWW-0011 ("Defence Witness 11") also testified about the self-defence committees and the presence of minors within them.[6] The witness stated that Thomas Lubanga held meetings with officials from the committees.[7]

4. On 12 April 2011, Witness DRC-D01-WWWW-0007 ("Defence Witness 7") who was the coordinator of the self-defence committees,[8] testified extensively about the creation, operation, and coordination of the committees which he submitted existed in Ituri within "every village in which the Hema lived" from 1999 until 2004.[9] According to Defence Witness 7, the self-defence committees "[did] not take age into account. If somebody could fight with a machete or with a spear, and if there were weapons, if he could carry a firearm, we would give it to him".[10] In 2002, the witness's self-defence group sent "young boys" to train with the UPC with the idea that they would return to defend their villages (although apparently these boys did not return but remained with the UPC).[11] This witness also stated that he met with Thomas Lubanga at his residence on

[4] Transcript of hearing on 31 March 2011, ICC-01/04-01/06-T-341-ENG ET, page 4, line 6 to page 6, line 23.
[5] Transcript of hearing on 31 March 2011, ICC-01/04-01/06-T-341-ENG ET, page 4, lines 18 – 20.
[6] Transcript of hearing on 7 April 2011, ICC-01/04-01/06-T-346-ENG ET, page 78, line 25 to page 79, line 12; Transcript of hearing on 8 April 2011, ICC-01/04-01/06-T-347-Red-ENG WT, page 46, lines 17 – 25.
[7] ICC-01/04-01/06-T-347-Red-ENG WT, page 11, line 10 to page 12, line 4.
[8] Transcript of hearing on 12 April 2011, ICC-01/04-01/06-T-348-ENG ET, page 25, lines 1 – 3.
[9] ICC-01/04-01/06-T-348-ENG ET, page 23, line 4 to page 24, line 25.
[10] ICC-01/04-01/06-T-348-ENG ET, page 24, lines 13 – 15.
[11] ICC-01/04-01/06-T-348-ENG ET, page 35, line 11 to page 38, line 9 and page 39, line 25 to page 40, line 3.

23 February 2003, and that the accused allegedly told him to disarm the children in his group.[12]

5. Finally, on 13 and 14 April 2011, the Chamber heard evidence from Witness DRC-D01-WWWW-0037 ("Defence Witness 37") who was at one time a member of a self-defence group in Mandro formed to protect the Hema community.[13] This witness also testified about the respective functions of the UPC and the self-defence forces during the conflict in Ituri.[14]

6. During a meeting on 11 April 2011 between the prosecution and Witness 5, which occurred in circumstances that are analysed in detail hereafter, the witness (REDACTED) indicated that Hema self-defence groups were set up in response to similar groups created within the Lendu community, in the context of the general conflict in Ituri. He suggested that when the UPC was created in 2000, it incorporated Hema self-defence groups. Indeed, he suggested that this provided the basis of the military wing of the UPC (the FPLC). Once this occurred (in 2000), they stopped referring to the self-defence groups because they had ceased to exist. The witness attended executive meetings at which there was no discussion about the demobilisation of children under 18 from the UPC. However, MONUC officials mentioned that this should happen.[15]

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[12] ICC-01/04-01/06-T-348-ENG ET, page 27, line 6 to page 30, line 8; page 39, line 7 – 24 and page 57, line 3 to page 59, line 8.
[13] Transcript of hearing on 13 April 2011, ICC-01/04-01/06-T-349-ENG ET, page 5, lines 5 – 12.
[14] ICC-01/04-01/06-T-349-ENG ET, page 13, lines 8 – 17; page 16, line 16 to page 17, line 12; and page 57, line 23 to page 60, line 21.
[15] Confidential transcript of interview with Witness 5 on 11 April 2011, InterviewWITNESS0005, notified by CMS on 15 April 2011.

II. Out-of-Court meetings with witnesses (including Witness 5)

7. It is necessary to give brief consideration to the development during this trial of the opportunity (provided by the Chamber) for out-of-court meetings to take place between counsel for one of the parties and the participants, on the one hand, and witnesses called by the other party or with Court witnesses, on the other. On 3 June 2008, in the context of suggested access by the defence to prosecution witnesses in advance of their testimony both parties agreed that this procedure was appropriate, although the prosecution submitted that the consent of the witness ought to be obtained in advance.[16] The Chamber summarised the prosecution's submissions as follows:

> 4. With regard to contact by the prosecution and the defence and the witnesses to be called by the other party, the prosecution accepted that this may occur, so long as the witness consents. The prosecution submitted that the details of contact of this kind - such as the proposed location thereof - may raise specific protection or access issues which it or the Victims and Witnesses Unit may wish to raise with the Trial Chamber.
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> 5. Accordingly, the prosecution sought an order requiring the defence to inform the prosecution of its intention to contact any prosecution witness, together with the date and location of the proposed contact, so that the prosecution can establish whether or not the witness consents, and in order to send a representative to the interview. It submitted that the interview should be arranged by the Victims and Witnesses Unit. The prosecution agreed to be bound by this regime should it seek to contact defence witnesses.[17]

8. Thereafter the Chamber decided:

> 11. With regard to permitting contact between a party or a participant and the witnesses to be called by the other party or a participant, the overarching consideration is the consent of the witness. Once a witness consents, unless

[16] Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, notified on 4 June 2008, ICC-01/04-01/06-1372.
[17] ICC-01/04-01/06-1372, paragraphs 4 – 5.

> the Chamber rules otherwise, contact should be facilitated. If the party or participant who intends to call a witness objects to the meeting, it shall raise the matter with the Chamber by way of an application in advance of the interview. The party or participant calling the witness is entitled to have a representative present during the interview, unless - again, following an application - the Chamber rules otherwise.[18]

9. It is important to note, first, that no suggestion was made as part of the submissions in this context that anything said by the witness during these meetings could be introduced as "free-standing evidence", as a substitute for the oral testimony of the witness. Second, although it was indicated that the party calling the witness could be present during the meeting, it was not in any sense argued that there was an obligation on that party to ask questions, in order to avoid later adverse evidential consequences. Third, on 21 January 2010[19] the Chamber, at least on a preliminary basis,[20] indicated that meetings of this kind were not to turn into a procedure resembling a deposition-taking exercise, as follows:

> Presiding Judge:
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> Ms Samson, focusing on the three hours and stenographers being present and there being records and the suggestion that is emerging that Prosecution, Defence and where relevant representatives of the victims should also be present, this seems to be developing from a meeting in which a few questions of clarification so that lines of enquiry can be developed, is to take place into a full-scale deposition taking event, with the witness being taken through his or her evidence once outside of court, with all of this equipment and all of these people being present without the Judges, prior to the witness coming into court and going over it all over again. And speaking entirely for myself - and I stress that, because it hasn't been the subject of discussion between us - this really isn't what I had in mind at all when leave was given for there to be pre-meetings.
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> Now, this is going to need very careful consideration, isn't it, because this [...] runs the risk of introducing a whole new layer of evidence which the Bench is going to be asked to consider when we make our decision, very possibly with lines of cross-examination being developed in court founded on what the witness has said a few hours before outside of court? And there

[18] ICC-01/04-01/06-1372, paragraph 11.
[19] Transcript of hearing on 21 January 2010, ICC-01/04-01/06-T-230-Red-ENG, page 15 *et seq.*
[20] See Article 64 (8) (b) of the Statute.

> is a real question as to whether this is in the interests of justice for there to be this two stage process.[21]

10. On 19 November 2009 in a Decision addressing, in part, whether the prosecution may contact defence witnesses,[22] the Chamber indicated at paragraph 49 that there are many reasons why a discussion with some individuals in advance of their testimony may assist the efficient management of the proceedings, and assist the Chamber in the determination of the truth. The Chamber established that as a matter of generality, the prosecution could meet with defence witnesses in advance of their testimony, subject to the witnesses' consent and any adverse personal factors for them or security concerns (see paragraph 50). Particular practical and procedural factors were set out in paragraph 51 which it is unnecessary to rehearse in this context.

11. On 4 December 2009, the Chamber addressed the issue of contact between the prosecution and Court witnesses.[23] Witnesses have been so categorised because it was considered that if they were to testify in the trial, it would be necessary for the judges rather than one of the parties or participants to call them to give evidence. They had been particularly identified because they were, at least potentially, in the position of being able to provide exculpatory evidence but, for a variety of reasons, they were apparently at risk if their identities were revealed.[24] On the issue of contact between the

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[21] Transcript of hearing on 21 January 2011, ICC-01/04-01/06-T-230-Red-ENG, page 18, line 23 to page 19, line 14.
[22] Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009, ICC-01/04-01/06-2192-Conf. A public redacted version was issued on 20 January 2010, ICC-01/04-01/06-2192-Red.
[23] Decision on the prosecution's "Request on the Manner of Questioning of Witness DRC-OTP-WWWW-0015" and contact by the prosecution with Court witnesses, 4 December 2009, ICC-01/04-01/06-2201-Conf. A public redacted version of this decision was filed on 1 February 2010 and notified on 2 February 2010, ICC-01/04-01/06-2201-Red.
[24] Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 24 April 2008, ICC-01/04-01/06-1295-US-Exp. This decision was reclassified as confidential *ex parte* prosecution and Registry only on 17 July 2009 pursuant to order ICC-01/04-01/06-2033 dated

prosecution and Court witnesses, the Chamber on 19 November 2009 reached the same conclusion as set out above,[25] (*i.e.* as regards contact between the prosecution and defence witnesses):

> 23. There is no reason in principle why this approach should not be applied to individuals who have been identified as potential Court witnesses, as well as those who have refused to participate further with the Court. The overriding consideration is the consent of the individual.[26]

12. Given the position of the witnesses in this context, the Chamber gave the Victims and Witnesses Unit responsibility for ensuring that there were no personal or security reasons that caused difficulties for this approach.[27]

13. Witness 5, who had once been a prosecution witness (but who had refused to testify),[28] was included in the category of Court witnesses because although his statement contained potentially exculpatory information, there were identified security concerns; however, on 25 June 2009 the Chamber ordered the disclosure of his identity to the defence because the witness had subsequently agreed to this course. Accordingly, he became a witness who was available to be called by either the prosecution or the defence.[29]

14. On 25 February 2011, the prosecution (by email) applied to question Witness 5 in the absence of the defence. There was no suggestion that this

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9 July 2009, ICC-01/04-01/06-1295-Conf-Exp; Preliminary and Final Decisions on the group of potential court witnesses, 25 June 2009, ICC-01/04-01/06-1986-Conf-Exp. A confidential redacted and a public redacted version of this decision were filed as annexes to the Order issuing confidential and public redacted versions of the "Preliminary and Final Decisions on the group of potential court witnesses", 9 July 2009, ICC-01/04-01/06-2033.

[25] ICC-01/04-01/06-2192-Red.

[26] ICC-01/04-01/06-2201-Red, paragraph 23.

[27] ICC-01/04-01/06-2201-Red, paragraph 23.

[28] Prosecution's Omnibus Application Concerning Disclosure by the Defence and other procedural issues related to the Prosecution's preparation for the Defence case, 2 October 2009, ICC-01/04-01/06-2144-Conf, paragraph 41. A public redacted version was filed on 5 October 2009, ICC-01/04-01/06-2144-Red.

[29] ICC-01/04-01/06-1986-Conf-Exp, paragraphs 15 and 16.

meeting was one to which Rule 68 of the Rules potentially applied or, indeed, that it was anticipated at the time of the application that what was said might later form the subject matter of an application to admit documentary evidence. Instead, in clear terms, it was set out that counsel wished to speak to Witness 5 in preparation for the defence case.[30] By email on 9 March 2011, the Chamber refused this application because there was no basis for excluding the representatives of the accused. The Chamber authorised the prosecution to interview Witness 5 under the following conditions:

i. the meeting should include the defence, if possible, and so must be organized in consultation with the defence;
ii. the meeting must be video or audio recorded;
iii. the Chamber and the defence, regardless of whether the latter can attend or not, must be provided with a transcript of the meeting.[31]

15. It therefore needs to be stressed that this was simply a meeting between the prosecution and a Court witness (who was available to be called by the prosecution and the defence) to which the latter had been given the opportunity of attending.

16. The meeting occurred on 11 April 2011, in Courtroom 2. The witness had been brought to The Hague especially for this purpose. The Registry, the prosecution and the defence were present. The prosecution questioned the witness for just under an hour (with a break of 23 minutes). The defence did not ask any questions.

[30] Annex A to Order entering into the record an order on interviews with DRC-OTP-WWWW-0005 and DRC-OTP-WWWW-0003, 31 March 2011, ICC-01/04-01/06-2712-Conf-AnxA.
[31] ICC-01/04-01/06-2712-Conf-AnxA.

III. The present application

17. On 14 April 2011, the prosecution applied to admit the transcript of the 11 April 2011 interview.[32] The prosecution submitted that the witness had been brought to The Hague once the Chamber had given consent for the prosecution to speak to this witness, as part of the prosecution's preparation "into the defence case" and as part of the prosecution's preparation for cross-examination.[33] Counsel went on to observe that these reasons "[...] did not foreclose the possibility that any evidence or any information elicited would become relevant in this case".[34] Counsel highlighted the fact that the prosecution had focussed on the issue of self-defence forces [REDACTED].[35] It is argued that in light of the evidence given by recent defence witnesses, the material elicited from this witness during the meeting on 11 April 2011 took on particular significance.[36] It is submitted that although he had previously provided a thorough and detailed statement in which he set out that he had not been aware of information concerning demobilisation, given his role, he was well placed to comment on the suggestion that demobilisation had been discussed during the relevant executive committee meetings.[37]

18. The application is made under Article 69(3) of the Rome Statute ("Statute") and Rule 68 of the Rules, although counsel accepted that calling the

[32] ICC-01/04-01/06-T-350-CONF-ENG ET, page 18, line 25 to page 19, line 2 and page 19, lines 23 – 25; Confidential transcript of interview with Witness 5 on 11 April 2011, InterviewWITNESS0005, notified by CMS on 15 April 2011. A draft copy of the transcript of the interview with Witness 5 was provided to the Chamber during the hearing.
[33] ICC-01/04-01/06-T-350 CONF-ENG ET, page 22, lines 3 – 10.
[34] ICC-01/04-01/06-T-350 CONF-ENG ET, page 22, lines 10 – 12.
[35] ICC-01/04-01/06-T-350 CONF-ENG ET, page 22, lines 15 – 18.
[36] ICC-01/04-01/06-T-350 CONF-ENG ET, page 22, lines 21 – 22.
[37] ICC-01/04-01/06-T-350 CONF-ENG ET, page 22 line 23 to page 23 line 5.

witness "would be the preferred course of action".[38] Moreover, the prosecution observed that if the Chamber considered it necessary for the witness to testify in person, there were no known obstacles to adopting that course.[39] The prosecution contended that the requirements of Rule 68 of the Rules were met because the defence had been present during the meeting and had had the opportunity of asking questions. The prosecution suggested that the defence had chosen not to ask any questions.[40] The prosecution referred the Chamber to the decision to admit the statement of witness DRC-OTP-WWWW-0555 ("Witness 555") and the transcripts of witness DRC-OTP-WWWW-0028 (neither of whom had testified before Trial Chamber I).[41]

19. The prosecution did not ask the witness to stay in The Netherlands as a potential witness (notwithstanding the short four-day gap between the meeting on 11 April 2011 and the present application) "[...] because we were digesting the information the witness was providing, and we had not determined whether, firstly, we would even seek to tender the transcript, and secondly, [...] call him as a rebuttal witness. Much depended on the outcome of the evidence of the remaining Defence witnesses, but it is upon further reflection that we have decided to make this application pursuant to Rule 68 and indeed pursuant to Article 69(3)".[42] Therefore, the prosecution accepted that it had not at any stage asked the Registry to keep the witness for a few additional days in The Hague,[43] and on 7 April

[38] ICC-01/04-01/06-T-350 CONF-ENG ET, page 24, line 7 – 13 and page 26, lines 6 – 10.
[39] ICC-01/04-01/06-T-350 CONF-ENG ET, page 26, lines 18 – 24.
[40] ICC-01/04-01/06-T-350 CONF-ENG ET, page 24, lines 12 – 19.
[41] ICC-01/04-01/06-T-350 CONF-ENG ET, page 33, lines 15 – 20.
[42] ICC-01/04-01/06-T-350 CONF-ENG ET, page 26, lines 3 – 10.
[43] ICC-01/04-01/06-T-350 CONF-ENG ET, page 25, line 24 to page 26, line 3.

2011 the prosecution did not indicate that Witness 5 might be called when asked directly by a representative of the Registry.[44]

20. The defence opposed the application on the basis that the present facts do not satisfy the criteria in Rule 68 of the Rules.[45] It is argued that the prosecution did not, at any stage, indicate to the defence and the Chamber that it intended to use the contents of the meeting as evidence or that it intended to call Witness 5 to give evidence. The defence indicates that it would have considered asking questions if it had been informed that the meeting was taking place within the context of Rule 68 of the Rules as had been the position with witnesses DRC-OTP-WWWW-0582 and DRC-OTP-WWWW-0583. Instead, the defence understood that the purpose of the meeting was to prepare for the prosecution's questioning of defence witnesses.[46]

21. As to the possibility of calling Witness 5 at this stage in the case, the defence submits that all of the matters covered in the transcript of 11 April 2011 on which the prosecution now relies are "not a surprise".[47] It is said they do not constitute a "new element", and they have been addressed in the opening statement of the defence and during the questioning of prosecution witnesses (*e.g.* DRC-OTP-WWWW-0015 and DRC-OTP-WWWW-0017 ("Witness 17")).[48] Accordingly, it is suggested that in these circumstances Witness 5 should not be called as a rebuttal witness. It is argued that this is not a question of rebutting "new subjects" but adding to evidence that has already been given on the relevant issues.[49]

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[44] ICC-01/04-01/06-T-350 CONF-ENG ET, page 27, lines 7 – 13; page 32, lines 13 – 20.
[45] ICC-01/04-01/06-T-350 CONF-ENG ET, page 27, line 24 to page 28, line 13.
[46] ICC-01/04-01/06-T-350 CONF-ENG ET, page 27, line 14 to page 28, line 15.
[47] ICC-01/04-01/06-T-350 CONF-ENG ET, page 30, lines 6 – 11.
[48] ICC-01/04-01/06-T-350 CONF-ENG ET, page 30, lines 11 – 24.
[49] ICC-01/04-01/06-T-350 CONF-ENG ET, page 30, line 6 to page 31, line 3.

22. The Chamber allowed the parties to file additional submissions by 12.00 on 15 April 2011.[50]

23. In the submissions made pursuant to this Direction, the prosecution suggests that as an alternative to admitting the transcript of the interview with Witness 5 under either Article 69(2) of the Statute and Rule 68 of the Rules (as prior recorded testimony) or under Article 69(4) of the Statute, the Chamber is requested to call him as a Court witness, to give evidence in person under Articles 64(6)(b) and 69(3) of the Statute.[51]

24. The prosecution suggests that the information provided by the witness during the interview is clearly relevant to certain core issues that are in dispute in this case. It is argued that it would be in the interests of justice, and it would assist the Chamber in the determination of the truth, if this witness is called as a Court witness or if the transcript of the interview is admitted into evidence. The prosecution submits that the limitations on rebuttal evidence are not applicable in this situation, and it suggests that the Court is not circumscribed as regards the stage in the trial at which it is able to consider an application under Article 64(6) and (9), Article 69 (2), (3) and (4) of the Statute and Rule 68 of the Rules.[52]

25. Whilst the prosecution seeks to introduce the transcript in the interests of efficiency – in order not to disrupt the schedule set by the Court for the final witnesses in the case and the closing statements – it accepts that it

[50] ICC-01/04-01/06-T-350 CONF-ENG ET, page 31, lines 4 to 14; page 32, lines 3 – 12.
[51] Email communication from the prosecution to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011. See Annex A to this Decision.
[52] Email communication from the prosecution to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.

would be preferable to allow the parties and participants to explore and test the witness's evidence in person.[53]

26. The prosecution submits that the transcript of the interview satisfies the requirements of Rule 68(a) of the Rules as the defence was present and was provided with the opportunity to ask questions, but did not do so. It refers to the prior practice of the Chamber and argues that the purpose of the interview and whether or not the witness has already appeared before the Court are factors to be considered, but it is submitted that these are not determinative. It is suggested that the transcript should not be excluded automatically because the interview was not conducted under oath; instead it is argued that this is a factor to be taken into consideration by the Chamber in determining the overall weight to be accorded to the evidence. In the event that the Chamber determines that the transcript is inadmissible under Rule 68 of the Rules, the prosecution relies, in the alternative, on Article 69(4) of the Statute.[54]

27. Addressing the Chamber's question of whether Witness 5 provides relevant information on existing issues in the case, as opposed to new issues that have recently been brought into focus, the prosecution concedes that the issues of demobilisation and the role of self-defence groups have already been addressed in the course of the trial. However, it suggests that demobilisation has only been considered substantively in the context of the demobilisation of (child) soldiers from the UPC/FPLC and that self-defence groups have only been raised in a marginal way. The prosecution has provided examples of the way in which this issue has

[53] Email communication from the prosecution to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.
[54] Email communication from the prosecution to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.

been dealt with thus far in the trial. The prosecution suggests that certain critical factors relating to the self-defence groups and their relationship with the UPC have only emerged recently, during the testimony of the final defence witnesses in the case, and it is argued that the prosecution was only put on notice of the importance of this issue through the disclosure by the defence of documents DRC-D01-0003-2176, DRC-D01-0003-5894, DRC-D01-0003-5896 and DRC-D01-0003-5900.[55]

28. As to the availability of Witness 5 to testify in person or via a video-link, the witness has indicated his willingness to testify in person at any time, or via video link. The prosecution concedes that its decision not to retain the witness in The Hague following his interview could potentially cause a delay in the proceedings, and it indicates that it will not request an extension of time for submitting closing submissions.[56]

29. The defence objects to the admission of the transcript into evidence.[57] It is argued that the interview was conducted solely to prepare for the cross-examination of defence witnesses and it is suggested therefore that the Chamber's permission in this regard should not enable the prosecution to introduce further evidence under Rule 68 of the Rules. In addition, the witness was not interviewed under oath and he did not appear before the Chamber; as a result, it is said the judges are unable to assess his reliability and credibility. Furthermore, the defence did not question the witness. The defence suggests that the Chamber has determined that interviews conducted in these circumstances do not satisfy the requirements of Rule

[55] Email communication from the prosecution to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.
[56] Email communication from the prosecution to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.
[57] Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011. See Annex B to this Decision.

68 of the Rules. It is argued that the mere presence of the defence at the interview does not render the transcript admissible.[58]

30. The defence emphasises that the defence was not, at any stage, informed of the possibility that the prosecution might apply to use the transcript as evidence; indeed, the Chamber is reminded the prosecution objected to the presence of the defence during the interview. It is submitted that this confirms that the prosecution did not envisage that the transcript might later be admissible under Rule 68 of the Rules. Moreover, it is observed that the Chamber did not refer to the possibility that the defence might question the witness during the interview. The defence submits that, under these circumstances, it is inappropriate to suggest that the accused was on notice that it was necessary for his counsel to consider questioning the witness.[59]

31. The defence also opposes calling Witness 5 to give oral testimony. It is argued that the prosecution cannot call rebuttal evidence simply because one of its theories has been contradicted by certain defence witnesses. Similarly, it is contended that at this stage in the proceedings the prosecution should not be permitted to introduce fresh evidence on issues already addressed during the presentation of the prosecution's evidence. With reference to jurisprudence from the *ad hoc* tribunals, the defence suggests that the prosecution can only be permitted to call witnesses in rebuttal as regards matters that have arisen for the first time during the

[58] Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.
[59] Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.

presentation of the defence evidence and which could not reasonably have been anticipated during the presentation of the prosecution case.[60]

32. In the instant situation, the defence suggests that the topics the prosecution seeks to address with Witness 5 have been essential elements of the case from the beginning of the prosecution's investigations; that although the prosecution could have called this witness, he was removed from the list of those who were to testify; and that since the confirmation stage of the proceedings the defence has clearly indicated that these were contested issues in the proceedings.[61] The defence provides detailed examples of evidence that it suggests demonstrates that the particular aspects of Witness 5's statement have been addressed in the course of the trial and it is argued that accordingly the prosecution had the opportunity to call the witness at an earlier stage in this trial.[62] For example, the defence suggest that the circumstances in which the armed branch of the UPC was constituted in 2000-2002, and, in particular, the incorporation of self-defence groups was addressed in the document containing the charges dated 28 August 2006,[63] along with the prosecution's summaries of

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[60] Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.
[61] Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.
[62] Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.
[63] Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), 28 August 2006, ICC-01/04-01/06-356-Conf-Anx1, paragraphs 14 and 25 (emphasis added):

> 14. From its inception, the UPC had soldiers, arms and ammunition at its disposal. In September 2002, Thomas LUBANGA DYILO, as President of the UPC, founded the FPLC as its military wing. From the beginning, the FPLC - commonly referred to simply as "the UPC" - was mainly comprised of Hema. By incorporating, inter alia, members of the pre-existing Hema militia as soldiers and officers, the FPLC shortly after its creation had several thousands of troops in arms, including a significant number of children under the age of fifteen years.
>
> 25. With the foundation of the UPC, Thomas LUBANGA DYILO started to pursue his political, military and economic aims by using Hema members of pre-existing militia groups and selected trained officers, including some officers of other ethnic and geographical origins. Soon, the UPC recruited in large numbers men, women and children and provided them with extensive military training.

evidence[64] and the prosecution's opening statement.[65] Similarly, the defence suggests that the fictitious nature of the demobilisation strategy of the UPC has been referred to in the prosecution's summaries of evidence[66] as well as the prosecution's opening statement.[67]

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[64] Annex A to "Submission of the Prosecution's Summary of Presentation of Evidence", 14 December 2007, ICC-01/04-01/06-1089-Conf-Exp-AnxA, paragraphs 1 and 52; Annex A to "Prosecution's Updated Summary of Presentation of Evidence and Annexes", 23 May 2008, ICC-01/04-01/06-1354-Conf-AnxA, paragraphs 1 and 53 (emphasis added):

> 1. In or about 2000, Thomas LUBANGA assumed control of a Hema militia operating in the Ituri district of the Democratic Republic of the Congo (DRC). The group, which had no name at the time, pursued a policy of using child soldiers, among others, to further its principal objective of securing political domination over the Ituri region through armed force. [...]
>
> 53. [...]At Thomas LUBANGA's direction, the pre-existing Hema militias were incorporated into the FPLC as soldiers and officers in a hierarchically-organized army which included a Chief of General Staff and two deputies (in charge of, respectively, operations and administration/logistics). [...]

[65] Transcript of hearing on 26 January 2009, ICC-01/04-01/06-T-107-ENG-ET WT, (emphasis added):

> In April of 2002, when he was excluded from the Sun City deal, Lubanga was ready to move. He broke away from the Rassemblement Congolais, taking with him its loyal Hema soldiers. Integrating other small militias, Lubanga built his own army. Lubanga, supported by the Ugandan army, then turned against the Rassemblement Congolais, and in August of 2002 chased them out of Bunia. (Page 21, lines 2 – 7)
>
> Lubanga was soon to use them as the basis of his own army. As I described before, your Honours, in April of 2002, Lubanga severed all links with the Rassemblement Congolais and they trained Hema soldiers and others to build the UPC army. (Page 26, lines 15 – 18)

[66] Annex A to "Submission of the Prosecution's Summary of Presentation of Evidence", 14 December 2007, ICC-01/04-01/06-1089-Conf-Exp-AnxA, paragraphs 76 – 81; Annex A to "Prosecution's Updated Summary of Presentation of Evidence and Annexes", 23 May 2008, ICC-01/04-01/06-1354-Conf-AnxA, paragraphs 76 and 79.

[67] Transcript of hearing on 26 January 2009, ICC-01/04-01/06-T-107-ENG-ET WT, (emphasis added):

> On the 1st of June, 2003, Lubanga issued a decree ordering demobilisation of all persons under 18 years old from his group. The decree indicates that this is done taking into consideration the will of the international community to continue its programme of demobilisation and reintegration of child soldiers, a programme supported by NGOs such as Save the Children and SOS Grand Lacs. However, the Prosecution will tender evidence showing that these orders were never, in fact, implemented. The Prosecution will tender evidence showing that these orders to demobilise child soldiers were issued merely to appease the international community while Lubanga continued to recruit children. The orders reflect his attempt to mislead the international community. (Page 30, line 15 to page 31, line 1)
>
> In sum, Mr. President, your Honours, both the recruitment orders and the sham orders issued by Lubanga to demobilise child soldiers are conclusive evidence of Lubanga's knowledge of the practice of recruiting and of using children as soldiers. (Page 32, lines 11 – 14)
>
> Thomas Lubanga knew what he was doing so clearly that he consciously tried to mislead and appease the international community by issuing demobilisation orders on paper even as he kept recruiting child soldiers in practice. He knew he was committing a crime not just against his own Gegere and Hema community, not just against national law. He knew he was breaking the basic rules that the world established to protect those with the least power among us: Little children. (Page 35, lines 19 – 25)

33. In these circumstances, the defence submits that the necessary requirements for introducing rebuttal evidence are not fulfilled, and it is suggested that it would be manifestly unfair to introduce this testimony at this late stage in the proceedings. Furthermore, it is argued that it would violate the right of the accused to adequate time and facilities in order to prepare his defence, given the proximity of the end of the trial.[68]

34. It is said that if the Chamber allows this application, the delays that will be caused by disclosure and the additional investigations that will need to be undertaken will gravely violate the right of the accused to be tried without undue delay.[69]

IV. Applicable law

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

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

[68] Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.

[69] Email communication from the defence to the Trial Chamber through a Legal Officer of the Trial Division on 15 April 2011.

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
[...]
(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
(f) Rule on any other relevant matters.
8. [...]
(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.
9. 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; and
(b) Take all necessary steps to maintain order in the course of a hearing.

Article 67 of the Statute

Rights of the accused
1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
[...]
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
(c) To be tried without undue delay;
[...]
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

Article 69 of the Statute

Evidence
[...]
2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.
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 Rules

General provisions relating to evidence

[...]

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 68 of the Rules

Prior recorded testimony

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

Rule 101 of the Rules

Time limits

1. In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.

2. Taking into account the rights of the accused, in particular under article 67, paragraph (1) (c), all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court.

Rule 140 of the Rules

Directions for the conduct of the proceedings and testimony

1. If the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.

2. In all cases, subject to article 64, paragraphs 8 (b) and 9, article 69, paragraph 4, and rule 88, sub-rule 5, a witness may be questioned as follows:

(a) A party that submits evidence in accordance with article 69, paragraph 3, by way of a witness, has the right to question that witness;

(b) The prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters;

(c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2 (a) or (b);
(d) The defence shall have the right to be the last to examine a witness.
[...]

Regulation 43 of the Regulations of the Court ("Regulations")

Testimony of witnesses
Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:
(a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth;
(b) Avoid delays and ensure the effective use of time.

V. Analysis and Conclusions

Rebuttal Evidence

36. The first issue that needs to be addressed is whether the prosecution is entitled, with the leave of the Chamber, to introduce "rebuttal evidence". The Rome Statute framework does not create different stages of the case, such as "the prosecution case", "the defence case", "evidence in rebuttal" or "rejoinder evidence". This issue has already been addressed by the Chamber as follows:

> [...] The Chamber did not determine that as a matter of general policy, no additional incriminating evidence is to be permitted following the close of the "prosecution case". It is to be noted that the expressions the "prosecution case" and "defence case" are not to be found in the relevant provisions. The Rome Statute framework does not apply fixed stages for the presentation of evidence during the trial, and in this the ICC differs from the position in some other courts or tribunals (see, for instance. Rule 85 of the Rules of Procedure and Evidence of the ICTY). Article 64(8)(b) of the Statute. and Rule 140(1) of the Rules of Procedure and Evidence essentially leave it to the Chamber to determine the model to be followed instead of applying a mechanistic formula.[70]

[70] Decision on the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la décision orale du 4 mars 2010 autorisant l'utilisation et le dépôt en preuve de trois photographies", 29 April 2010, ICC-01/04-01/06-2404, paragraph 26.

37. However, although the Rome Statute framework does not expressly create a stage of the proceedings in which rebuttal evidence may be called, the provisions are sufficiently broadly framed to permit the Chamber to allow evidence of this kind to be introduced. By way of summary, pursuant to Article 64(6)(b) of the Statute, the Chamber may "[r]equire the attendance and testimony of witnesses and production of documents and other evidence [...]". Under Article 64 (6)(d) and (f) of the Statute, the Chamber may "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties" and "[r]ule on any other relevant matters". By Article 64 (9)(a) of the Statute the Trial Chamber has the power on the application of a party or on its own motion to "[r]ule on the admissibility or relevance of evidence" (see also Article 69(4) of the Statute). Significantly in the context of this application, Article 69(3) of the Statute provides the Chamber with the authority to request the submission of all the evidence that it considers necessary for the determination of the truth.

38. These provisions taken together establish the clear statutory basis for the Chamber to order or to allow the production of evidence at any stage during the trial, within the context of its overarching obligation to uphold the accused's right to a fair hearing under Article 67 of the Statute.

39. Trial Chamber II issued its "Directions for the conduct of the proceedings and testimony in accordance with Rule 140,"[71] without expressly providing for a potential rebuttal phase of the proceedings.

[71] Directions for the conduct of the proceedings and testimony in accordance with rule 140, 4 February 2009, ICC-01/04-01/07-1665-Corr.

40. However, in a later oral decision addressing a prosecution application to call rebuttal evidence,[72] Trial Chamber II decided that "[...] unforeseen questions is an inherent phenomena to criminal cases" and that in exceptional circumstances, which cannot be dealt with sufficiently during the evidence of the witness then before the Court by way of questioning or making an objection, rebuttal evidence may be permitted. Trial Chamber II decided that in this situation the prosecution was required to file a specific application to introduce additional evidence, in order to address the "new circumstances". The Chamber stressed "[...] that the mere fact that a Prosecutor could not foresee a given Defence question does not, in itself, constitute an exceptional circumstance".[73] However, a possibly important part of the context in this regard was that the Chamber "[...] had already decided that by virtue of Article 64(6)(d) and 69(3) of the Statute, it could accept disclosure or the addition of additional evidence when such evidence contributes to the manifestation of the truth".[74] The Chamber went on to explain that this could occur:

> On the dual condition that, one, such an exhibit is clearly more convincing than the evidence already disclosed to the Defence, or that it is going to be of crucial importance to the trial and relates to an event which had hitherto not been made known, and that, two, its late disclosure or addition does not undermine the right of the Defence to have the requisite time and means to prepare. The Chamber therefore feels that the filing of such an application can enable the Prosecutor to file into the record of the case additional evidence which constitutes an effective response to the evidence filed by the Defence and admitted in the course of the cross-examination of Prosecution witnesses. And in any case, it should be understood that in this exercise, the Defence is going to have the final word.[75]

41. The jurisprudence of the *ad hoc* tribunals supports this approach. Although the decisions of other international courts and tribunals are not part of the

[72] Transcript of hearing on 24 November 2010, ICC-01/04-01/07-T-222-Red-ENG WT, page 72, line 22 to page 78, line 2.
[73] ICC-01/04-01/07-T-222-Red-ENG WT, page 77, lines 9 – 11.
[74] ICC-01/04-01/07-T-222-Red-ENG WT, page 77, lines 11 – 14.
[75] ICC-01/04-01/07-T-222-Red-ENG WT, page 77, line 16 to page 78, line 2.

directly applicable law under Article 21 of the Statute, the *ad hoc* tribunals are, broadly speaking, in a comparable position to the Court because, as set out above, the provisions of the Rome Statute are sufficiently broadly framed to permit the Chamber to allow evidence in circumstances sometimes described as "rebuttal evidence". Therefore, the jurisprudence of the *ad hoc* tribunals when addressing the circumstances in which evidence may be presented at the stage provided by Rule 85 (A)(iii) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") ("prosecution evidence in rebuttal") is potentially of relevance in this context.

42. The *ad hoc* tribunals have considered the admission of rebuttal evidence on a number of occasions. Both the ICTY and the ICTR have decided that the Chamber has a wide discretion to limit or preclude the presentation of rebuttal evidence in order to ensure that the trial proceeds expeditiously, and to avoid unfairness and unnecessary delays.[76] The tribunals have determined that the proposed rebuttal evidence must relate to a significant issue that arises directly out of defence evidence that has been introduced, which could not reasonably have been anticipated.[77] However, the prosecution cannot call rebuttal evidence merely because its case has been

[76] ICTR, *The Prosecutor v. Ntagerura et al, Case No. ICTR-99-46-T*, Trial Chamber, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73, and 85(A) (iii) of the Rules of Procedure and Evidence, 21 May 2003, paragraph 31; ICTR, *Prosecutor v Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwinemeye and Innocent Sagahutu, Case No. ICTR-00-56-T*, Trial Chamber, Decision on the Prosecution Motion to call Rebuttal Evidence, 20 February 2009, paragraph 3.

[77] ICTY, *The Prosecutor v Delalić et al Case No. IT-96-21-A*, Appeal Chamber Judgment, 20 February 2001, paragraphs 271 - 275; ICTR, *The Prosecutor v. Semanza, Case No. ICTR-97-20-T*, Trial Chamber, Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, 27 March 2002, paragraphs 8 and 9; ICTY, *Prosecutor v Lukić and Lukić Case No. IT-98-32/1-T*, Trial Chamber, Decision on motion for reconsideration or certification to appeal the decision on rebuttal witnesses, 9 April 2009, paragraph 18; ICTR, *Prosecutor v Augustin Ndindiliyimana et al, Case No. ICTR-00-56-T*, Trial Chamber, Decision on the Prosecution Motion to call Rebuttal Evidence, 20 February 2009, paragraph 4.

contradicted by other evidence[78] or in order to reinforce other evidence that has already been called.[79] Indeed, the tribunals have determined that the prosecution is under a duty to adduce all the evidence necessary to prove the guilt of the accused and thereafter it should close its case.[80]

43. This Chamber broadly agrees with the general approach as set out above in the various Decisions of Trial Chamber II and the *ad hoc* tribunals. In summary, calling rebuttal evidence is likely to be an exceptional event, and certainly in the context of this application, it will be necessary for the prosecution to demonstrate, first, that an issue of significance has arisen *ex improviso*; second, that the evidence on rebuttal satisfies the admissibility criteria; and, third, this step will not undermine the accused's rights, in particular under Article 67 of the Statute.

44. At the Chamber's request the parties addressed the issue of whether or not the evidence that can be given by Witness 5 has arisen *ex improviso*. As described in detail above, the prosecution suggests that some of the aspects are new whilst the defence maintains that the prosecution has been aware of all the material aspects of Witness 5's testimony throughout the trial. This issue is analysed in detail hereafter.

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[78] ICTY, *The Prosecutor v Delalić et al Case No. IT-96-21-A*, Appeal Chamber Judgment, 20 February 2001, paragraph 275.
[79] ICTY, *The Prosecutor v Stanislav Galić, Case No. IT-98-29-T*, Trial Chamber, Decision on Rebuttal Evidence, 2 April 2003, paragraph 4; ICTY, *Prosecutor v Limaj et al, Case No. IT-03-66-T*, Trial Chamber, Decision on Prosecution's Motion to admit Rebuttal Statements via Rule 92*bis*, 7 July 2005, paragraph 6.
[80] ICTY, *Prosecutor v Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T*, Trial Chamber, Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence under Rule 92*bis* in its Case on Rebuttal and to Re-open its Case for a Limited Purpose, 13 September 2004, paragraph 6; ICTY, *Prosecutor v Sefer Halilović Case No. IT-01-48-T*, Trial Chamber, Decision on Prosecution Motion to Call Rebuttal Evidence, 21 July 2005, page 3; ICTY, *Prosecutor v Naser Orić, Case No. IT-03-68-T*, Trial Chamber, Decision on the Prosecution Motion with Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii), 9 February 2006, page 4. ICTR, *The Prosecutor v. Ntagerura et al, Case No. ICTR-99-46-T*, Trial Chamber, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73, and 85(A) (iii) of the Rules of Procedure and Evidence, Trial Chamber, 21 May 2003, paragraph 32.

Documentary Evidence

45. In light of the prosecution's application, it is necessary to examine the Chamber's approach to applications to admit prior recorded statements into evidence.

46. In this Chamber's first relevant Decision, the Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses on 15 January 2009,[81] the Chamber, under Rule 68 of the Rules, admitted prior recorded testimony taken in the absence of the defence on the basis that the latter was able to question the witnesses in court. As the Chamber observed, "[...] although the defence did not participate in the process by which the written records were produced, under Rule 68(b) the witnesses will be present in Court for any examination by the defence and the Chamber which is necessary [...]"[82] and the Chamber went on to identify a number of other factors favouring the admission of this evidence.

47. In the Chamber's Decision on the defence request for the admission of 422 documents (17 November 2010),[83] it admitted the interview transcripts of prosecution witnesses who testified before the Chamber (witnesses DRC-OTP-WWWW-0007 ("Witness 7"), DRC-OTP-WWWW-0008 ("Witness 8") and DRC-OTP-WWWW-0010 ("Witness 10")), but it rejected the transcripts of interviews of individuals not called as witnesses (witnesses

[81] Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603.
[82] ICC-01/04-01/06-1603, paragraph 24.
[83] Decision on the defence request for the admission of 422 documents, 17 November 2010, ICC-01/04-01/06-2595. A confidential corrected version was issued on 8 March 2011, ICC-01/04-01/06-2595-Conf-Corr, and a public redacted corrected version was issued the same day, ICC-01/04-01/06-2595-Red-Corr.

DRC-OTP-WWWW-0006 ("Witness 6") and DRC-OTP-WWWW-0009 ("Witness 9")).[84] The Chamber decided that although, under Article 69(2) of the Statute, the Chamber may admit, *inter alia*, documents and written transcripts, the three-stage approach to be applied is that of relevance, probative value and fairness.[85] Since the witnesses had not been called to give oral testimony, the Chamber held that given the interviews had been conducted as part of an information-gathering exercise, "there are insufficient indications as to whether the prosecution's questions were sufficiently comprehensive or penetrating to provide a balanced and reliable picture".[86] For this reason it was held that "[i]f the defence seeks to put this material before the Chamber, it should call the relevant individuals as witnesses so that a proper assessment can be made of their reliability and credibility".[87]

48. In connection with this Decision, it is to be observed, however, that on 17 June 2010, following the agreement of the parties, the Chamber authorised the admission of the statements of DRC-OTPWWWW-0496 and DRC-OTP-WWWW-0497, without the need to call either witness to testify before the Chamber. The Chamber indicated that "[b]ecause of that agreement (and given the Chamber's consent), it is unnecessary to engage in an investigation of the admissibility of these documents of the kind set out between paragraphs 53 and 58 below, and save for the terms of the disposition, these statements will therefore not be addressed further in this Decision".[88]

[84] ICC-01/04-01/06-2595-Red-Corr, paragraphs 53 – 58.
[85] ICC-01/04-01/06-2595-Red-Corr, paragraph 56.
[86] ICC-01/04-01/06-2595-Red-Corr, paragraph 57.
[87] ICC-01/04-01/06-2595-Red-Corr, paragraph 58.
[88] ICC-01/04-01/06-2595-Red-Corr, paragraph 10.

49. In the Chamber's Decision on the "Troisième requête de la Défense aux fins de dépôt de documents",[89] (17 December 2010) the Chamber refused the defence application to admit a number of documents, and in the course of giving its reasons the Chamber[90] referred particularly to paragraphs 56 – 58 of its Decision on the defence request for the admission of 422 documents.[91] The Chamber, in the course of the Decision, excluded the signed statements of witnesses 9 and 6 (who had not testified), indicating that if the defence sought to put this material before the Chamber, it should call the relevant individuals as witnesses so that a proper assessment could be made of their reliability and credibility.[92]

50. Similarly, the Chamber refused a defence application to admit the signed statement of intermediary DRC-OTP-WWWW-0183, who was not called,[93] and the statements signed by another individual, also not called to give evidence.[94]

51. In the Chamber's Decision on the legal representative's application for leave to tender into evidence material from the "bar table" and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9) of the Statute, the Chamber admitted post-testimony statements by witnesses 7, 8 and 10 (taken by the legal representatives).[95]

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[89] Decision on the "Troisième requête de la Défense aux fins de dépôt de documents", 17 December 2010, ICC-01/04-01/06-2664-Conf. A public redacted version of this decision was issued on 16 March 2011, ICC-01/04-01/06-2664-Red.
[90] ICC-01/04-01/06-2664-Red, paragraph 27.
[91] ICC-01/04-01/06-2595 Red-Corr.
[92] ICC-01/04-01/06-2664-Red, paragraph 35.
[93] ICC-01/04-01/06-2664-Red, paragraphs 36 – 38.
[94] ICC-01/04-01/06-2664-Red, paragraphs 39 – 41.
[95] Corrigendum to Decision on the legal representative's application for leave to tender into evidence material from the "bar table" and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9), 9 March 2011, ICC-01/04-01/06-2694-Corr.

52. A statement taken from Witness 555 was (exceptionally) admitted into evidence although he had not been called to testify (under Article 69(4) of the Statute as opposed to Rule 68 of the Rules): see the Chamber's Decision on the "Cinquième requête de la Défense aux fins de dépôt de documents".[96] In order to describe why this course was taken, it is necessary for the relevant part of the Chamber's Decision to be set out *in extenso*:

> 17. In this instance, the statement is inadmissible under Rule 68 of the Rules, because the exceptions relating to prior-recorded testimony in that Rule do not apply (in particular, the defence did not have any opportunity to examine the witness during the recording).
>
> 18. However, that conclusion does not resolve this application, and it is of relevance to note that the Chamber concluded its oral decision substituting Witness 598 for Witness 555 by stating:
>
> > Notwithstanding his absence, he [Witness 555] remains relevant to the current abuse application because the Defence argues that the evidence gathered regarding his position reveals the insufficiency and lack of integrity of the Prosecution's investigation. Indeed, on the 4th of November, 2010 (T-325, page 25), the Chamber ordered the Prosecution to disclose his identity because "... the suggested failure by the Prosecution adequately to investigate the reliability and probity of its intermediaries and witnesses is a legitimate area to be explored by the Defence as part of the present abuse of process application and, more generally, during the trial. It forms part of a pattern of an alleged failure to investigate these suggested crimes reliably. On the basis of the material investigated by the Defence ... the Chamber is of the view that in this context evidence relating to 555 has been materially called into question and the threshold for disclosure has been crossed, as regards the detail of the contacts between 555 and the Office of the Prosecutor."
>
> 19. Furthermore, as part of its recent abuse of process application, the defence reiterated the allegation that the prosecution had been negligent in carrying out its investigations, and that erroneous or false evidence has been introduced at trial as a result. The defence cited the statement and school record of Witness 555 in support of this argument.

[96] Decision on the "Cinquième requête de la Défense aux fins de dépôt de documents", 16 March 2011, ICC-01/04-01/06-2702-Conf. A public redacted version of this decision was filed on 6 April 2011, ICC-01/04-01/06-2702-Red.

> 20. The evidence of Witness 598 was given on 1 December 2010 in the form of a Rule 68 deposition attended by both parties and presided over by the Legal Advisor to the Trial Division. In its ruling on certain objections raised during this procedure, the Chamber re-emphasised that Witness 598 had been called solely as a replacement for Witness 555.
>
> 21. Given that the testimony of Witness 598 was focussed essentially on matters about which Witness 555 would have been able to give evidence, the written statement of Witness 555 is relevant to Witness 598's testimony, and it is potentially probative of several contested issues raised in the course of Witness 598's evidence, including threats allegedly received by Witness 555 and the extent of the prosecution's investigation into this witness. In these circumstances, it falls to the Chamber to consider whether this statement should be admitted under Article 69(4) of the Statute. As the Chamber has already observed:
>
> > [...] Article 69(4) gives the Chamber the discretion to rule on the relevance or admissibility of evidence, taking into account, inter alia, any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness. Furthermore, pursuant to Rule 63(2) of the Rules, the Chamber has authority, in accordance with the discretion described in Article 64(9) of the Statute, to assess freely all the evidence submitted in the case, in order to determine its relevance or admissibility in accordance with Article 69 of the Statute.
>
> 22. The statement was taken under the supervision of the prosecution and contains the signature of the witness, thereby indicating that the information contained therein is accurate. The introduction of the statement into evidence will not prejudice the prosecution, who had an opportunity to examine the witness when it originally took the statement, and who clearly considered his account is reliable, given it intended to call the witness to testify at trial. By requesting the introduction of the statement the defence has indicated that it does not consider that the accused is prejudiced by virtue of the lack of an opportunity to examine the witness and thus it is not suggested his rights have been undermined. It follows the statement is relevant and its probative value outweighs any prejudice. Accordingly, the Chamber admits the statement of Witness 555 in Annex 2, under Article 69 (4) of the Statute.[97]

53. The following conclusions are to be drawn from the various Decisions set out above. For an application under Rule 68 of the Rules, it is necessary that the prosecution and defence have had or will have an opportunity to examine the witness, whether in court or otherwise.[98] This must have been a real as opposed to a symbolic or theoretical opportunity. The

[97] ICC-01/04-01/06-2702-Red, paragraphs 17 – 22.
[98] Rule 68(a) and (b) of the Rules.

questioning should have occurred in circumstances in which the parties were aware that it was necessary to exercise their right to examine the witness, or, in any event, they availed themselves sufficiently of this opportunity. As has been set out extensively above, the interview that is the subject matter of this application had been arranged to enable the prosecution to prepare for the defence case and (save for a tentative suggestion by the prosecution that was not pursued),[99] it is not contended that the defence was alerted to the possibility that the prosecution might apply to admit the transcript and that the accused was on notice that he should consider examining the witness because an application may be made, at least in part, under Rule 68 of the Rules. Given the circumstances and the context in which the interview was conducted, it was a wholly sustainable decision by the defence, acting in the best interests of Mr Lubanga, to choose not to ask any questions.

54. In all the circumstances, the application under Rule 68 of the Rules is ill founded. Turning to Article 64(9) of the Statute, it is clear from the jurisprudence set out above that before the Chamber admits the transcripts of interviews with, or the evidence of, witnesses who do not attend to testify before the Chamber, the Court will need to investigate with considerable care the merits of the application, applying the criteria now well established in this case. The Chamber has already referred to paragraphs 38 and 39 of the Decision on the defence request for the admission of 422 documents.[100] That makes clear that the Chamber must ensure that the evidence is, *prima facie*, relevant; it must have probative value; and the Chamber must weigh its probative value against its prejudicial effect.

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[99] ICC-01/04-01/06-T-350-CONF-ENG CT, page 24, lines 12 – 19.
[100] ICC-01/04-01/06-2595-Red-Corr.

55. In relation to this application, it is not disputed that the contents of the interview is relevant, and to the extent that Witness 5 answered questions on pertinent issues, it also has probative value. However, this document's probative value is far outweighed by its prejudicial effect. In contrast with the statement taken by Witness 555, the party not calling the witness was not at any stage alerted to the need to ask questions (to avoid adverse evidential consequences), nor did counsel avail themselves of this opportunity. It would be unfair in those circumstances to admit evidence that is potentially of real significance when the accused would have been denied the opportunity, in a real sense, to test the material by questioning.

56. This brings the Chamber to the final issue to be determined on this application: whether or not the prosecution should be allowed to call Witness 5 as rebuttal evidence, and, in the alternative, whether or not the Chamber should call him. The incorporation of existing Hema militias and forces into the UPC has been repeatedly referred to during the evidence in the case, along with aspects of the suggested demobilisation of young combatants. However, the testimony of the final defence witnesses has focussed attention on these two interrelated issues in a way that has not been significantly explored hitherto. There is a real element of novelty in the description that has been given of the particular relationship between the self-defence groups that used child soldiers and the UPC, which has only crystallised at this stage of the trial.

57. Nonetheless, this does not of itself mean that the evidence has arisen *ex improviso*. As a critical part of the relevant background, it is to be observed that the issue of Mr Lubanga's alleged control over the conscription,

enlistment and use of children to participate actively in hostilities lies at the core of the prosecution's case against the accused.

58. The suggestion that the accused did not have the authority to prevent the enlistment of children was dealt with by the defence during the confirmation hearing with sufficient clarity for the prosecution to be aware that this may become an issue in the case. The defence suggested that this was a practical reality resulting from an impending war in which, first, the UPC government was attacked from all sides and, second, an increasing number of splinter groups were being formed.[101]

59. Moreover, Witness 17 addressed the issue of the self-defence forces in his evidence. He indicated that self-defence groups were composed of civilians and were "somewhat" organised, and he referred to members of the groups patrolling the villages in order to warn the inhabitants of any impending attacks. He stated that when the UPC arrived, there was better structure; they had weapons; and the villagers felt more confident about the prospect of a war between ethnic groups. The following extract from the evidence is relevant in this regard:

> PRESIDING JUDGE FULFORD: We're now back in public session, and Maitre Mabille has just asked the witness as to what made him think that by joining the UPC he would be able to confront this situation of insecurity. Yes, sir. If you could give your answer to that, please.
> THE WITNESS (interpretation): I would say before joining the UPC we felt better in the committees. It was somewhat organised. There were patrols. We could be forewarned of certain things, but when the UPC arrived it was better structured and they had weapons, above all, and that's what made us feel more confident, because at the time, you know, things weren't over with UPC, and there was this feeling of there being a war between ethnic groups. People were dying. That was the reality. Families would just disappear. So it was necessary to be within the system, not outside of the system, because if

[101] Transcript of hearing on 23 November 2006, ICC-01/04-01/06-T-43-EN [23Nov2006 CT WT] , page 74, line 23 to page 75, line 19.

you were inside you could perhaps take shelter more easily, but on the outside you felt as if you were elsewhere and without protection.
MS. MABILLE (interpretation): Q. Could you explain what you have just said to us about the committees? How did these committees function, and as of which date were they, in fact, operational?
A. The first time was in Fataki. It was a matter of self-defence, because the village had been attacked by surprise. The villagers hadn't been warned. They didn't know they were going to be attacked. So there were more people who were killed. They hadn't been warned. That's how this system developed, the system of committees which were organised. Individuals could go on patrol around the villages, and thus they would warn us if there were any attacks. They were informed. They would warn us. If it was necessary to flee, you could do so rapidly.
Q. And who was part of these committees? Who were the people who joined the committees?
A. Well, many more actually were traders. Many are people who had a chance of managing our people. So they could hire people who knew how weapons worked, because if they needed to use them within the committee and they needed to hire strong people, dynamic people. So very often they -- they hired traders.
Q. [REDACTED]
A. [REDACTED]
Q. And actually, these were civilians who were armed, those who were in these committees?
A. Yes, in most cases.
Q. So it was the civilian population who organised itself in a way. Was that what the committee was all about?
A. Yes.[102]

60. Accordingly, it was suggested that individuals joined the self defence groups for the purposes of protection and security and, subsequently, they joined the UPC for similar reasons. That said, it remained unclear whether all members of the self-defence forces were integrated into the UPC within the timeframe relevant to the charges or whether these self-defence protective systems remained in place simultaneously.

[102] Transcript of hearing on 1 April 2009, ICC-01/04-01/06-T-160-CONF-ENG ET, page 38, line 3 to page 39, line 21.

61. It follows that the issues raised during the evidence of the final defence witnesses, in a substantive sense, do not arise *ex improviso,* in that they have been sufficiently alluded to at earlier stages of this case.

62. However, that conclusion does not determine this application because the Chamber must determine whether or not to call Witness 5 as a Court witness, as the Chamber envisaged at an earlier stage in its ruling on potential Court witnesses.[103] The conclusions reached in that decision are applicable in the context of the present application. The Chamber decided that it "will only consider calling the witness if in due course it considers this step is necessary, pursuant to Article 64(6)(b) of the Statute [...]".[104]

63. Given this new, albeit potentially, foreseeable, development in the case, the Chamber is of the view that Witness 5's evidence is necessary for the determination of the truth on the following issues: (i) whether certain Hema self-defence groups were independent of, or were instead incorporated into, the UPC (and if so, when); (ii) whether these self-defence groups included children under the age of 15; and (ii) whether the accused made efforts to demobilise these children, including during discussions in the UPC executive committee meetings with representatives of the groups.

64. The account of Witness 5 is relevant to these issues, and, [REDACTED], he may be able to give testimony of potential probative value. As set out above, defence witnesses have directly addressed these topics and the presentation of the accused's evidence makes it clear that he is aware of their potential importance. Accordingly, the defence is not taken by

[103] ICC-01/04-01/06-1986-Conf-Exp (public version: ICC-01/04-01/06-2033-Anx2).
[104] ICC-01/04-01/06-2033-Anx2, paragraph 16.

surprise. If the testimony of Witness 5 leads to consequences for the accused that need to be confronted by the defence at this stage in the trial, an application can be made to the Chamber at the appropriate stage.

65. Witness 5 is to be called pursuant to Articles 64(6)(b) and 69(3) of the Statute which give the Chamber the power to require the attendance and testimony of witnesses. Bearing in mind the potential importance of this testimony, and given the willingness of the witness to travel to The Hague, the Chamber is of the view that it would be preferable if he testifies "live" before the Court rather than via a video link.

66. The Chamber has earlier established that "the precise manner and timing of any testimony from this witness will only be addressed if the issue becomes relevant" [105] and it was envisaged that it was likely that the judges would conduct the initial questioning of any witness called by the Chamber.[106] However, given the special circumstances in which the evidence of Witness 5 has been demonstrated to be of importance for the determination of the truth, the Chamber is of the view that, pursuant to Rule 140 of the Rules and Regulation 43 of the Regulations, the questioning shall be conducted in the manner usual for prosecution witnesses (the prosecution, followed by the defence, etc.), within the parameters set out above.

67. In order to avoid any delay to the proceedings, pursuant to Rule 101 of the Rules, the schedule established by the Chamber for closing statements will be maintained, and Witness 5 will give evidence in person, commencing on Monday 16 May at 09.30.

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[105] ICC-01/04-01/06-2033-Anx2, paragraph 16.
[106] ICC-01/04-01/06-2033-Anx2, paragraph 77.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 28 April 2011

At The Hague, The Netherlands