

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06

Date: 8 March 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

**Corrigendum to Redacted Decision on the defence request for the admission of
422 documents**

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

The Office of the Prosecutor

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Mr Luc Walley
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Ms Carine Bapita Buyangandu
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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Ms Paolina Massidda

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States Representatives

Amicus Curiae

REGISTRY

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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 defence request for the admission of 422 documents (“Decision”):¹

I. Background

1. On 19 November 2009, the Trial Chamber authorised the Office of the Prosecutor (“prosecution”) to conduct further interviews with prosecution witnesses, in particular witnesses DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008 and DRC-OTP-WWWW-0010, in order to prepare for evidence introduced by the defence.² The transcripts of the interviews were disclosed to the defence between October 2009 and March 2010, in accordance with Article 67(2) of the Rome Statute (“Statute”) and Rule 77 of the Rules of Procedure and Evidence (“Rules”).³
2. On 4 May 2010, pursuant to Regulation 37(2) of the Regulations of the Court (“Regulations”), the defence requested an extension of the page limit for a request for the admission of documents,⁴ which was granted.⁵
3. The defence thereafter submitted, on 5 May 2010, its “Requête de la Défense aux fins de dépôt de documents” (“Request”), in which it seeks to introduce 422 documents into evidence, contained within 28 annexes.⁶ In summary, it wishes to rely on the transcripts of interviews conducted between the prosecution and certain individuals; documents relating to

¹ Requête de la Défense aux fins de dépôt de documents, 5 May 2010, ICC-01/04-01/06-2417-Conf, with confidential annexes 1 to 28.

² 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; public redacted version, 20 January 2010, ICC-01/04-01/06-2192-Red, paragraph 66.

³ ICC-01/04-01/06-2417-Conf, paragraph 3.

⁴ Email communication from the defence to the Chamber through a Legal Officer to the Trial Division on 4 May 2010.

⁵ Email communication from the Chamber to all parties and participants through a Legal Officer to the Trial Division on 4 May 2010.

⁶ ICC-01/04-01/06-2417-Conf, paragraph 1; ICC-01/04-01/06-2417-Conf-Anx1. Annex 1 contains a chart listing the documents the defence seeks to admit into evidence.

expenses incurred by the prosecution for some of its witnesses and particular intermediaries; and other documents that are likely to affect the credibility of particular elements of the prosecution's evidence in the case.

4. The prosecution replied on 27 May 2009.⁷
5. The legal representatives of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 filed their observations on 25 May 2010.⁸
6. On 3 June 2010, in the context of discussing scheduling arrangements for the anticipated witnesses, as well as other issues relating to intermediaries, the prosecution notified the Chamber that it sought to call a number of witnesses in rebuttal of the defence witnesses who have testified thus far on the abuse of process application (in addition to the intermediaries and the representatives of the prosecution who have been ordered to appear before the Court).⁹ The prosecution wishes to introduce the statements of DRC-OTP-WWWW-0496 in rebuttal of allegations made against DRC-OTP-WWWW-0007 and DRC-OTP-WWWW-0008.¹⁰ The statements of DRC-OTP-WWWW-0496 also form part of the present defence Request.¹¹ Both DRC-OTP-WWWW-0496, and the linked witness, DRC-OTP-WWWW-0497, at the time of the hearing on 3 June 2010, were not trial witnesses in this case.
7. During the hearing held on 10 June 2010 the defence submitted, in response to the prosecution's request to call DRC-OTP-WWWW-0496, that the statement of DRC-OTP-WWWW-0497 relates to that of DRC-OTP-

⁷ Prosecution's Response to the "Requête de la Défense aux fins de dépôt de documents" of 5 May 2010, 27 May 2010, ICC-01/04-01/06-2460-Conf.

⁸ Réponse du Représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 à la "Requête de la Défense aux fins de dépôt de documents" datée du 5 mai 2010, 25 May 2010, ICC-01/04-01/06-2458-Conf. [REDACTED].

⁹ Transcript of hearing on 3 June 2010, ICC-01/04-01/06-T-298-ENG ET, page 4, lines 17 – 18.

¹⁰ ICC-01/04-01/06-T-298-ENG ET, page 12, lines 3 – 7.

¹¹ ICC-01/04-01/06-2417-Conf, paragraph 8 and footnote 4.

WWWW-0496 ([REDACTED]). The defence further indicated that DRC-OTP-WWWW-0497 would be “coming to give further information”.¹² The defence reiterated its request that her statement should be admitted into evidence¹³ and, on the same day, the prosecution agreed that the statement of DRC-OTP-WWWW-0497 should be introduced into evidence.¹⁴

8. The Chamber observed that, despite any *inter partes* agreement on the admission of the statements, this course of action was subject to approval by the Chamber.¹⁵
9. On 14 June 2010 the prosecution filed the “Prosecution’s Provision of Information on the witnesses dealing with the abuse of process and intermediaries”,¹⁶ in which it formally requested leave from the Chamber to call DRC-OTP-WWWW-0496 as a rebuttal witness. Moreover, the prosecution sought leave to introduce DRC-OTP-WWWW-0496’s statement in order to establish the truth of its contents, pursuant to Rule 68 of the Rules, in lieu of oral testimony.¹⁷
10. However, on 17 June 2010, based on the agreement of the parties, the Chamber authorised the admission of the statements of DRC-OTP-WWWW-0496 and DRC-OTP-WWWW-0497,¹⁸ without the need to call either witness to testify before the Chamber.¹⁹ Because of that agreement (and given the Chamber’s consent), it is unnecessary to engage in an

¹² Transcript of hearing on 10 June 2010, ICC-01/04-01/06-T-299-ENG ET, page 27, line 17 to page 26, line 2.

¹³ ICC-01/04-01/06-T-299-ENG ET, page 27, lines 21 – 23.

¹⁴ Email communication from the prosecution to the Chamber through the Legal Advisor to the Trial Division on 10 June 2010.

¹⁵ ICC-01/04-01/06-T-299-ENG-ET, page 28, lines 20 – 22.

¹⁶ Prosecution’s Provision of Information on the witnesses dealing with the abuse of process and intermediaries, 11 June 2010, ICC-01/04-01/06-2473-Conf; public redacted version filed on 18 June 2010, ICC-01/04-01/06-2473-Red.

¹⁷ ICC-01/04-01/06-2473-Red, paragraph 20.

¹⁸ The ERN numbers of the documents contained in Annexes 6, 7 and 8 are listed in ICC-01/04-01/06-2417-Conf-Anx1, pages 2 and 3.

¹⁹ Transcript of hearing on 17 June 2010, ICC-01/04-01/06-T-303-Red-ENG WT, page 29, line 18 to page 30, line 1; ICC-01/04-01/06-T-299-CONF-ENG ET, page 27, line 15 to page 28, line 22; Email communication from the prosecution to the Chamber through the Legal Advisor to the Trial Division on 10 June 2010.

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.

II. Submissions of the parties

Defence submissions

11. The defence seeks admission of the transcripts of audio and audio-video interviews conducted between (i) the prosecution and some of its witnesses who have already testified in the case, and (ii) between the prosecution and other individuals who were questioned as part of the prosecution's investigations.²⁰ These interviews occurred after the close of the prosecution's evidence.²¹

12. Relying on the jurisprudence of the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the defence argues that evidence relating to the credibility of a witness who has appeared during the trial is *prima facie* relevant.²² It is contended that the information in the transcripts is likely to undermine the credibility of certain prosecution witnesses, as they reveal substantial contradictions between the witnesses' testimony before the Chamber and their later statements. Second, it is submitted that the interviews with certain individuals, who are linked to these witnesses, are new and relevant material.²³

13. In arguing that the statements should be admitted into evidence, the defence avers that Rule 68 of the Rules allows the substitution, in certain

²⁰ ICC-01/04-01/06-2417-Conf, paragraph 3.

²¹ ICC-01/04-01/06-2417-Conf, paragraph 3.

²² ICC-01/04-01/06-2417-Conf, paragraph 7 and footnote 3.

²³ ICC-01/04-01/06-2417-Conf, paragraph 8.

circumstances, of all or part of live witness testimony with prior-recorded testimony “on the condition that both the defence and the prosecution had the opportunity to examine the witness during the recording”.²⁴ Even though the defence was not present during the recordings, it contends that it has the discretion to waive this right if the interests of the accused are fully respected.²⁵ It asserts that the statements are reliable, and that the prosecution had the opportunity to examine each witness when the statements were recorded.²⁶ The defence exceptionally waives any potential objection on the basis of its lack of opportunity to question the witnesses during these interviews, provided that their probative value is strictly limited to their “intrinsic” content (“leur contenu intrinsèque”), and it is not extended to the facts to which they relate.²⁷

14. The transcripts were disclosed to the defence following the testimony of the relevant prosecution witnesses, and as a result the defence has been unable to question the witnesses about their contents,²⁸ but it is argued admitting these documents would avoid a delay in the trial otherwise caused by recalling witnesses who have already testified, and by calling four additional witnesses.²⁹

15. The defence requests that documents are admitted from the bar table that relate to expenses incurred by the prosecution for intermediaries DRC-OTP-WWWW-0316 and DRC-OTP-WWWW-0321, and witnesses DRC-OTP-WWWW-0031, DRC-OTP-WWWW-0015, and DRC-D01-WWWW-0016,³⁰ arguing they are relevant because they assist in establishing that certain prosecution witnesses and intermediaries received substantial

²⁴ ICC-01/04-01/06-2417-Conf, paragraph 20.

²⁵ ICC-01/04-01/06-2417-Conf, paragraph 22.

²⁶ ICC-01/04-01/06-2417-Conf, paragraph 21.

²⁷ ICC-01/04-01/06-2417-Conf, paragraph 23.

²⁸ ICC-01/04-01/06-2417-Conf, paragraph 25.

²⁹ ICC-01/04-01/06-2417-Conf, paragraph 27.

³⁰ ICC-01/04-01/06-2417-Conf, paragraph 29.

material benefit in connection with their work for the Office of the Prosecutor.³¹

16. The defence submits that it intends to use these documents to demonstrate the existence of a prosecution policy of securing false testimony.³² The documents apparently set out the sums of money paid by the prosecution to the individuals in question, and, by way of example, according to defence estimates at least \$23,000 USD in expenses were incurred for DRC-OTP-WWWW-0031.³³

17. The defence asserts that the documents are probative of the amounts paid to the relevant witnesses and intermediaries,³⁴ and that the prosecution, as either the author or recipient of this material, had the opportunity to investigate the information before authorising payment.³⁵

18. The defence also requests admission of documents from the bar table that relate to the credibility of certain prosecution witnesses. It submits that the documents were obtained late, and thus it was unable to use them during cross-examination of the relevant prosecution witnesses.³⁶

The prosecution submissions

19. The prosecution does not oppose the admission of the documents in Annexes 12, 14, 15, 16, 17, 18, 19, 20, 21 and 22.³⁷

20. The prosecution advances a number of objections in relation to the documents in Annexes 2 to 11, 13 and 23 to 28. It opposes the introduction

³¹ ICC-01/04-01/06-2417-Conf, paragraph 30.

³² ICC-01/04-01/06-2417-Conf, paragraph 30.

³³ ICC-01/04-01/06-2417-Conf, paragraph 31.

³⁴ ICC-01/04-01/06-2417-Conf, paragraphs 32 – 33.

³⁵ ICC-01/04-01/06-2417-Conf, paragraph 34.

³⁶ ICC-01/04-01/06-2417-Conf, paragraphs 36 – 37.

³⁷ ICC-01/04-01/06-2460-Conf, paragraph 8 and footnote 10.

of the transcripts of the further interviews with DRC-OTP-WWWW-0007,³⁸ DRC-OTP-WWWW-0008,³⁹ DRC-OTP-WWWW-0010,⁴⁰ DRC-OTP-WWWW-0011⁴¹ and DRC-OTP-WWWW-0299.⁴² The prosecution also opposes the admission of the transcripts of interviews conducted with individuals who have not testified at trial, namely DRC-OTP-WWWW-0006,⁴³ and DRC-OTP-WWWW-0009.⁴⁴

21. Regarding expense-related documents, the prosecution resists the introduction of documents relevant to DRC-OTP-WWWW-0031.⁴⁵ The prosecution further opposes the admission of documents relating to the arrest and detention of DRC-OTP-WWWW-0011.⁴⁶

³⁸ ICC-01/04-01/06-2460-Conf, paragraph 2. Documents bearing the ERN Numbers: DRC-OTP-0222-0607, DRC-OTP-0222-0631, DRC-OTP-0222-0655 contained in ICC-01/04-01/06-2417-Conf-Anx2.

³⁹ ICC-01/04-01/06-2460-Conf, paragraph 2. Documents bearing ERN Numbers: DRC-OTP-0222-0371 and DRC-OTP-0222-0411 contained in ICC-01/04-01/06-2417-Conf-Anx3.

⁴⁰ ICC-01/04-01/06-2460-Conf, paragraph 2. Documents bearing ERN Numbers: DRC-OTP-0221-0375 and DRC-OTP-0221-0389 contained in ICC-01/04-01/06-2417-Conf-Anx4.

⁴¹ ICC-01/04-01/06-2460-Conf, paragraph 2. Documents bearing ERN Numbers: DRC-OTP-0222-0014 and DRC-OTP-0222-0048 contained in ICC-01/04-01/06-2417-Conf-Anx5.

⁴² ICC-01/04-01/06-2460-Conf, paragraph 2. Documents bearing ERN Numbers: DRC-OTP-0224-0218, DRC-OTP-0224-0245, DRC-OTP-0224-0287, DRC-OTP-0224-0312 and DRC-OTP-0224-0334 contained in ICC-01/04-01/06-2417-Conf-Anx11.

⁴³ ICC-01/04-01/06-2460-Conf, paragraph 2. Documents bearing the ERN Numbers: DRC-OTP-0226-0793, DRC-OTP-0226-0822, DRC-OTP-0226-0853 and DRC-OTP-0226-0889 contained in ICC-01/04-01/06-2417-Conf-Anx9.

⁴⁴ ICC-01/04-01/06-2460-Conf, paragraph 2. Document bearing the ERN Number: DRC-OTP-0221-0404 contained in ICC-01/04-01/06-2417-Conf-Anx10.

⁴⁵ ICC-01/04-01/06-2460-Conf, paragraph 2. Documents bearing the ERN Numbers: DRC-OTP-0194-0073, DRC-OTP-0194-0137, DRC-OTP-0196-0025, DRC-OTP-0200-0234, DRC-OTP-0196-0418, DRC-OTP-0196-0590, DRC-OTP-0196-0760, DRC-OTP-0200-0288, DRC-OTP-0205-0008, DRC-OTP-0205-0109, DRC-OTP-0205-0281, DRC-OTP-0288, DRC-OTP-0205-0289, DRC-OTP-0205-0290, DRC-OTP-0205-0291, DRC-OTP-0205-0293, DRC-OTP-0205-0294, DRC-OTP-0205-0304, DRC-OTP-0205-0305, DRC-OTP-0205-0342, DRC-OTP-0205-0365, DRC-OTP-0205-0366, DRC-OTP-0205-0368, DRC-OTP-0205-0369, DRC-OTP-0205-0370, DRC-OTP-0205-0371, DRC-OTP-0205-0372, DRC-OTP-0205-0373, DRC-OTP-0205-0374, DRC-OTP-0205-0375, DRC-OTP-0205-0376, DRC-OTP-0205-0377, DRC-OTP-0205-0378, DRC-OTP-0205-0379, DRC-OTP-0205-0380, DRC-OTP-0205-0381, DRC-OTP-0205-0393, DRC-OTP-0205-0394, DRC-OTP-0205-0432, DRC-OTP-0205-0485, DRC-OTP-0205-0488, DRC-OTP-0205-0490, DRC-OTP-0205-0496, DRC-OTP-0205-0498, DRC-OTP-0205-0499, DRC-OTP-0205-0500, DRC-OTP-0205-0502, DRC-OTP-0205-0593, DRC-OTP-0209-0104, DRC-OTP-0209-0105, DRC-OTP-0186, DRC-OTP-0209-0357, DRC-OTP-0209-0488, DRC-OTP-0489, DRC-OTP-0209-0490, DRC-OTP-0491, DRC-OTP-0492, DRC-OTP-0493, DRC-OTP-0210-0013, DRC-OTP-0210-0014, DRC-OTP-0210-0015, DRC-OTP-0210-0016, DRC-OTP-0211-0007, DRC-OTP-0211-0033, DRC-OTP-0211-0043, DRC-OTP-0211-0093, DRC-OTP-0211-0114, DRC-OTP-0211-0126, DRC-OTP-0211-0127, DRC-OTP-0211-0233, DRC-OTP-0211-0234, DRC-OTP-0211-0255, DRC-OTP-0211-0256, DRC-OTP-0211-0258, DRC-OTP-0211-0259, DRC-OTP-0211-0263, DRC-OTP-0211-0264, DRC-OTP-0214-0021, DRC-OTP-0214-0022, DRC-OTP-0214-0035, DRC-OTP-0214-0036 contained in ICC-01/04-01/06-2417-Conf-Anx13.

⁴⁶ ICC-01/04-01/06-2460-Conf, paragraph 2. Documents bearing the ERN numbers: DRC-D01-0003-2595, DRC-D01-0003-2597, DRC-D01-0003-2598, DRC-D01-0003-2599, DRC-D01-0003-2600, DRC-D01-0003-2602 contained in ICC-01/04-01/06-2417-Conf-Anx23 to -Anx28.

22. The prosecution generally argues that the transcripts of interviews conducted with its trial witnesses following their in-court testimony should not be admitted. It is averred that the Statute and Rules provide that evidence should be given under oath by witnesses and that there is no justification for departing from this approach, absent either the unavailability of the witness or the consent of the parties to the admission of the transcript.⁴⁷ Furthermore, it is argued that the interviews do not reveal contradictions regarding substantive issues, such as the age of particular witnesses. The prosecution submits that the transcripts only relate to the credibility of witnesses, an issue that is (and was, or could have been) appropriately explored during their in-court "cross-examination".⁴⁸ The prosecution suggests that to introduce extrinsic evidence, at this stage, in order to attack the credibility of a witness would be unfair and is impermissible.⁴⁹

23. It is maintained that the re-interviews with particular trial witnesses were necessary because the defence failed, on occasion, to put its case properly when they were originally called to give evidence.⁵⁰ The prosecution submits that if, in those circumstances, the Chamber now permits the introduction of the transcripts, the defence will benefit from its failure to question the witnesses properly during their original examination.⁵¹ The prosecution contends that if the defence application is granted, it will create difficulties for the future, in that the prosecution will henceforth have to choose between questioning defence witnesses without appropriate preparation (such as re-interviewing witnesses who have already given evidence) on the one hand, and the risk that selective

⁴⁷ ICC-01/04-01/06-2460-Conf, paragraph 3.

⁴⁸ ICC-01/04-01/06-2460-Conf, paragraph 4.

⁴⁹ ICC-01/04-01/06-2460-Conf, paragraph 5.

⁵⁰ ICC-01/04-01/06-2460-Conf, paragraph 14.

⁵¹ ICC-01/04-01/06-2460-Conf, paragraph 14.

portions of the re-interviews will be introduced, on the other. Further, it is suggested that this evidence lacks the necessary admissibility indicia.⁵²

24. It is averred that if the Chamber permits a party to introduce additional evidence after follow-up investigations of this kind, which are described as forming part of the prosecution's on-going duty to investigate inculpatory and exculpatory evidence, trials may be greatly extended.⁵³ In the prosecution's submission, in these circumstances, there is no justification for introducing out-of-court statements from witnesses who are available to testify.⁵⁴

25. The prosecution contends that the limited circumstances in which Rule 68 of the Rules permits the introduction of out-of-court statements do not apply in the present situation.⁵⁵ It is argued that Rule 68(b) envisages the presence of the witness in court; thus, out-of-court statements should not be relied on when the witness is available, absent any compelling reason for him or her not to give evidence in person.⁵⁶ Furthermore, it is contended that it would not be in the interests of justice to admit the instant transcripts without affording the witnesses the opportunity to address directly the suggested inconsistencies and contradictions in court.⁵⁷

26. The prosecution suggests that if the Chamber decides to admit these transcripts notwithstanding the provisions of Rule 68(b), all out-of-court statements, including those of defence witnesses called to undermine prosecution witnesses, will also be admissible.⁵⁸

⁵² ICC-01/04-01/06-2460-Conf, paragraph 14.

⁵³ ICC-01/04-01/06-2460-Conf, paragraph 15.

⁵⁴ ICC-01/04-01/06-2460-Conf, paragraph 16.

⁵⁵ ICC-01/04-01/06-2460-Conf, paragraph 18.

⁵⁶ ICC-01/04-01/06-2460-Conf, paragraph 19.

⁵⁷ ICC-01/04-01/06-2460-Conf, paragraph 20.

⁵⁸ ICC-01/04-01/06-2460-Conf, paragraph 21.

27. The prosecution opposes the admission of expense-related documents on the grounds that they are neither relevant to, nor probative of, any extant issues in the present case.⁵⁹ Similarly, the prosecution resists the defence contention that prosecution payments to witnesses establish an incentive to give false testimony.⁶⁰ The prosecution, however, acknowledges that witnesses, including DRC-OTP-WWWW-0031, were compensated and reimbursed for their own costs, as well as the costs incurred on behalf of others, for meetings with the Office of the Prosecutor, testifying at trial, and their relocation.⁶¹

28. In relation to documents relevant to the arrest and detention of DRC-OTP-WWWW-0011, the prosecution submits that evidence concerning unproven allegations has no relevance to the determination of a witness's character.⁶² It is further contended that there is no evidence to suggest that this witness gave the information regarding the date of birth that appears in the DRC record and, therefore, the latter should not be construed as an inconsistent statement on his part.⁶³ Additionally, it is argued that the inconsistency as to the date of birth of DRC-OTP-WWWW-0011 has no material impact on his evidence that he was under the age of 15 at the time of his recruitment, because both dates that have been provided indicate that was the position.⁶⁴

Submissions of the legal representatives for victims

29. The legal representatives aver that Annexes 2 to 10, 17 and 21 to 28 of the Request directly concern the personal interests of the victims they

⁵⁹ ICC-01/04-01/06-2460-Conf, paragraph 25.

⁶⁰ ICC-01/04-01/06-2460-Conf, paragraph 25.

⁶¹ ICC-01/04-01/06-2460-Conf, paragraphs 24 – 25.

⁶² ICC-01/04-01/06-2460-Conf, paragraph 27.

⁶³ ICC-01/04-01/06-2460-Conf, paragraph 28.

⁶⁴ ICC-01/04-01/06-2460-Conf, paragraph 29.

represent.⁶⁵ With the exception of the document in Annex 17,⁶⁶ the legal representatives oppose the admission of these documents.⁶⁷

30. The legal representatives submit that they do not fulfil the criteria laid down by the Chamber in its "Decision on the admissibility of four documents".⁶⁸ Further, it is argued that Rule 68 of the Rules unequivocally sets out the conditions for the introduction of an individual's written statements, namely, the opportunity for the parties to question the witness.⁶⁹ It is contended that Rule 68 is clear in its language, and it does not provide for any exceptions to this requirement.⁷⁰ Accordingly, the legal representatives submit that the accused is not entitled to waive his rights in order to remedy a violation of Rule 68 of the Rules,⁷¹ and the absence of the defence when a statement is recorded is an absolute bar to its admission into evidence.⁷²

31. The legal representatives contend that the recordings lack sufficient reliability due to certain technical and interpretation issues,⁷³ and, for this additional reason, they should not be admitted.⁷⁴ In relation to the interviews of witnesses not called during the trial, it is argued that the reliability of their statements is affected by the fact that they have not testified before the Court. These individuals have not given a solemn undertaking; they have not been advised of the possible consequences that

⁶⁵ ICC-01/04-01/06-2458-Conf, paragraph 9.

⁶⁶ ICC-01/04-01/06-2458-Conf, paragraph 41.

⁶⁷ ICC-01/04-01/06-2458-Conf, page 20.

⁶⁸ Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1398-Conf; public redacted version, 13 June 2008, ICC-01/04-01/06-1399.

⁶⁹ ICC-01/04-01/06-2458-Conf, paragraph 10.

⁷⁰ ICC-01/04-01/06-2458-Conf, paragraph 13.

⁷¹ ICC-01/04-01/06-2458-Conf, paragraph 13.

⁷² ICC-01/04-01/06-2458-Conf, paragraph 18.

⁷³ ICC-01/04-01/06-2458-Conf, paragraph 22.

⁷⁴ ICC-01/04-01/06-2458-Conf, paragraph 18.

may follow from their statements; and they have not faced cross-examination in open court.⁷⁵

32. Addressing the letter from the [REDACTED] in Annex 21, the legal representatives submit that the document is insufficiently probative. Even though the author was interviewed by the prosecution about his observations concerning DRC-OTP-WWWW-0008, the defence was not present when this occurred.⁷⁶

33. In relation to the document contained in Annex 22,⁷⁷ the legal representatives aver that it directly concerns defence witness DRC-D01-WWWW-0005 and it should, therefore, have been introduced during his testimony.⁷⁸

34. The documents in Annexes 23 to 28, in the legal representatives' submission, are irrelevant to the trial. It is submitted that the crimes allegedly committed by DRC-OTP-WWWW-0011 have no bearing on the circumstances of this case. Furthermore, it is suggested they involve events which occurred after the timeframe relevant to the charges against the accused and, moreover, they do not affect the credibility of the witness.⁷⁹

35. In conclusion, it is observed that the documents in Annexes 23 to 28, provided to the defence by the Registry, were never notified to the legal

⁷⁵ ICC-01/04-01/06-2458-Conf, paragraph 26.

⁷⁶ ICC-01/04-01/06-2458-Conf, paragraph 34.

⁷⁷ ICC-01/04-01/06-2417-Conf-Anx22 contains extract of the document of witness DRC-OTP-WWWW-0046 entitled "Individual case story" concerning DRC-D01-WWWW-0005, bearing ERN Number DRC-OTP-0223-0117.

⁷⁸ ICC-01/04-01/06-2458-Conf, paragraph 36.

⁷⁹ ICC-01/04-01/06-2458-Conf, paragraph 39.

representatives, even though the documents directly concern the personal interests of witness DRC-OTP-WWWW-0011.⁸⁰

III. Applicable Provisions

36. 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.

[...]

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.

[...]

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 [...]

Article 69 of the Statute

Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

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.

⁸⁰ ICC-01/04-01/06-2458-Conf, paragraph 40.

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

[...]

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

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 66 of the Rules

Solemn undertaking

1. Except as described in sub-rule 2, every witness shall, in accordance with article 69, paragraph 1, make the following solemn undertaking before testifying:

“I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.”

2. A person under the age of 18 or a person whose judgement has been impaired and who, in the opinion of the Chamber, does not understand the nature of a solemn undertaking may be allowed to testify without this solemn undertaking if the Chamber considers that the person is able to describe matters of which he or she has knowledge and that the person understands the meaning of the duty to speak the truth.

3. Before testifying, the witness shall be informed of the offence defined in article 70, paragraph 1 (a).

Rules 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.

IV. Analysis and Conclusion

37. On 13 June 2008, this Chamber issued the “Decision on the admissibility of four documents”,⁸¹ in which it set out its general approach to the issue of the admissibility of evidence other than direct oral evidence.⁸² The Chamber identified four key factors, based on the statutory framework of the Court, that provide the necessary starting-point for an investigation of the Trial Chamber’s general approach in these circumstances. First, pursuant to Article 69(3) of the Statute, the Chamber has the authority to request the submission of any evidence that it considers necessary in order to determine the truth.⁸³ Second, the Chamber is under an obligation to ensure that the trial is fair and expeditious, and that it is conducted with full respect for the rights of the accused under Article 64(2) of the Statute.⁸⁴ Third, notwithstanding the desirability that witnesses should give evidence orally in accordance with Article 69(2) of the Statute,⁸⁵ there is “a clear recognition that a variety of other means of introducing evidence may be appropriate”.⁸⁶ This reflects the terms of Article 68 of the Statute, which is expressly referred to in the first sentence of Article 69(2) of the

⁸¹ ICC-01/04-01/06-1398-Conf; ICC-01/04-01/06-1399.

⁸² ICC-01/04-01/06-1399, paragraph 19.

⁸³ ICC-01/04-01/06-1399, paragraph 20.

⁸⁴ ICC-01/04-01/06-1399, paragraph 21.

⁸⁵ ICC-01/04-01/06-1399, paragraph 22.

⁸⁶ ICC-01/04-01/06-1399, paragraph 22.

Statute.⁸⁷ Fourth, Article 64(9) of the Statute confers upon the Chamber a “wide discretion to rule on admissibility or relevance and to asses[s] any evidence, subject to the specified issues of ‘fairness’”.⁸⁸

38. In accordance with the power conferred by Article 64(9), it is for the Chamber to rule on the relevance or admissibility of evidence. This is underlined by Rule 63(2) of the Rules which provides that “a Chamber shall have the authority [...] to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69”.

39. Bearing in mind those key considerations, the Chamber established a three-stage approach to be applied, on a case-by-case basis, in order to determine the admissibility of evidence other than oral evidence.⁸⁹ First, the Chamber shall determine whether the evidence in question is, *prima facie*, relevant to the trial, in that it relates to matters that are properly to be considered by the Chamber in its investigation of the charges against the accused.⁹⁰ Second, again on a *prima facie* basis, the Chamber must consider whether the evidence has probative value.⁹¹ The Chamber has indicated that “[t]here should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall”⁹² and the Chamber cautioned against imposing artificial limits on its “ability to consider any piece of evidence freely, subject to the requirements of fairness”.⁹³ Third, where relevant, the Chamber has to weigh the probative value of the evidence against its prejudicial effect.⁹⁴

⁸⁷ ICC-01/04-01/06-1399, paragraph 22.

⁸⁸ ICC-01/04-01/06-1399, paragraph 23.

⁸⁹ ICC-01/04-01/06-1399, paragraphs 26 – 28 and 31.

⁹⁰ ICC-01/04-01/06-1399, paragraph 27.

⁹¹ ICC-01/04-01/06-1399, paragraph 28.

⁹² ICC-01/04-01/06-1399, paragraph 29.

⁹³ ICC-01/04-01/06-1399, paragraph 29.

⁹⁴ ICC-01/04-01/06-1399, paragraph 31.

40. Addressing the instant application, the defence seeks the admission of 422 documents relating to (i) the testimony of certain prosecution witnesses who have testified before the Chamber, (ii) statements of individuals interviewed by the prosecution as part of its on-going investigations, and (iii) some of the prosecution's intermediaries.
41. The defence has identified three distinct categories of documents, namely, (a) transcripts of interviews between the prosecution and witnesses who have already given evidence during the trial, along with the transcripts of interviews with individuals that occurred during the prosecution's investigation, (b) documents relevant to expenses incurred by the Office of the Prosecutor for witnesses and intermediaries, and (c) other documents likely to affect the credibility of the prosecution's evidence. These categories will be considered in turn.

a) Interview transcripts

i. Transcripts of interviews with prosecution witnesses who testified before the Chamber

42. As rehearsed above, the statutory framework of the Court establishes the clear presumption that the evidence of a witness at trial will be given orally ("in person": Article 69(2) of the Statute).⁹⁵ Article 69(2) of the Statute, however, expressly recognises the possibility of derogation from this principle, in accordance with Article 68 of the Statute and the Rules of Procedure and Evidence.
43. The Chamber has previously analysed one of the circumstances when this may arise in its "Decision on the prosecution's application for the

⁹⁵ The Chamber has previously recalled the Statute's preference for oral evidence in detail in ICC-01/04-01/06-1399, paragraph 22.

admission of the prior recorded statements of two witnesses".⁹⁶ Essentially, in that Decision the Chamber considered the situation when the prior recorded statements of a witness can be admitted in lieu of oral examination by the prosecution (*i.e.* they are introduced in advance of the remainder of the witness's (oral) testimony). In the course of that Decision, the Chamber observed:

17. [...] Article 68(2) of the Statute facilitates a departure from the usual course of "public hearings" in order to protect victims and witnesses or an accused, in that the Court may conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic **or other special means**. In the judgment of the Chamber this provision enables the Court, when it is necessary to provide protection to victims, witnesses or the accused, to use any appropriate "*special means*", which will include reading part, or all, of a witness's statement in open Court or in private, so long as these steps do not detract from the fairness of the proceedings.

18. Turning to Article 69(2) and Rule 68, in the judgment of the Chamber the latter provision is directed at the "testimony of a witness" in a broad sense, given that the various forms of testimony that are specifically included in the rule are audio- or video- records, transcripts **or other documented evidence** of "such" testimony (namely, the testimony of a witness). The Chamber highlights, particularly, that the "*other documented evidence*" (of the testimony of the witness) is referred to separately, and in addition to, the audio- or video-records in the opening paragraph of Rule 68; moreover, in sub-rules a) and b) "*previously recorded testimony*" is referred to without limiting its scope to video or audio evidence. Against that background, the Chamber is persuaded that the ambit of Rule 68 permits the introduction of written statements, in addition to video- or audio-taped records or transcripts, of a witness's testimony because these are all clear examples of the "documented evidence" of a witness's testimony.

19. Therefore, applying the straightforward language of Rule 68, its correct interpretation is that the Chamber has the discretion to order that written statements (*viz.* "*the transcript or other documented evidence of [...] the testimony*") are to replace "live" evidence if, but only if, one of the two following conditions are met: either that the defence and the prosecution have had the opportunity to question the witness if he or she is not present before the Court, or, for a witness before the Court, the witness – who gives consent to the introduction of the evidence – is available for examination by the prosecution and the defence.

20. In consequence, in the right circumstances, Article 68(2) of the Statute and Rule 68(b) of the Rules create separate routes whereby prior recorded testimony can replace, in full or in part, live testimony. However, these provisions, although potentially overlapping, are clearly different in scope, since the focus of Article 68(2) is specifically directed at protecting victims and witnesses whilst Rule 68 is a general provision for the introduction of prior recorded testimony, subject to specific

⁹⁶ 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.

safeguards. [...]

44. The Chamber in the instant application is addressing a different situation, in that it is suggested that these interview transcripts should be introduced after, rather than before, the evidence of the relevant witness. Furthermore, it should be noted that the present application does not concern the unavailability of a witness to testify before the Court, or the vulnerability of victims and witnesses, which may require evidence to be introduced by “special means”. Although the Rome Statute framework has addressed certain particular situations when transcripts or other documentary evidence can be tendered in certain identified circumstances, this scenario – the suggested introduction of interview transcripts created after a witness has testified – is not dealt with.

45. As set out above, Rule 68 of the Rules, relied on by the defence, applies only to the *prior* recorded testimony of a witness, such as a transcript or a witness statement. Furthermore, as the Chamber has previously indicated, applying the straightforward language of Rule 68 of the Rules, the Chamber has discretion to order that written statements are to *replace live testimony* if, and only if, one of the two relevant conditions is met: either the defence and the prosecution have had the opportunity to question the witness if he or she is not present before the Court, or, for a witness before the Court, the witness – who gives consent to the introduction of the evidence – is available for examination by the prosecution and the defence.⁹⁷

46. Given, therefore, the present application concerns the transcripts of interviews conducted with prosecution witnesses following their live testimony before the Court, the statutory exceptions relating to prior-

⁹⁷ ICC-01/04-01/06-1603, paragraph 19.

recorded testimony in Rule 68 of the Rules self-evidently do not apply. Indeed, it would be a misconstruction of the statutory framework of the Court to rule that a subsequent interview with a trial witness could replace his or her oral testimony under Rule 68 of the Rules, and, as just set out, in the judgment of the Chamber that particular provision has no application to the present circumstances.

47. Instead, 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.

48. The Chamber earlier authorised the prosecution to conduct additional interviews with a number of its witnesses, as part of enquiries into the defence evidence.⁹⁸ So long as their introduction does not create unfairness, the contents of these post-testimony interviews may be admissible, once they have been disclosed to the defence pursuant to Articles 67(2) of the Statute and Rule 77 of the Rules. It is to be recalled that the prosecution applied to contact its witnesses in order to determine the veracity of the defence allegations against them, and it is relevant to this Decision that the prosecution met with witnesses DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008 and DRC-OTP-WWWW-0010.⁹⁹

⁹⁸ Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2010, ICC-01/04-01/06-2192-Conf and public redacted version, ICC-01/04-01/06-2192-Red filed on 20 January 2010, paragraph 66.

⁹⁹ ICC-01/04-01/06-2192-Red, paragraph 66.

49. The defence alleges that a number of prosecution witnesses have fabricated evidence and deliberately lied in their testimony,¹⁰⁰ and the Chamber considers that the transcripts of the subsequent interviews with these witnesses that were conducted, at least in part, to address those allegations are therefore relevant to this important issue, given they may potentially assist the Chamber in determining whether the individuals concerned have told the truth. Put otherwise, their responses in *ex post facto* interviews to the suggestions that have been advanced merit attention by the Chamber, and they have, *prima facie*, probative value.

50. It follows, in these particular circumstances, that evidence relevant to the credibility of a witness not emanating from either a prior statement admitted pursuant to the exception contained within Rule 68 of the Rules or live testimony in open court, may assist the Chamber in its overall assessment of the witness's testimony, and, for the reasons set out above, the present material is relevant to the trial, and it is admissible pursuant to Article 69(3) of the Statute (subject to the issue of fairness, considered below). It must, however, be stressed that the admissibility of evidence and its weight are entirely separate issues, and the Chamber will bear in mind particularly that the contents of the transcripts have not been the subject of examination in court. This is especially necessary given the usual course, set out above, that witnesses will give their evidence in court, under oath.

51. It is not suggested that the transcripts fail to reflect accurately the audio and video recorded interviews conducted between the prosecution and its witnesses, as authorised by the Chamber. They are relevant to, and probative of, the issues the Chamber is considering, and given the defence does not seek to ask any further questions of the relevant witnesses, and

¹⁰⁰ ICC-01/04-01/06-2417-Conf, paragraph 10.

the prosecution had the opportunity to raise all relevant issues during the interviews, no material unfairness will be occasioned by their introduction.

52. The Chamber therefore grants the defence request for admission from the bar table of the transcripts of the further interviews conducted with prosecution witnesses DRC-OTP-WWWW-0007,¹⁰¹ DRC-OTP-WWWW-0008,¹⁰² DRC-OTP-WWWW-0010,¹⁰³ DRC-OTP-WWWW-0011¹⁰⁴ and DRC-OTP-WWWW-0299.¹⁰⁵

ii. Transcripts of interviews with individuals not called as witnesses at trial

DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009

53. In preparation for the testimony of a number of defence witnesses – called, it was understood, to contradict certain prosecution witnesses – the prosecution interviewed a number of individuals who are not witnesses in this case. As part of this application, the defence is seeking to introduce the transcripts of some of these interviews from the bar table, arguing that the content tends to undermine the credibility and suggested honesty of prosecution witnesses DRC-OTP-WWWW-0010¹⁰⁶ and DRC-OTP-WWWW-0011.¹⁰⁷ On this basis, it is argued that this material is relevant,¹⁰⁸ and, in support of this submission, the defence relies on jurisprudence

¹⁰¹ Documents bearing the ERN Numbers: DRC-OTP-0222-0607, DRC-OTP-0222-0631, DRC-OTP-0222-0655 contained in ICC-01/04-01/06-2417-Conf-Anx2.

¹⁰² Documents bearing ERN Numbers: DRC-OTP-0222-0371 and DRC-OTP-0222-0411 contained in ICC-01/04-01/06-2417-Conf-Anx3.

¹⁰³ Documents bearing ERN Numbers: DRC-OTP-0221-0375 and DRC-OTP-0221-0389 contained in ICC-01/04-01/06-2417-Conf-Anx4.

¹⁰⁴ Documents bearing ERN Numbers: DRC-OTP-0222-0014 and DRC-OTP-0222-0048 contained in ICC-01/04-01/06-2417-Conf-Anx5.

¹⁰⁵ Documents bearing ERN Numbers: DRC-OTP-0224-0218, DRC-OTP-0224-0245, DRC-OTP-0224-0287, DRC-OTP-0224-0312 and DRC-OTP-0224-0334 contained in ICC-01/04-01/06-2417-Conf-Anx11.

¹⁰⁶ ICC-01/04-01/06-2417-Conf, paragraph 15.

¹⁰⁷ ICC-01/04-01/06-2417-Conf, paragraph 17.

¹⁰⁸ ICC-01/04-01/06-2417-Conf, paragraph 7.

from the *ad hoc* tribunals to the effect that all evidence relating to the credibility of witnesses is *prima facie* relevant.¹⁰⁹

54. However, whilst relevant jurisprudence from the *ad hoc* tribunals may assist the Chamber in its interpretation of the Statute, the Chamber is bound, in the first place, to apply the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence, pursuant to Article 21(1)(a) of the Statute. The International Criminal Court's statutory framework regarding the admission of out-of-court statements to replace part of a witness's oral testimony is set out above, and the Chamber, when considering the admissibility of evidence in this context, must focus on the three key issues of relevance, probative value and fairness. Applying this approach, it follows that not all information relating to credibility is necessarily admissible, and to this extent the approach of this Court may differ from that of the *ad hoc* tribunals.¹¹⁰ For instance, while evidence of this kind may be relevant to, and probative of, the issues before the Chamber, it is necessary to consider, additionally, whether it is fair to admit it. The matter therefore remains within the discretion of the Chamber, pursuant to Article 64(9) of the Statute, and it must rule on admissibility in these circumstances on a case-by-case basis.

55. The defence contends that the evidence should be admitted under Rule 68 of the Rules, and it seeks to waive the opportunity to question the witnesses as provided by Rule 68(a). As rehearsed above, although Rule 68 applies to individuals who have given prior recorded testimony, whether

¹⁰⁹ ICC-01/04-01/06-2417-Conf, paragraph 7 and footnote 3.

¹¹⁰ While, for instance, Rule 92*bis* (A) of the Rules of Procedure and Evidence of the ICTR and the ICTY specifically addresses the admission of written statements in lieu of oral testimony, which go to proof of a matter other than the acts and conduct of the accused as charged, this Court's Rules do not provide for such a specific provision. Rule 68 of the Rules of Procedure and Evidence of the ICC, which is the equivalent to the aforementioned Rule of the Rules of Procedure and Evidence of the *ad hoc* tribunals, is significantly narrower in its ambit, as discussed above. *See e.g.*, ICC-01/04-01/06-2417-Conf, paragraph 7, footnote 3, *citing inter alia* an ICTY Trial Chamber decision, "Decision on Defence Motion to Introduce Exhibit Evidence" in the case of *The Prosecutor v Miroslav Kvočka et al.*, 17 April 2001, which held that "information related to witness testimony and credibility should in principle be considered as relevant and of probative value and admitted accordingly".

or not they are “present before the Chamber” (the Rule in (a) and (b) allows for both possibilities), Rule 68(a) is clearly directed at the particular circumstances when, as a substitute for oral evidence in court, a witness’s account is provided by way of an audio or video recording which includes his or her examination by the prosecution and the defence. However, in the present instance, the interviews were conducted with individuals who were simply being questioned by the prosecution in the course of its investigations. No attempt has been made at any relevant stage to comply substantively with Rule 68, and in particular the defence was not present during the recordings (Rule 68(a)) and DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009 are not to be called to give evidence (Rule 68(b)). Thus, this provision does not apply in these circumstances, notwithstanding the defence suggestion that it is entitled to waive the requirements of Rule 68(a).

56. Although, under Article 69(2) of the Statute, the Chamber may admit, *inter alia*, documents and written transcripts, the three-part approach to be applied is that of relevance, probative value and fairness.

57. These individuals were not questioned under oath, and their account, as just set out, was simply part of an information-gathering exercise by the prosecution. The Chamber has not seen these individuals and there are insufficient indications as to whether the prosecution’s questions were sufficiently comprehensive or penetrating to provide a balanced and reliable picture. As the Chamber has previously observed:

live questioning of a witness in open court on all aspects of his or her evidence can have a material impact on the Chamber’s overall assessment of the evidence, [...] most importantly the evidence can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part by observing the conduct and demeanour of the witness.¹¹¹

¹¹¹ ICC-01/04-01/06-1603, paragraph 21.

58. If 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. In the present circumstances, the transcripts of the interviews with DRC-OTP-WWWW-0006¹¹² and DRC-OTP-WWWW-0009¹¹³ will be of low, if any, probative value, and it will be unfair on the prosecution to admit them into evidence from the bar table.

b) Documents relating to expenses incurred by the Office of the Prosecutor relating to its witnesses and intermediaries

59. Annexes 12 to 16 to the defence Request contain documents relevant to the expenses incurred by the prosecution vis-à-vis its intermediaries DRC-OTP-WWWW-0316 and DRC-OTP-WWWW-0321, as well as witnesses DRC-OTP-WWWW-0031, DRC-OTP-WWWW-0015 and DRC-D01-WWWW-0016.¹¹⁴

60. In its “Decision on Intermediaries”,¹¹⁵ the Chamber held that: “[t]he precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial”,¹¹⁶ and as a result it has adopted an individual-by-individual approach when determining applications for disclosure of identities of the intermediaries used by the prosecution,¹¹⁷ establishing as the threshold for disclosure (under Rule 77 of the Rules) whether *prima facie* grounds exist for suspecting that the intermediary in question had been in contact with

¹¹² Documents bearing ERN numbers: DRC-OTP-0226-0793, DRC-OTP-0226-0822, DRC-OTP-0226-0853 and DRC-OTP-0226-0889 contained in ICC-01/04-01/06-2417-Conf-Anx9.

¹¹³ Document bearing ERN number: DRC-OTP-0221-0404 contained in ICC-01/04-01/06-2417-Conf-Anx10.

¹¹⁴ ICC-01/04-01/06-2417-Conf, paragraph 29.

¹¹⁵ Decision on Intermediaries, 12 May 2010, ICC-01/04-01/06-2434-Conf-Exp; confidential redacted version, ICC-01/04-01/06-2434-Conf-Red filed on 20 May 2010; corrigendum to confidential *ex parte* version, ICC-01/04-01/06-2434-Conf-Exp-Corr issued on 27 May 2010; corrigendum to confidential redacted version, ICC-01/04-01/06-2434-Conf-Red-Corr issued on 27 May 2010; public redacted version, ICC-01/04-01/06-2434-Red2 filed on 31 May 2010.

¹¹⁶ ICC-01/04-01/06-2434-Red2, paragraph 135.

¹¹⁷ ICC-01/04-01/06-2434Red2, paragraph 139a.

one or more witnesses whose incriminating evidence has been materially called into question.¹¹⁸ The Chamber identified evidence that intermediaries 316 ([REDACTED]) and 321 ([REDACTED]) may have misused their positions in varying ways,¹¹⁹ and decided that:

[...] in light of the extensive allegations made against intermediaries 316 ([REDACTED]) and 321 ([REDACTED]), [...] it is in the interests of a fair trial for these two individuals to be called to deal with the suggestions that they attempted to persuade one or more individuals to give false evidence. Their testimony before the Court is likely to assist the Chamber in resolving, first, the criticisms that have been levelled against them; second, some of the extensive conflicts in the evidence that have emerged during the trial; and, third, the possible contacts between the intermediaries.¹²⁰

61. The prosecution was therefore ordered to call intermediaries 316 and 321 following the defence witnesses on the abuse of process application, prior to the submissions of the parties and participants on the issue.¹²¹
62. It is noteworthy that both DRC-OTP-WWWW-0015 and DRC-OTP-WWWW-0016 implicated intermediary 316 in their testimony before the Court.¹²²
63. Given that the role of certain intermediaries, as well as the alleged improper payments to intermediaries and witnesses, have become live issues in the case, the Chamber considers that these documents are

¹¹⁸ ICC-01/04-01/06-2434-Red2, paragraph 139b. The prosecution sought leave to appeal *inter alia* this aspect of the decision; see “Prosecution’s Application for Leave to Appeal the ‘Decision on Intermediaries’”, 19 May 2010, ICC-01/04-01/06-2453-Conf-Exp and public redacted version, ICC-01/04-01/06-2453-Red filed on 8 June 2010. The Chamber denied leave to appeal in its “Decision on the prosecution request for leave to appeal the ‘Decision on Intermediaries’”, 2 June 2010, ICC-01/04-01/06-2463, reclassified as public pursuant to Trial Chamber I’s instruction on 4 June 2010.

¹¹⁹ ICC-01/04-01/06-2434-Conf-Red, paragraph 140.

¹²⁰ ICC-01/04-01/06-2434-Conf-Red, paragraph 141.

¹²¹ ICC-01/04-01/06-2434-Red2, paragraph 141.

¹²² See e.g., Transcript of hearing on 16 June 2009, ICC-01/04-01/06-T-192-Conf-ENG CT, page 5, line 18 and page 6, lines 7 – 18, on the relevant testimony of DRC-OTP-WWWW-0015 as well as, Transcript of hearing on ICC-01/04-01/06-T-256-Conf-ENG CT page 11, line 21 to page 14, line 16 in relation to the relevant testimony of DRC-OTP-WWWW-0016.

relevant to “matters that are properly to be considered by the Chamber in its investigation of the charges against the accused”.¹²³

64. In the Chamber’s view, the documents bear sufficient indicia of reliability, given they are official reimbursement receipts originating from the prosecution, along with invoices that were submitted for reimbursement, the latter having been accepted by the prosecution. Therefore, the invoices and receipts are, *prima facie*, probative.

65. In light of the above, these documents are relevant to, and probative of, the issues the Chamber is considering, and given the indicia of reliability it is fair for them to be introduced into evidence.¹²⁴

c) Other documents tending to undermine the credibility of incriminating evidence

Annex 17 (DRC-OTP-0216-0107)

66. Annex 17 to the defence Request is a receipt, dated 29 November 2005 and signed by [REDACTED] (DRC-OTP-WWWW-0497). [REDACTED] indicates she received \$50 USD in reimbursement for travel expenses incurred by [REDACTED] witnesses DRC-OTP-WWWW-0007 and DRC-OTP-WWWW-0008.¹²⁵

67. The introduction of this document into evidence is not opposed. Based on the Chamber’s analysis set out in paragraphs 63 and 64 above, the Chamber is persuaded that it is fair to admit it into evidence.¹²⁶

¹²³ ICC-01/04-01/06-1398-Conf, paragraph 27.

¹²⁴ The ERN numbers of the documents contained in Annexes 12 to 16 are listed in ICC-01/04-01/06-2417-Conf-Anx1, pages 4 to 16.

¹²⁵ ICC-01/04-01/06-2417-Conf, paragraph 38; ICC-01/04-01/06-2417-Conf-Anx17.

¹²⁶ Document bearing ERN number DRC-OTP-WWWW-0216-0107, contained in ICC-01/04-01/06-2417-Conf-Anx17.

Annexes 18 to 20: Primary School Records

68. Annexes 18 to 20 are copies of various school documents relating to witnesses DRC-OTP-WWWW-0157 and DRC-OTP-WWWW-0213.¹²⁷ The legal representatives, but not the prosecution, oppose their introduction. Witness DRC-OTP-WWWW-0157 testified on 3, 4, 5, and 9 June 2009 and witness DRC-OTP-WWWW-0213 on 20, 23, and 24 February 2009. The relevant documents were disclosed to the defence by the prosecution on 9 March 2010,¹²⁸ and it is suggested that they are acceptable copies of the originals.¹²⁹ Annex 18 is the register from [REDACTED] primary school [REDACTED],¹³⁰ and Annex 19 is an enrollment register from [REDACTED] primary school [REDACTED].¹³¹

69. Addressing Annexes 18 and 19, the Chamber has previously indicated that the identity and age of the alleged former child soldiers who testified before the Chamber is a highly relevant question, given the Chamber will need to consider whether they were under the age of 15 years during the period relevant to the charges against the accused.¹³² The two documents in question are school registers of enrolled students, which purportedly include their year of birth.¹³³ Therefore, they are, *prima facie*, relevant to the charges against the accused, as they relate to the identities and dates of birth of two alleged former child soldiers.

70. The probative value of the school registers is that, ostensibly, they are the record of the enrollment of students, who included DRC-OTP-WWWW-0157 and DRC-OTP-WWWW-0213. The Chamber previously indicated that “although an important consideration” the fact that the authors of

¹²⁷ ICC-01/04-01/06-2417-Conf, paragraph 43.

¹²⁸ See ICC-01/04-01/06-2417-Conf-Anx1, page 16.

¹²⁹ ICC-01/04-01/06-2417-Conf, paragraph 42.

¹³⁰ ICC-01/04-01/06-2417-Conf, paragraph 44; ICC-01/04-01/06-2417-Conf-Anx18.

¹³¹ ICC-01/04-01/06-2417-Conf, paragraph 45; ICC-01/04-01/06-2417-Conf-Anx19.

¹³² ICC-01/04-01/06-1398-Conf, paragraph 34.

¹³³ ICC-01/04-01/06-2417-Conf, paragraph 45; ICC-01/04-01/06-2417-Conf-Anx18; ICC-01/04-01/06-2417-Conf-Anx19; documents DRC-OTP-0224-0495 and DRC-OTP-0224-0347.

documents were not called as witnesses “is not in itself determinative of admissibility”.¹³⁴ The documents are photocopies of original documents, which were brought to The Hague by the prosecution;¹³⁵ they have been inspected by the parties; and the defence submits that they accurately reflect the originals.¹³⁶ They were purportedly created contemporaneously with the events they record (*viz.* the enrollment of students).¹³⁷ In all the circumstances, they bear sufficient indicia of reliability, and therefore they are, *prima facie*, probative of the issues just described.

71. Given that the admission of these annexes is unopposed by the prosecution, and bearing in mind that similar documents have been introduced, albeit during the examination of witnesses, there is no significant prejudice that may result from their admission. In all the circumstances it is fair to admit Annexes 18 and 19 into evidence.¹³⁸

72. Annex 20 is a copy of the enrollment register from the [REDACTED] primary school [REDACTED].¹³⁹ A previous copy of this register has already been admitted into evidence.¹⁴⁰ The defence relies on the suggestion that the photocopy in Annex 20 is of better quality than the document in the court record.¹⁴¹ On this basis, the application is granted.¹⁴²

¹³⁴ ICC-01/04-01/06-1398-Conf, paragraph 36.

¹³⁵ ICC-01/04-01/06-2417-Conf, paragraph 42.

¹³⁶ ICC-01/04-01/06-2417-Conf, paragraph 42.

¹³⁷ *See* ICC-01/04-01/06-1398-Conf, paragraph 38, where the Chamber uses this consideration as an indicia of reliability.

¹³⁸ Document bearing the ERN number DRC-OTP-0224-0495 contained in ICC-01/04-01/06-2417-Conf-Anx18 and document bearing the ERN number DRC-OTP-0224-0347 contained in ICC-01/04-01/06-2417-Conf-Anx19.

¹³⁹ ICC-01/04-01/06-2417-Conf-Anx20.

¹⁴⁰ The copy of the document that is already admitted into evidence bears EVD Number EVD-D01-00054.

¹⁴¹ ICC-01/04-01/06-2417-Conf, paragraphs 47 – 48.

¹⁴² Document bearing the ERN number DRC-OTP-0225-0064 contained in ICC-01/04-01/06-2417-Conf-Anx20.

Annex 21: The document provided by the [REDACTED] primary school [REDACTED]

73. Annex 21 is a document signed by [REDACTED] ([REDACTED]) in which it is asserted that a “[REDACTED]” was not a student at the school.¹⁴³ The document was disclosed on 25 February 2010 to the defence by the prosecution as potentially exculpatory material.¹⁴⁴ The prosecution does not oppose this document’s admission from the bar table; however, its admission is opposed by the legal representatives.

74. The defence requests the admission of this document on the basis that it tends to prove that witness DRC-OTP-WWWW-0008 was never enrolled at a school he claimed he attended.¹⁴⁵ This suggestion is clearly relevant to an issue in this case.

75. As regards the probative value of the document, it was created by [REDACTED].¹⁴⁶ It bears the seal of the primary school and the [REDACTED] signature. In all the circumstances, it bears sufficient indicia of reliability, and therefore it is, *prima facie*, probative of the issues just described.

76. Turning to its possible prejudicial effect, witness DRC-OTP-WWWW-0008 testified at trial that he used several names, one of which was “[REDACTED]”.¹⁴⁷ Indeed, the Chamber has heard evidence that the use of multiple names is common practice in the DRC. As a result, it is possible that witness DRC-OTP-WWWW-0008 could have attended the school under another name, and this possibility has not been explored in the context of this document. The Chamber has previously observed that it “must be careful to ensure that it is not unfair to admit the disputed

¹⁴³ ICC-01/04-01/06-2417-Conf, paragraph 49.

¹⁴⁴ ICC-01/04-01/06-2417-Conf, paragraph 49; ICC-01/04-01/06-2417-Conf-Anx1, page 16.

¹⁴⁵ ICC-01/04-01/06-2417-Conf, paragraph 53.

¹⁴⁶ ICC-01/04-01/06-2417-Conf, paragraphs 50 – 52.

¹⁴⁷ Transcript of hearing on 25 February 2009, ICC-01/04-01/06-T-135-CONF-ENG CT2, page 3, line 20 to page 4, line 3; ICC-01/04-01/06-2458-Conf, paragraph 34.

material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case."¹⁴⁸

77. The defence seeks to rely on this document, and the application is unopposed by the prosecution. Although it is clearly of probative value on the particular issue of whether someone called "[REDACTED]" attended the school during the relevant period, it does not assist on the more general possibility that DRC-OTP-WWWW-0008 was enrolled under another name. The Chamber is persuaded, in these circumstances, that the document is relevant to, and probative of, the narrow issue concerning "[REDACTED]" attendance at the school, but that is the extent and limit of its evidential effect. On this clearly defined basis, the document is admissible and its probative value outweighs its prejudicial effect, and it is fair to introduce it into evidence.¹⁴⁹

Annex 22: Excerpt from a document entitled: "Individual case story", relating to witness DRC-D01-WWWW-0005

78. Annex 22 is an excerpt from a larger document entitled "Individual case story" which was created by witness DRC-OTP-WWWW-0046, who testified before the Chamber on 7, 8, 9, 13 and 15 July 2009. It concerns defence witness DRC-D01-WWWW-0005,¹⁵⁰ who appeared before the Chamber on 15 and 16 March 2010.¹⁵¹ It was disclosed to the defence by the prosecution on 24 February 2010.¹⁵² The legal representatives, but not the prosecution, oppose its introduction.

79. When DRC-OTP-WWWW-0046 testified earlier in the trial, a different excerpt from the document relating to witness DRC-OTP-WWWW-0010

¹⁴⁸ ICC-01/04-01/06-1398-Conf, paragraph 31.

¹⁴⁹ Document bearing the ERN number DRC-OTP-0223-0106 contained in ICC-01/04-01/06-2417-Conf-Anx21.

¹⁵⁰ ICC-01/04-01/06-2417-Conf, paragraph 55.

¹⁵¹ Transcript of hearing on 16 March 2010, ICC-01/04-01/06-T-263-CONF-ENG CT, page 1, line 24; Transcript of hearing on 15 March 2010, ICC-01/04-01/06-T-261-CONF-ENG CT, page 14, line 23.

¹⁵² ICC-01/04-01/06-2417-Conf-Anx1, page 16.

was admitted into evidence.¹⁵³ To that extent this document clearly has *prima facie* relevance and probative value.

80. The legal representatives oppose the introduction of another excerpt from this document on the basis that it should have been introduced during the evidence of the relevant witnesses.¹⁵⁴ However, apart from that assertion, no arguments have been advanced as to the prejudice that will be caused if it is admitted at this stage, although self-evidently no witness will have been questioned about it. Victims are entitled to present their views and concerns during the trial, but only to the extent that their intervention is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (Article 68(3) of the Statute). The Chamber notes that the author of the report testified in July 2009 and the defence only received this excerpt after the Chamber ordered its disclosure in 10 March 2010.¹⁵⁵ In addition, although the defence did not put the excerpt to defence witness DRC-D01-WWWW-0005, the witness was questioned about having met with, and talked to, the author of the report.¹⁵⁶ The excerpt has obvious potential significance for the accused, and, as set out above, the application is unopposed by the prosecution. Therefore, as regards the trial process, the possible prejudice to the accused means that it is desirable that this material is introduced.¹⁵⁷

¹⁵³ ICC-01/04-01/06-2417-Conf, paragraph 55.

¹⁵⁴ ICC-01/04-01/06-2458-Conf, paragraph 38.

¹⁵⁵ Transcript of hearing on 10 March 2010, ICC-01/04-01/06-T-258-CONF-ENG CT2, page 73, line 15 to page 79, line 19.

¹⁵⁶ Transcript of hearing on 15 March 2010, ICC-01/04-01/06-T-261-CONF-ENG CT, page 30, line 8 to page 31, line 8.

¹⁵⁷ Document bearing the ERN number DRC-OTP-0223-0117 contained in ICC-01/04-01/06-2417-Conf-Anx17.

Annexes 23 to 28: Documents obtained from the Registry relating to witness DRC-OTP-WWWW-0011

81. Annexes 23 to 28 are documents relating to prosecution witness DRC-OTP-WWWW-0011.¹⁵⁸ On 15 December 2009 the defence requested the assistance of the Registry in obtaining certain official documents from the DRC.¹⁵⁹ On 17 March 2010, the Registry transmitted the results of this request to the defence.¹⁶⁰ The documents include: Annex 23, a transcript from an interview with a police officer in the DRC concerning witness DRC-OTP-WWWW-0011; Annex 24, the confirmation of receipt of a communication received from the ICC field office and notice of the transmission of a transcript and annexes [REDACTED] to the ICC field office, dated 15 March 2010; Annex 25, a communication from the ICC field office in Kinshasa [REDACTED], dated 5 May 2010; Annex 26, a letter from the Registrar of the ICC [REDACTED], dated 20 January 2010; Annex 27, a copy of an order of release from detention for witness DRC-OTP-WWWW-0011 ([REDACTED]); and Annex 28, the prison register [REDACTED] concerning witness DRC-OTP-WWWW-0011.¹⁶¹

82. The defence argues that this evidence goes to the credibility of witness DRC-OTP-WWWW-0011. However, the prosecution contends that, as this witness was not convicted, his arrest alone can have no bearing on the determination of his character and credibility.

83. The fact that an individual was merely suspected of a criminal offence does not constitute proof of a lack of credibility. Furthermore, it is preferable for the witness in question to be given the opportunity of

¹⁵⁸ ICC-01/04-01/06-2417-Conf, paragraph 57; Documents bearing the ERN numbers: DRC-D01-0003-2595 contained in ICC-01/04-01/06-2417-Conf-Anx 23, DRC-D01-0003-2597 contained in ICC-01/04-01/06-2417-Conf-Anx24, DRC-D01-0003-2598 contained in ICC-01/04-01/06-Conf-Anx25, DRC-D01-0003-2599 contained in ICC-01/04-01/06-2514-Conf-Anx26, DRC-D01-0003-2600 contained in ICC-01/04-01/06-2514-Conf-Anx27 and DRC-D01-0003-2602 contained in ICC-01/04-01/06-2417-Conf-Anx28.

¹⁵⁹ ICC-01/04-01/06-2417-Conf, paragraph 57.

¹⁶⁰ ICC-01/04-01/06-2417-Conf, paragraph 58.

¹⁶¹ ICC-01/04-01/06-2417-Conf, paragraph 58; ICC-01/04-01/06-2417-Conf-Anx1, page 16.

addressing this kind of material during the course of his or her evidence. Given, in the present instance, the documents indicate that the witness was detained and thereafter released because of lack of evidence, the documents are irrelevant to any substantive issue before the Court. In all the circumstances, the Chamber declines to admit annexes 23 to 28 into evidence.¹⁶²

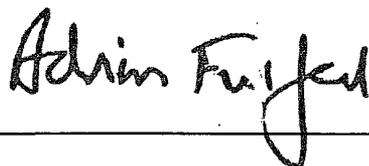
84. Accordingly, the Chamber:

- a. **grants** the defence Request in relation to the transcripts of the further interviews conducted with prosecution witnesses DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008, DRC-OTP-WWWW-0010, DRC-OTP-WWWW-0011, DRC-OTP-WWWW-0299 contained in Annexes 2 to 5 and Annex 11;
- b. **grants** the defence Request in relation to the transcripts of the interviews with DRC-OTP-WWWW-0496 and DRC-OTP-WWWW-0497 contained in Annexes 6 to 8;
- c. **refuses** the defence Request in relation to the transcripts of the interviews with DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009 contained in Annexes 9 and 10;
- d. **grants** the defence Request in relation to the expense documents relevant to DRC-OTP-WWWW-0316 and DRC-OTP-WWWW-0321, DRC-OTP-WWWW-0031, DRC-OTP-WWWW-0015 and DRC-OTP-WWWW-0016 contained in Annexes 12 to 16;
- e. **grants** the defence Request in relation to DRC-OTP-0216-0107 contained in Annex 17;

¹⁶² Documents bearing the ERN numbers: DRC-D01-0003-2595 contained in ICC-01/04-01/06-2417-Conf-Anx 23, DRC-D01-0003-2597 contained in ICC-01/04-01/06-2417-Conf-Anx24, DRC-D01-0003-2598 contained in ICC-01/04-01/06-Conf-Anx25, DRC-D01-0003-2599 contained in ICC-01/04-01/06-2514-Conf-Anx26, DRC-D01-0003-2600 contained in ICC-01/04-01/06-2514-Conf-Anx27 and DRC-D01-0003-2602 contained in ICC-01/04-01/06-2417-Conf-Anx28.

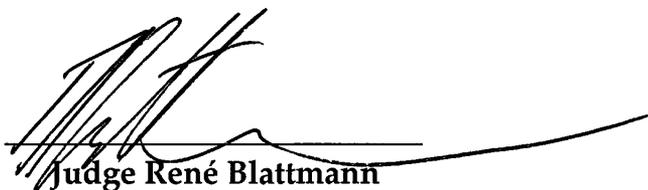
- f. **grants** the defence Request in relation to documents DRC-OTP-0224-0495, DRC-OTP-0224-0347 and DRC-OTP-0064 contained in Annexes 18, 19 and 20;
- g. **grants** the defence Request in relation to document DRC-OTP-0223-0106 contained in Annex 21 only in relation to the issue of “REDACTED” school attendance;
- h. **grants** the defence Request in relation to DRC-OTP-0223-0117 contained in Annex 22; and
- i. **refuses** the defence Request in relation to documents DRC-D01-0003-2595, DRC-D01-0003-2597, DRC-D01-0003-2598, DRC-D01-2599, DRC-D01-0003-2600, DRC-D01-0003-2602 contained in Annexes 23 to 28;
- j. **instructs** the Registry to assign EVD numbers to the documents contained in Annexes 2 – 8 and 11 – 22.

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



Judge Adrian Fulford

Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 8 March 2011

At The Hague, The Netherlands