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International Criminal Court

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No.: **ICC-01/04-01/06**
Date: **13 June 2008**

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 Version

Decision on the admissibility of four documents

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

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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" or "ICC"), in the case of The Prosecutor v. Thomas Lubanga Dyilo, delivers the following decision on the admissibility of 4 documents ("Decision"):

I. Procedural history

1. In its decision of 9 November 2007 the Trial Chamber held, *inter alia*, that the Office of the Prosecutor ("prosecution") had to serve the entirety of its evidence on the defence by 14 December 2007[1] with explanations justifying any redactions.[2]

2. The Chamber further held, on 4 December 2007, that the removal of any redactions made pursuant to Rule 81(4) of the Rules of Procedure and Evidence ("Rules") would require its authorisation.[3]

3. The prosecution filed, on 12 December 2007, the "Prosecution's application for lifting redactions, non-disclosure of information and disclosure of summary evidence".[4] Attached as annexes thereto were:

- the witness statement of a [REDACTED];[5]

- redacted copies of three notebooks, [REDACTED], which list alleged child soldiers;[6] and

- a logbook purportedly recording the entry into, and departure from, [REDACTED] by child soldiers.[7]

[1] Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2008, ICC-01/04-01/06-1019, paragraph 25.
[2] *Ibid*, paragraph 27
[3] Transcript of hearing on 4 December 2007, ICC-01/04-01/06-T-62-ENG, page 23, lines 12-20.
[4] Prosecution's application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 12 December 2007, ICC-01/04-01/06-1081
[5] *Ibid*, Annex 43.
[6] *Ibid*, Annexes 46-48 See also Prosecution's Submission on the Admissibility of Four Documents, 28 March 2008, ICC-01/04-01/06-1245-Conf, paragraph 5, Transcript of hearing of 12 March 2008, ICC-01/04-01/06-T-78-ENG, page 59, lines 15-16.

4. These had originally been disclosed, in part, on 25 September and, for the remainder, on 19 October 2007.[8]

5. Whilst the authors of the books are unavailable to give evidence, [9] [REDACTED] will be called as a prosecution witness.[10] The prosecution, in its 12 December 2007 filing, sought the Chamber's authorisation to lift redactions on these documents,[11] having indicated it intends to rely on them.[12]

6. During the Status Conference on 12 March 2008, the Bench indicated that prior to ruling on this request to lift redactions, it was necessary to establish whether the documents in question were admissible,[13] given the authors of the logbooks are not available to give evidence.[14] This was identified as an issue of importance[15] and the Bench invited the parties to file written submissions on the matter.[16] The prosecution filed the "Prosecution's submission on the admissibility of four documents" on 28 March 2008[17] followed by the defence's "Réponse de la défense à la « Prosecution's submission on the admissibility of four documents » datée du 28 mars 2008" on 7 April 2008.[18]

II. Submissions of the parties

[7] Prosecution's application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 12 December 2007, ICC-01/04-01/06-1081, Annex 51. See also Prosecution's submission on the admissibility of four documents, 28 March 2008, ICC-01/04-01/06-1245-Conf, paragraph 8, ICC-01/04-01/06-T-78-ENG, page 60, lines 3-7.
[8] Prosecution's submission on the admissibility of four documents, 28 March 2008, ICC-01/04-01/06-1245-Conf, footnote 1.
[9] Prosecution's submission on the admissibility of four documents, 28 March 2008, ICC-01/04-01/06-1245-Conf, paragraph 10, ICC-01/04-01/06-T-78-ENG, page 59, line 1
[10] *Ibid.*, paragraph 34-6; ICC-01/04-01/06-T-78-CONF-ENG, page 58, lines 20-21
[11] Prosecution's application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 12 December 2007, ICC-01/04-01/06-1081.
[12] Prosecution's submission on the admissibility of four documents, 28 March 2008, ICC-01/04-01/06-1245-Conf, paragraph 3
[13] ICC-01/04-01/06-T-78-CONF-ENG, page 55, lines 15-16.
[14] Prosecution's submission on the admissibility of four documents, 28 March 2008, ICC-01/04-01/06-1245-Conf, paragraph 10.
[15] ICC-01/04-01/06-T-78-CONF-ENG, page 53, line 17
[16] *Ibid*, page 56, lines 4-5
[17] Prosecution's submission on the admissibility of four documents, 28 March 2008, ICC-01/04-01/06-1245-Conf
[18] Réponse de la Défense à la « Prosecution's submission on the admissibility of four documents » datée du 28 mars 2008, 7 April 2008, ICC-01/04-01/06-1265-Conf.

The prosecution submissions

7. The prosecution avers that the documents are admissible, in accordance with the Rome Statute ("Statute"), on the basis that "the documents are relevant and probative of issues in the proceedings, and there are sufficient indicia of reliability to warrant their admission".[19] The prosecution included in its written submissions an analysis of the Statute and the relevant jurisprudence, arguing that Articles 69(3) and (4) create a straightforward test: that the evidence must be relevant, have probative value and be *prima facie* reliable.[20] The prosecution argued that the Chamber is free to assess the admissibility of any evidence against the background of the Court's goal of discovering the truth and ensuring a fair and expeditious trial under Articles 54(1), 64(2) and 69(3) of the Statute. The prosecution emphasised that the powers of the Chamber were not limited by the provisions of any national laws.[21] Thus, whilst the prosecution acknowledged that the documents in question may be inadmissible in certain national jurisdictions, it submitted that "the *ad hoc* importation of certain rules of evidence stemming from one legal tradition into the ICC context would be inconsistent with the object and purpose of the Statute."[22]

8. The prosecution, in its analysis of the history of the Rome Statute framework, argued that it reflected, to a significant extent, the experience of other international criminal tribunals, which have consistently admitted hearsay evidence.[23] Indeed, in its arguments on this issue, the prosecution focussed on the practice of particular international criminal tribunals.[24] It highlighted that the Nuremberg and Tokyo tribunals "could admit relevant hearsay evidence and this

[19] Prosecution's submission on the admissibility of four documents, 28 March 2008, ICC-01/04-01/06-1245-Conf, paragraph 10
[20] *Ibid*, paragraph 11.
[21] *Ibid*, paragraph 13.
[22] *Ibid.*, paragraph 14
[23] *Ibid*, paragraph 15.
[24] *Ibid*, paragraphs 16-25.

was considered not to render the trial unfair". This approach, in the prosecution's submission, was due, *inter alia,* to "the unique circumstances" of the tribunals, and the lack of a jury.[25]

9. Addressing the circumstances of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"), the prosecution, having cited the relevant provisions of those tribunals, argued that they are the precursors of the relevant ICC provisions.[26] The prosecution submitted that the *ad hoc* tribunals adopt a "broad" approach to the admission of evidence, within which relevant evidence is "clearly admissible".[27]

10. The prosecution also focussed its submissions on the test applied by the *ad hoc* tribunals to the admissibility of statements made out of court. The prosecution suggested that the ICTY Appeals Chamber has identified certain indicia of reliability which may assist the court when determining admissibility, including the following factors: voluntariness, truthfulness, trustworthiness, the content of the statement and the circumstances in which the evidence came into existence.[28]

11. Whilst the prosecution acknowledged that the Chamber may exclude irrelevant evidence, the probative value of which is outweighed by its prejudicial effect, it argued that probative value should not be viewed in isolation but rather as part of the whole body of evidence.[29] The prosecution noted that indicia of reliability for documentary evidence referred to by the ICTY (in addition to the above) include the source of the document, the place where it was seized, testimony concerning the chain of custody following seizure, the nature of the document (such as whether it bears a signature or stamp, its structure, whether it is a fax or

[25] *Ibid*, paragraph 16
[26] *Ibid*, paragraph 17.
[27] *Ibid.*, paragraph 19
[28] *Ibid*, paragraph 21.
[29] *Ibid*, paragraph 22.

a letter), the method of its transmission (where relevant), its content, the purpose for which the document was created and when it was created.[30] It was emphasised by the prosecution that there is 'no legal basis' in international criminal jurisprudence for suggesting "that proof of authenticity is a threshold requirement for the admissibility of documentary evidence".[31] Therefore, it was argued that there was "no express provision excluding documents simply on the grounds that the author has not been called to testify". [32]

12. The prosecution acknowledged that this Court is not bound by jurisprudence of the *ad hoc* tribunals but argued, nonetheless, that they provide "persuasive authority".[33] On the basis of this approach, the prosecution submitted that the documents are relevant and probative of the "systematic policy to enlist children into the UPC/FPLC"[34] at the relevant time.[35] Furthermore, the prosecution suggested that the documents bear many of the relevant indicia of reliability – described above – that it submits are a precondition of admission.[36] Particularly, it argued that the notebooks were from a reliable source and were compiled for a reliable purpose.[37] The prosecution averred it would be able to establish these two propositions in due course because the "source" of the documents, [REDACTED] will be called as a witness, [REDACTED] will support his credibility.[38] Moreover, the prosecution argued that the documents are likely to be reliable because they were created contemporaneously with the events they record, during the "normal course of business", and in accordance with a "credible and reliable system".[39]

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[30] *Ibid*, paragraph 23.
[31] *Ibid*, paragraph 24.
[32] *Ibid.*, paragraph 25.
[33] *Ibid*, paragraph 26.
[34] *Ibid*, paragraph 30.
[35] *Ibid*, paragraph 29.
[36] *Ibid*, paragraphs 32-47.
[37] *Ibid*, paragraphs 33-36
[38] *Ibid*, paragraph 34
[39] *Ibid*, paragraph 36.

13. Applying these indicia of reliability to the logbooks the prosecution argued that the requirements of admissibility in the following areas are satisfied: source, purpose, chain of custody, consistency in recording and corroboration with other evidence.[40] The prosecution noted that the logbooks consistently record key identifying details of alleged child soldiers;[41] they were prepared contemporaneously with demobilisation; and they were not created by either party to the proceedings, or for litigation purposes, but rather were compiled to monitor the children. Thus, the prosecution contended that there had been "no reason to falsify these reports".[42] Moreover, the prosecution argued there is consistency within and between the logbooks and the [REDACTED],[43] and that other witnesses[44] will provide corroboration which enhances the reliability of the logbooks and their value as evidence.[45]

14. Finally, the prosecution submitted that admitting the documents will not undermine the accused's right to a fair trial, because the defence can challenge the veracity of the documents by questioning the [REDACTED]who will testify about them.[46]

The defence submissions

15. The defence rehearsed that, on 31 March 2008, it had requested leave to appeal the Chamber's decision of 20 March 2008 on defence disclosure.[47] In particular, the defence noted that it had requested leave to appeal its obligation to raise any issues concerning the admissibility or relevance of evidence three weeks in advance of the trial and it had requested the

[40] *Ibid*, paragraphs 37-47.
[41] *Ibid*, paragraphs 38-39
[42] *Ibid*, paragraph 40
[43] *Ibid.*, paragraphs 42-44.
[44] *Ibid*, paragraphs 45-46.
[45] *Ibid*, paragraph 47.
[46] *Ibid*, paragraph 49.
[47] Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235.

suspension of the proceedings for the duration of the appeal.[48] The defence averred that all pre-trial deliberations on the admissibility of evidence are covered by the requested suspension and thus the current issue should be suspended during the appeal process.[49] Moreover the defence emphasised that it did not have in its possession, at the time of preparing its written submissions, non-redacted versions of the four documents in question,[50] and it submitted that the redactions appear to cover essential information.[51] Thus, the defence argued that it was unable to advance informed submissions on the admissibility of the four documents, because the redactions are too significant.[52] In support of a postponement of the issue, the defence relied on Article 64 of the Statute, which, it submitted, indicates that all objections to admissibility should be raised during the presentation of the evidence before the Chamber.[53] Similarly, the defence argued that the prosecution was barred from using the statement of [REDACTED] because it has yet to be put in evidence before the Chamber.[54] It should be noted that this witness statement has been filed with the Court.

16. In the alternative, the defence argued that the four documents in question are inadmissible.[55] The defence noted the prosecution does not intend to call as witnesses the authors of the documents,[56] and whilst it is anticipated that [REDACTED], the defence contended that this person, in reality, has no personal knowledge of them, since [REDACTED].[57] This situation, argued the defence, was unacceptable because it deprives the defence of the opportunity to examine the authors of the documents in order to verify their contents, the

[48] Réponse de la Défense à la « Prosecution's Submission on the Admissibility of Four Documents » datée du 28 mars 2008, 7 April 2008, ICC-01/04-01/06-1265-Conf, paragraphs 3-4; Decision on defence disclosure, 20 March 2008, ICC-01/04-01/06-1235, paragraph 41 (c).
[49] *Ibid*, paragraph 5
[50] *Ibid*, paragraph 6
[51] *Ibid*, paragraph 7.
[52] *Ibid*, paragraph 8.
[53] *Ibid*, paragraph 9.
[54] *Ibid.*, paragraph 11.
[55] *Ibid*, paragraph 12.
[56] *Ibid*, paragraph 13
[57] *Ibid*, paragraph 14.

methods applied to, and the context of, their preparation, and thus their reliability, validity and relevance.[58] Given the significance which the prosecution attaches to these documents – for instance, that they reveal a systematic policy of the recruitment of child soldiers – the defence submitted it was incomprehensible that the prosecution had chosen not to call the authors as witnesses. In this context the defence stressed the means at the prosecution's disposal.[59] The importance of the authors appearing as witnesses in the trial was reinforced, in the contention of the defence, because only they can provide clarification on the content of the records.[60]

17. The defence argued that the prosecution had misinterpreted the documents.[61] The defence focussed on particular extracts from them, together with the relevant submissions from the prosecution and it was submitted this exercise revealed errors on the prosecution's behalf. For instance, the defence maintained that there are inconsistencies in the documents regarding whether the children were soldiers.[62] Furthermore, the point was made that there is no internal record in the logbooks as to the place where they were written,[63] and that, contrary to the prosecution's submissions, the documents sometimes do not include the age of the child and where they allegedly acted as soldiers.[64] In the submission of the defence, nothing in the entries indicates that the children concerned were child soldiers or that the books originate from the same [REDACTED].[65] In the circumstances, the defence argued that the prosecution's conclusions on the relevance and probative value of the documents have no basis in the information contained in the documents.[66] Similarly, it was contended by the defence that there is no evidence from within the documents that they were prepared contemporaneously with

[58] *Ibid*, paragraph 16.
[59] *Ibid*, paragraph 17.
[60] *Ibid*, paragraph 18.
[61] *Ibid*, paragraph 18.
[62] *Ibid*, paragraph 19(a).
[63] *Ibid*, paragraph 19(b).
[64] *Ibid*, paragraph 19(c)-(d).
[65] *Ibid*, paragraph 19(e)
[66] *Ibid*, paragraph 19(f).

events they allegedly concern[67] or that they are exit and entry records, as suggested.[68] The defence further argued that the prosecution have erroneously claimed that the "entrance" logbook sets out the armed group to which particular children belonged.[69] Similarly, the defence argued that it was inaccurate for the prosecution to claim that they record the parental link between the children and the persons with whom they were reunited; instead, the defence asserted that the logbooks merely describe a wider possible relationship with the child.[70] The defence submitted that only examination of the authors of the documents, rather than the documents themselves, can establish the reasons for their creation and establish the extent of any falsification.[71] The defence additionally submitted that it was not possible for it to test the prosecution's claim that there was consistency between the documents due to their heavy redactions.[72] As the notebooks have not been put in evidence before the Chamber, the defence submitted they cannot provide corroborative evidence.[73] Again, it is to be noted that this material has been filed with the Court. Finally, the defence argued that, in the circumstances, it is unsustainable for the prosecution to seek to argue that the documents are reliable because they were created during the normal course of business, under a credible and trustworthy system. Rather, the defence contended that any assessment of their probative value depends on the defence having the opportunity to question the people who prepared them.[74]

III. Relevant Provisions

Article 64(9) of the Statute

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[67] *Ibid*, paragraph 19(g)
[68] *Ibid*, paragraph 19(h)
[69] *Ibid*, paragraph 19(i)
[70] *Ibid.*, paragraph 19(j).
[71] *Ibid*, paragraph 19(k)
[72] *Ibid*, paragraph 19(l).
[73] *Ibid*, paragraph 19(m).
[74] *Ibid*, paragraph 19(n)

Functions and Powers of the Trial Chamber

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

a) Rule on the admissibility or relevance of evidence

[...]

Article 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.

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.

[...]

5. The Chambers shall not apply national laws governing evidence, other than in accordance with article 21.

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.

IV. Analysis and Conclusions

The preliminary issue of whether admissibility should be discussed prior to the trial

18. The defence raised in its filing the issue of when admissibility objections should be raised,[75] and it submitted that they do not fall for consideration until the evidence is presented during the trial. This issue has already been dealt with by the Chamber, and there are no sustainable objections to this issue being dealt with in advance of trial. [76] Leave to appeal was sought and refused on this issue; however, the Chamber rescinded the order.[77]

The admissibility of evidence other than direct oral evidence

19. There are **four key factors** arising from the provisions contained within the statutory framework which provide the necessary starting-point for an investigation of the Trial Chamber's general approach to this issue.

20. **First**, the chamber's statutory authority to request the submission of all evidence that it considers necessary in order to determine the truth: Article 69(3).

21. **Second**, the Chamber's obligation to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused: Article 64(2).

[75] *Ibid.*, paragraphs 9-11.
[76] Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235, paragraph 36.
[77] Decision on the defence request for leave to appeal the "Decision on disclosure by the defence", 8 May 2008, ICC-01/04-01/06-1313, paragraph 22.

22. **Third**, although the Rome Statute framework highlights the desirability of witnesses giving oral evidence – indeed, the first sentence of Article 69(2) requires that "[t]he 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 the Rules of Procedure and Evidence" - the second and third sentence of Article 69(2) provide for a wide range of other evidential possibilities: "[t]he 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." Therefore, notwithstanding the express reference to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate. Article 68, which is expressly referred to in the first sentence of Article 69(2) as providing instances when there may be a departure from the expectation of oral evidence, deals directly with the particular exigencies of trials before the ICC, and most particularly there is an express recognition of the potential vulnerability of victims and witnesses, along with the servants and agents of a State,[78] which may require "special means" to be used for introducing evidence.[79] The Court is enjoined to consider the range of possibilities that exist to afford protection, subject always to the rights of the accused and the need for the trial to be fair and impartial.

23. **Fourth**, Article 69(4) of the Statute confers on the Chamber a broad power to make decisions as regards evidence: "[t]he 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 witness, in accordance with the Rules of Procedure and Evidence" and by Article 64(9) the Trial Chamber has the power

[78] Article 68 (6) of the Statute.
[79] Article 68 (2) of the Statute.

to "[r]ule on the admissibility or relevance of any evidence." Therefore, the Court *may* rule on the relevance *or* admissibility of evidence, and Rule 63(2) provides that "[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9 to assess freely all evidence". It follows that the Chamber has been given a wide discretion to rule on admissibility or relevance and to asses any evidence, subject to the specified issues of "fairness".

24. **Therefore, summarising these four key factors**, the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to "apply national laws governing evidence". For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling – for credible reasons – to give evidence.

25. If a challenge is made to the admissibility of evidence, it appears logical that the burden rests with the party seeking to introduce the evidence– in this case the

prosecution. This has been the practice of the ICTY[80] and there seems no reason to disturb this self-evidently sensible requirement.

26. Bearing in mind those key considerations, when the admissibility of evidence other than direct oral testimony is challenged the approach should be as follows.

27. **First**, the Chamber must ensure that the evidence is *prima facie* **relevant** to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. In this Decision, however, it is unnecessary to analyse further the meaning or the application of this expression, particularly since there has been no suggestion that this first test is not satisfied as regards the documents in question.

28. **Second**, the Chamber must assess whether the evidence has, on a *prima facie* basis, **probative value**. In this regard there are innumerable factors which may be relevant to this evaluation, some of which, as set out above, have been identified by the ICTY. The Appeals Chamber in *Aleksovski* stated that the indicia of reliability include whether the evidence is "voluntary, truthful and trustworthy, as appropriate; and for this purpose [the Trial Chamber] may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant..."[81]

[80] ICTY, *Prosecutor v Oric*, IT-03-68, Trial Chamber, Transcript of hearing on 7 October 2004, page 275, lines 6-8
[81] ICTY, *Prosecutor v Aleksovski*, IT-95-14/1, Decision on prosecutor's appeal on admissibility of evidence, 16 February 1999, paragraph 15 [footnotes omitted]. Cited with approval in *Prosecutor v Martic*, IT-95-11, Decision adopting guidelines on the standards governing the admission of evidence, 19 January 2006, Annex A 'Guidelines on the Standards Governing the Admission of Evidence', paragraph 8.

29. However, it is necessary to emphasise that there is no finite list of possible criteria that are to be applied, and a decision on a particular disputed piece of evidence will turn on the issues in the case, the context in which the material is to be introduced into the overall scheme of the evidence and a detailed examination of the circumstances of the disputed evidence. There should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall. Whilst the suggested test of the "indicia of reliability", as relied on by the prosecution and described by the ICTY, may be a helpful tool, the Chamber must be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness.

30. It is necessary to observe that if, in the circumstances, it is impossible for the Chamber to conduct any independent evaluation of the evidence – if there are no adequate and available means of testing its reliability – then the court will need to consider carefully whether the party seeking to introduce it has met the test of demonstrating, *prima facie*, its probative value. Similarly, if evidence is demonstrably lacking any apparent reliability the Chamber must equally carefully decide whether to exclude the evidence at the outset or whether to leave that decision until the evidence overall is considered by the Chamber at the end of the case.

31. **Third**, the Chamber must, where relevant, weigh **the probative value of the evidence against its prejudicial effect**. Whilst it is trite to observe that all evidence that tends to incriminate the accused is also "prejudicial" to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed 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.

32. It follows, that this will always be a fact-sensitive decision, and the court is free to

assess any evidence that is relevant to, and probative of, the issues in the case, so long as it is fair for the evidence to be introduced.

The disputed documents

33. Given that the Chamber is to rule on the admissibility of this material, it has been necessary to consider the documents in some detail. However, it is to be stressed that any conclusions on factual issues have been reached for the purposes of this ruling on admissibility only, and they do not in any sense prejudge the eventual assessment that must be made of the evidence as a whole at the end of the case.

34. Although there is no apparent suggestion that the materials are **irrelevant**, the Chamber has, in any event, addressed their *prima facie* relevance. The logbooks ostensibly record the entrance and exit of child soldiers [REDACTED] at the relevant time, and they include details such as the children's age and the apparent date of their entry or departure. This material is relevant to the existence of child soldiers during a period relating to the charges. The notebooks provide various details about the children: their personal histories, their involvement with armed groups and their demobilisation. The notebook at Annex 46 of the prosecution's 12 December 2007 filing, for example, records the child's identity and age both of which are highly relevant to the requirement in the Elements of Crimes that the victims were children at the required time. The notebook at Annex 46 also details the armed group for which the child allegedly fought, his role therein and the operations in which he is said to have taken part.[82] The notebook in Annex 47 provides similar details.[83] Such details all relate, *prima facie*, to the charges against the accused and potentially develop the factual basis of the charges.

[82] Prosecution's application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 12 December 2007, ICC-01/04-01/06-1081, Annex 46.
[83] *Ibid*, Annex 47.

35. For these reasons, in the context of this case which concerns child soldiers, the Chamber is persuaded that this evidence is potentially relevant to its consideration of the charges the accused faces.

36. Turning to the possible **probative value** of the evidence, the Chamber has carefully borne in mind that the authors of the notebooks and the logbooks will not be called as witnesses. However, that fact, although an important consideration, is not in itself determinative of admissibility, for the reasons set above.

37. Rather than concentrating on the sole issue of whether the authors are to give evidence, the Chamber has looked generally at the relevant circumstances and has concluded that the logbooks and notebooks bear sufficient apparent indicia of reliability. There are several relevant circumstances which tend to indicate that they are not vitiated by error, distortion or fabrication. First, the documents were created by [REDACTED] in consultation with the children themselves, and information was also collected from the field and shared and compiled during weekly meetings with co-operating partners [REDACTED].[84] This collaboration with other centres and NGOs provides the possibility of cross-checking the material, thereby identifying any errors. Second, as the prosecution accurately points out, these documents are alleged to have been created during the normal course of a credible business,[85] [REDACTED][86] and monitored [REDACTED].[87] Third, at present no suggestion has been made that there was a motive to fabricate or distort the records. These factors all provide means of testing the reliability of the documents, since they came into existence in a context which arguably reduced the risk of error, distortion or fabrication.

[84] *Ibid.*, paragraph 43.
[85] *Ibid*, paragraph 36.
[86] *Ibid*, paragraph 34.
[87] *Ibid*, paragraph 42.

38. The logbooks were seemingly created contemporaneously with the events they purport to record – the demobilisation of child soldiers. Accordingly, errors associated with failing memories are not apparently great. Similarly, the recording of the notebooks ostensibly occurred contemporaneously with the children reporting those events. However, the notebooks also record the involvement of children in armed conflict – events which occurred significantly before the notebooks were created. Indeed the notebook at Annex 47 of the prosecution's filing purports to record events that occurred in 2001.[88] However, those events were, *prima facie*, of fundamental importance to the children who purportedly reported them, given they relate to their participation in military operations or being wounded.[89]

39. Whilst the documents are not printed on official paper and they do not bear a stamp, they are apparently signed by the relevant social workers and are seemingly written in different handwriting.

40. The documents are, *prima facie*, internally consistent and are seemingly corroborated by the witness statement [REDACTED]. The prosecution accurately points out that there is consistency between the entry and exit logbooks, in that records of children entering the [REDACTED] are reflected by records of them leaving.[90] Similarly, the witness statement of [REDACTED] provides a significant degree of corroboration in that [REDACTED] is able to discuss some of the children described in the notebooks and one of the authors of the notebooks.[91]

41. Finally, **in weighing the potential probative value of the evidence against its possible prejudicial effect**, the admission of the documents will not be

[88] Prosecution's application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 12 December 2007, ICC-01/04-01/06-1081, Annex 47
[89] *Ibid.*, Annex 46
[90] Prosecution's submission on the admissibility of four documents, 28 March 2008, ICC-01/04-01/06-1245-Conf, paragraph 41
[91] Prosecution's application for lifting of redactions, non-disclosure of information and disclosure of summary evidence, 12 December 2007, ICC-01/04-01/06-1081, Anx 43, paragraphs 171 and 180-181.

prejudicial to the fairness of the trial. The evidence is relevant to the issues in the case and for the reasons extensively set out above there are sufficient means of testing and evaluating its reliability.

42. For these reasons, the Chamber decides that the documents are admissible. In due course the Chamber will decide what, if any, significance is to be attributed to this material. The application to lift redactions on these documents will be dealt with in due course as appropriate.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 13 June 2008

At The Hague, The Netherlands