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International Criminal Court

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Date: 3 May 2011

THE APPEALS CHAMBER

Before: **Judge Akua Kuenyehia, Presiding Judge**
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public document

Judgment
on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Liriss Nkwebe
Mr Aimé Kilolo-Musamba

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" of 19 November 2010 (ICC-01/05-01/08-1022),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" is reversed.

REASONS

I. KEY FINDINGS

1. Evidence is "submitted" if it is presented to the Trial Chamber by the parties on their own initiative or pursuant to a request by the Trial Chamber for the purpose of proving or disproving facts in issue, and in conformity with the directions of the Presiding Judge or the manner agreed upon by the parties. The items on the Revised List of Evidence that the Trial Chamber admitted into evidence were not evidence submitted in terms of article 74 (2) of the Statute and rule 64 (1) of the Rules of Procedure and Evidence.

2. By admitting into evidence all the items on the Revised List of Evidence based on a "*prima facie* finding of admissibility", without an item-by-item evaluation or giving reasons, the Trial Chamber acted outside the legal framework of the Court.

3. The Trial Chamber's admission into evidence of the witnesses' written statements without a cautious item-by-item analysis and without satisfying rule 68 of the Rules of Procedure and Evidence was incompatible with the principle of orality established by article 69 (2) of the Statute.

II. PROCEDURAL HISTORY

4. On 19 November 2010, Trial Chamber III (hereinafter: "Trial Chamber") rendered, by majority, the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"[1] (hereinafter "Impugned Decision"). Judge Ozaki dissented from this decision and filed a dissenting opinion on 23 November 2010.[2]

5. On 29 November 2010, the Prosecutor[3] and Mr Jean-Pierre Bemba Gombo[4] (hereinafter: "Mr Bemba") sought leave to appeal the Impugned Decision, which the Trial Chamber granted on 26 January 2011[5] (hereinafter: "Decision Granting Leave to Appeal").

6. On 7 February 2011, Mr Bemba[6] and the Prosecutor[7] filed their documents in support of the appeals against the Impugned Decision (hereinafter: "Mr Bemba's Document in Support of the Appeal" and "Prosecutor's Document in Support of the Appeal", respectively).

7. On 18 February 2011, the Prosecutor filed his response to Mr Bemba's Document in Support of the Appeal[8] (hereinafter: "Response to Mr Bemba's Document in Support of the Appeal").

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[1] ICC-01/05-01/08-1022.
[2] "Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1028.
[3] "Prosecution's Application for Leave to Appeal the 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", ICC-01/05-01/08-1059.
[4] "Application for leave to appeal Trial Chamber III's decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1061. The Prosecutor responded to this filing on 6 December 2010, *see* "Prosecution's Response to Defence 'Application for leave to appeal Trial Chamber III's decision on the admission into evidence of materials contained in the prosecution's list of evidence'", ICC-01/05-01/08-1079.
[5] "Decision on the prosecution and defence applications for leave to appeal the 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", ICC-01/05-01/08-1169.
[6] "Defence appeal against the 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence' of 19 November 2010", ICC-01/05-01/08-1191.
[7] "Prosecution's Document in Support of Appeal against Trial Chamber III's 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence' (ICC-01/05-01/08-1022)", ICC-01/05-01/08-1194.
[8] "Prosecution's Response to the 'Defence appeal against the "Decision on the admission into evidence of material contained in the Prosecution's list of evidence" of 19 November 2010'", ICC-01/05-01/08-1264.

III. MERITS OF THE APPEALS

A. Procedural context and relevant part of the Impugned Decision

8. On 4 November 2009, the Prosecutor filed, at the request of the Trial Chamber,[9] the "Prosecution's submission of its 'Summary of Presentation of Evidence' Confidential, *Ex Parte,* Prosecution and Defence only Annexes A and B", annexing a "List of Evidence".[10] (hereinafter: "List of Evidence of 4 November 2009"). On 15 January 2010, again at the request of the Trial Chamber,[11] the Prosecutor filed the "Prosecution's Submission of its 'Updated Summary of Presentation of Evidence' with Confidential, *Ex Parte*, Prosecution and Defence Only Annexes A, B, C, D and Public Annex E'"[12] (hereinafter: "Summary of Presentation of Evidence"). He annexed to this filing *inter alia* an "Updated List of Evidence (15 January 2010)"[13] (hereinafter "List of Evidence of 15 January 2010"),[14] listing the "incriminatory evidence [...] which [the Prosecutor] currently intends to rely upon at trial, without excluding the possibility of introducing further evidence necessary to establish the truth".[15]

9. On 4 October 2010, the Trial Chamber issued an order[16] (hereinafter: "Order of 4 October 2010") to the parties and participants to file observations on "the potential submission into evidence of the witness statements of those witnesses to be called to

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[9] *See* ICC-01/05-01/08-T-14-ENG, pp. 12-13.
[10] ICC-01/05-01/08-595-Conf-AnxB.
[11] *See* ICC-01/05-01/08-T-18-ENG, pp. 44-46.
[12] ICC-01/05-01/08-669.
[13] ICC-01/05-01/08-669-AnxB.
[14]. Another document annexed to the Summary of Presentation of Evidence and entitled "List of Evidence (15 January 2010)", ICC-01/05-01/08-669-AnxD, except for the formatting, is identical in content to the "Updated List of Evidence (15 January 2010)".
[15] Summary of Presentation of Evidence, para. 9. Hereinafter, the List of Evidence of 4 November 2009 and the List of Evidence 15 January 2010 when referred to collectively will be designated as "Lists of Evidence".
[16] "Order for submissions on the presentation of evidence at trial", ICC-01/05-01/08-921.

give evidence at trial".[17] The Prosecutor,[18] the Office of Public Counsel for victims[19] and Mr Bemba[20] filed observations pursuant to this order.

10. Noting that the List of Evidence of 15 January 2010 did "not correspond exactly" with the order of witnesses to be called by the Prosecutor,[21] the Trial Chamber, in the Impugned Decision, ordered the Prosecutor to file a "revised and updated List of Evidence" by 22 November 2010[22] (hereinafter: "Revised List of Evidence").

11. Furthermore, under the heading "Decision", the Trial Chamber decided that:

> [A]ny materials, including witnesses' written statements and related documents previously disclosed to the defence and which will form part of the prosecution's Revised List of Evidence are *prima facie* admitted as evidence for the purpose of the trial.[23]

12. In its reasoning, the Trial Chamber explained that its decision to admit all items of evidence was "based on making a *prima facie* finding of the admissibility of [the] evidence".[24] The Trial Chamber stated that this finding must be distinguished

> [F]rom the [Trial] Chamber's future determination of the probative value to be given to the evidence since the Chamber will evaluate, in accordance with Rule 63(2) of the Rules, the probative value and appropriate weight to be given to the evidence as a whole, at the end of the case when making its final judgment. The Chamber would then make the appropriate determinations on whether the probative value of the evidence is out-weighed by its prejudicial effect.[25]

13. The Trial Chamber further stated that

> [A] ruling on admissibility is not a pre-condition for the admission of any evidence, as it only implies a *prima facie* assessment of the relevance of any material, on the basis that it appears to be *a priori* relevant to the case.[26]

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[17] Order of 4 October 2010, para. 2.
[18] "Prosecution's Position on Potential Submission of Witness Statements at Trial pursuant to Trial Chamber III's Order", 11 October 2010, ICC-01/05-01/08-941.
[19] "Legal Representative's Observations on the potential submission into evidence of the prior recorded statements of Prosecution witnesses testifying at trial", 11 October 2010, ICC-01/05-01/08-943.
[20] "Defence Observations on the Potential Submission into Evidence of the Prior Recorded Statements of Prosecution Witnesses Testifying at Trial", 18 October 2010, ICC-01/05-01/08-960.
[21] Impugned Decision, para. 29.
[22] Impugned Decision, para. 30.
[23] Impugned Decision, para. 35.
[24] Impugned Decision, para. 9.
[25] Impugned Decision, para. 9.
[26] Impugned Decision, para. 10, footnote omitted.

14. To support its approach, the Trial Chamber opined that under the legal framework of the Court, and subject to the exceptions stipulated in article 69 (7) of the Statute and rule 71 of the Rules of Procedure and Evidence, "no evidence is *per se* inadmissible" and that it was the "uncontested jurisprudence" of the Court that all evidence could be admitted unless an item was found to be inadmissible.[27] The Trial Chamber also recalled its powers under article 64 (6) (f) and (8) (b) of the Statute, rules 134 (1) and 140 of the Rules of Procedure and Evidence, and regulation 54 (g) and (i) of the Regulations of the Court in relation to the conduct of proceedings.[28]

15. Furthermore, the Trial Chamber noted that under the Court's legal framework, it could admit non-oral evidence.[29] While there was a "presumption in favour of oral testimony", there was "no prevalence of *orality* of the procedures as a whole", given that article 69 (2) of the Statute provided for exceptions to oral testimony and allowed for the discretionary introduction of non-oral evidence.[30] In addition, in the Trial Chamber's view, article 74 (2) of the Statute obliged the Chamber to consider all types of evidence for its final decision.[31]

16. Moreover, the Trial Chamber stated that under article 64 (9) and 69 (4) of the Statute, it was not obliged to rule on the admissibility of evidence, but had discretion to do so, reflecting a compromise reached between different legal traditions.[32] In the view of the Trial Chamber, it was only obliged to enter a ruling on the admissibility of a given item of evidence if the evidence could fall under the exclusionary rule of article 69 (7) of the Statute ("Evidence obtained by means of a violation of this Statute or internationally recognized human rights").[33] The Trial Chamber emphasised furthermore that despite the "*prima facie* admission into evidence" of the items on the Revised List of Evidence, the parties could still challenge, and the Chamber could rule on, the admissibility of the evidence.[34]

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[27] Impugned Decision, para. 10.
[28] Impugned Decision, paras 11-12.
[29] Impugned Decision, para. 13.
[30] Impugned Decision, para. 14.
[31] Impugned Decision, para. 15.
[32] Impugned Decision, para. 16-18.
[33] Impugned Decision, para. 18.
[34] Impugned Decision, para. 19.

17. Turning to the rights of the accused, the Trial Chamber underlined that Mr Bemba's right to examine, or to have examined, the witnesses against him was not infringed because the admission of the evidence was "not intended to replace oral testimony".[35] The Trial Chamber also stated that *prima facie* admission into evidence of the items fostered fairness and expeditiousness of the proceedings and could facilitate the preparation of the defence.[36]

18. In addition, the Trial Chamber referred to the practice of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: "ICTY"), the International Criminal Tribunal for Rwanda (hereinafter: "ICTR") and the Special Tribunal for Lebanon,[37] stating that "the *prima facie* admission of evidence, including witnesses' written statements is in keeping with the current developments of the procedural models adopted by the international criminal tribunals".[38]

19. The Trial Chamber also noted that most of the evidence had already been disclosed and used during the pre-trial phase of the proceedings and that the *prima facie* admission of this evidence would "allow for more coherence between the pre-trial and trial stages of the proceedings".[39] In the view of the Trial Chamber, there was "no compelling reason for the statements and related documents that were the basis for the charges to be confirmed by the Pre-Trial Chamber, not to be used at trial by the Trial Chamber".[40] Finally, the Trial Chamber expressed the view that the *prima facie* admission of the evidence "would be in line with the Chamber's statutory obligation [...] to search for the truth, and with the discretionary power of the judges to decide on additional elements as they deem necessary for the Chamber's determination of the truth".[41]

B. Submissions of the parties

20. In the Decision Granting Leave to Appeal, the Trial Chamber formulated the issue on appeal as follows:

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[35] Impugned Decision, para. 20.
[36] Impugned Decision, paras 21-24, 27.
[37] Impugned Decision, paras 25-26.
[38] Impugned Decision, para. 25.
[39] Impugned Decision, para. 27.
[40] Impugned Decision, para. 27.
[41] Impugned Decision, para. 28.

whether the legal framework of the ICC allows for *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Majority Decision, including witnesses' written statement (*sic*) and related documents previously disclosed to the defence and which form part of the prosecution's Revised List of Evidence.[42]

1. Submissions of Mr Bemba

21. Mr Bemba raises three grounds of appeal: a) that the legal framework of the Court does not allow for the *prima facie* admission into evidence of materials, as defined in paragraphs 9 and 10 of the Impugned Decision;[43] b) that the Trial Chamber's regime of *prima facie* admission into evidence of documents contravenes the rights of the accused;[44] and c) that the regime cannot be reconciled with the principle of orality imposed by the legal framework of the Court.[45]

22. As to the first ground of appeal, Mr Bemba notes that the Trial Chamber admitted *prima facie* into evidence all items referred to on the Revised List of Evidence in a "wholesale" manner, and that it will assess the probative value and weight of the individual items only at the end of the trial.[46] Mr Bemba submits that the Impugned Decision failed to point to any provision in the Court's legal framework that supports its approach.[47] In his view, the legal framework requires that only evidence that is relevant and that is "consistent with full respect for the rights of the accused" be admitted.[48] Mr Bemba argues furthermore that by admitting evidence without evaluating its probative value and prejudicial effect, evidence which might otherwise have been declared inadmissible will be put to witnesses, and it will be impossible for the judges to determine, at the end of proceedings, the extent to which a witness has been led or influenced by the inadmissible evidence.[49]

23. Mr Bemba submits furthermore that the Trial Chamber's approach does not find any support in the decisions of other Chambers of this Court on which the Trial Chamber relied in the Impugned Decision and contests the Trial Chamber's

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[42] Decision Granting Leave to Appeal, para. 37.
[43] Mr Bemba's Document in Support of the Appeal, paras 6, 8-32.
[44] Mr Bemba's Document in Support of the Appeal, paras 6, 33-52.
[45] Mr Bemba's Document in Support of the Appeal, paras 6, 53-63.
[46] Mr Bemba's Document in Support of the Appeal, para. 10.
[47] Mr Bemba's Document in Support of the Appeal, para. 16.
[48] Mr Bemba's Document in Support of the Appeal, para. 22.
[49] Mr Bemba's Document in Support of the Appeal, para. 24.

interpretation of those decisions.[50] Mr Bemba also distinguishes the Trial Chamber's approach from the approach adopted by the ICTY and ICTR.[51]

24. As to his second ground of appeal, Mr Bemba submits that it would violate his right to be informed of the charges against him if the Trial Chamber ruled on the admissibility of documents tendered into evidence only at the end of the proceedings because under this approach, the accused will know the nature of the Prosecutor's evidence against him only after the defence has closed its case.[52] Furthermore, he submits that the right of the accused to have adequate time and facilities for preparation of his defence is compromised if he has to investigate and defend against vast amounts of evidence that may ultimately be excluded by the Chamber.[53]

25. In addition, Mr Bemba asserts that the Impugned Decision conflicts with his right to be tried without undue delay because he has to question witnesses on all allegations made in their written statements, leading to lengthier cross-examination and prolonged proceedings.[54] He states that he will be required to lead evidence to rebut factual allegations contained in the evidence admitted *prima facie* even though these allegations may eventually not form part of the Prosecutor's case, thereby increasing the burden on the defence and wasting the time and resources of the Court.[55] Mr Bemba also argues that the Impugned Decision leads to a reversal of the burden of proof because as the Trial Chamber has admitted all evidence, it is now for him to challenge this decision.[56]

26. As to his right to question witnesses, Mr Bemba notes that the Impugned Decision does not indicate what would happen if a witness whose previous statements have been admitted fails to appear before the Court.[57] Mr Bemba assumes that in such a situation he would have to challenge the admissibility of the witness statements, amounting to a reversal of the burden of proof.[58] Furthermore, Mr Bemba submits that under the Trial Chamber's approach, he will not know the purpose for which the

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[50] Mr Bemba's Document in Support of the Appeal, paras 25-28.
[51] Mr Bemba's Document in Support of the Appeal, paras 30-32.
[52] Mr Bemba's Document in Support of the Appeal, paras 33-35.
[53] Mr Bemba's Document in Support of the Appeal, paras 36-37.
[54] Mr Bemba's Document in Support of the Appeal, para. 42.
[55] Mr Bemba's Document in Support of the Appeal, para. 46-47.
[56] Mr Bemba's Document in Support of the Appeal, para. 49.
[57] Mr Bemba's Document in Support of the Appeal, para. 50.
[58] Mr Bemba's Document in Support of the Appeal, paras 50-51.

evidence has been admitted, nor will the Chamber, before the end of the trial, determine whether counterbalancing measures need to be taken if evidence is admitted.[59] In his view, this will preclude him from obtaining appropriate relief in a timely manner and will further prejudice his right to question witnesses.[60]

27. As to his third ground of appeal, Mr Bemba submits that the *prima facie* admission into evidence of all items on the Revised List of Evidence cannot be reconciled with the "principle of orality" enshrined in article 69 (2) of the Statute and is contrary to the jurisprudence of the Court, which accepts a departure from this principle only as an exception.[61] Noting the drafting history of the Rules of Procedure and Evidence,[62] Mr Bemba argues that the Trial Chamber may deviate from the principle of orality only if the specific exceptions are met,[63] and not by relying on its general power to admit relevant evidence.[64]

2. Submissions of the Prosecutor

28. The Prosecutor requests the Appeals Chamber to reverse the Impugned Decision, arguing that the Trial Chamber erred, firstly, by admitting into evidence all the items on the Revised List of Evidence without assessing its admissibility on an item-by-item basis and giving the parties an opportunity to raise any issues of admissibility prior to admission;[65] and secondly, by circumventing the statutory principle of oral evidence.[66]

29. In relation to the first error, the Prosecutor submits that the Trial Chambers have discretion to decide whether and when to rule on the admissibility of evidence and to freely assess all evidence submitted before it.[67] However, the Trial Chambers' discretion "is not unfettered" because the Chamber must ensure that the trial is fair and protect the rights of the accused, the fair evaluation of the testimony of a witness and the rights of the victims.[68] Furthermore, in the submission of the Prosecutor, when

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[59] Mr Bemba's Document in Support of the Appeal, para. 52.
[60] Mr Bemba's Document in Support of the Appeal, para. 52.
[61] Mr Bemba's Document in Support of the Appeal, paras 53-56.
[62] Mr Bemba's Document in Support of the Appeal, paras 61-62.
[63] Mr Bemba's Document in Support of the Appeal, para. 58.
[64] Mr Bemba's Document in Support of the Appeal, para. 62.
[65] Prosecutor's Document in Support of the Appeal, paras 18-36.
[66] Prosecutor's Document in Support of the Appeal, paras 37-42.
[67] Prosecutor's Document in Support of the Appeal, para. 23.
[68] Prosecutor's Document in Support of the Appeal, para. 24.

a Trial Chamber decides to rule on the admissibility of evidence, then it must do so on the basis of the criteria of article 69 (4) of the Statute.[69] The Prosecutor asserts that even though the Trial Chamber made a "*prima facie* finding on the admissibility of the evidence",[70] it did not apply those criteria to each of the individual items.[71] The Prosecutor also submits that the Trial Chamber did not provide a reasoned decision, as required by rule 64 (2) of the Rules of Procedure and Evidence.[72]

30. The Prosecutor submits that by filing the List of Evidence of 15 January 2010, he did not intend to "submit" the material referred to therein as evidence for the purposes of article 74 (2) of the Statute and rule 64 (1) of the Rules of Procedure and Evidence.[73] In his view, the Impugned Decision thus deprived him of his right to submit the evidence at trial and to withdraw particular items that he considers have become irrelevant.[74] Furthermore, he contends that by admitting the material on the Revised List of Evidence prior to the commencement of the trial and without prior notice to the parties, the Trial Chamber denied the parties an opportunity to raise issues on the admissibility of the evidence, thereby violating rule 64 (1) of the Rules of Procedure and Evidence.[75]

31. The Prosecutor further argues that the immediate admission of the evidence shifts the burden of establishing admissibility to the party challenging the evidence which, in the Prosecutor's opinion, is contrary to the principle that the party proffering the evidence must establish its admissibility.[76]

32. Turning to the "principle of orality", the Prosecutor submits that the Statute requires, as "a central aspect of the fairness of the proceedings and the rights of the accused", that as a general rule witness evidence shall "be given in person".[77] He

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[69] Prosecutor's Document in Support of the Appeal, para. 25.
[70] Impugned Decision, para. 9.
[71] Prosecutor's Document in Support of the Appeal, paras 19, 25-26.
[72] Prosecutor's Document in Support of the Appeal, para. 22.
[73] Prosecutor's Document in Support of the Appeal, para. 28.
[74] Prosecutor's Document in Support of the Appeal, para. 28.
[75] Prosecutor's Document in Support of the Appeal, para. 32.
[76] Prosecutor's Document in Support of the Appeal, para. 35.
[77] Prosecutor's Document in Support of the Appeal, para. 38.

argues that prior witness statements "could only be included as evidence *per se* by means of exception and under very specific conditions".[78]

33. The Prosecutor also disagrees with the Trial Chamber's reliance on the Rules of Procedure and Evidence of the ICTY and ICTR and emphasises that these provisions are not applicable to the processes of the Court.[79] In addition, the Prosecutor notes that rules 92*bis* and 92*ter* of the Rules of Procedure and Evidence of the ICTY, to which the Trial Chamber referred, only allow for admission of written statements on a item-by-item basis and for specific purposes.[80]

34. The Prosecutor notes that the arguments advanced by Mr Bemba in his first and third grounds of appeal largely coincide with his own position.[81] He does not, however, agree with Mr Bemba that the Chamber's "failure to make particularized admissibility rulings before the start of trial causes prejudice to his right to a fair trial."[82]

35. In the Prosecutor's view, Mr Bemba's right to be informed of the charges against him "is fully protected by the filing of the document containing the charges and the confirmation decision".[83] Furthermore, the Prosecutor submits that the right to have adequate time to prepare for the defence does not include the right to have "adequate advance notice of how the Trial Chamber will rule on evidentiary issues".[84] The Prosecutor notes that his incriminatory evidence has been disclosed to Mr Bemba in time for him to investigate and to prepare his defence.[85] The Prosecutor also doubts that the proceedings will be unduly delayed as a result of the Impugned Decision, stating that he anticipates "that the critical facts will be elicited in direct testimony".[86]

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[78] Prosecutor's Document in Support of the Appeal, para. 37.
[79] Prosecutor's Document in Support of the Appeal, para. 41.
[80] Prosecutor's Document in Support of the Appeal, para. 41.
[81] Response to Mr Bemba's Document in Support of the Appeal, para. 4.
[82] Response to Mr Bemba's Document in Support of the Appeal, para. 4.
[83] Response to Mr Bemba's Document in Support of the Appeal, para. 6.
[84] Response to Mr Bemba's Document in Support of the Appeal, para. 10.
[85] Response to Mr Bemba's Document in Support of the Appeal, para. 10.
[86] Response to Mr Bemba's Document in Support of the Appeal, para. 11.

IV. DETERMINATION BY THE APPEALS CHAMBER

A. The effect of the Impugned Decision

36. At the outset, the Appeals Chamber notes that article 64 (9) (a) of the Statute gives the Trial Chamber the power to "[r]ule on the admissibility or relevance of evidence". This power is further elaborated in article 69 (4) of the Statute, which states:

> 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. [Emphasis added.]

37. The above provisions accord the Trial Chamber discretion when admitting evidence at trial. As borne out by the use of the word "may" in article 69 (4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. In that case, an item will be admitted into evidence only if the Chamber rules that it is relevant and/or admissible in terms of article 69 (4), taking into account "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". Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person.[87] Nevertheless, under article 64 (2) of the Statute, the Chamber must always ensure that the trial "is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". In particular, if a party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its discretion to defer consideration of this issue with its obligations under that provision. Moreover, it should be underlined that irrespective of the approach the Trial Chamber chooses, it will have to consider the

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[87] *See* Piragoff, Donald, "Evidence", in R. S. Lee (ed.), *The International Criminal Court*: Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers, 2001), pp. 351-352; Piragoff, Donald, "Evidence" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 1322, marginal number 36.

relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial.

38. Turning to the case at hand, as stated above, the Trial Chamber decided in the Impugned Decision that the items listed in the Revised List of Evidence are "*prima facie* admitted as evidence for the purpose of the trial".[88] The Appeals Chamber understands that the intended effect of this decision is that the Trial Chamber, at the end of the trial, will be able to rely on all of those items as evidence for its decision under article 74 (2) of the Statute.[89] The Trial Chamber also indicated that at the end of the trial, it would evaluate the items on the Revised List of Evidence, and, as part of that evaluation, it would consider not only the weight, but also the probative value, and the potential prejudicial effect of the evidence.[90] Furthermore, the Impugned Decision foresees the possibility that the Trial Chamber will, at a later stage, decide to exclude certain items of evidence, either *proprio motu* or as a result of a challenge by a party. This possibility is acknowledged in particular at paragraph 19 of the Impugned Decision, where the Trial Chamber states that despite the admission of the items into evidence, the parties may still challenge, and the Chamber may still rule on, the admissibility of the evidence.

39. It should be noted, however, that the Trial Chamber's decision was "based on a *prima facie* finding of the admissibility of the evidence".[91] Although the Chamber stated that "a ruling on admissibility was not a pre-condition for the admission of any evidence"[92] and indicated that it would consider the probative value of the evidence and the potential prejudice that it may cause at the end of the trial,[93] it nevertheless appears to have considered, and ruled on, the *admissibility* of all items on the Revised

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[88] Impugned Decision, para. 35.
[89] This reading is supported in particular by paragraph 27 of the Impugned Decision, where the Trial Chamber indicated that there is no "compelling reason for the statements and related document [...] not to be used at trial by the Trial Chamber". Along the same lines, at paragraph 28 the Trial Chamber explained that the introduction of the items into evidence "would be in line with the Chamber's statutory obligation [...] to search for the truth" and that "[i]n this regard, the Chamber would have at its disposal all the evidence upon which the prosecution seeks to rely". Similarly, at paragraph 13, it stated that it could "rely on all types of evidence", and at paragraph 15, it referred to its obligation "to consider all the evidence 'submitted' and 'discussed' at trial in making its final determination".
[90] Impugned Decision, para. 9.
[91] Impugned Decision, para. 9.
[92] Impugned Decision, para. 10.
[93] Impugned Decision, para. 9.

List of Evidence. There is, however, no indication in the reasoning of the Impugned Decision how the Trial Chamber reached this finding.

40. The Appeals Chamber will proceed to analyse the arguments raised by Mr Bemba and by the Prosecutor in light of this understanding of the Impugned Decision.

B. Admitting the items into evidence before their submission

41. The Prosecutor submits that the Trial Chamber "appears to consider that by filing the List of Evidence all material referred to therein has been submitted to the Trial Chamber".[94] In this regard, he contends that the List of Evidence of 15 January 2010 was only a case management tool, the primary purpose of which was to inform the Chamber and the other participants of the material he intended to use at trial. He avers that admitting the items on this list as evidence "effectively" deprives him of his "right to submit the evidence at trial and to withdraw particular items that it considers have become irrelevant".[95] The Prosecutor emphasises that he did not, by the mere filing of the List of Evidence of 15 January 2010, intend to submit evidence to the Chamber for the purposes of article 74 (2) of the Statute and rule 64 (1) of the Rules of Procedure and Evidence.[96] Thus, the question presented to the Appeals Chamber is when evidence is deemed to be "submitted" by a party.

42. Several provisions of the Statute and the Rules of Procedure and Evidence refer to the submission of evidence at trial. Notably, article 69 (3) of the Statute provides that "[t]he parties may submit evidence relevant to the case, in accordance with article 64" and that "[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth". Article 64 (8) (b) stipulates that "[s]ubject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute". Moreover, under rule 140 of the Rules of Procedure and Evidence, the parties shall agree on the order and manner in which evidence will be submitted to the Trial Chamber if the Presiding Judge does not give directions. If no agreement is reached, the Presiding Judge is required to issue directions on the matter. Furthermore, the first sentence of rule 64 (1) of the Rules of Procedure and Evidence stipulates that "[a]n issue relating to

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[94] Prosecutor's Document in Support of the Appeal, para. 28.
[95] Prosecutor's Document in Support of the Appeal, para. 28.
[96] Prosecutor's Document in Support of the Appeal, para. 28.

relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber". Article 74 (2) requires the Court to "base its decision only on evidence submitted and discussed before it at the trial".

43. It is clear from the above provisions, first, that evidence is "submitted" if it is presented to the Trial Chamber by the parties on their own initiative or pursuant to a request by the Trial Chamber for the purpose of proving or disproving the facts in issue before the Chamber. Second, the submission of evidence must conform to the directions of the Presiding Judge or the manner agreed upon by the parties. Depending on the manner directed or agreed upon, the submission may also take place outside of the trial hearings; however, in such a case, the procedure for the submission of evidence must be clear.

44. Turning to the case at hand, the Appeals Chamber finds that in light of the above, the Prosecutor did not "submit" the items that the Trial Chamber admitted. Prior to rendering the Impugned Decision, the Trial Chamber did not indicate that it would consider that the filing of a list of evidence as the "submission" of that evidence. Rather, in its Order of 4 October 2010, which was issued after the Prosecutor had filed the Lists of Evidence, the Trial Chamber merely referred to the "*potential* submission into evidence of the witness statements of those witnesses to be called to give evidence at trial".[97] In its oral decision of 21 October 2010 concerning "bar table motions", i.e. the submission of documentary evidence other than through a witness, the Trial Chamber adopted the approach of Trial Chamber II, which provides for an item-by-item submission of documentary evidence.[98] Accordingly, when the Prosecutor filed the Lists of Evidence, he did not do so with a view to submitting the items as evidence for the trial, but for the "purpose of informing the Trial Chamber and the other parties and participants of the materials that [he] intends to use at trial" and as a "case management tool".[99] The actual submission of the evidence was to take place later in the proceedings, when the Prosecutor would call witnesses or tender

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[97] Order of 4 October 2010, para. 2; emphasis added.
[98] *See* ICC-01/05-01/08-T-30-ENG, p. 14; the approach of Trial Chamber II is set out in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* "Directions for the conduct of the proceedings and testimony in accordance with rule 140", 1 December 2009, ICC-01/04-01/07-1665-Corr, paras 101-102.
[99] Prosecutor's Document in Support of the Appeal, para. 28.

documents. In the view of the Appeals Chamber, the Trial Chamber therefore erred when it admitted into evidence items that had not yet been submitted.

45. Furthermore, as stated above, the last sentence of article 74 (2) of the Statute provides that a Trial Chamber may base its decision at the end of the trial only on evidence that was "submitted and discussed before it at the trial". Accordingly, the Trial Chamber may not rely, for the purposes of its final decision, on items that have come to the Chamber's knowledge but that have not been submitted and discussed at trial. As stated above, the items on the Revised List of Evidence had, at the time of the Impugned Decision, not yet been submitted. While the Prosecutor may (and probably will) submit many of these items in the course of the trial, he has discretion, as the case unfolds, and subject to the Trial Chamber's powers under article 69 (3) of the Statute, to rely on some and to abandon the rest. Nevertheless, by virtue of the Impugned Decision, the Trial Chamber admitted all items on the Revised List of Evidence into evidence. Thus, there is a potential that not all items that were admitted into evidence will have been submitted, bringing the Impugned Decision into conflict with article 74 (2) of the Statute.

46. In sum, the Appeals Chamber finds that the Trial Chamber erred when it admitted into evidence the items on the Revised List of Evidence when they had not yet been submitted to the Chamber.

C. Parties' right to raise issues

47. The Prosecutor argues that the Trial Chamber, contrary to rule 64 (1) of the Rules of Procedure and Evidence, denied the parties an opportunity to raise issues regarding the relevance or admissibility of the items.[100] He asserts that the possibility of raising issues concerning the relevance and/or admissibility of evidence at a later stage applies only in exceptional circumstances and only to issues that were unknown at the time the evidence was submitted.[101]

48. Rule 64 (1) of the Rules of Procedure and Evidence entitles the parties to raise issues as to the relevance or admissibility of evidence at the time when the evidence is submitted to a Chamber. The rule ensures that the parties have the chance to raise

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[100] Prosecutor's Document in Support of the Appeal, paras 32-36.
[101] Prosecutor's Document in Support of the Appeal, para. 36.

objections to the evidence before it is admitted into evidence. The Trial Chamber has to give effect to this right and, therefore, cannot admit items into evidence without first giving the parties an opportunity to raise issues.

49. In the present case, the Trial Chamber, prior to rendering the Impugned Decision, sought submissions from the parties "on the potential submission into evidence of the witness statements of those witnesses to be called to give evidence at the trial".[102] However, it did not indicate that it would admit into evidence all the items on the Lists of Evidence, and it did not seek submissions on the relevance or admissibility of these items. The Appeals Chamber is not persuaded by the Trial Chamber's reasoning that the parties would later on have the opportunity to raise issues relating to the relevance or admissibility of the evidence.[103] Rule 64 (1) allows for later objection only "when those issues were not known at the time when the evidence was submitted", and it is unclear whether the parties would always be able to rely on this exception in the situation created by the Impugned Decision.

50. In sum, the Appeals Chamber finds that by admitting into evidence the items on the Revised List of Evidence without first giving the parties an opportunity to raise issues as to their relevance and admissibility, the Trial Chamber failed to give effect to rule 64 (1) of the Rules of Procedure and Evidence.

D. 'Wholesale' finding of admissibility

51. The Prosecutor[104] and Mr Bemba[105] argue that the Trial Chamber erred when it made a "*prima facie* finding of the admissibility"[106] of all items on the Revised List of Evidence without assessing them on an item-by-item basis.

52. According to article 69 (4) of the Statute, when the Trial Chamber decides to rule on the relevance or admissibility of evidence, it must assess the evidence, taking into account, *inter alia*, its probative value and any prejudice to a fair trial or to a fair evaluation of the testimony of a witness that such evidence might cause. Furthermore, article 69 (7) of the Statute and rule 71 of the Rules of Procedure and Evidence

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[102] Order of 4 October 2010, para. 2.
[103] Impugned Decision, para. 19.
[104] Prosecutor's Document in Support of the Appeal, paras 20-22, 25.
[105] Mr Bemba's Document in Support of the Appeal, paras 10-15.
[106] Impugned Decision, para. 9.

stipulate that certain evidence may not be admitted. Article 69 (7) renders evidence that is obtained in violation of the Statute or internationally recognised human rights inadmissible if (1) the violation casts substantial doubt on the reliability of the evidence or (2) its admission would be antithetical to or would seriously damage the integrity of the proceedings. Rule 71 of the Rules of Procedure and Evidence declares "evidence of the prior or subsequent sexual conduct of a victim or witness" inadmissible.

53. The scheme established by article 69 (4) and (7) of the Statute and rule 71 of the Rules of Procedure and Evidence thus anticipates that a Chamber's determination of the relevance or admissibility of evidence be made on an item-by-item basis. Whether evidence is relevant, has probative value, or would be prejudicial to the accused will depend on the specific characteristics of each item of evidence; the factors that will require consideration will not be the same for all items of evidence. Similarly, whether evidence was obtained in violation of the Statute or human rights or relates to the prior or subsequent sexual conduct of a victim or witness can only be determined on an item-specific basis.

54. In the Impugned Decision, there is no indication that the Trial Chamber carried out an item-specific analysis as a basis for its "*prima facie* finding of the admissibility of this evidence". Thus, in the view of the Appeals Chamber, the Trial Chamber ruled incorrectly on the admissibility of the evidence.

55. The Appeals Chamber is not persuaded by the Trial Chamber's reasoning that the "*prima facie* admission of the evidence, without the need to rule on each piece of evidence as it is presented will save significant time during the proceedings and expedite matters".[107] While expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements. Thus, if a Chamber decides to rule on the admissibility of evidence, it must do so correctly.

56. Similarly, the case-law of other international tribunals cited by the Trial Chamber[108] does not support its approach. Such jurisprudence, which is based on specific provisions in those tribunals' legal texts, cannot overrule statutory

[107] Impugned Decision, para. 24.
[108] Impugned Decision, paras 26-27.

requirements for the proceedings at this Court. In any event, as the Trial Chamber itself noted,[109] those tribunals carry out an item-by-item analysis and do not rule on the admissibility of evidence in the manner adopted by the Trial Chamber in the case at hand.

57. In conclusion, the Appeals Chamber is of the view that the Trial Chamber erred when it made a "*prima facie* finding of the admissibility" of the evidence listed on the Revised List of Evidence without assessing the evidence on an item-by-item basis.

E. Requirement to give reasons for rulings on evidentiary matters

58. The Prosecutor submits that, having failed to assess the evidence on an item-by-item basis, the Trial Chamber also failed to give reasons for its decision, in violation of rule 64 (2) of the Rules of Procedure and Evidence.[110]

59. Pursuant to rule 64 (2) of the Rules of Procedure and Evidence, a "Chamber shall give reasons for any rulings it makes on evidentiary matters". The Appeals Chamber has previously held, albeit in a different context, that a Chamber must explain with sufficient clarity the basis of its decision.[111] In other words, "it must identify which facts it found to be relevant in coming to its conclusion".[112] As stated in the preceding section, rulings on the admissibility of evidence must be made on an item-by-item basis. This analysis must be reflected in the reasons. This is not to say that the Trial Chamber may not rule on the relevance or admissibility of several items of evidence in one decision. However, it must be clear from the reasons of the decision that the Chamber carried out the required item-by-item analysis, and how it was carried out.

60. In the present case, the Trial Chamber did not give any item-specific reasons for its "*prima facie* finding of the admissibility" of the evidence listed on the Revised List of Evidence. Aside general statements as to the legal basis and the potential value of

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[109] Impugned Decision, para. 26.
[110] Prosecutor's Document in Support of the Appeal, para. 22.
[111] *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773 OA 5 (hereinafter: "Judgment in *Lubanga* OA 5"), para. 20, citing ECtHR, *Hadjianastassiou v. Greece*, Application number 12945/87, 16 December 1992, para. 32.
[112] Judgment in *Lubanga* OA 5, para. 20.

admitting the evidence, the Impugned Decision did not explain why the material was found to be *prima facie* admissible. This amounted to a breach of rule 64 (2) of the Rules of Procedure and Evidence.

F. Rights of the accused

61. Mr Bemba argues that the admission into evidence of all the items on the Revised List of Evidence without an item-by-item assessment of their admissibility violates some of his rights under article 67 of the Statute. These arguments will now be examined.

1. Right to be informed promptly and in detail of the nature, cause and content of the charge

62. Mr Bemba contends that the Trial Chamber's intention to consider the admissibility of the items it admitted into evidence only at the end of the trial violates his right under article 67 (1) (a) of the Statute to be informed promptly and in detail of the nature, cause and content of the charge against him.[113] In Mr Bemba's submission, the Trial Chamber's approach would result in him knowing the precise nature of the Prosecutor's evidence against him only after the close of the defence case.[114] Thus, the Appeals Chamber understands Mr Bemba's argument to be that his right to be informed of the charges was violated because the Trial Chamber did not make a definitive ruling on the admissibility of the evidence that it admitted.

63. The Appeals Chamber is not persuaded by this argument because, as the Prosecutor notes, article 67 (1) (a) of the Statute is not concerned with the timing of rulings on the admissibility of evidence.[115] The accused person enjoys the right to be informed of the nature, cause and content of the *charges* against him. This information has already been provided to Mr Bemba: Mr Bemba was, at the pre-trial stage, served with the document containing the charges, the evidence supporting those charges and the confirmation decision. The evidence upon which the Prosecutor intends to rely at trial has also been disclosed to him. In addition, the Trial Chamber ordered the Prosecutor to submit an updated "in-depth analysis chart", setting out in detail how the documentary evidence and witness statements related to the

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[113] Mr Bemba's Document in Support of the Appeal, paras 33-35.
[114] Mr Bemba's Document in Support of the Appeal, para. 33.
[115] Response to Mr Bemba's Document in Support of the Appeal, para. 6.

Prosecutor's factual allegations.[116] Thus, Mr Bemba has been made fully aware of the factual and legal allegations against him.

64. Furthermore, the Appeals Chamber notes that article 67 (1) (a) of the Statute is based on similar provisions in international human rights treaties.[117] In respect of article 6 (3) (a) of the European Convention on Human Rights, the European Court of Human Rights (hereinafter: "ECtHR") and the European Commission of Human Rights (hereinafter: "ECommHR") have held that the "cause" of a charge are "the acts [the accused] is alleged to have committed and on which the accusation is based", and that the "nature" is the legal characterisation of those alleged acts.[118] The ECommHR has held that the information as to the charges does not "necessarily [have to mention] the evidence on which the charge is based".[119] This jurisprudence thus also indicates that the right to be informed of the charges is not concerned with the timing of admissibility rulings.

65. Accordingly, Mr Bemba's argument that his right to be informed of the charges was violated is misconceived and therefore is dismissed.

2. *The right to adequate time and facilities for the preparation of his defence*

66. Mr Bemba submits that the Impugned Decision "impacts" on his right under article 67 (1) (b) of the Statute to have adequate time and facilities for the preparation of the defence. He maintains that the admission into evidence of all items on the Revised List of Evidence means that he has "to investigate and seek to defend against large swathes of 'evidence' which may ultimately [be] disregarded by the

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[116] "Decision on the 'Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth Analysis Chart'", 29 January 2010, ICC-01/05-01/08-682.
[117] Article 14 (3) (a) of the ICCPR provides for the right to "be informed promptly and in detail [...] of the nature and cause of the charge against him". Article 8 (2) (b) of the American Convention on Human Rights provides for the right to "prior notification in detail to the accused of the charges against him". Article 6 (3) (a) of the European Convention on Human Rights provides for the right to be "informed promptly [...] and in detail, of the nature and cause of the accusation against him".
[118] ECtHR, *I.H. and others v. Austria*, Judgment of 20 April 2006, para. 30; ECtHR, *Ayçoban and others v. Turkey*, Judgment, of 20 October 2005, para.. 21; ECtHR, *Sipavifiius v. Lithuania*, Judgment, Judgment of 21 February 2002, para. 27; ECtHR, *Sadak and others v. Turkey*, Judgment of\ 17 July 2001, para. 48; ECtHR, *Dallos v. Hungary*, Judgment of 1 March 2001, paragraph 47; ECtHR, *Pélissier and Sassi v. France*, Judgment, of 25 March 1999, para. 51; ECommHR, *X v Belgium*, decision, 9 May 1977, Application No. 7628/76; ECommHR, *Sacramati v. Italy,* decision 6 September 1995, Application No. 23369/94.
[119] *See* ECommHR, *X v Belgium*, decision, 9 May 1977, Application No. 7628/76; ECommHR, *Sacramati v. Italy,* decision 6 September 1995, Application No. 23369/94.

Chamber".[120] This, in his view, "has the potential to greatly increase the scope of his investigations".[121]

67. The Appeals Chamber notes that Mr Bemba does not argue here that his right under article 67 (1) (b) has been violated by the Impugned Decision, but that it *could* be violated. The Appeals Chamber finds this argument speculative as it is not possible, at this stage, to determine the impact of the Impugned Decision on this right. Moreover, it is not unusual that prior to the beginning of the trial, the defence does not know on which evidence the Court will eventually rely and which evidence will be ruled inadmissible. Therefore, irrespective of the approach the Trial Chamber takes to the admission of evidence, Mr Bemba must, at this stage of the proceedings, expect that all the evidence listed on the Revised List of Evidence might be used against him and prepare his defence accordingly.

68. For these reasons, the Appeals Chamber dismisses Mr Bemba's assertions in this regard.

3. The right to be tried without undue delay

69. Mr Bemba submits that admission into evidence of the items on the Revised List of Evidence infringes his right to be tried without undue delay, which is protected by article 67 (1) (c) of the Statute.[122] In particular, Mr Bemba observes that this could delay the trial as he "will now be required to lead evidence to rebut the factual allegations contained in the thousands of pages of 'evidence'".[123]

70. As with Mr Bemba's arguments on his right to prepare his defence,[124] the Appeals Chamber finds his submissions as to the alleged breach of article 67 (1) (c) to be speculative at this point in time. Having said that, the Appeals Chamber considers that, in exercising its discretion under article 69 (4) to admit the items of evidence without first giving the parties an opportunity to raise issues regarding their relevance or admissibility, the Trial Chamber failed to effectively evaluate any potential

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[120] Mr Bemba's Document in Support of the Appeal, para. 37.
[121] Mr Bemba's Document in Support of the Appeal, para. 37.
[122] Mr Bemba's Document in Support of the Appeal, paras 40-48.
[123] Mr Bemba's Document in Support of the Appeal, para. 47.
[124] *See* above, paras 66 et seq.

prejudice that such evidence may cause to a fair trial, in particular Mr Bemba's right to a trial without undue delay.

4. The right not to have imposed any reversal of the burden of proof

71. Referring to article 67 (1) (i) of the Statute, Mr Bemba submits that the *prima facie* admission of all the evidence constitutes a "*de facto* reversal of the burden of proof" because rather than placing the onus on the Prosecutor to prove the admissibility of the evidence, it places the burden on Mr Bemba to challenge it.[125]

72. In the view of the Appeals Chamber, the burden of proof referred to in article 67 (1) (i) of the Statute refers to the burden on the Prosecutor to prove the case against the accused beyond reasonable doubt (see article 66 (2) of the Statute). This burden does not shift as a result of the Impugned Decision. Accordingly, the burden of proof is not implicated and the Appeals Chamber finds Mr Bemba's argument in this regard to be misconceived.

73. However, the Appeals Chamber notes that under rule 64 (1) of the Rules of Procedure and Evidence, the parties have the right to raise issues concerning the relevance or admissibility of the evidence when it is submitted. As discussed previously, the Trial Chamber failed to give effect to this right before admitting the evidence. Therefore, rather than merely having to raise issues as to the relevance or admissibility of the evidence, Mr Bemba now has the additional burden of disproving the admissibility of items on which the Chamber has already ruled. It is in this sense that the Appeals Chamber finds merit in Mr Bemba's submission on this point.

G. Orality of the proceedings and the right of the accused to examine witnesses against him

74. Both the Prosecutor[126] and Mr Bemba[127] argue that the admission of all prior written witness statements into evidence, in the way that the Trial Chamber did, violates the "principle of primacy of orality" enshrined in article 69 (2) of the Statute. In this regard, Mr Bemba states that the Trial Chamber's assertion that the witness statements would not replace oral testimony is irrelevant because according to the

[125] Mr Bemba's Document in Support of the Appeal, para. 49.
[126] Prosecutor's Document in Support of the Appeal, para. 37.
[127] Mr Bemba's Document in Support of the Appeal, para. 56.

Trial Chamber, the purpose of the admission of the statements was "to limit the questioning of witnesses by the Prosecution".[128]

75. The Appeals Chamber underlines that the alleged violation concerns only the witness statements that the Trial Chamber admitted into evidence. In this respect, the Chamber recalls that article 69 (2) of the Statute provides that:

> 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. [Emphasis added]

76. The direct import of the first sentence of this provision is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality. The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.

77. Nevertheless, in-court personal testimony is not the exclusive mode by which a Chamber may receive witness testimony. The first sentence of article 69 (2) also provides for exceptions, namely for measures taken under article 68 of the Statute or under the Rules of Procedure and Evidence "to protect witnesses, victims or an accused".[129] In addition, under the second sentence of article 69 (2), the Chamber may *inter alia* permit the introduction of "documents or written transcripts". This power is, however, "subject to this Statute" and must be exercised "in accordance with the Rules of Procedure and Evidence". Thus, under the second sentence of article 69 (2) of the Statute, a Chamber has the discretion to receive the testimony of a witness by means other than in-court personal testimony, as long as this does not violate the

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[128] Mr Bemba's Document in Support of the Appeal, para. 56.
[129] Article 68 (2) of the Statute.

Statute and accords with the Rules of Procedure and Evidence. The most relevant provision in the Rules of Procedure and Evidence is rule 68 which provides that the "Trial Chamber may [...] allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony". However, the introduction of such evidence is subject to strict conditions set out in the provision, namely:

> (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.

78. In deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally.[130] In the view of the Appeals Chamber, this requires a cautious assessment.[131] The Trial Chamber may, for example, take into account, a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.[132]

79. In the case at hand, the Appeals Chamber notes that there is no indication in the Impugned Decision that the Trial Chamber considered, in respect of each witness statement, whether the conditions for its admission under rule 68 of the Rules of

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[130] The last sentence to article 68(5) of the Statute reads: "[s]uch measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." In similar vein, the last sentence of article 69(2) of the Statute reads: "[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused".

[131] *See*, for example, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on Prosecutors request to allow the introduction in evidence of prior recorded testimony of P-166 and P-219", 3 September 2010, ICC-01/04-01/07-2362, para. 19.

[132] *See*, for instance, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecution's application for the admission of prior recorded statements of two witnesses", 15 January 2009, ICC-01/04-01/06-1603, para. 24; "Decision on the Admissibility of four documents", 13 June 2008, ICC-01/04-01/06-1399, paras 33-41; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Prosecutor's Bar Table Motions", 17 December 2010, ICC-01/04-01/07-2635, paras 42-51; "Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-O2 and accompanying video excerpts", 27 August 2010, ICC-01/04-01/07-2289, para. 14.

Procedure and Evidence were met. Although the "Decision on Directions for the Conduct of Proceedings",[133] which was rendered on the same day as the Impugned Decision, foreshadowed that the Trial Chamber would, in respect of each witness, inquire whether he or she objected to the introduction of the witness statement, thus taking up elements of rule 68 (b) of the Rules of Procedure and Evidence,[134] the Impugned Decision does not indicate that the Trial Chamber assessed each of the statements. Moreover, there is no indication that the Trial Chamber considered whether the admission of a given statement would be prejudicial to or inconsistent with the rights of the accused. Instead the Chamber admitted into evidence indiscriminately *all* the witness statements on the Revised List of Evidence. In the Appeal Chamber's view, this mode of receiving evidence was an improper exercise of the Trial Chamber's discretion. It resulted in the Chamber paying little or no regard to the principle of orality, to the rights of the accused, or to trial fairness generally. It had the potential effect of depriving Mr Bemba of his right "to examine, or have examined the witnesses against him".[135]

80. The Appeals Chamber notes that to support its approach, the Trial Chamber opined that "[m]ost of the witnesses' written statements and related documents to be relied upon by the prosecution at trial were collected, disclosed and used as evidence forming the basis for confirming the charges at pre-trial stage".[136] Thus, in its view, since "the Decision Confirming the Charges [is] the main authoritative document"[137] the "Majority does not see any compelling reason for the statements [...] not to be used at trial by the Trial Chamber".[138] The Trial Chamber's argumentation as to the link between the pre-trial and trial phases is unpersuasive. While it is true that there is,

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[133] 19 November 2010, ICC-01/05-01/08-1023, hereinafter: "Rule 140 Decision".
[134] *See* Rule 140 Decision, para. 10.
[135] In this regard, it should be noted that in relation to article 6 (3) (d) of the European Convention on Human Rights, which is almost identical to article 67 (1) (e) of the Statute, the ECtHR has held that "[i]n principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument". The ECtHR has, however, qualified this statement by adding that: "This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 [...] provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings [...]." *See* ECtHR, *Kostovski v. The Netherlands,* judgment, Application no. 11454/85, 20 November 1989, para. 41.
[136] Impugned Decision para. 27.
[137] Impugned Decision, para. 27.
[138] Impugned Decision para. 27.

and must be, a strong link between the two phases of the proceedings, this does not mean that the same evidentiary rules apply. On the contrary, the rules regarding orality in the pre-trial phase are more relaxed than at trial. Pursuant to article 61 (5) of the Statute, for the purposes of the confirmation hearing, the Prosecutor "may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial". At the trial, however, the Trial Chamber must respect article 69 (2). Witness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met.

81. For these reasons, the Appeals Chamber concludes that the decision of the Trial Chamber to admit all prior recorded statements without a cautious item-by-item analysis was incompatible with article 69 (2) of the Statute and with rule 68 of the Rules of Procedure and Evidence.

V. APPROPRIATE RELIEF

82. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to reverse the Impugned Decision because it was materially affected by the errors identified above.

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

Judge Akua Kuenyehia
Presiding Judge

Dated this 3rd day of May 2011
At The Hague, The Netherlands