

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 November 2010

TRIAL CHAMBER I

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

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

Public

Redacted Decision on the "Prosecution's Application for Admission of Documents related to Witness 297 Pursuant to Article 64(9)"

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

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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**The Office of Public Counsel for the
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States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER I of the International Criminal Court (the “Court”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following Decision on the “Prosecution’s Application for Admission of Documents related to Witness 297 Pursuant to Article 64(9)”:¹

I. Background and Submissions

Prosecution Submissions

1. On 11 June 2010 the Office of the Prosecutor (“prosecution”) applied for leave to introduce five documents into evidence that are relevant to trial witness DRC-OTP-WWWW-0297 (“Witness 297”),² in order to establish the truth of their contents, without calling or re-calling the authors.
2. The five documents are: (i) a hand-wrist X-ray for Witness 297;³ (ii) a mandible X-ray for Witness 297;⁴ (iii) an affidavit from an investigator of the prosecution providing the date on which the X-rays were taken;⁵ (iv) the Pre-Registration Form referred to in the affidavit;⁶ (v) an expert report from expert witnesses DRC-OTP-WWWW-0358 and DRC-OTP-WWWW-0359 containing the results of the X-ray evaluation and their expert opinion on the age of Witness 297.⁷

¹ Prosecution’s Application for Admission of Documents related to Witness 297 Pursuant to Article 64(9), 11 June 2010, ICC-01/04-01/06-2472-Conf; public redacted version, 11 June 2010 (notified on 14 June 2010), ICC-01/04-01/06-2472-Red.

² ICC-01/04-01/06-2472-Red.

³ ERN DRC-OTP-0191-0219; ICC-01/04-01/06-2472-Conf-Anx1.

⁴ ERN DRC-OTP-0191-0220; ICC-01/04-01/06-2472-Conf-Anx2.

⁵ ERN DRC-OTP-0229-0066; ICC-01/04-01/06-2472-Conf-Anx3.

⁶ ERN DRC-OTP-0229-0067; ICC-01/04-01/06-2472-Conf-Anx3.

⁷ ERN DRC-OTP-0182-0432; ICC-01/04-01/06-2472-Conf-Anx4.

3. The prosecution submits that the documents are relevant to, and probative of, issues to be determined during the trial.⁸ The prosecution argues that the documents are relevant to the current proceedings as they concern the age of Witness 297, which is a matter of relevance to the charges against the accused.⁹
4. The prosecution argues these documents have several indicia of reliability, and further, that they are admissible notwithstanding the absence of the relevant witnesses during the trial.¹⁰ The prosecution highlights that the Pre-Registration Form is referred to in the affidavit; it is written on a document with an official prosecution letterhead; and it is signed by the investigator who collected the X-rays from the hospital.¹¹
5. The prosecution notes that Witness 297 testified before the Chamber that he agreed to these X-rays; an investigator from the prosecution accompanied him; and they were taken in [REDACTED].¹² The prosecution further relies on the evidence from defence witness DRC-D01-WWWW-0003,¹³ that [REDACTED], and he [REDACTED].¹⁴ A copy of an affidavit documenting [REDACTED] DRC-D01-WWWW-0003 is attached as an annex to the prosecution's application,¹⁵ but the prosecution does not seek to introduce it into evidence.
6. The prosecution submits it did not request the admission of these documents at an earlier stage because Witness 297 was withdrawn from the witness list

⁸ ICC-01/04-01/06-2472-Red, paragraph 11.

⁹ ICC-01/04-01/06-2472-Red, paragraph 11.

¹⁰ ICC-01/04-01/06-2472-Red, paragraph 11.

¹¹ ICC-01/04-01/06-2472-Red, paragraph 13.

¹² ICC-01/04-01/06-2472-Conf, paragraph 14 (a).

¹³ [REDACTED].

¹⁴ ICC-01/04-01/06-2472-Conf, paragraph 14 (b).

¹⁵ ICC-01/04-01/06-2472-Conf-Anx5.

before the testimony of expert witnesses 358 and 359. This decision was reversed following their testimony, and Witness 297 has since testified, leading to the current request.¹⁶ The prosecution submits that the expert witnesses have given evidence as to their methods of evaluation regarding several essentially identical reports, in which the X-rays relating to eight other trial witnesses have been evaluated.¹⁷ Further, the defence questioning as regards those reports focused on the general scientific methodology used in the analysis, rather than the contents of the individual reports. In all the circumstances, it is suggested that questioning is equally relevant to this additional material.¹⁸

7. The prosecution argues that the probative value of these documents outweighs any prejudicial effect, given their clear reliability and their relevance to the issues in the case.¹⁹ The prosecution further submits that admitting documents from the bar table in these circumstances assists the efficiency of the proceedings, in accordance with the rights of the accused under Article 67(1) (c) of the Rome Statute ("Statute").²⁰

8. There were no responses to this application.

II. Applicable Law

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

¹⁶ ICC-01/04-01/06-2472-Red, paragraph 4.

¹⁷ ICC-01/04-01/06-2472-Red, paragraphs 13 – 14.

¹⁸ ICC-01/04-01/06-2472-Red, paragraph 14 (e).

¹⁹ ICC-01/04-01/06-2472-Conf, paragraph 17.

²⁰ ICC-01/04-01/06-2472-Conf, paragraph 19.

Article 64 of the Statute
Functions and powers of the Trial Chamber

[...]

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

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

[...]

Article 69 of the Statute
Evidence

[...]

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

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

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

[...]

Rule 63 of the Rules of Procedure and Evidence ("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.

[...]

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.

III. Analysis and Conclusion

10. Various provisions in the Statute and the Rules set out the principles to be applied when considering the admissibility of evidence, other than oral evidence, that is presented during the trial. These have provided the basis for the Chamber's general approach to the admissibility of documents, as described in its "Decision on the admissibility of four documents on 13 June 2008".²¹ The Chamber ruled that it will focus, *first*, on the **relevance** of the material (*viz.* how it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused or in its evaluation of the views and concerns of participating victims); *second*, on whether or not it has **probative value** (bearing in mind, for instance, "the indicia of reliability"); and *third*, on the **probative value of the evidence as against its prejudicial effect**.

11. However, for three of these documents (*viz.* the affidavit from an investigator of the prosecution providing the date on which the X-rays were taken, the pre-registration form documenting that he took the X-rays into custody and the expert report from expert witnesses DRC-OTP-WWWW-0358 and DRC-OTP-WWWW-0359 containing the results of the X-ray evaluation and their expert opinion on the age of Witness 297), the prosecution is seeking to

²¹ Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1398-Conf; public redacted version, 13 June 2008, ICC-01/04-01/06-1399, paragraphs 27 – 31.

introduce the evidence of the investigator and the experts via their affidavit and report without calling or recalling them to give evidence.

12. The statutory framework of the Court establishes the clear presumption that the evidence of a witness at trial will be given orally (“in person”: Article 69(2) of the Statute).²² Article 69(2) of the Statute, however, expressly recognises the possibility of derogation from this principle, in accordance with Article 68 of the Statute and the Rules of Procedure and Evidence. In the present context, the Court can receive documents or written transcripts, subject to the Statute and the Rules of Procedure and Evidence, so long as these measures are not prejudicial to or inconsistent with the rights of the accused.

13. Ordinarily, therefore, the Chamber would need to consider whether or not the exceptions to the usual requirement of “live” evidence are met. However, in this instance the defence has not objected to the introduction of the affidavit, the pre-registration form documenting the chain of custody of the X-rays and the report without calling the authors, and given that stance (and the Chamber’s consent), it is unnecessary to consider this particular issue further.

14. Generally, this material is relevant and probative, given that it relates to matters that are currently under consideration by the Chamber – the X-rays, the affidavit (along with the attached pre-registration form) and the views of the experts will assist as to whether Witness 297 was under the age of 15 between September 2002 and August 2003, that is, during the timeframe relevant to the charges against the accused. There is no suggestion that the X-

²² The Chamber has previously recalled the Statute’s preference for oral evidence in detail in its Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1398-Conf, paragraph 22.

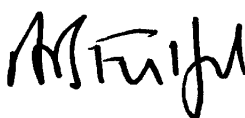
rays are forgeries or that there has been an error in their handling. The probative value of this evidence is not outweighed by its prejudicial effect.

IV. Conclusion

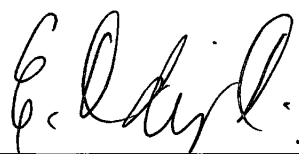
15. The Prosecution's application to admit these documents relating to Witness 297 is granted.

16. The Registry is instructed to assign EVD numbers to the documents submitted in annexes 1 – 4 of the prosecution's application.

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



Judge Adrian Fulford
Presiding Judge



Judge Elizabeth Odio Benito
Judge



Judge René Blattmann
Judge

Dated this 12 November 2010

At The Hague, The Netherlands