

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 17 November 2010

TRIAL CHAMBER I

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

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

Public

Redacted Decision on the « Seconde requête de la Défense aux fins de dépôt de documents »

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

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Defence Support Section

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**Victims Participation and Reparations
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Other

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga case”), delivers the following decision (“Decision”) on the Defence “Seconde requête de la Défense aux fins de dépôt de documents”:

I. Background and Submissions

1. On 16 June 2010 the defence filed its “Seconde requête de la Défense aux fins de dépôt de documents” seeking leave to introduce four documents into evidence.¹ The defence sets out that it came into possession of these documents on 15 June 2010 when they were given to its “resource person” in the Democratic Republic of the Congo (“DRC”). The documents are copies of duplicate election cards for witnesses DRC-OTP-WWWW-0010 (“witness 10”), DRC-OTP-WWWW-0294 (“witness 294”), DRC-OTP-WWWW-0006 (“witness 6”) and DRC-OTP-WWWW-0009 (“witness 9”).²
2. The defence highlights that each duplicate election card contains a photograph and the name of the relevant witness, his or her place and date of birth and the names of the witness’s parents.³
3. The defence argues that these documents are relevant as they contain certain personal details for these prosecution witnesses (who were allegedly child soldiers), including particularly their date of birth, which tends to demonstrate that they were over the age of 15 during the period covered by the charges. Therefore, it is argued that this material seriously affects the

¹ Seconde requête de la Défense aux fins de dépôt de documents, 16 June 2010, ICC-01/04-01/06-2484-Conf with one confidential annex.

² ICC-01/04-01/06-2484-Conf, paragraph 2.

³ ICC-01/04-01/06-2484-Conf, paragraphs 3 – 6.

credibility of the four witnesses, an issue that is of relevance to the defence abuse of process application.⁴

4. The defence submits that these duplicate election cards have probative value because they were signed and given to the defence “resource person” by Mr John Ukunya Undiga, President of the Independent Electoral Commission (the Bunia Liaison Office) on the 14 and 15 June 2010.⁵ The defence submits, therefore, that the circumstances in which the documents were obtained sufficiently establishes their reliability.⁶ Moreover, the Office of the Prosecutor (“prosecution”) can review their authenticity by consulting the official registers.⁷

5. On 17 June 2010 the prosecution requested an extension to the deadline for filing a response, because it needed further time to investigate the matter.⁸ On 18 June 2010 the team of legal representatives V01 similarly requested an extension of the deadline, arguing it was necessary to contact one of the victims affected by the documents.⁹ On 18 June 2010 the Chamber granted the respective requests, extending the deadlines to 16.00 on 23 June 2010, under Regulation 35(2) of the Regulations of the Court.¹⁰

The prosecution’s response

6. The prosecution submits these four election cards should not be introduced into evidence, although it does not suggest that the defence has misdescribed

⁴ ICC-01/04-01/06-2484-Conf, paragraphs 7 – 9.

⁵ ICC-01/04-01/06-2484-Conf, paragraph 12.

⁶ ICC-01/04-01/06-2484-Conf, paragraph 13.

⁷ ICC-01/04-01/06-2484-Conf, paragraph 14.

⁸ Email communication from the prosecution to the Legal Advisor of the Trial Division on 17 June 2010.

⁹ Email communication from Luc Walley to the Legal Advisor of the Trial Division on 18 June 2010.

¹⁰ Email communication from the Legal Advisor of the Trial Division to the parties and participants on 18 June 2010.

them.¹¹ The prosecution highlights instead that they are to be used, *inter alia*, to challenge the credibility of two prosecution witnesses when they were not put to the latter during their evidence before the Chamber.¹²

7. The prosecution argues that there is no basis to admit the election cards relating to witnesses 6 and 9, because their statements are not before the Court as evidence and their credibility is not in issue (these individuals did not give evidence before the Court).¹³
8. The prosecution requests leave to file further submissions, since it is [REDACTED].¹⁴
9. The prosecution submits that election cards are sometimes unreliable and that they may contain inaccurate information. The prosecution cites examples of witnesses called in the current case, as well as in the case of the *Prosecutor v Germain Katanga and Mathieu Ngudjolo* (the “*Katanga case*”), when evidence has been given that certain election cards were obtained in violation of Congolese law, and that the information therein is inaccurate.¹⁵
10. The prosecution relies on reports by the United Nations Organization, along with NGO sources regarding the difficulties experienced in the 2006 elections in the DRC, especially in the Ituri District. It also refers to a report indicating that due to a lack of security in the process of issuing voter documents, many

¹¹ Prosecution’s Response to the “Seconde requête de la Défense aux fins de dépôt de documents” of 16 June 2010, 23 June 2010, ICC-01/04-1/06-2501-Conf, paragraph 2. A public redacted version of this response was filed on 2 July 2010 (notified on 5 July 2010), ICC-01/04-01/06-2501-Red, paragraph 2.

¹² ICC-01/04-1/06-2501-Red, paragraph 2.

¹³ ICC-01/04-1/06-2501-Red, paragraph 5.

¹⁴ ICC-01/04-1/06-2501-Conf, paragraph 6.

¹⁵ ICC-01/04-1/06-2501-Red, paragraphs 9 – 13.

Rwandans were able to acquire Congolese identification cards during the 2006 elections.¹⁶

11. The prosecution submits that the reasons for obtaining election cards are relevant to the admissibility of these documents.¹⁷ The prosecution highlights that those issued for the 2006 election were the first identification documents recognized by the Congolese government, thus providing a strong incentive for citizens to obtain them.¹⁸ It is suggested by the prosecution that in order to request an election card which could be used as a means of identification, an individual would need to claim that they were born in or before 1987.¹⁹ The prosecution relies on evidence from the *Katanga* case to the extent that witnesses have testified that they were persecuted for not having an election card (several reports to this effect were cited).²⁰

12. The prosecution submits that these documents should be accorded little evidential value if the Chamber admits them without their contents having been addressed by the relevant witnesses during their evidence.²¹

Submissions of the Legal Representatives for Victims

13. On 21 June 2010 responses were filed by the legal representatives of victims a/0050/06²² and a/0051/06²³ opposing the defence request. On 22 June 2010 the

¹⁶ ICC-01/04-1/06-2501-Red, paragraphs 14 – 15.

¹⁷ ICC-01/04-1/06-2501-Red, paragraphs 16 – 20.

¹⁸ ICC-01/04-1/06-2501-Red, paragraph 16.

¹⁹ ICC-01/04-1/06-2501-Red, paragraph 16.

²⁰ ICC-01/04-1/06-2501-Red, paragraphs 17 – 20.

²¹ ICC-01/04-1/06-2501-Red, paragraphs 23 – 24.

²² Réponse du Représentant légal de la victime a/0050/06 à la “Seconde requête de la Défense aux fins de dépôt de documents” datée du 16 juin 2010, 21 June 2010, ICC-01/04-01/06-2497-Conf.

²³ Observations de la représentante légale de la victime a/0051/06 sur la seconde requête de la Défense aux fins de dépôt de documents en date du 16 juin 2010, 21 June 2010, ICC-01/04-01/06-2499-Conf with one public annex.

Office of Public Counsel for Victims (“OPCV”) filed a response on behalf of victim a/0049/06 also resisting the application.²⁴

14. The legal representatives of victims a/0049/06 and a/0051/06 argue that Congolese law regarding the creation of duplicate election cards applies in this situation, and that the cards were created in violation of that law, thus rendering them unreliable and inadmissible as evidence²⁵ (section III, article 16, order number 003/CEI/BUR/06 of 9/03/2006 is cited).²⁶ The representatives further argue that the head of the Liaison Office of the Electoral Commission of Bunia did not respect the law when giving duplicate cards to the defence “resource person”.²⁷

15. The legal representative for victim a/0049/09 contends that document DRC-D01-0003-5483 is not a copy of the election card that was given to his client. Instead, although this victim recalls having obtained a card of this kind several years ago, its contents are not identical to the document now produced by the defence.²⁸ The legal representative submits that his client has not requested a duplicate card nor suggested to the relevant authorities that the original was lost or stolen, as, it is argued, Congolese law requires before a duplicate voter card is provided.²⁹

16. On this basis, it is argued that the document relied on is, *prima facie*, false and therefore inadmissible.³⁰

²⁴ Observations du représentant légal de la Victime a/0049/06 à la seconde requête de la Défense aux fins de dépôt de documents, 22 June 2010, ICC-01/04-01/06-2500-Conf with one public annex.

²⁵ ICC-01/04-01/06-2500, paragraphs 4 – 8; ICC-01/04-01/06-2499-Conf, paragraphs 4 – 12.

²⁶ ICC-01/04-01/06-2500, paragraphs 5 – 7; ICC-01/04-01/06-2499-Conf, paragraphs 4 – 5.

²⁷ ICC-01/04-01/06-2499-Conf, paragraph 10; ICC-01/04-01/06-2500, paragraph 10.

²⁸ ICC-01/04-01/06-2500, paragraph 4.

²⁹ ICC-01/04-01/06-2500, paragraphs 6 – 8.

³⁰ ICC-01/04-01/06-2500, paragraph 11.

17. The legal representative of victim a/0051/06 submits that her client was not in Bunia in June 2010; this victim did not request a duplicate election card and he did not report the loss of a card to the relevant authorities in Bunia.³¹ It is suggested that the defence have not provided evidence demonstrating that the requirements for issuing a duplicate card were met.³²
18. It is contended that victim a/0051/06 did not register for the elections in 2006,³³ and that the information on the election card submitted by the defence differs from that on the victim's student identity card and on her application to participate in these proceedings.³⁴ The legal representative submits that the details appear to relate to two different individuals, and the victim does not know how the photograph was produced on the duplicate election card.³⁵
19. The OPCV, representing victim a/0050/06, submits that the defence has failed to demonstrate that the documents satisfy the admissibility criteria established by the Chamber.³⁶ The OPCV argues that document DRC-D01-0003-5482 is without probative value because the circumstances of its creation cannot be verified, and victim a/0050/06 does not recall being provided with an original election card.³⁷ Furthermore, the OPCV suggests that an identity document was attached to the application form to participate in these proceedings, establishing the identity of the victim. In all the circumstances, the OPCV submits that a duplicate election card of doubtful authenticity should not be given greater weight than the application form, which was accompanied by identifying documentation.³⁸

³¹ ICC-01/04-01/06-2499-Conf, paragraph 7.

³² ICC-01/04-01/06-2499-Conf, paragraph 8.

³³ ICC-01/04-01/06-2499-Conf, paragraph 15.

³⁴ ICC-01/04-01/06-2499-Conf, paragraph 16.

³⁵ ICC-01/04-01/06-2499-Conf, paragraph 16.

³⁶ ICC-01/04-01/06-2497-Conf, paragraph 3.

³⁷ ICC-01/04-01/06-2497-Conf, paragraphs 10 – 12.

³⁸ ICC-01/04-01/06-2497-Conf, paragraph 13.

20. Finally, the OPCV submits that the prejudicial effect of this document outweighs its potential probative value.³⁹ It is argued that since the document and its contents cannot be verified, it will not assist in establishing the truth but instead it will adversely affect the fairness of these proceedings.⁴⁰

Other submissions

21. On 28 June 2010 the defence received the official documents originating from the Congolese authorities (via the prosecution).⁴¹ The defence submitted that the personal data recorded within this material was identical to that set out on the election cards, and in consequence it argued that this additional material comes within the ambit of its original application.⁴² Following instructions from the Chamber,⁴³ the defence thereafter provided the ERN numbers of the original 4 election cards to the Chamber.⁴⁴

II. Applicable Law

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

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

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

[...]

³⁹ ICC-01/04-01/06-2497-Conf, paragraph 14.

⁴⁰ ICC-01/04-01/06-2497-Conf, paragraph 15.

⁴¹ Email communication from the defence to the Legal Advisor of the Trial Division on 28 June 2010.

⁴² Email communication from the defence to the Legal Advisor of the Trial Division on 28 June 2010.

⁴³ Email communication from the Legal Advisor of the Trial Division to the parties and participants on 28 June 2010.

⁴⁴ Email communication from the defense to the Legal Advisor of the Trial Division on 28 June 2010; ERN numbers: DRC-D01-0003-5499, DRC-D01-0003-5500, DRC-D01-0003-5501, DRC-D01-0003-5502.

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

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

[...]

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence [...]

Article 69 of the Statute

Evidence

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

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

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

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.

[...]

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.

Rule 66 of the Rules**Solemn undertaking**

1. Except as described in sub-rule 2, every witness shall, in accordance with article 69, paragraph 1, make the following solemn undertaking before testifying:
"I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."
2. A person under the age of 18 or a person whose judgement has been impaired and who, in the opinion of the Chamber, does not understand the nature of a solemn undertaking may be allowed to testify without this solemn undertaking if the Chamber considers that the person is able to describe matters of which he or she has knowledge and that the person understands the meaning of the duty to speak the truth.
3. Before testifying, the witness shall be informed of the offence defined in article 70, paragraph 1 (a).

III. Analysis

23. On 13 June 2008 the Chamber issued the "Decision on the admissibility of four documents",⁴⁵ in which it set out its general approach to the issue of the admissibility of evidence other than direct oral evidence.⁴⁶ The Chamber identified four key factors, based on the statutory framework of the Court, that provide the necessary starting-point for the Trial Chamber's general

⁴⁵ Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1398-Conf. A public redacted version was issued the same day, ICC-01/04-01/06-1399..

⁴⁶ ICC-01/04-01/06-1399, paragraph 19.

approach in these circumstances. First, pursuant to Article 69(3) of the Statute, the Chamber has the authority to request the submission of any evidence that it considers necessary in order to determine the truth.⁴⁷ Second, the Chamber is under an obligation to ensure that the trial is fair and expeditious, and that it is conducted with full respect for the rights of the accused under Article 64(2) of the Statute.⁴⁸ Third, notwithstanding the desirability that witnesses should give evidence orally in accordance with Article 69(2) of the Statute,⁴⁹ there is “a clear recognition that a variety of other means of introducing evidence may be appropriate”.⁵⁰ Fourth, Article 64(9) of the Statute confers upon the Chamber a “wide discretion to rule on admissibility or relevance and to assess any evidence, subject to the specified issues of ‘fairness’”.⁵¹

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

25. Bearing in mind those key considerations, the Chamber established a three-stage approach that is to be applied, on a case-by-case basis, in order to determine the admissibility of evidence other than oral evidence.⁵² First, the Chamber will determine whether the evidence in question is, *prima facie*, relevant to the trial, in that it relates to matters that are properly to be considered by the Chamber in its investigation of the charges against the accused.⁵³ Second, again on a *prima facie* basis, the Chamber must consider

⁴⁷ ICC-01/04-01/06-1399, paragraph 20.

⁴⁸ ICC-01/04-01/06-1399, paragraph 21.

⁴⁹ ICC-01/04-01/06-1399, paragraph 22.

⁵⁰ ICC-01/04-01/06-1399, paragraph 22.

⁵¹ ICC-01/04-01/06-1399, paragraph 23.

⁵² ICC-01/04-01/06-1399, paragraph 26.

⁵³ ICC-01/04-01/06-1399, paragraph 27.

whether the evidence has probative value.⁵⁴ The Chamber has indicated that “there should be no automatic reasons for either admitting or excluding a piece of evidence, but instead the court should consider the position overall”,⁵⁵ and the Chamber cautioned against imposing artificial limits on its “ability to consider any piece of evidence freely, subject to the requirements of fairness”.⁵⁶ Third, where relevant, the Chamber has to weigh the probative value of the evidence against its prejudicial effect.⁵⁷

26. Turning to the merits of the instant application, the defence seeks to introduce the four duplicate election cards, partly to discredit two witnesses called during the trial, but also in general support of the defence abuse of process submission.

27. The relevance of this evidence is to be judged in the context of the issues that have arisen during the abuse application. At the hearing on 27 January 2010 the defence observed as follows:

[...] the Defence intends to set out succinctly the main lines of our Defence. While adducing evidence the Prosecutor brought 26 witnesses before the Court, if we set aside the three expert witnesses. First of all, the Defence intends to prove to the Chamber that many of the Prosecution's witnesses came before the Court and testified knowing that they would be giving inaccurate information to the Court. The Defence also intends to show that some of this false testimony was fabricated with the assistance of intermediaries who collaborated with the Office of the Prosecutor. [...] Did the Prosecution fail to carry out their duty, their duty to provide proper control and oversight over its intermediaries and, in particular, did the Prosecutor fulfill his statutory obligation to investigate exculpatory evidence, particularly from his own witnesses? [...] At the appropriate time, after hearing the first 16 witnesses, the Defence shall examine the possibility of bringing these serious matters before the Chamber and will strive to determine whether the proceedings should continue.⁵⁸

⁵⁴ ICC-01/04-01/06-1399, paragraph 28.

⁵⁵ ICC-01/04-01/06-1399, paragraph 29.

⁵⁶ ICC-01/04-01/06-1399, paragraph 29.

⁵⁷ ICC-01/04-01/06-1399, paragraph 31.

⁵⁸ Transcript of hearing on 27 January 2010, ICC-01/04-01/06-T-236-CONF-ENG ET, page 20, line 16 to page 23, line 24.

28. In short, the defence seeks to demonstrate that evidence was fabricated with the assistance of intermediaries, who in turn collaborated with the Office of the Prosecutor. Additionally, it is suggested that the latter failed to exercise proper control and oversight over the intermediaries it utilized, and that it did not investigate exculpatory evidence from its own witnesses. The defence argues that the documents tend to prove that certain witnesses relied on by the prosecution during the pre-trial stage, who formed part of the prosecution's list of witnesses until they were withdrawn prior to the commencement of the trial, provided false evidence. Given this is an argument that the defence is entitled to develop, the two voter's cards relating to witnesses 6 and 9, which tend to indicate that they may have lied about their ages, are relevant and probative.

29. Furthermore, the evidence as regards the four documents is likely to assist the Chamber in its assessment of the reliability of election cards generally, and for two of the cards this evidence concerns the credibility of two witnesses called by the prosecution, in that it is suggested they tend to establish that these individuals were not under the age of 15 at the relevant time. Given the defence submission that each of the relevant individuals provided false information (particularly as to their ages), these duplicate election cards will, *prima facie*, assist the Chamber in determining that allegation.

30. The Chamber is unpersuaded by the submissions that it should not admit these documents because they were arguably obtained in breach of Congolese law (in that they were not requested by the relevant individuals). The duplicate election cards were issued by the Congolese Independent Electoral Commission, and they are signed by the President of that public body, which provides duplicate election cards, Mr John Ukunya. In the circumstances they are *prima facie* reliable. Whether there was irregularity in their production, as

alleged by the Legal Representatives, and whether those irregularities cast doubt on their reliability, are matters that will be decided, if necessary, on an assessment of the whole of the relevant evidence in due course (bearing in mind the applicable Congolese law).⁵⁹

31. The Chamber has been informed that the defence did not obtain the duplicate election cards for witnesses 10 and 294 until a year after they testified before the Chamber. In those circumstances it would be unfair to refuse to admit them solely on the basis that they were not raised with the witnesses during their evidence. There is no basis for concluding that the defence has been dilatory in the production of this evidence. In due course the Chamber will bear in mind that the relevant witnesses were not asked questions about these cards, when it assesses generally the weight, if any, to be attached to them.

32. In all the circumstances, on a *prima facie* basis, the four cards are relevant and they have probative value, and their probative value is not outweighed by their potential prejudicial effect. Accordingly, they are admissible.

33. The defence application to introduce the four documents from the bar table is therefore granted.

34. The Registry is instructed to assign EVD numbers to the documents contained in the annex to the defence application.

⁵⁹ 003/CEI/BUR/06 of 9 March 2006, article 16 (ICC-01/04-01/06-2500-Anx, pages 5 and 6).

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 17 November 2010

At The Hague, The Netherlands