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TRIAL CHAMBER I

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

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

Public

**Corrigendum to Decision on the legal representative's application for leave to
tender into evidence material from the "bar table"
and on
the Prosecution's Application for Admission of three documents from the Bar Table
Pursuant to Article 64 (9)**

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

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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*, delivers the following Decision on the legal representative’s application for leave to tender into evidence material from the “bar table”¹ and on the Prosecution’s Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9)²:

I. Background and Submissions

A. *The legal representative’s application*

1. On 29 November 2010, principal counsel of the Office of Public Counsel for Victims (“OPCV”), in her capacity as legal representative for victims a/0047/06, a/0048/06 and a/0050/06, applied for leave to submit an application to admit certain written statements provided by her clients.³ These statements describe the circumstances in which voting cards No. 5007-11-0678, 5149-11-0600 and 5129-21-0099 were issued.⁴ It is argued that the personal interests of these victims are affected because the statements explain personal data contained in the voting cards, as well as in the database of the Independent Electoral Commission.⁵

2. The legal representative submits that these statements are relevant and it is appropriate to admit them at this stage of the proceedings, and it is contended this step would be consistent with the rights of the accused and a fair trial.⁶ It is suggested they explain the circumstances in which the personal data for dual-status victims was included in the relevant records by the Congolese

¹ Application for leave to tender into evidence material from the “bar table”, 29 November 2010, ICC-01/04-01/06-2647 (“OPCV’s request”).

² Prosecution’s Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9), 20 December 2010, ICC-01/04-01/06-2666 (“prosecution’s application”).

³ ICC-01/04-01/06-2647, paragraph 6.

⁴ ICC-01/04-01/06-2647, paragraphs 4, 5, 6.

⁵ ICC-01/04-01/06-2647, paragraph 6.

⁶ ICC-01/04-01/06-2647, paragraph 6.

authorities, notwithstanding their inaccuracy.⁷ The veracity of this information is said to be relevant to the third application⁸ by the defence to admit documents because the credibility of dual-status victims a/0047/06, a/0048/06 and a/0050/06 (prosecution witnesses DRC-OTP-WWWW-0007 (“Witness 7”), DRC-OTP-WWWW-0008 (“Witness 8”) and DRC-OTP-WWWW-0010 (“Witness 10”)) is at stake.⁹ The legal representative indicates that the statements were provided to the defence on 26 November 2010, with discrete redactions, and she applies for leave to submit an application to admit them into evidence from the “bar table”, as was the position with certain documents originating from the prosecution and the defence.¹⁰ If the Chamber grants the application, the legal representative indicates she will demonstrate that the admissibility criteria, as determined by the Chamber, are met.¹¹

3. On 1 December 2010, the defence filed objections to the OPCV’s request.¹² The accused submits that the statements do not fulfil the requirements of Rule 68 of the Rules of Evidence and Procedure (“Rules”), which – as an exception to the principle set out in Article 69(2) of the Rome Statute (“Statute”) – allows for the introduction of prior recorded testimony.¹³ Moreover, it is argued that the statements do not fulfil the criteria for the admission of interview transcripts of witnesses who have previously testified before the Chamber, set

⁷ ICC-01/04-01/06-2647, paragraph 7.

⁸ Troisième requête de la Défense aux fins de dépôt de documents, 8 November 2010, ICC-01/04-01/06-2604-Conf. A first corrigendum was filed on 11 November 2010, ICC-01/04-01/06-2604-Conf-Corr, and a second corrigendum was filed on 15 November 2010, ICC-01/04-01/06-2604-Conf-Corr2.

⁹ ICC-01/04-01/06-2647, paragraph 6.

¹⁰ ICC-01/04-01/06-2647, paragraphs 8 and 9.

¹¹ ICC-01/04-01/06-2647, paragraph 9.

¹² Réponse de la Défense à la requête du BCPV intitulé « Application for leave to tender into evidence material from the “bar table” », datée du 29 novembre 2010, 1 December 2010, ICC-01/04-01/06-2652.

¹³ ICC-01/04-01/06-2652, paragraph 3.

out in the Chamber's decision of 26 October 2010.¹⁴ As the documents are not transcripts of recorded interviews, but are instead written statements prepared by the legal representative, it is said they are an insufficiently accurate record of the accounts of the individual witnesses.¹⁵ The defence further suggests that their reliability is undermined because they were compiled by participating victims who seek to introduce them into evidence.¹⁶ The defence has not examined the witnesses on these new statements, and the accused is not willing to waive his rights under Article 67(1)(e) of the Statute.¹⁷ Finally, the participating victims have not been given leave to present evidence in rebuttal ("des éléments de preuve en réplique") at this stage of the proceedings.¹⁸

B. The prosecution's application

4. On 20 December 2010, the Prosecution filed its Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9).¹⁹ The Office of the Prosecutor ("prosecution") seeks to tender the same statements (attached as Annexes 1 to 3 to the application) that are the subject of the OPCV's request (the three written statements of the interviews conducted by the OPCV with Witness 7 (victim a/0047/06), Witness 8 (victim a/0048/06) and Witness 10 (victim a/0050/06)).²⁰

5. The prosecution submits that the documents are relevant to, and probative of,

¹⁴ ICC-01/04-01/06-2652, paragraph 4, referring to the Decision on the defence request for the admission of 422 documents, 26 October 2010, ICC-01/04-01/06-2595-Conf ("Decision on admission of 422 documents") A public redacted version was issued on 17 November 2010, ICC-01/04-01/06-2595-Red.

¹⁵ ICC-01/04-01/06-2652, paragraph 4.

¹⁶ ICC-01/04-01/06-2652, paragraph 4.

¹⁷ ICC-01/04-01/06-2652, paragraph 4.

¹⁸ ICC-01/04-01/06-2652, paragraph 5.

¹⁹ ICC-01/04-01/06-2666.

²⁰ ICC-01/04-01/06-2666, paragraphs 1 and 8.

the credibility of the witnesses, and they relate to the accused's alleged guilt.²¹ It is argued that the documents possess sufficient indicia of reliability to warrant their admission into evidence.²² Finally, the prosecution suggests that introducing the documents will not be prejudicial to the accused, not least because the defence failed to ask necessary questions of the witnesses during their testimony, and, moreover, this course will streamline the proceedings given these witnesses will not be recalled.²³ Any prejudicial effect will be outweighed by the potential probative value of the evidence.²⁴

6. On 21 December 2010, the OPCV filed a response to the prosecution's application on the basis of Regulation 24 (2) of the Regulations of the Court ("Regulations").²⁵ The OPCV provides details on the languages used by the dual-status witnesses during the interviews and the role played by the interpreters, as well as the circumstances in which two members of the OPCV questioned the witnesses separately. It is suggested that the statements were signed by everyone present once they had been read back to and approved by the dual-status witnesses.²⁶ The OPCV submits that the documents are relevant to the issues that are properly to be considered in the case.²⁷ It rehearses the jurisprudence of the Chamber when it admitted post-testimony statements taken by the prosecution (which had been submitted in order to support the credibility of certain witnesses).²⁸ Finally, the OPCV submits that the approach adopted when admitting statements taken by the prosecution should be extended to these statements (*viz.* as taken by the legal

²¹ *Ibid.*, paragraphs 2 and 11 to 17.

²² *Ibid.*, paragraphs 2 and 16.

²³ *Ibid.*, paragraphs 18 and 19.

²⁴ *Ibid.*, paragraphs 3, 18 and 19.

²⁵ Réponse du représentant légal des victimes a/0047/06, a/0048/06 et a/0050/06 à la «Prosecution's Application for Admission of three documents from the Bar Table pursuant to Article 64(9)» datée du 20 décembre 2010, ICC-01/04-01/06-2667-Conf.

²⁶ ICC-01/04-01/06-2667-Conf, paragraph 12.

²⁷ ICC-01/04-01/06-2667-Conf, paragraph 13.

²⁸ ICC-01/04-01/06-2667-Conf, paragraph 14.

representatives).²⁹

7. The defence filed objections to the prosecution's application on 10 January 2011 and to the OPCV's response thereto.³⁰ It submits that the admission of these three statements will cause serious prejudice to the accused.³¹ In essence, the defence observes that it was not invited to participate in the statement-taking exercise and thus it was deprived of the opportunity to question the witnesses on the matters that were addressed.³² Instead of clarifying the issues involved, it is suggested the statements raise additional and important questions that need to be explored in greater detail.³³ The accused disputes the prosecution's suggestion that the defence should have investigated the issue of the electoral cards with the dual-status witnesses during their testimony, as the defence only obtained this material about a year after they had completed their evidence.³⁴ Lastly, the defence submits that the redactions to the identity of the interpreter who assisted the OPCV are unjustified, and this information should be disclosed to the defence.³⁵

II. Applicable Law

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

Article 64 of the Statute

²⁹ ICC-01/04-01/06-2667-Conf, paragraph 15.

³⁰ Réponse de la Défense à la « Prosecution's Application for Admission of three documents from Bar Table Pursuant to Article 64(9) », datée du 20 décembre 2010, ainsi qu'à la « Réponse du représentant légal des victimes a/0047/06, a/0048/06 et a/0050/06 [...] » datée du 21 décembre 2010, 10 January 2011, ICC-01/04-01/06-2671-Conf.

³¹ ICC-01/04-01/06-2671-Conf, paragraph 4.

³² ICC-01/04-01/06-2671-Conf, paragraphs 5 and 6.

³³ ICC-01/04-01/06-2671-Conf, paragraph 7.

³⁴ ICC-01/04-01/06-2671-Conf, paragraph 10.

³⁵ ICC-01/04-01/06-2671-Conf, paragraph 11.

Functions and powers of the Trial Chamber

[...]

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

[...]

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

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

[...]

Article 67 of the Statute

Rights of the accused

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

[...]

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

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the proceedings

[...]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and 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

General provisions relating to evidence

[...]

2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

3. A Chamber shall rule on an application of a party or on its own motion, made under article 64, subparagraph 9 (a), concerning admissibility when it is based on the grounds set out in article 69, paragraph 7.

Rule 64 of the Rules

Procedure relating to the relevance or admissibility of evidence

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with Article 64, paragraph 10, and Rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

Rule 68 of the Rules

Prior recorded testimony

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

- (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
- (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

Rule 111 of the Rules

Record of questioning in general

1. A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefor.

2. When the Prosecutor or national authorities question a person, due regard shall be given to article 55. When a person is informed of his or her rights under article 55, paragraph 2, the fact that this information has been provided shall be noted in the record.

III. Analysis and Conclusion

9. As set out above, the applications by the OPCV and the prosecution address identical documents. Strictly, the application of 29 November 2010 by

principal counsel to admit this material raises the substantive issue of whether it is appropriate for victim participation of this type to occur at this juncture in the proceedings (on the basis of the criteria established by the Chamber in its Decision on victims' participation,³⁶ as confirmed by the Appeals Chamber).³⁷ It is to be noted that the Appeals Chamber has recently indicated that participating victims have a right to bring evidence before the Trial Chamber whenever the Chamber considers it necessary for the determination of the truth.³⁸ However, given the prosecution also applies to introduce this material, it is unnecessary for the Chamber to resolve whether this separate application by the representatives of certain participating victims should be granted.

10. On 13 June 2008, the Chamber issued its "Decision on the admissibility of four documents",³⁹ in which it set out its general approach to the admissibility of evidence other than direct oral evidence.⁴⁰ The Chamber identified four key factors, based on the Rome Statute framework, that provide the necessary starting-point for an investigation of the Trial Chamber's general approach in these circumstances. First, pursuant to Article 69(3) of the Statute, the Chamber has the authority to request the submission of any evidence that it

³⁶ Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 108.

³⁷ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432. The procedure and requirements for authorizing victims to tender and examine evidence were summarised as follows in paragraph 104: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial.

³⁸ See the recent Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial, 16 July 2009, ICC-01/04-01/07-2288, paragraphs 37 – 41.

³⁹ 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. Corrigenda of both the confidential version (ICC-01/04-01/06-1398-Conf-Corr) and the public redacted version (ICC-01/04-01/06-1399-Corr) were issued on 20 January 2011.

⁴⁰ ICC-01/04-01/06-1399-Corr, paragraph 19.

considers necessary in order to determine the truth.⁴¹ 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.⁴² Third, notwithstanding the desirability that witnesses should give evidence orally in accordance with Article 69(2) of the Statute, there is "a clear recognition that a variety of other means of introducing evidence may be appropriate". This reflects the terms of Article 68 of the Statute, which is expressly referred to in the first sentence of Article 69(2) of the Statute.⁴³ 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'".⁴⁴

11. 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".

12. Bearing in mind those key considerations, the Chamber established a three-stage approach to be applied, on a case-by-case basis, in order to determine the admissibility of evidence other than oral evidence. First, the Chamber shall determine whether the evidence in question is, *prima facie*, relevant to the trial, in that it relates to matters that are properly to be considered by the Chamber in its investigation of the charges against the accused.⁴⁵ Second, again on a *prima facie* basis, the Chamber must consider whether the evidence

⁴¹ ICC-01/04-01/06-1399-Corr, paragraph 20.

⁴² ICC-01/04-01/06-1399-Corr, paragraph 21.

⁴³ ICC-01/04-01/06-1399-Corr, paragraph 22.

⁴⁴ ICC-01/04-01/06-1399-Corr, paragraph 23.

⁴⁵ ICC-01/04-01/06-1399-Corr, paragraph 27.

has probative value.⁴⁶ The Chamber has indicated that "[t]here should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall"⁴⁷ and the Chamber cautioned against imposing artificial limits on its "ability to consider any piece of evidence freely, subject to the requirements of fairness"⁴⁸. Third, where relevant, the Chamber has to weigh the probative value of the evidence against its prejudicial effect.⁴⁹

13. Turning to the circumstances of this application, the statements are clearly relevant to the issue of the credibility of witnesses 7, 8 and 10 who gave evidence in February and March 2009. On 21 June 2010, the defence applied to admit Witness 10's voting card from the bar table,⁵⁰ and the Chamber granted the request on 26 October 2010.⁵¹ Subsequently, on 8 November 2010, the defence applied to admit documents from the Independent Electoral Commission that are relevant to the voting cards for witnesses 7 and 8,⁵² and the Chamber similarly granted the request.⁵³ It is to be observed that the names and the dates of birth provided by these three prosecution witnesses during their evidence do not coincide with the information on the voting

⁴⁶ ICC-01/04-01/06-1399-Corr, paragraph 28.

⁴⁷ ICC-01/04-01/06-1399-Corr, paragraph 29.

⁴⁸ ICC-01/04-01/06-1399-Corr, paragraph 29.

⁴⁹ ICC-01/04-01/06-1399-Corr, paragraph 31.

⁵⁰ *Seconde requête de la Défense aux fins de dépôt de documents*, 16 June 2010, ICC-01/04-01/06-2484-Conf.

⁵¹ *Decision on the « Seconde requête de la Défense aux fins de dépôt de documents »*, 26 October 2010, ICC-01/04-01/06-2596-Conf, paragraph 33. A public redacted version was issued on 11 November 2010, ICC-01/04-01/06-2596-Red.

⁵² *Troisième requête de la Défense aux fins de dépôt de documents*, 8 November 2010, ICC-01/04-01/06-2604-Conf, paragraphs 50 – 55. A first corrigendum was filed on 11 November 2010 (ICC-01/04-01/06-2604-Conf-Corr) and a second corrigendum was filed on 15 November 2010 (ICC-01/04-01/06-2604-Conf-Corr2, notified on 16 November 2010). The relevant annexes are 39 and 41 – 43.

⁵³ *Decision on the "Troisième requête de la Défense aux fins de dépôt de documents"*, 17 December 2010, ICC-01/04-01/06-2664-Conf, paragraphs 69 and 76. The parties and participants were informed of the outcome of the Chamber's decision before it was issued by email communication from the Legal Officer of the Trial Division on 6 December 2010.

cards, and it was in those circumstances that the Chamber decided that evidence that is potentially relevant to their credibility should be admitted. The statements that are the subject of these applications relate directly to the material tendered by the defence, as described above.

14. On 15 November 2010, two members of the OPCV met with witnesses 7, 8 and 10 following their evidence in order to clarify, first, the circumstances in which the voting cards were issued and, second, why incorrect personal data was included in the record by the Congolese authorities. It is suggested that the statements were signed by the dual-status witnesses and all those present during the interviews. In the view of the Chamber, any discrepancies between the identities and ages given by these witnesses during their evidence and the information set out on the voting cards may have a material impact on their credibility and the weight to be attached to the evidence they have given. Hence, the statements are *relevant* to the issues raised in this trial (a conclusion that is not challenged by the defence).

15. The accused submits that there are two significant differences between post-testimony interviews with prosecution witnesses (including those with dual-status witnesses 7, 8 and 10 admitted by the Chamber in its decision of 26 October 2010)⁵⁴ and the post-testimony statements that are the subject of the current applications. First, the present items are not full transcripts of the interviews but instead they are statements written by the legal representatives who conducted the interviews and therefore they do not provide a sufficient guarantee of reliability – they are an incomplete record of what was said.⁵⁵ Second, the statements are made by the very participating victims who

⁵⁴ Decision on the defence request for the admission of 422 documents 26 October 2010, ICC-01/04-01/06-2595-Conf, paragraphs 42 – 52. A public version was issued on 17 November 2010, ICC-01/04-01/06-2595-Red.

⁵⁵ ICC-01/04-01/06-2652, paragraph 4.

request their admission, and it is said the reliability of the statements is therefore uncertain.⁵⁶ In addition, the defence notes that the signatures of victims a/0047/06 (Witness 7) and a/0048/06 (Witness 8) on the statements written by the legal representatives on 15 November 2010 differ from those on their respective victim applications.⁵⁷

16. Notwithstanding these arguments, the Chamber is of the view that these documents demonstrate sufficient indicia of reliability. They were taken in the presence – and bear the signatures – of two counsel from the OPCV who are officers of the Court, and who, as legal representatives of victims, are bound by the Code of Professional Conduct for counsel. Further, they contain the dates and the location of the interviews, and having been written by the legal representatives, they were only signed by all those present once they had been read back to, and confirmed by, each interviewee. In these circumstances there is a sufficient basis for concluding that, *prima facie*, they reflect the substance of the interviews on 15 November 2010.

17. As set out above, the prosecution and the OPCV seek to introduce the statements without recalling the witnesses to give evidence. The statutory framework of the Court establishes the clear presumption that the evidence of a witness at trial will be given orally.⁵⁸ Article 69(2) of the Statute, however, expressly recognises the possibility of derogation from this principle, in accordance with the Rules and Article 68 of the Statute, and the Court can receive documents or written transcripts, subject to the Statute and the Rules, so long as these measures are not prejudicial to or inconsistent with the rights of the accused. As discussed in the Chamber’s Decision on the admission of

⁵⁶ ICC-01/04-01/06-2652, paragraph 4.

⁵⁷ ICC-01/04-01/06-2671-Conf, paragraph 7 (a)(iii) and (b) (iv).

⁵⁸ See ICC-01/04-01/06-1399-Corr, paragraph 22 (highlighting the “desirability of witnesses giving oral evidence” and noting that the first sentence of Article 69(2) of the Statute requires that witness testimony “shall be given in person”).

422 documents, Rule 68 of the Rules – which addresses prior-recorded testimony, as an exception to the principle of live testimony – does not apply to post-testimony interview transcripts.⁵⁹ Instead, they are potentially admissible under Article 69(3) of the Statute, subject to considerations of fairness.⁶⁰ The Chamber is of the view that the factors relevant to post-testimony interview transcripts equally apply to written statements compiled after witnesses have testified.⁶¹

18. In light of these conclusions, it is necessary for the Chamber to consider, *inter alia*, whether it is fair to admit the material without recalling the relevant witnesses to give oral evidence.

19. The prosecution argues that it is not unfair to the accused to admit the statements. It submits that they were obtained in direct response to an unanticipated defence application for admission of documents from the bar table, which led to the introduction of material the defence relied on in its latest abuse of process application (concerning the credibility of certain dual-status victims). It is said these statements are directly relevant to this latter issue, along with the bar table evidence that the defence applied to introduce: most particularly they provide answers to the questions that should have been put to the witnesses during their testimony. It is submitted that the defence is attempting to use impermissible tactics by (a) failing to question

⁵⁹ ICC-01/04-01/06-2595-Red, paragraphs 44 – 46.

⁶⁰ ICC-01/04-01/06-2595-Red, paragraph 50.

⁶¹ The Chamber notes that in a general sense it has prohibited post-testimony discussions concerning evidence with witnesses until the close of the evidence in the case, unless it has ordered, pursuant to an application, that this may happen earlier (Transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG ET WT, page 26, lines 7 – 9). The Chamber granted the prosecution’s application to meet with witnesses 7, 8 and 10 after their testimony (Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, paragraph 66). Whilst it may be necessary for there to be contact between the legal representatives and their clients, the Chamber emphasises that discussions about evidence that has been given during the proceedings requires prior authorisation.

witnesses on certain matters during their evidence, and (b) thereafter seeking to introduce relevant documents without recalling the witnesses. It is submitted, therefore, that the defence has made it necessary to admit these out of court statements: if they are excluded, the prosecution will be unable to address particular issues of fact, the importance of which have only been recently revealed. Accordingly, the prosecution submits that it is proportionate to admit this material, which will help establish the truth in a way that is not unfair to the accused.⁶²

20. The defence observes that it was not invited to the statement-taking exercise, and, as a result, it has been prevented from questioning the witnesses on the issues addressed in the statements.⁶³ It challenges the prosecution's contention that it failed to put appropriate questions to the witnesses during their testimony and it submits that the relevant material was only disclosed by the prosecution significantly after their evidence was completed.⁶⁴

21. The Chamber is unpersuaded by the argument that the defence is attempting to use impermissible tactics to secure an unfair evidential advantage, particularly since it only received the documentation on the voting cards (that have been admitted into evidence and which are dealt with in the statements under consideration) approximately a year after the witnesses gave evidence. When the Chamber addressed the defence request to admit Witness 10's voting card (which is the subject of one of the three statements) the Chamber ruled that "it would be unfair to refuse to admit [it] solely on the basis that [it was] 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

⁶² ICC-01/04-01/06-2666 paragraphs 3 and 18.

⁶³ ICC-01/04-01/06-2671-Conf, paragraphs 5 and 6; ICC-01/04-01/06-2652, paragraph 4.

⁶⁴ ICC-01/04-01/06-2671-Conf, paragraph 10.

evidence.”⁶⁵ The same conclusion applies to the electoral commission material relevant to witnesses 7 and 8.

22. Although the Chamber rejects the suggestion that the defence has acted in bad faith, these statements are clearly relevant to an issue of significance in the case. Furthermore, the probative value of this material is not outweighed by its potential prejudicial effect, not least because the defence will have the opportunity to introduce further material on this issue during the presentation of its evidence.

23. The Chamber will make due allowance for the lack of opportunity for defence counsel to question the witnesses when the statements were taken. When dealing with the admissibility of the voting cards, it was decided that:

31 [...] [i]n 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.⁶⁶

24. The Chamber will apply the same approach when it assesses generally the weight, if any, to be attached to the material relevant to the current applications. The Chamber will consider any particular submissions of the parties and the participants as to its reliability when evaluating the overall evidence in the case at the end of the trial. However, in the judgment of the Court, this is a matter of weight rather than admissibility.

⁶⁵ ICC-01/04-01/06-2596-Red, paragraph 31.

⁶⁶ ICC-01/04-01/06-2596-Red, paragraphs 31 and 32.

25. The OPCV indicated that, in accordance with protection orders previously issued by the Chamber, redactions have been applied to the name of the STIC interpreter who assisted the members of the OPCV, including the location of the meetings (given the individuals concerned are in the ICCPP).⁶⁷ The defence submits that this redaction is unjustified.⁶⁸

26. The Chamber earlier decided not to disclose the name of the acting interpreter to the defence during an *ex parte* hearing held on the 16 of February 2009:

In the judgement of the Chamber, these applications are well founded. The redactions proposed jointly by the Prosecution and the OPCV serve to protect the dual-status victims, their families and guardians, intermediaries, and [the] interpreter, and someone who witnessed each of the applications. In each case it is necessary for the Chamber to approve the suggested measures in order to fulfil its obligations to victims, witnesses, and others put at risk by the activities of the court under Article 68(1). We have analysed each of the proposed redactions, and in our judgement, the exculpatory and Rule 77 value of the material is undiminished and the documents remain intelligible and usable. The application is necessary and its terms are proportionate and it does not cause any prejudice to the accused, in our judgement. The Prosecution is to disclose the applications in the redacted form it has proposed and the OPCV should assist the Prosecution in effecting disclosure as regards the supplementary material, in accordance with the detailed proposals set out by the OPCV in its application of 6 February 2009, document 1676.⁶⁹ (emphasis added)

27. That conclusion, and the reasoning in support, applies to the present circumstances, and in consequence the redactions are to remain in place.

28. The three post-testimony statements based on the interviews conducted by the OPCV with dual-status Witness 7 (victim a/0047/06), Witness 8 (victim

⁶⁷ ICC-01/04-01/06-2647 paragraph 8.

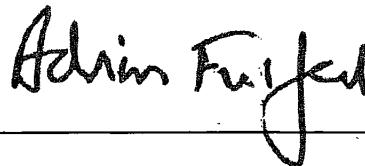
⁶⁸ ICC-01/04-01/06-2671-Conf, paragraph 11.

⁶⁹ Transcript of hearing on 16 February 2009, ICC-01/04-01/06-T-192-CONF-ENG-ET, page 4, line 15 to page 5, line 8.

a/0048/06) and Witness 10 (victim a/0050/06)⁷⁰ are therefore admitted into evidence.

29. The Registry is to assign EVD numbers to the statements (as annexed to the prosecution's application of 20 December 2010).

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 9 March 2011

At The Hague, The Netherlands

⁷⁰ ICC-01/04-01/06-2666, annexes 1 to 3.

ANNEX A

1. On 2 March 2011, the Chamber issued its Decision on the legal representative's application for leave to tender into evidence material from the "bar table" and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9).¹

2. Due to a clerical error, the date referred to in paragraph 29 was inaccurate. The paragraph should correctly read as follows:

29. The Registry is to assign EVD numbers to the statements (as annexed to the prosecution's application of 20 December 2010).

¹ ICC-01/04-01/06-2694.