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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

Redacted Decision on the "Troisième requête de la Défense aux fins de dépôt de documents"

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Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of The Prosecutor v. Thomas Lubanga Dyilo, issues the following Decision on the "Troisième requête de la Défense aux fins de dépôt de documents" ("Decision"):[1]

I. Background

1. On 13 June 2008, this Chamber issued the "Decision on the admissibility of four documents",[2] in which it set out its general approach to the issue of the admissibility of evidence other than direct oral evidence.[3] The Chamber identified four key factors, based on the statutory framework of the Court, 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 Rome Statute ("Statute"), the Chamber has the authority to request the submission of any evidence that it considers necessary in order to determine the truth.[4] 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.[5] Third, notwithstanding the desirability that witnesses should give evidece orally in accordance with Article 69(2) of the Statute,[6] there is "a clear recognition that a variety of other means of introducing evidence may be appropriate".[7] 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.[8] Fourth, Article 64(9) of the Statute confers upon the

[1] Troisième requête de la Défense aux fins de dépôt de documents, 8 November 2010, ICC-01/04-01/06-2604-Conf, with confidential annexes 1 to 49. Corrigendum filed on 11 November 2010, ICC-01/04-01/06-2604-Conf-Corr, and second corrigendum filed on 15 November 2010 and notified on 16 November 2010, ICC-01/04-01/06-2604-Conf-Corr2.
[2] ICC-01/04-01/06-1398-Conf; public redacted version issued on the same day, ICC-01/04-01/06-1399.
[3] ICC-01/04-01/06-1399, paragraph 19.
[4] ICC-01/04-01/06-1399, paragraph 20.
[5] ICC-01/04-01/06-1399, paragraph 21.
[6] ICC-01/04-01/06-1399, paragraph 22.
[7] ICC-01/04-01/06-1399, paragraph 22.
[8] ICC-01/04-01/06-1399, paragraph 22.

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Chamber a "wide discretion to rule on admissibility or relevance and to asses[s] any evidence, subject to the specified issues of 'fairness'".[9]

2. 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 of Procedure and Evidence ("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".

3. 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.[10] 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.[11] Second, again on a *prima facie* basis, the Chamber must consider whether the evidence has probative value.[12] 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"[13] and the Chamber cautioned against imposing artificial limits on its "ability to consider any piece of evidence freely, subject to the requirements of fairness".[14] Third, where relevant, the Chamber has to weigh the probative value of the evidence against its prejudicial effect.[15]

[9] ICC-01/04-01/06-1399, paragraph 23.
[10] ICC-01/04-01/06-1399, paragraphs 26 – 28 and 31.
[11] ICC-01/04-01/06-1399, paragraph 27.
[12] ICC-01/04-01/06-1399, paragraph 28.
[13] ICC-01/04-01/06-1399, paragraph 29.
[14] ICC-01/04-01/06-1399, paragraph 29.
[15] ICC-01/04-01/06-1399, paragraph 31.

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4. On 26 October 2010 the Chamber issued its Decision on the defence request for the admission of 422 documents ("Decision of 26 October 2010"), in which it established the criteria to admit interview transcripts, expense documents for witnesses and intermediaries, and other documents tending to undermine the credibility of incriminating evidence.[16]

5. On 15 November 2010, the defence submitted this "Troisième requête de la Défense aux fins de dépôt de documents" ("the defence third request").[17]

6. On 29 November 2010, the Office of the Prosecutor ("prosecution" or "OTP") provided its observations.[18]

7. On the same day Mr Keta and the Office of Public Counsel for Victims ("OPCV") submitted observations on behalf of the victims they represent.[19]

8. On 6 December 2010, the Legal Officer to the Trial Division notified the parties and participants of the Chamber's decision on the present request, indicating that reasons would be given in writing in due course.[20]

[16] Decision on the defence request for the admission of 422 documents, 26 October 2010, ICC-01/04-01/06-2595-Conf. Public redacted version issued on 17 November 2010, ICC-01/04-01/06-2595-Red.
[17] ICC-01/04-01/06-2604-Conf-Corr2.
[18] Prosecution's Response to the "Troisième requête de la Défense aux fins de dépôt de documents" of 8 November 2010, 29 November 2010, ICC-01/04-01/06-2650-Conf.
[19] Réponse à la troisième requête de la Défense en vue d'admission de certains documents comme éléments de preuve (ICC-01/04-01/06-2604), 29 November 2010, ICC-01/04-01/06-2651-Conf; Réponse du Représentant légal des victims a/0047/06, a/0048/06, a/0050/06 et a/0052/06 à la 'Troisième requête de la Défense aux fins de dépôt de documents" datée du 8 novembre 2010, 29 November 2010, ICC-01/04-01/06-2649-Conf.
[20] Email communication from the Legal Officer to the Trial Division to the parties and participants on 6 December 2010.

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II. Applicable Provisions

9. The legal provisions referred to in the Chamber's Decision of 26 October 2010 apply, *mutatis mutandis*, to the present request.[21]

III. Submissions and case-by-case analysis

10. The defence seeks to introduce numerous documents set out in 49 annexes, which are divided into five categories: (a) the transcripts of the interviews between the prosecution and witnesses who have given evidence during the trial; (b) the transcripts of the interviews between the prosecution and certain individuals during the course of the prosecution's investigations, (c) the signed statements of witnesses who did not testify during the trial; (d) the documents relevant to expenses incurred by the prosecution for witnesses and intermediaries, and (e) other documents that are likely to undermine the prosecution's incriminating evidence or to support the evidence of defence witnesses.[22]

11. In general terms, the prosecution opposes this third defence request to introduce documents that are, it is suggested, "internal work products" relating to security measures, and are devoid of probative value. The prosecution further contends that there are no valid reasons to introduce this information into evidence, against the background of the alleged failure by the defence to define properly the substance of the abuse of process application.[23]

12. The OPCV submits that these documents are only admissible if the existing criteria established by the Chamber are satisfied, and the

[21] ICC-01/04-01/06-2595-Red, paragraph 36.
[22] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 2.
[23] ICC-01/04-01/06-2650-Conf, paragraph 2.

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documents are admissible pursuant to Article 69 of the Statute. The OPCV contends that the observations of the defence as regards the behaviour of the witnesses called by the prosecution, and the intermediaries it used (coupled with the issue of their truthfulness), fall outside the ambit of a proper request to admit documents, and instead these matters should be addressed in the context of the closing statements at the end of the trial, or as part of an abuse of process application.[24]

13. The Chamber has analysed the 49 annexes individually. The parties' submissions as regards each category of documents have been summarised, along with any discrete arguments on particular documents. Thereafter, the Chamber has determined their admissibility in accordance with the relevant criteria.

A. The transcripts of the interviews with prosecution witnesses who testified during the trial

14. The defence indicates that the interview transcripts covered by this first category were disclosed between April and June 2010, pursuant to Article 67(2) of the Statute and Rule 77 of the Rules. The relevant trial witnesses, who have already testified before the Chamber, were further interviewed between February and April 2010, and it is argued that the transcripts are admissible pursuant to the Chamber's decision of 26 October 2010.[25]

15. The prosecution opposes this application pursuant to Article 69 of the Statute, on the general basis that transcripts or statements should not be admitted in lieu of oral evidence from witnesses, who are available to testify. The prosecution argues that the defence impermissibly avoided certain critical issues when questioning various witnesses in court, and

[24] ICC-01/04-01/06-2649-Conf, paragraphs 4 – 7.
[25] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 3 – 6 .

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instead attempted to address them via out-of-court interviews and statements. The prosecution submits that the defence should have applied to call the relevant witnesses.[26]

1. *The transcripts of the interviews with joint status victim a/0270/07 (VW-0001) (Annex 2)*

16. The defence submits that these interviews, which occurred in April 2010 and were thereafter disclosed to the defence on 17 June 2010, prove that victim a/0270/07 lied to the Chamber as regards his acquaintance with witness DRC-D01-WWWW-0035.[27] The defence observes that a/0270/07 was aware of the defence investigation at the time of the interviews. On this basis, the defence argues that these transcripts are relevant to a/0270/07's sincerity, particularly as regards his relationship with dual status victims a/0229/06 and a/0225/06, and their families.[28]

17. The prosecution argues that the particular elements selected by the defence provide a distorted picture, given the overall context of the interview. Furthermore, the prosecution contends that victim a/0270/07 was only interviewed in order to prepare for the examination of defence witnesses DRC-D01-WWWW-0032, DRC-D01-WWWW-0033, DRC-D01-WWWW-0034, and DRC-D01-WWWW-0035, and that in his post-testimony interview he clarified certain aspects of his evidence.[29] As regards the accused's submission that victim a/0270/07 was informed of the scope of the defence investigations before testifying, the prosecution observes that this was already known, as victim a/0270/07 himself indicated during his testimony. The prosecution also argues that the

[26] ICC-01/04-01/06-2650-Conf, paragraphs 6 – 7.
[27] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 7 – 8, referring to Anx2 (DRC-OTP-0230-0285, DRC-OTP-0230-0289, DRC-OTP-0230-0368, DRC-OTP-0230-0409).
[28] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 9 – 10.
[29] ICC-01/04-01/06-2650, paragraphs 8 – 11.

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defence mischaracterises the statements of victim a/0270/07 as regards his relationship with victims a/0225/06 and a/0229/06.[30] Finally, the prosecution contends that discussions between victims a/0225/06, a/0229/06 and a/0270/07 after they had each testified in court is unsurprising given the latter's role as the guardian of victims a/0225/06 and a/0229/06, and bearing in mind he lives with them.[31]

18. In the Decision of 26 October 2010, the Chamber concluded:

> 44. The Chamber in the instant application is addressing ... [the suggestion] that these interview transcripts should be introduced after, rather than before, the evidence of the relevant witness. Furthermore, it should be noted that the present application does not concern the unavailability of a witness to testify before the Court, or the vulnerability of victims and witnesses, which may require evidence to be introduced by "special means". Although the Rome Statute framework has addressed certain particular situations when transcripts or other documentary evidence can be tendered in certain identified circumstances, this scenario - the suggested introduction of interview transcripts created after a witness has testified - is not dealt with.
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> 45. [...] Rule 68 of the Rules, relied on by the defence, applies only to the prior recorded testimony of a witness, such as a transcript or a witness statement. Furthermore, as the Chamber has previously indicated, applying the straightforward language of Rule 68 of the Rules, the Chamber has discretion to order that written statements are to replace live testimony if, and only if, one of the two relevant conditions is met: either the defence and the prosecution have had the opportunity to question the witness if he or she is not present before the Court, or, for a witness before the Court, the witness - who gives consent to the introduction of the evidence - is available for examination by the prosecution and the defence.
>
> 46. Given, therefore, the present application concerns the transcripts of interviews conducted with prosecution witnesses following their live testimony before the Court, the statutory exceptions relating to prior-recorded testimony in Rule 68 of the Rules self-evidently do not apply. Indeed, it would be a misconstruction of the statutory framework of the Court to rule that a subsequent interview with a trial witness could replace his or her oral testimony under Rule 68 of the Rules, and, as just set out, in the judgment of the Chamber that particular provision has no application to the present circumstances.
>
> 47. Instead, Article 69(4) gives the Chamber the discretion to rule on the relevance or admissibility of evidence, taking into account, *inter alia*, any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness. Furthermore, pursuant to Rule 63(2) of the Rules, the Chamber has authority, in accordance with the discretion described in Article 64(9) of the Statute, to assess freely all the evidence submitted in the case, in order to determine its relevance or admissibility in accordance with Article 69 of the Statute.
>
> 48. The Chamber earlier authorised the prosecution to conduct additional interviews with a number of its witnesses, as part of enquiries into the defence evidence. So long as their introduction does not create unfairness, the contents of these post-testimony interviews may be admissible, once they have been disclosed to the defence pursuant to Articles 67(2) of the Statute and Rule 77 of the Rules. It is to be recalled that the prosecution applied to contact its witnesses in order to determine the veracity of the defence allegations against them, and it is relevant to this Decision that the prosecution met with witnesses DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008 and DRC-OTP-WWWW-0010.

[30] ICC-01/04-01/06-2650-Conf, paragraph 12.
[31] ICC-01/04-01/06-2650-Conf, paragraph 13.

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49. The defence alleges that a number of prosecution witnesses have fabricated evidence and deliberately lied in their testimony, and the Chamber considers that the transcripts of the subsequent interviews with these witnesses that were conducted, at least in part, to address those allegations are therefore relevant to this important issue, given they may potentially assist the Chamber in determining whether the individuals concerned have told the truth. Put otherwise, their response in an *ex post facto* interview to the suggestions that have been advanced merits attention by the Chamber, and they have, *prima facie*, probative value.

50. It follows, in these particular circumstances, that evidence relevant to the credibility of a witness not emanating from either a prior statement admitted pursuant to the exception contained within Rule 68 of the Rules or live testimony in open court, may assist the Chamber in its overall assessment of the witness's testimony, and, for the reasons set out above, the present material is relevant to the trial, and it is admissible pursuant to Article 69(3) of the Statute (subject to the issue of fairness, considered below). It must, however, be stressed that the admissibility of evidence and its weight are entirely separate issues, and the Chamber will bear in mind particularly that the contents of transcripts have not been the subject of examination in court. This is especially necessary given the usual course, set out above, that witnesses will give their evidence in court, under oath.

51. It is not suggested that the transcripts fail to reflect accurately the audio and video recorded interviews conducted between the prosecution and its witnesses, as authorised by the Chamber. They are relevant to, and probative of, the issues the Chamber is considering, and given the defence does not seek to ask any further questions of the relevant witnesses, and the prosecution had the opportunity to raise all relevant issues during the interviews, no material unfairness will be occasioned by their introduction.

52. The Chamber therefore grants the defence request for admission from the bar table of the transcripts of the further interviews conducted with prosecution witnesses DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008, DRC-OTP-WWWW-0010, DRC-OTP-WWWW-0011 and DRC-OTP-WWWW-0299.[32]

19. This reasoning applies *mutatis mutandis* to the present application, given the relevance of the evidence in question to the abuse of process application; the matters raised by the prosecution go to the weight of the evidence as opposed to its admissibility; and accordingly the Chamber grants the defence request to admit the transcripts of the interview with victim a/0270/07 from the bar table.

2. *The transcripts of the interviews with witness DRC-OTP-WWWW-0089 (Annex 3)*

20. The defence submits that these interviews, which occurred in March 2010 and were thereafter disclosed to the defence in April 2010, corroborate the testimony of defence witness DRC-D01-WWWW-0023, since DRC-OTP-WWWW-0089 recognised [REDACTED] when he was shown

[32] ICC-01/04-01/06-2595-Red.

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[REDACTED], and he recognised document EVD-D01-00127 (a request for financing for former child soldiers), which DRC-OTP-WWWW-0089 unsuccessfully requested.[33]

21. The prosecution suggests that the re-interview with DRC-OTP-WWWW-0089 was conducted because the defence failed to put its case to the witness appropriately at the time of his testimony, and in order to enable the prosecution to prepare for defence witnesses DRC-D01-WWWW-0009 and DRC-D01-WWWW-0023.[34] It is observed that the identity and details of DRC-OTP-WWWW-0089 were disclosed to the defence in January 2008 and that the defence spoke [REDACTED] in June 2009.[35] The prosecution thus contends that the defence should have addressed all the issues relating to DRC-OTP-WWWW-0089 during his evidence. The prosecution argues that admitting selected portions of an out-of-court statement, at this stage of the trial, to establish facts that were not addressed when the witness was originally questioned in court contravenes the Chamber's order that all relevant, substantive matters should be raised with the witnesses during their evidence.[36] Furthermore, the prosecution disputes the relevance of this witness's interview as regards the evidence of defence witness DRC-D01-WWWW-0023.[37] Finally, the prosecution submits that any value the statement may have is outweighed by the presumption that evidence should be given orally during the trial, and it will be unfair to the prosecution to admit this material from the bar table.[38]

22. The Chamber is unpersuaded that the prosecution has established that the defence deliberately or inexcusably failed to question the witness on the

[33] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 11 – 12 and Anx3 (DRC-OTP-0227-0275, DRC-OTP-0227-0304, DRC-OTP-0227-0335).
[34] ICC-01/04-01/06-2650-Conf, paragraph 14.
[35] ICC-01/04-01/06-2650-Conf, paragraph 15.
[36] ICC-01/04-01/06-2650-Conf, paragraph 15.
[37] ICC-01/04-01/06-2650-Conf, paragraph 16.
[38] ICC-01/04-01/06-2650-Conf, paragraph 16.

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matters relevant to this application. Further, the elements of this evidence that the defence seeks to rely on are relevant to the abuse of process application. In all the circumstances, the Decision the Chamber of 26 October 2010, as quoted in paragraph 18 above, applies, *mutatis mutandis,* to this material, and the defence application to admit the transcripts of interviews with DRC-OTP-WWWW-0089 from the bar table is granted.

B. The transcripts of interviews with individuals not called as witnesses during the trial

23. As regards this second category of documents, the defence acknowledges that in its Decision of 26 October 2010, the Chamber refused to admit documents in this category.[39] However, it submits that these particular transcripts are to be distinguished because, unlike the documents addressed in the Decision of 26 October 2010, they are not relied on to contradict the statements of trial witnesses, but instead it is said they have the capacity to support or, alternatively, to contradict the authenticity of documents already admitted into evidence. In the circumstances, unlike the situation addressed in the Decision of 26 October 2010, the defence submits that it is unnecessary for those who were interviewed to give oral evidence before the Chamber, and that an assessment of "[the] accuracy, reliability and honesty" of the material, is not a prerequisite for admitting these transcripts..[40]

24. The prosecution relies on the Decision of 26 October 2010, highlighting the Chamber's refusal to admit statements of this kind from witnesses who have not been called during the trial.[41] The prosecution submits that the distinction as to the different use proposed for this material relied on by

[39] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 13.
[40] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 14 – 17.
[41] ICC-01/04-01/06-2650-Conf, paragraph 17.

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the defence is without substance, given the statements are relied on as evidence, and it is submitted that the Trial Chamber in its Decision of 26 October 2010 did not focus on the nature of the evidence in issue, but rather on the use of out-of-court statements. Finally, the prosecution contends that it would be unfair to use out-of-court interviews with individuals about whom the Court has been unable to make a proper assessment, and who were interviewed by the prosecution as part of its investigations into documents that had been admitted into evidence, when this new material may affect the evaluation of certain trial witnesses.[42]

1. *The transcripts of the interviews with DRC-OTP-WWWW-0578 (Annex 4)*

25. The defence submits that the transcripts of these interviews in May 2010, which were disclosed to the defence in October 2010, relate to an individual who is an education official in Ituri, and who is the acknowledged author of document EVD-D01-00071: a certificate relating to the studies of trial witness DRC-OTP-WWWW-0294. The defence submits that he is able to explain the circumstances in which this document was created, and he attests to its authenticity. The defence also suggests that this document tends to indicate that questions put to witness DRC-D01-WWWW-0029 by the prosecution had no proper basis.[43]

26. As rehearsed in paragraph 24 above, the prosecution opposes the introduction of these interview transcripts.[44]

27. The Chamber its Decision of 26 October 2010 set out the following:

[42] ICC-01/04-01/06-2650-Conf, paragraphs 17 – 18.
[43] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 18 – 20, referring to Anx4 (DRC-OTP-0232-0016, DRC-OTP-0232-0040, DRC-OTP-0232-0063, DRC-OTP-0229-0041, DRC-OTP-0229-0042, DRC-OTP-0229-0043).
[44] ICC-01/04-01/06-2650-Conf, paragraphs 17 – 18.

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56. Although, under Article 69(2) of the Statute, the Chamber may admit, *inter alia*, documents and written transcripts, the three-part approach to be applied is that of relevance, probative value and fairness.

57. These individuals were not questioned under oath, and their account, as just set out, was simply part of an information-gathering exercise by the prosecution. The Chamber has not seen these individuals and there are insufficient indications as to whether the prosecution's questions were sufficiently comprehensive or penetrating to provide a balanced and reliable picture. As the Chamber has previously observed:

live questioning of a witness in open court on all aspects of his or her evidence can have a material impact on the Chamber's overall assessment of the evidence, [...] most importantly the evidence can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part by observing the conduct and demeanour of the witness.

58. If the defence seeks to put this material before the Chamber, it should call the relevant individuals as witnesses so that a proper assessment can be made of their reliability and credibility. In the present circumstances, the transcripts of the interviews with DRC-OTP-WWWW-0006 and DRC- OTP-WWWW-0009 will be of low, if any, probative value, and it will be unfair on the prosecution to admit them into evidence from the bar table.[45]

28. The Chamber is unpersuaded by the defence argument that in order to take this material into consideration, the Chamber does not need to hear evidence from the relevant individuals to assess the accuracy, reliability and honesty of this evidence; to the contrary, if this material is admitted, even for a restricted purpose, it requires proper scrutiny. There is no foundation for the contention that this transcript should be treated differently to other disputed evidence in the case. In all the circumstances, the reasoning of the Chamber in its Decision of 26 October 2010 applies, *mutatis mutandis,* to the present application, and the Chamber refuses the defence request to admit the transcript of interview with DRC-OTP-WWWW-0578 from the bar table. This evidence relates to a potentially important issue in the case.

2. *The transcripts of the interviews with DRC-OTP-WWWW-0563 (Annexes 5 and 6)*

[45] ICC-01/04-01/06-2595-Red, paragraphs 56 – 58.

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29. The defence suggest that the transcripts of these interviews in April 2010, which were disclosed to the defence in May 2010, concern [REDACTED] who signed the student identity cards for dual status victims a/0225/06 and a/0229/06. It is said that in the course of his interview DRC-OTP-WWWW-0563 indicated that he issued these documents, following a delay and at a time when the relevant individuals were no longer students. The defence also observes that DRC-OTP-WWWW-0563 has given evidence that he would issue documents of this kind following a request from ICC investigators, and that people came to him, with [REDACTED]'s approval and accompanied by Mr Keta, so that he could sign the relevant documents, even though he was no longer the [REDACTED]. DRC-OTP-WWWW-0563 apparently confirms that the tutor of a/0229/06 (*viz.* a/0270/07) asked him to issue certain documents (the student identity cards), and thus he contradicts the evidence of dual status victim a/0229/06, who indicated that he had not been assisted by a/0270/07. It is argued, given these identity cards were supposedly issued without authority by DRC-OTP-WWWW-0563, that this supports the defence suggestion that a/0270/07 organised the identity theft of certain victims.[46]

30. As rehearsed in paragraph 24 above, the prosecution opposes the introduction of this material.[47]

31. It is suggested by one of the legal representatives that although DRC-OTP-WWWW-0563 signed the student identity cards in July 2007, Mr Keta did not meet him until November 2007, when DRC-OTP-WWWW-0563 indicated he was [REDACTED] for the [REDACTED], in the absence of [REDACTED] who had left for [REDACTED]. [REDACTED] has allegedly

[46] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 21 – 25, referring to Anx5 (DRC-OTP-0228-0135) and Anx6 (DRC-OTP-0228-0143).
[47] ICC-01/04-01/06-2650-Conf, paragraphs 17 – 18.

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indicated he will provide information confirming this assertion.[48] The legal representative relies on two documents, which he submits establish that DRC-OTP-WWWW-0563 was [REDACTED] the [REDACTED].[49] In all the circumstances, Mr Keta objects to the introduction of these interview transcripts because DRC-OTP-WWWW-0563 did not testify under oath, and counsel relies on the Decision on the defence request for the admission of 422 documents, in which the Chamber refused a defence request to admit similar documents.[50]

32. The Chamber is unpersuaded by the defence argument that in order to take this material into consideration, the Chamber does not need to hear evidence from the relevant individuals to assess the accuracy, reliability and honesty of this evidence; to the contrary, if this material is admitted, even for a restricted purpose, it requires proper scrutiny. The arguments raised by Mr Keta concern, in the main, matters of evidence, which he cannot personally give by way of submissions to the Chamber. In all the circumstances, the reasoning of the Chamber from the Decision of 26 October 2010, as rehearsed in paragraph 27 above applies, *mutatis mutandis,* to the present application, and the Chamber refuses the defence request to admit the transcripts of the interviews with DRC-OTP-WWWW-0563 from the bar table. This evidence relates to a potentially important issue in the case.

C. The signed statements of witnesses who did not testify during the trial

1. *The signed statements of witnesses DRC-OTP-WWWW-0009 (Annex 7) and DRC-OTP-WWWW-0006 (Annexes 8 and 9) who were not called during the trial*

[48] ICC-01/04-01/06-2651-Conf, paragraph 8.
[49] ICC-01/04-01/06-2651-Conf, paragraph 8 and Annexes 1 and 2.
[50] ICC-01/04-01/06-2651-Conf, paragraph 8.

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33. The defence submits that these individuals, who are alleged to be former child soldiers, were withdrawn from the prosecution's list of trial witnesses in May 2008. They were interviewed in 2005 and 2007, and the transcripts of their interviews were respectively disclosed to the defence in 2006 and 2007.[51] The defence observes that these individuals were contacted via intermediary DRC-OTP-WWWW-0143 ("intermediary 143"), who assisted them with their applications to participate as victims.[52] It is pointed out that the statements from these two individuals were admitted as evidence for the purposes of the confirmation of charges, and Pre-Trial Chamber I referred to them repeatedly in the Decision on the Confirmation of Charges.[53] The defence further submits that during the testimony of witness DRC-D01-WWWW-0029, several documents were admitted that tend to show that these two witnesses (who were not called) lied about their ages and schooling. It is the defence contention that the Chamber will only be able to evaluate the contradictions between this documentary material and the statements of these two individuals if the latter are admitted into evidence.[54]

34. The prosecution objects to the admission of these documents, given neither party has called witnesses DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009, and it is submitted their statements are inadmissible pursuant to the principles laid down by the Trial Chamber in its Decision of 26 October 2010. It is suggested that in the present circumstances it would be unfair to the prosecution if the defence is permitted to introduce

[51] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 26 and Anx7 (DRC-OTP-0126-0154), Anx8 (DRC-OTP-0132-0079), and Anx9 (DRC-OTP-0173-0002).
[52] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 27.
[53] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 28.
[54] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 29 – 31.

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the statements from the bar table, thereby avoiding questioning the witnesses in court.[55]

35. The request from the defence fails to afford the Chamber an adequate opportunity to investigate the integrity and reliability of this evidence, and in all the circumstances the Decision of 26 October 2010 as rehearsed in paragraph 27 above applies, *mutatis mutandis,* to the present application. This evidence relates to a potentially important issue in the case. Therefore, the Chamber refuses the defence request to admit the signed statements of DRC-OTP-WWWW-0009 and DRC-OTP-WWWW-0006 from the bar table.

2. The signed statement of intermediary DRC-OTP-WWWW-0183 (Annex 10)

36. The defence suggests that the statement of this intermediary, who was interviewed in December 2009 (the statement was disclosed to the defence in June 2010), demonstrates that he is alive – contrary to the testimony of another intermediary, DRC-OTP-WWWW-0316 ("intermediary 316"), who claimed he was dead.[56] Furthermore, it is argued that this individual deals with various incidents that call the integrity of intermediary DRC-OTP-WWWW-0316 into question.[57]

37. The prosecution submits that the defence application lacks any proper foundation, as the material relied on fails to establish either the necessary degree of probative value or sufficient relevance to justify its admission from the bar table. It is argued that the statement does not demonstrate either that the prosecution conducted itself inappropriately or that it failed

[55] ICC-01/04-01/06-2650-Conf, paragraph 36.
[56] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 32 – 33, referring to Anx10 (DRC-OTP-2001-0732).
[57] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 33 – 34.

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properly to investigate the conduct of DRC-OTP-WWWW-0316.[58] The prosecution relies on the suggestion that the statement concerns events that occurred at a time when DRC-OTP-WWWW-0316 was no longer a prosecution intermediary, when he was not substantively involved in the operations of the OTP. The prosecution also submits that these issues have been addressed *in extenso* during the testimony of witnesses DRC-OTP-WWWW-0316, DRC-OTP-WWWW-0321, DRC-OTP-WWWW-0581, DRC-OTP-WWWW-0582 and DRC-OTP-WWWW-0583, who were called specifically for this purpose, pursuant to the Trial Chamber's Decision on Intermediaries of 12 May 2010.[59] The prosecution also contends that the conduct described in the statement does not relate to the alleged corruption of witnesses, and thus it is irrelevant to the defence allegations against intermediary 316 within the ambit of the abuse of process application.[60]

38. The request from the defence fails to afford the Chamber an adequate opportunity to investigate the integrity and reliability of this evidence, and in all the circumstances the Decision of 26 October 2010, as rehearsed in paragraph 27 above, applies *mutatis mutandis* to the present application. This evidence relates to a potentially important issue in the case. Therefore, the Chamber refuses the defence request to admit the signed statement of DRC-OTP-WWWW-0183 from the bar table.

3. *The statements signed by an individual called* "[REDACTED]" *(Annex 11)*

39. The defence submits that in his statements (disclosed to the defence in December 2009) this individual referred to a loan of 355 USD he made to

[58] ICC-01/04-01/06-2650-Conf, paragraphs 19 – 20.
[59] ICC-01/04-01/06-2650-Conf, paragraph 21.
[60] ICC-01/04-01/06-2650-Conf, paragraph 23.

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intermediary DRC-OTP-WWWW-0316, which was not repaid.[61] He then set out how DRC-OTP-WWWW-0316 incited him to tell lies to an OTP investigator.[62] Moreover, the defence submits that in his written statement, intermediary 0316 confirmed elements of this history, in that he admitted inciting "[REDACTED]" to lie to OTP investigators.[63] The defence requests the introduction of this document solely to demonstrate that the prosecution was aware of DRC-OTP-WWWW-0316's inappropriate behaviour.[64]

40. The prosecution submits that for the reasons that relate to witness DRC-OTP-WWWW-0183, the defence application lacks foundation and fails to satisfy the requirements for the introduction of documents from the bar table.[65] The prosecution also contends that the conduct described in the statement does not relate to the alleged corruption of witnesses, and thus it is not probative of the allegations made by the defence against intermediary 316 as part of the abuse of process application.[66] Additionally, the prosecution raises objections based on the circumstances in which the statement was taken. It is suggested an Operations Officer from the OTP interviewed this individual in order to clarify an incident relating to expenses for intermediary 316. It is argued that this was simply an exercise to gain information and if the prosecution had known that the statement (that was not created for judicial purposes) might be used in this way, a trained investigator would have been used and the questioning would have been conducted, and the recording implemented, differently.[67]

[61] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 35 – 36, referring to Anx11 (DRC-OTP-0219-0056).
[62] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 36.
[63] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 37.
[64] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 38 – 39.
[65] ICC-01/04-01/06-2650-Conf, paragraphs 19 – 24.
[66] ICC-01/04-01/06-2650-Conf, paragraph 23.
[67] ICC-01/04-01/06-2650-Conf, paragraph 22.

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41. The request from the defence fails to afford the Chamber an adequate opportunity to investigate the integrity and reliability of this evidence, and in all the circumstances the Decision of 26 October 2010 set out in paragraph 27 above applies, *mutatis mutandis,* to the present application. This evidence relates to a potentially important issue in the case. In all the circumstances, the Chamber refuses the defence request to introduce the signed statement of an individual identified as [REDACTED] from the bar table.

D. Documents relating to expenses incurred by the OTP relating to its witnesses and intermediaries (Annexes 12-17)

42. The defence seeks to introduce 247 expense-documents that relate to intermediaries DRC-OTP-WWWW-0143, DRC-OTP-WWWW-0316, DRC-OTP-WWWW-0321 and DRC-OTP-WWWW-0031, and witnesses DRC-OTP-WWWW-0055 and DRC-OTP-WWWW-0038. The defence submits that these documents should be admitted in accordance with the principles established by the Chamber in its Decision of 26 October 2010.[68]

43. The prosecution does not oppose the introduction of the expense-related documents in Annexes 12, 13, 14 and 15 to this third request, namely those for intermediaries DRC-OTP-WWWW-0143, DRC-OTP-WWWW-0031, DRC-OTP-WWWW-0316 and DRC-OTP-WWWW-0321.[69] As regards the witness-related expense documents for witnesses DRC-OTP-WWWW-0055 (Annex 16) and DRC-OTP-WWWW-0038 (Annex 17), the prosecution objects to their admission on the grounds that they are irrelevant to the

[68] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 40, Anx12 (contains 116 documents related to intermediary 143), Anx13 (contains 55 documents related to intermediary 31), Anx14 (contains 16 documents related to intermediary 316), Anx15 (contains 42 documents related to intermediary 321), Anx 16 (contains 5 documents related to witness 55), and Anx17 (contains 13 documents related to witness 38).
[69] ICC-01/04-01/06-2650-Conf, paragraph 25.

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issues in the case, and including the defence abuse of process application.[70] The prosecution reiterates its prior submission, namely that receipts of this kind simply demonstrate that witnesses were properly reimbursed for giving evidence, and that these payments do not establish, in these circumstances, an incentive for the witnesses to give false testimony.[71] The prosecution contends that witness DRC-OTP-WWWW-0055 is not implicated in, or connected to, the general allegations that have been made against intermediaries.[72] As regards witness DRC-OTP-WWWW-0038, the prosecution highlights the defence failure to ask him any questions as regards the relevant receipts when he was recalled in October 2010. In the submission of the prosecution, this demonstrates that the expenses for witness DRC-OTP-WWWW-0038 are not relevant to, or probative of, the abuse application. In any event, it is suggested that the document should be introduced via a witness.[73]

44. In the Decision of 26 October 2010, the Chamber set out the following:

> 60. In its "Decision on Intermediaries", the Chamber held that: "[t]he precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in this trial", and as a result it has adopted an individual-by-individual approach when determining applications for disclosure of identities of the intermediaries used by the prosecution, establishing as the threshold for disclosure (under Rule 77 of the Rules) whether prima facie grounds exist for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question. The Chamber identified evidence that intermediaries 316 ([REDACTED]) and 321 ([REDACTED]) may have misused their positions in varying ways, and decided that:
>
> > [...] in light of the extensive allegations made against intermediaries 316 ([REDACTED]) and 321 ([REDACTED]), [...] it is in the interests of a fair trial for these two individuals to be called to deal with the suggestions that they attempted to persuade one or more individuals to give false evidence. Their testimony before the Court is likely to assist the Chamber in resolving, first, the criticisms that have been levelled against them; second, some of the extensive conflicts in the evidence that have emerged during the trial; and, third, the possible contacts between the intermediaries.
>
> 61. The prosecution was therefore ordered to call intermediaries 316 and 321 following the defence witnesses on the abuse of process application, prior to the submissions of the parties and participants on the issue.

[70] ICC-01/04-01/06-2650-Conf, paragraph 26.
[71] ICC-01/04-01/06-2650-Conf, paragraph 26.
[72] ICC-01/04-01/06-2650-Conf, paragraph 27.
[73] ICC-01/04-01/06-2650-Conf, paragraph 28.

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62. It is noteworthy that both DRC-OTP-WWWW-0015 and DRC-OTP-WWWW-0016 implicated intermediary 316 in their testimony before the Court.

63. Given that the role of certain intermediaries, as well as the alleged improper payments to intermediaries and witnesses, have become live issues in the case, the Chamber considers that these documents are relevant to "matters that are properly to be considered by the Chamber in its investigation of the charges against the accused".

64. In the Chamber's view, the documents bear sufficient indicia of reliability, given they are official reimbursement receipts originating from the prosecution, along with invoices that were submitted for reimbursement, the latter having been accepted by the prosecution. Therefore, the invoices and receipts are, prima facie, probative.

65. In light of the above, these documents are relevant to, and probative of, the issues the Chamber is considering, and given the indicia of reliability it is fair for them to be introduced into evidence.[74]

45. This reasoning applies, *mutatis mutandis,* to the defence request to introduce Annexes 12, 13, 14 and 15. Bearing in mind the lack of opposition by the prosecution, the Chamber grants the defence request to tender the expense documents relating to intermediaries DRC-OTP-WWWW-0143, DRC-OTP-WWWW-0031, DRC-OTP-WWWW-0316, and DRC-OTP-WWWW-0321 from the bar table.

46. The defence has not called into question the evidence of DRC-OTP-WWWW-0055, and accordingly the approach just set out does not apply to the expense-documents relating to him: indeed, he did not give evidence against any of the intermediaries. In all the circumstances, this material is irrelevant to the present abuse of process application, and the Chamber refuses the defence request to introduce the expense-documents for DRC-OTP-WWWW-0055.

47. The Chamber considers that the introduction of the expense-documents relating to DRC-OTP-WWWW-0038, at this stage of the proceedings, would be unfair. As noted by the prosecution, these documents were disclosed to the defence on 25 June 2010, prior to his evidence when he was recalled in October 2010. They should have been put to the witness at

[74] ICC-01/04-01/06-2595-Conf.

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that point in time, and given this failure by the accused it would be unfair to admit them now from the bar table. The Chamber, therefore, refuses the defence request to introduce this material relating to DRC-OTP-WWWW-0038.

E. Other documents that tend to undermine the prosecution's incriminating evidence

1. *Affidavits relating to screening notes (Annexes 18-25)*

48. The defence seeks to admit eight affidavits signed by prosecution staff-members relating to the screening notes for eleven children who were dealt with by witness DRC-OTP-WWWW-0581 in November 2007.[75] These documents were disclosed to the defence between June and July 2010. The defence observes that the eleven relevant screening notes were admitted into evidence during the examination of witness DRC-OTP-WWWW-0581, and seven of the affidavits indicate that these interviews took place between 16 and 18 November 2007. Furthermore, on 6 July 2010 an additional affidavit was disclosed to the defence (DRC-OTP-0231-0037). It is suggested that this affidavit confirms that EVD-D01-00315 corresponds with the list of potential witnesses that intermediary DRC-OTP-WWWW-0031 provided to the prosecution in November 2007. The defence, therefore, applies to introduce these affidavits, given their suggested relevance to the evidence of witnesses DRC-OTP-WWWW-0581 and DRC-OTP-WWWW-0321.[76]

49. The prosecution does not oppose this application.[77]

[75] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 41 and Anx18 (DRC-OTP-0231-0337), Anx19 (DRC-OTP-0230-0280), Anx20 (DRC-OTP-0230-0272), Anx21 (DRC-OTP-0230-0278), Anx22 (DRC-OTP-0230-0276), Anx23 (DRC-OTP-0230-0270), Anx24 (DRC-OTP-0230-0274), and Anx25 (DRC-OTP-0230-0268).
[76] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 41 – 43.
[77] ICC-01/04-01/06-2650-Conf, paragraph 4.

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50. The Chamber grants this request given the stance of the prosecution, and bearing in mind the link between these affidavits and the screening notes already tendered in evidence. The criteria for admissibility, set out above, are met in this instance.

2. *The emails between witness DRC-OTP-WWWW-0581 and the OTP (Annexes 26-27)*

51. The defence applies to admit the email exchanges between witness DRC-OTP-WWWW-0581 and an OTP investigator concerning potential witnesses (these were disclosed to the defence in July 2010).[78] In the first exchange, DRC-OTP-WWWW-0581 corrects the name of a witness, thereby potentially improving information in document EVD-D01-00324.[79] In the second exchange, addressed to DRC-OTP-WWWW-0581, one of those involved in prosecuting the *Lubanga* case identifies eight individuals who should be interviewed; it is suggested this clarifies the evidence of DRC-OTP-WWWW-0581 and DRC-OTP-WWWW-0321.[80]

52. The prosecution opposes the introduction of these documents since, in its submission, they should have been put to witness DRC-OTP-WWWW-0581 and the defence ought not to be allowed to rectify its failure to question witnesses appropriately by an application of this kind.[81]

53. The Chamber is of the view that introducing these emails at this stage of the proceedings would be unfair. These documents were disclosed to the defence prior to the testimony of witness DRC-OTP-WWWW-0581 when he was recalled. Given the documents were disclosed on 6 July 2010, they

[78] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 44, referring to Anx26 (DRC-OTP-0231-0383) and Anx27 (DRC-OTP-0231-0396).
[79] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 45.
[80] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 46.
[81] ICC-01/04-01/06-2650-Conf, paragraph 29.

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should have been dealt with at that stage, when the witness had an opportunity to answer questions about them. In all the circumstances, the Chamber refuses the defence request to introduce these documents from the bar table.

3. The screening notes (Annexes 28-32)

54. The defence applies to admit five investigator's notes that were disclosed to the defence between June and October 2010, which relate to intermediary 316.[82] The defence submits that they establish the following: a) from February 2006, the prosecution had serious doubts about the honesty of intermediaries DRC-OTP-WWWW-0031, 143 and 316; b) the Prosecutor determined in May 2008 that 316 should no longer be used as an intermediary; c) in February 2006 the prosecution was aware that according to intermediary 143 one of the former child soldier witnesses had been "coached" by intermediary 316; and d) on numerous occasions between 2006 and 2009 the prosecution received indications that intermediary 316 was providing false or inaccurate information.[83]

55. The prosecution objects to the introduction of the investigator's report in Annex 29, given it was prepared by the prosecution to facilitate disclosure of relevant information from the "situation contacts management system", and as a result it is an "internal work product". A summary of this information was provided for the convenience of the defence.[84] The prosecution suggests, therefore, that this document was not prepared for judicial purposes and it should not be treated as "evidence". The prosecution relies on an Order from the Trial Chamber to disclose the

[82] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 47, referring to Anx28 (DRC-OTP-0231-0323), Anx29 (DRC-OTP-0230-0456), Anx30 (DRC-OTP-0230-0451), Anx31 (DRC-OTP-0232-0276), and Anx32 (DRC-OTP-0233-0525).
[83] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 47 – 48.
[84] ICC-01/04-01/06-2650-Conf, paragraphs 30 – 31.

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underlying information from this document.[85] Furthermore, it is noted that the defence has already put the substance of this information to intermediary DRC-OTP-WWWW-0316 during his testimony, as well as that of witnesses DRC-OTP-WWWW-0582 and DRC-OTP-WWWW-0583. The prosecution submits that the defence should not be permitted to rectify its failure to put relevant material to witnesses by introducing documents from the bar table.[86]

56. The prosecution observes that Annexes 30, 31 and 32 were introduced by the prosecution through witness DRC-OTP-WWWW-0582, and therefore the application may be moot. The prosecution submits that even if the Trial Chamber has yet to rule on their admissibility, they would ordinarily be admitted having been used by the prosecution when examining its witnesses. The prosecution submits that if this application is granted, these documents should receive a prosecution EVD number.[87]

57. The screening note in Annex 28 relates an incident that is relevant to intermediary 316's reliability. In addition, the note contains the prosecution's assessment that he should no longer be used as an intermediary. Given these are live and relevant issues in the abuse of process application, and absent any objections, the Chamber grants the defence request to admit the document contained in Annex 28 into evidence. The criteria for admissibility are met in this instance.

58. Notwithstanding the fact that Annex 29 is an "internal work product" of the prosecution, it was disclosed to the defence because its contents have become relevant to this case, and it has, *prima facie,* probative value on the

[85] ICC-01/04-01/06-2650-Conf, paragraph 31.
[86] ICC-01/04-01/06-2650-Conf, paragraph 31.
[87] ICC-01/04-01/06-2650-Conf, paragraphs 4 and 32.

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defence abuse of process submission. In all the circumstances, the Chamber grants the defence request to introduce this document.

59. Addressing Annexes 31 and 32, the Chamber observes, as pointed out by the prosecution, that the latter has already tendered these documents in its examination of witness DRC-OTP-WWWW-0582, and thus the defence application, to this extent, is moot. On 25 November 2010 the Chamber instructed the Registry to upload the edited transcript of DRC-OTP-WWWW-0582's deposition onto the Court's case management system and to assign a corresponding EVD number.[88] In addition, the Chamber set a deadline for the parties to bring to the Chamber's attention their objections to any of the documents shown to the witness.[89] As the parties did not make any representations, all the documents were assigned EVD numbers.

60. Annex 30 was disclosed to the defence on 22 June 2010, prior to the testimony of witness DRC-OTP-WWWW-0316, who was called in November 2010, witness DRC-OTP-WWWW-0581, who was recalled in October 2010, and witness DRC-OTP-WWWW-0582, who gave evidence in November 2010. The events described in the document within the annex, along with their consequences, were raised with witness DRC-OTP-WWWW-0582 in evidence on 17 November 2010, and another investigator's note (Annex 31), which addresses the same incident, was similarly introduced by the prosecution. [90] Given the absence of objections to the admission of this document and in order to place the evidence provided by DRC-OTP-WWWW-0582 in a wider, more complete context, the Chamber grants the defence request to admit Annex 30 into evidence.

[88] Transcript of hearing on 25 November 2010, ICC-01/04-01/06-T-337-CONF-ENG ET, page 1, lines 23 – 25.
[89] ICC-01/04-01/06-T-337-CONF ENG ET, page 1, line 25 to page 2, line 3.
[90] Transcript of deposition on 17 November 2010, ICC-01/04-01/06-Rule68Deposition-CONF-ENG ET, page 69, line 19 to page 75, line 10.

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4. *The photographs of certain OTP witnesses (Annexes 33-36)*

61. The defence wishes to introduce four photographs of witnesses DRC-OTP-WWWW-0006, DRC-OTP-WWWW-0009, DRC-OTP-WWWW-0010 and DRC-OTP-WWWW-0294 from the bar table which were taken by the prosecution in 2005 and 2007, and disclosed to the defence in 2007.[91] The defence submits that these pictures will enable the Chamber to establish whether they match those on the electoral cards admitted in the Decision of 26 October 2007, as well as the information related to the Independent Electoral Commission included in Annexes 37 to 43 to the present request.[92]

62. The prosecution does not oppose the application as regards Annexes 33 and 36.[93] However, for Annexes 34 and 35, the prosecution submits these documents relate to witnesses DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009 who have not been called by either party, and thus the material is inadmissible pursuant to the principles established in the Trial Chamber's Decision of 26 October 2010. The prosecution contends that given the defence did not call these witnesses, it would be unfair on the prosecution to admit the documents from the bar table at this stage, thereby avoiding any proper investigation of the information within all of the materials relating to DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009.[94]

63. The OPCV does not object to the introduction of Annex 33: a photograph of a/0050/06.[95]

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[91] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 49, Anx33 (DRC-OTP-0138-0015), Anx34 (DRC-OTP-0138-0020), Anx35 (DRC-OTP-0138-0009), and Anx36 (DRC-OTP-0208-0131).
[92] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 49.
[93] ICC-01/04-01/06-2650-Conf, paragraph 4.
[94] ICC-01/04-01/06-2650-Conf, paragraph 36.
[95] ICC-01/04-01/06-2649-Conf, paragraph 24.

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64. The Chamber's Decision of 26 October 2010, as rehearsed in paragraph 27 above applies, *mutatis mutandis,* to the present request of the defence to admit the photographs of witnesses DRC-OTP-WWWW-0009 and DRC-OTP-WWWW-0006. It would be unfair to permit the defence to introduce this material at this stage given the relevant witnesses have not been called, thereby preventing any proper assessment by the Chamber. In all the circumstances, the Chamber refuses the defence request to admit the photographs in Annexes 34 and 35 from the bar table.

65. The Chamber admits the photographs of trial witnesses DRC-OTP-WWWW-0010 and DRC-OTP-WWWW-0294 (Annexes 33 and 36), given this request is unopposed. The criteria for admissibility, set out above, are met in this instance.

5. *Excerpts from the database of the Independent Electoral Commission (Annexes 37-40)*

66. The defence wishes to rely on excerpts of information from the database of the Independent Electoral Commission that were disclosed by the prosecution in July 2010, and which relate to witnesses DRC-OTP-WWWW-0006, DRC-OTP-WWWW-0009, DRC-OTP-WWWW-0010 and DRC-OTP-WWWW-0294.[96] The accused submits that this material includes the names, and the place and date of birth, of these individuals (as well as their photographs) thus confirming the authenticity of certain documents admitted as evidence in the Decision of 26 October 2010.[97]

67. The prosecution does not oppose the application to introduce the document in Annex 40,[98] but it objects to those in Annexes 37 and 38, on

[96] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 50, referring to Anx37 (DRC-OTP-0231-0278), Anx38 (DRC-OTP-0231-0276), Anx39 (DRC-OTP-0231-0275), and Anx40 (DRC-OTP-0231-0277).
[97] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 50 – 51.
[98] ICC-01/04-01/06-2650-Conf, paragraph 4.

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the basis that they relate to witnesses DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009 who have not been called, and they are accordingly inadmissible pursuant to the principles laid down by the Trial Chamber in its Decision of 26 October 2010. The prosecution contends that given the defence did not call these witnesses, it would be unfair on the prosecution to admit the documents from the bar table at this stage, thereby avoiding any proper investigation of the information within these materials.[99]

68. The Chamber's Decision of 26 October 2010, as rehearsed in paragraph 27 above applies, *mutatis mutandis,* to the present request of the defence to admit the excerpts relating to witnesses DRC-OTP-WWWW-0009 and DRC-OTP-WWWW-0006. It would be unfair to permit the defence to introduce this material at this stage given the relevant witnesses have not been called, thereby preventing any proper assessment by the Chamber. In all the circumstances, the Chamber refuses the defence request to admit the excerpts contained in Annexes 37 and 38 from the bar table.

69. The Chamber admits the excerpts relating to trial witnesses DRC-OTP-WWWW-0010 and DRC-OTP-WWWW-0294 (Annexes 39 and 40), not least because the request is unopposed. The criteria for admissibility, set out above, are met in this instance.

6. The documents sent by the Independent Electoral Commission (Annexes 41-43)

70. The defence seeks to introduce 3 documents sent by the Independent Electoral Commission to the defence (via the Registry), which are official copies of excerpts from the Commission's database and which were received by the defence in September 2010. These documents provide

[99] ICC-01/04-01/06-2650-Conf, paragraph 36.

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information on witnesses DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008, DRC-OTP-WWWW-0157, DRC-D01-WWWW-0034, defence witness DRC-D01-WWWW-0033 and his father, and someone by the name of [REDACTED].[100] The defence submits that information within these documents contradicts the evidence of prosecution witnesses DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008 and DRC-OTP-WWWW-0157 as regards their age, whilst simultaneously confirming certain evidence from defence witnesses DRC-D01-WWWW-0032, DRC-D01-WWWW-0033 and DRC-D01-WWWW-0034.[101]

71. The prosecution does not oppose this application.[102]

72. One of the victims' legal representatives, Mr Keta, opposes the introduction of these documents on the basis that the document in Annex 41 refers to [REDACTED], who is someone other than his client, [REDACTED]. In the alternative, he submits that if these documents are admitted, the Chamber should compare them with two further documents attached to his client's application to participate as a victim: the student identity card and the birth certificate in Annex 76 of filing ICC-01/04-01/06-1275-Conf-Exp, at pages 19 and 20.[103]

73. The OPCV observes that Annexes 42 and 43 are relevant to certain of its clients: DRC-OTP-WWWW-0007 (a/0047/06), DRC-OTP-WWWW-0008 (a/0048/06), and DRC-OTP-WWWW-0010 (a/0050/06).[104] The OPCV has sought to investigate the information within these documents to the extent that it affects them. Three of those with dual status have indicated that they requested these identity cards from the Independent Electoral

[100] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 52 – 54 and Anx41 (DRC-D0l-0003-5518, DRC-D0l-0003-5519), Anx42 (DRC-D0l-0003-5520 to DRC-D0l-0003-5522), Anx43 (DRC-DOl-0003-5524).
[101] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 55.
[102] ICC-01/04-01/06-2650-Conf, paragraph 4.
[103] ICC-01/04-01/06-2651-Conf, paragraph 9.
[104] ICC-01/04-01/06-2649-Conf, paragraph 15.

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Commission in order to be able to move about freely as adults. They lied about their age because they were under age at the time – the minimum age for these purposes is 18 years of age.[105] They also gave incorrect information as regards their names, either because they were uncertain of their true names or to avoid being found by their families.[106] The OPCV has attached declarations reflecting these accounts in Annexes A, B and C to its submission.[107] The OPCV argues that given the integrity of the documents of the Independent Electoral Commission is disputed by those who provided the relevant information, granting this application will not assist the Chamber to establish the truth, and the documents will undermine the fairness of the proceedings. The OPCV further submits that events of the kind just described occurred routinely in the period prior to the 2006 elections.[108]

74. The OPCV further objects to the information in Annexes 41 and 42 that relates to its client DRC-OTP-WWWW-0011 (a/0052/06) which tends to cast doubt (at least implicitly) over the veracity of information relating to him, and it submits that the relevant excerpt should not be introduced.[109]

75. The documents relate to prosecution and defence witnesses, and they provide, *inter alia,* official information about their identities and ages, issues which are clearly relevant to the issues in this case. Given the documents come from the Independent Electoral Commission of the Democratic Republic of Congo they have, *prima facie,* probative value. The Chamber is unpersuaded by the OPCV's submission that they should be disregarded because some of its clients lied to the Commission. This material will assist as part of the overall evidence on the issues in the case,

[105] ICC-01/04-01/06-2649-Conf, paragraphs 15 – 18.
[106] ICC-01/04-01/06-2649-Conf, paragraph 18.
[107] Confidential annexes A, B and C to ICC-01/04-01/06-2649-Conf.
[108] ICC-01/04-01/06-2649-Conf, paragraphs 19 – 23.
[109] ICC-01/04-01/06-2649-Conf, paragraphs 25 – 28.

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including the abuse of process application. The probative value of these documents outweighs their prejudicial effect.

76. Given the criteria for admissibility are met in this instance, the Chamber grants the defence request to admit the documents contained in Annexes 41 – 43 into evidence.

7. *Birth certificates (Annexes 44-47)*

77. The defence seeks to rely on 4 birth certificates for witnesses DRC-OTP-WWWW-0006, DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0009 and DRC-OTP-WWWW-0010, which give their date and place of birth, and which were issued by the "État Civil" of [REDACTED].[110] The defence submits that although these certificates were disclosed to the defence in 2006, it was only in October 2010 that the prosecution provided their history (the "chain of custody"), following a specific defence request.[111] Intermediary 0143 obtained these documents, which were each issued by the same officer of the "État Civil" of [REDACTED], on [REDACTED]. On the basis of the evidence of prosecution witnesses DRC-OTP-WWWW-0008, DRC-OTP-WWWW-0010 and DRC-OTP-WWWW-0011, the defence argues that the origin of these documents is suspect, particularly given that DRC-OTP-WWWW-0010 stated she did not go to the "État Civil" to request such a document and did not know how the document relating to her had been obtained, and DRC-OTP-WWWW-0008 and DRC-OTP-WWWW-0011 testified that they were not present when these documents were created.[112] The defence further submits that it was informed by the prosecution in October 2010 that intermediary 143 had, at least on one occasion, obtained a birth certificate based on information provided to him

[110] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 56, referring to Anx44 (DRC-OTP-0132-0010), Anx45 (DRC-OTP-0132-0011), Anx46 (DRC-OTP-0132-0013), and Anx47 (DRC-OTP-0132-0012).
[111] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 56.
[112] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 57.

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by the prosecution, even though there is no other evidence of the child in any record or archive.[113]

78. The prosecution opposes the application for the admission of the documents contained in Annexes 44 and 45, because they relate to witnesses DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009 who were not called, and it is submitted they are inadmissible pursuant to the principles laid down by in the Decision of 26 October 2010. The prosecution contends that given the defence did not call these witnesses, it would be unfair on the prosecution to admit the documents from the bar table at this stage, thereby avoiding any proper investigation of the information within these materials.[114]

79. As regards Annexes 46 and 47 that relate to prosecution witnesses DRC-OTP-WWWW-0007 and DRC-OTP-WWWW-0010, who have been called to give evidence, the prosecution concedes that the involvement of intermediary 0143 in producing these documents was only revealed recently to the defence. Nonetheless, the prosecution submits the basis of their suggested admissibility is unclear. It is argued that if the dates and place of birth of these witnesses, as set out in these documents, are relevant, the defence was at liberty to show them to the witnesses during their testimony. The prosecution submits that the role of intermediary 143 does not affect their relevance in this regard.[115] Therefore, it is said that the defence has failed to establish how the involvement of intermediary 0143 in obtaining these documents relates to any issue in the case and it is observed that his participation in this regard is, in any event, uncontested. The prosecution submits these documents will not assist the Chamber. [116]

[113] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 58.
[114] ICC-01/04-01/06-2650-Conf, paragraph 36.
[115] ICC-01/04-01/06-2650-Conf, paragraph 33.
[116] ICC-01/04-01/06-2650-Conf, paragraphs 34 – 35.

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80. The OPCV does not oppose the admission of the birth certificates in Annexes 46 and 47, which concern its clients OTP-WWWW-0007 (a/0047/06) and DRC-OTP-WWWW-0010 (a/0050/06).[117] However, the OPCV observes that the defence has previously requested the admission of the birth certificate of DRC-OTP-WWWW-0010 (a/0050/06). It is suggested that the comments by the defence on DRC-OTP-WWWW-0008 and DRC-OTP-WWWW-0011 should be disregarded by the Chamber as they are irrelevant to the request to admit documents.[118]

81. The Chamber's Decision of 26 October 2010, as rehearsed in paragraph 27 above applies, *mutatis mutandis,* to the present request by the defence to admit the birth certificates for witnesses DRC-OTP-WWWW-0009 and DRC-OTP-WWWW-0006. It would be unfair to permit the defence to introduce this material at this stage, given the relevant witnesses have not been called, thereby preventing any proper assessment by the Chamber. In all the circumstances, the Chamber refuses the defence request to admit the certificates contained in Annexes 44 and 45 from the bar table.

82. The birth certificates of trial witnesses DRC-OTP-WWWW-0010 and DRC-OTP-WWWW-0007 (Annexes 46 and 47) are admissible, in the view of the Chamber. These documents relate to two prosecution witnesses who were called to give evidence and they were allegedly obtained by intermediary DRC-OTP-WWWW-0143; they are thus, *prima facie,* relevant to the present case and particularly to the defence abuse of process application. Given the defence was unaware that this intermediary had been involved in the "chain of custody" of these documents at the time the witnesses gave evidence, it would be unfair now to refuse to admit them. Furthermore,

[117] ICC-01/04-01/06-2649-Conf, paragraphs 29 – 30.
[118] ICC-01/04-01/06-2649-Conf, paragraphs 31 – 32.

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these certificates are allegedly official documents from the government of the DRC, and they have *prima facie* probative value that is not outweighed by any prejudicial effect.

8. Two victims' application forms (Annexes 48-49)

83. The defence finally applies to introduce two victims' application forms for witnesses DRC-OTP-WWWW-0006 and DRC-OTP-WWWW-0009, which were submitted by intermediary 0143 on their behalf.[119] They were disclosed in non-redacted form to the defence in October 2010.[120] The defence submits that the circumstances in which these applications were completed, given the accounts of witnesses 0007, 0008, 0010 and 0011, calls into question the integrity of the information contained therein. On the basis of the Chamber's Decision on admissibility of four documents, the defence submits that these documents fulfil the relevant criteria.[121]

84. The prosecution opposes the application because the forms relate to witnesses 0006 and 0009 who were not called, and it is submitted they are inadmissible pursuant to the principles laid down by Chamber in the Decision of 26 October 2010. The prosecution contends that given the defence did not call these witnesses, it would be unfair on the prosecution to admit the documents from the bar table at this stage, thereby avoiding any proper investigation of the information within these materials.[122]

85. The **OPCV** submits that the Chamber should disregard the defence observations as regards the truthfulness of its clients (namely DRC-OTP-0007, a/0047/06; DRC-OTP-0008, a/0048/06; DRC-OTP-0010, a/0050/06; and

[119] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 59, referring to Anx48 (DRC-OTP-0231-0477) and Anx49 (DRC-OTP-0231-0451).
[120] ICC-01/04-01/06-2604-Conf-Corr2, paragraph 59.
[121] ICC-01/04-01/06-2604-Conf-Corr2, paragraphs 60 – 62.
[122] ICC-01/04-01/06-2650-Conf, paragraph 36.

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DRC-OTP-0011, a/0052/06) as they fall outside the scope of the request to admit documents.[123]

86. The Chamber's Decision of 26 October 2010, as rehearsed in paragraph 27 above applies, *mutatis mutandis*, to the present request by the defence to admit the application forms for witnesses DRC-OTP-WWWW-0009 and DRC-OTP-WWWW-0006. It would be unfair to permit the defence to introduce this material at this stage, given the relevant witnesses have not been called, thereby preventing any proper assessment by the Chamber. In all the circumstances, the Chamber refuses the defence request to admit the two application forms in Annexes 48 and 49.

IV. Orders

87. Accordingly, the Chamber:

a. Admits into evidence the documents in Annexes 2, 3, 12 – 15, 18 – 25, 28, 29, 30, 33, 36, 39, 40 – 43, 46, and 47 and instructs the Registry to assign EVD numbers to these documents;

b. *Refuses the application to admit the documents in Annexes 4 – 11, 16, 17, 26, 27, 34, 35, 37, 38, 44, 45, 48 and 49.*

[123] ICC-01/04-01/06-2649-Conf, paragraphs 33 – 34.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito **Judge René Blattmann**

Dated this 16 March 2011.

At The Hague, The Netherlands

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