

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 December 2010

TRIAL CHAMBER I

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

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

Confidential

**Decision on the Prosecution's application for admission of four 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:

The Office of the Prosecutor

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Mr Franck Mulenda
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Legal Representatives of the Applicants

Unrepresented Victims

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

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber I ("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 Prosecution's application for admission of four documents from the bar table pursuant to Article 64(9):¹

I. Background and Submissions

Prosecution Submissions

1. On 22 November 2010, the Office of the Prosecutor ("prosecution" or "OTP") filed the "Prosecution's application for admission of four documents from the Bar Table pursuant to Article 64(9)",² seeking leave to introduce four documents, and requesting the Trial Chamber's authorisation to add these documents to its list of evidence to be relied on at trial.³
2. During the examination of DRC-V01-WWWW-0002 ("VW-0002"), the identity of victim a/0225/06 arose as an issue. The defence called DRC-D01-WWWW-0032 ("DW-0032"), who testified that he, and not VW-0002, was victim a/0225/06.⁴
3. On 28 April 2010, witness DW-0032 gave evidence that the fingerprints on the "Application form to participate in proceedings before the ICC for individual victims and person acting on their behalf", received by the Victims Participation and Reparations Section on 27 November 2006 and bearing the reference number a/0225/06, were made by him. The witness thereafter agreed to provide the Court with his fingerprints, and the prosecution applied for DW-0032's fingerprints to be taken. The Chamber approved this course, and

¹ Prosecution's Application for admission of four documents from the Bar Table pursuant to Article 64(9), 22 November 2010, ICC-01/04-01/06-2631-Conf, with confidential annexes A and 1-4.

² ICC-01/04-01/06-2631-Conf, with confidential annexes A and 1-4.

³ ICC-01/04-01/06-2631-Conf, paragraph 1.

⁴ ICC-01/04-01/06-2631-Conf, paragraph 4.

established a number of conditions.⁵

4. A forensic report, submitted by the Registry, comparing the fingerprints taken from DW-0032 against those on the victim application form number a/0225/06 concluded that the fingerprints did not match.⁶ Annexes 1, 2 and 3 of the Registry filing directly relate to this issue, and therefore the prosecution requests the admission of these documents.⁷
5. In addition, the prosecution seeks to introduce a document containing a printout of the DRC electoral card database entry for witness DRC-OTP-WWWW-0089 ("W-0089"). The document bears the number DRC-OTP-0231-0271, and it is attached as annex 4 to the prosecution's filing. The prosecution submits that the document confirms the information contained within the electoral card, which was tendered during the examination of witness DRC-D01-WWWW-0023 ("DW-0023"). The prosecution notes that it first received this printout on 23 June 2010, following a request for assistance addressed to the DRC Prosecutor General.⁸
6. The prosecution seeks to tender these documents to establish the truth of their contents, but it does not apply to call their authors. In the prosecution's submission, the documents are relevant to and probative of issues in the proceedings,⁹ and the potential probative value of this evidence outweighs the prejudicial effect, if any, resulting from its admission.¹⁰
7. On 26 November 2010, the Chamber asked the victims' legal representatives

⁵ ICC-01/04-01/06-2631-Conf, paragraph 2.

⁶ ICC-01/04-01/06-2631-Conf, paragraph 3.

⁷ ICC-01/04-01/06-2631-Conf, paragraph 4.

⁸ ICC-01/04-01/06-2631-Conf, paragraph 5.

⁹ ICC-01/04-01/06-2631-Conf, paragraphs 15 to 23.

¹⁰ ICC-01/04-01/06-2631-Conf, paragraphs 24 to 26.

and the defence whether they intended to file observations.¹¹ On 29 November 2010, the legal representatives and the defence indicated that they do not intend to respond to the prosecution's request.¹²

II. Applicable Law and relevant Decisions

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

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

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

[...]

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

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

[...]

Article 67 of the Statute

Rights of the accused

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

[...]

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

Article 69 of the Statute

Evidence

[...]

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.

¹¹ Email communication from the Trial Chamber to the defence and the victims' legal representatives through the Legal Advisor to the Trial Division on 26 November 2010.

¹² Email communication from the defence and the victims' legal representatives to the Trial Chamber through the Legal Advisor to the Trial Division on 29 November 2010.

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

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

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

General provisions relating to evidence

[...]

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

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.

III. Analysis and Conclusion

9. The Chamber set out its approach to the admission of documents from the bar table in its first Decision on material in this category.¹³ It indicated, *inter alia*, that the general approach to the admissibility of evidence laid down in the Chamber's "Decision on the admissibility of four documents"¹⁴ will be

¹³ Decision on the admission of material from the "bar table", 24 June 2009, ICC-01/04-01/06-1981.

¹⁴ Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1398-Conf. A public redacted version ICC-01/04-01/06-1399 was issued on the same day.

applied on a case-by-case basis.¹⁵ The Chamber has therefore considered the documents that the prosecution seeks to introduce individually, applying the approach it has established, namely the three-stage test based on, first, relevance, second, probative value and, third, an evaluation of the probative value of the evidence weighed against any prejudice that may be caused by the admission of the material.

10. The Chamber is of the view that the documents in annexes 1, 2 and 3 are *prima facie* relevant. The identity of victim a/0225/06 was called into question during the examination of VW-0002, who claimed to be that victim. The defence called DW-0032, who testified that he, and not VW-0002, was victim a/0225/06.¹⁶ During his testimony, witness DW-0032 confirmed that the fingerprints on the victim's application to participate in proceedings bearing the reference number a/0225/06 were made by him. On request, the witness provided his fingerprints to the Registry for a dactyloscopy to take place, in order to compare the fingerprints on the application form with those provided by DW-0032.

11. In authorising the fingerprint analysis and setting out a number of conditions to be followed during this exercise, the Chamber, at least on a preliminary basis, indicated that the dactyloscopy is relevant to the issues in the case.¹⁷ This conclusion logically extends to the documents that the prosecution now seeks to tender into evidence, following the conclusion of the fingerprint analysis. Thus (i) the 'Procès - Verbal' (annex 1 of the Registry filing) recording the procedure for collecting DW-0032's fingerprints, including an acknowledgement by the witness of his consent; (ii) the impressions (annex 2 of the Registry filing) comprising a complete set of the fingerprints collected

¹⁵ At paragraph 32 of its "Decision on the admissibility of four documents", the Chamber stated that the application of the three-stage test is always a fact-sensitive decision.

¹⁶ ICC-01/04-01/06-2631-Conf, paragraph 4.

¹⁷ Transcript of hearing on 5 May 2010, ICC-01/04-01/06-T-280-CONF-ENG CT, pages 1-5.

from DW-0032 and (iii) the expert report (annex 3 of the Registry filing) providing the results of the forensic comparison of the fingerprints taken from DW-0032 and those appearing on the victim application form, are all *prima facie* relevant to the issues in this case. These documents may assist the Chamber in determining the identity of the victim a/0225/06 and the truth of the testimony of witness DW-0032.

12. The document contained in annex 1 is printed on ICC OTP letterhead, and it was signed by all those present when the fingerprint impressions were taken. Annex 2 has been signed by the witness and the OTP investigator who took the impressions on 10 May 2010. The expert report, included as annex 3, is printed on paper bearing the official hallmarks of the Office of Forensic Analysis, Hague Regional Police Force, and it has been signed by the author, who is a certified fingerprint analyst employed in that office. In these circumstances the reliability of the documents is established, at least on a *prima facie* basis.

13. As set out above, the prosecution seeks to introduce the expert report on the fingerprint analysis without calling the author 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.¹⁸ 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. In this context, 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.

14. Ordinarily, therefore, the Chamber needs to consider, *inter alia*, whether it is

¹⁸ See ICC-01/04-01/06-1399, 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”).

fair to admit the material without calling the relevant witnesses to give oral evidence. However, in this instance the defence has not objected to these documents being admitted in this way, and, given the lack of objections (and the Chamber's consent), it is unnecessary to consider this particular issue further.

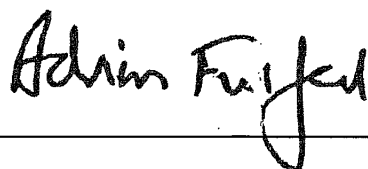
15. The same conclusions apply to the document containing a print out of the DRC electoral card database entry for W-0089. This document, included as annex 4,¹⁹ confirms the information set out on the electoral card tendered during the examination of DW-0023.²⁰ This card has already been admitted into evidence and it bears the number EVD-OTP-00555. The new printout provided by the prosecution essentially contains the same information, in a significantly more legible form.
16. Given that the information contained in the document attached as annex 4 has already been admitted into evidence, it is *prima facie* relevant. Furthermore, the printout has been stamped by the Independent Electoral Commission of the DRC providing it with *prima facie* probative value. Finally, although the document was not introduced on Wednesday 24 March 2010 during the questioning of the DW-0023, the prosecution notes that it first received the document on 23 June 2010 following a request for assistance to the DRC Prosecutor General. Moreover, the defence has not objected to this document being admitted into evidence from the bar table. In all the circumstances, the Chamber is of the view that its probative value outweighs any prejudicial effect that the late admission into evidence may cause to the defence.
17. The totality of this material satisfies the relevant criteria established by the Chamber, and in all the circumstances the documents in annexes 1, 2, 3 and 4,

¹⁹ The document bears the number DRC-OTP-0231-0271.

²⁰ ICC-01/04-01/06-2631-Conf, paragraph 5.

the subject of the current application, will be admitted via the bar table. The Chamber instructs the Registry to assign EVD numbers to the documents in annexes 1, 2, 3 and 4.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 16 December 2010

At The Hague, The Netherlands