

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 6 April 2011

**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 "Cinquième requête de la Défense aux fins de dépôt de documents"**

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

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo  
Ms Fatou Bensouda

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean Marie Biju-Duval

**Legal Representatives of the Victims**

Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu  
Mr Joseph Keta Orwinyo  
Mr Jean Chrysostome Mulamba  
Nsokoloni  
Mr Paul Kabongo Tchibangu  
Mr Hervé Diakiese

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda  
Ms Sarah Pellet

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**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*, issues the following Decision on the “Cinquième requête de la Défense aux fins de dépôt de documents” (“Decision”):<sup>1</sup>

## I. Background

1. On 13 June 2008, Trial Chamber I issued the “Decision on the admissibility of four documents”,<sup>2</sup> in which it set out its general approach to the issue of the admissibility of evidence other than direct oral evidence.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> Third, notwithstanding the desirability that witnesses should give evidence orally in accordance with Article 69(2) of the Statute,<sup>6</sup> there is “a clear recognition that a variety of other means of introducing evidence may be appropriate”.<sup>7</sup> 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.<sup>8</sup> Fourth, Article 64(9) of the Statute confers

<sup>1</sup> Cinquième requête de la Défense aux fins de dépôt de documents, 15 December 2010, ICC-01/04-01/06-2660-Conf, with confidential annexes 1 to 16.

<sup>2</sup> 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.

<sup>3</sup> ICC-01/04-01/06-1399-Corr, paragraph 19.

<sup>4</sup> ICC-01/04-01/06-1399-Corr, paragraph 20.

<sup>5</sup> ICC-01/04-01/06-1399-Corr, paragraph 21.

<sup>6</sup> ICC-01/04-01/06-1399-Corr, paragraph 22.

<sup>7</sup> ICC-01/04-01/06-1399-Corr, paragraph 22.

<sup>8</sup> ICC-01/04-01/06-1399-Corr, paragraph 22.

upon the Chamber a “wide discretion to rule on admissibility or relevance and to assess any evidence, subject to the specified issues of ‘fairness’”.<sup>9</sup>

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

<sup>9</sup> ICC-01/04-01/06-1399-Corr, paragraph 23.

<sup>10</sup> ICC-01/04-01/06-1399-Corr, paragraphs 26 – 28 and 31.

<sup>11</sup> ICC-01/04-01/06-1399-Corr, paragraph 27.

<sup>12</sup> ICC-01/04-01/06-1399-Corr, paragraph 28.

<sup>13</sup> ICC-01/04-01/06-1399-Corr, paragraph 29.

<sup>14</sup> ICC-01/04-01/06-1399-Corr, paragraph 29.

<sup>15</sup> ICC-01/04-01/06-1399-Corr, paragraph 31.



4. On 26 October 2010 the Chamber rendered its Decision on the defence request for the admission of 422 documents ("Decision of 26 October 2010"), in which it established the criteria for the admission of interview transcripts, expense documents related to witnesses and intermediaries, and other documents tending to undermine the credibility of incriminating evidence.<sup>16</sup>
5. By email of 3 December 2010, the Chamber informed the parties and participants that the fourth and the (at that stage, anticipated) fifth defence requests to admit documents would be dealt with after all the submissions had been received on the abuse of process motion, which it was expected would be filed by the defence during December 2010.<sup>17</sup>
6. On 15 December 2010, the defence submitted this "Cinquième requête de la Défense aux fins de dépôt de documents" ("defence fifth request").<sup>18</sup>
7. On 6 January 2011, the Office of the Prosecutor ("prosecution" or "OTP") submitted its observations.<sup>19</sup>
8. On 23 February, the Trial Chamber issued the Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings" in which it refused the defence application.<sup>20</sup> However, the Chamber emphasised that it:

<sup>16</sup> Decision on the defence request for the admission of 422 documents, 26 October 2010, ICC-01/04-01/06-2595-Conf. A corrigendum to the decision was issued on 8 March 2011, ICC-01/04-01/06-2595-Conf-Corr, and a corrected public redacted version was issued on the same day, ICC-01/04-01/06-2595-Red-Corr.

<sup>17</sup> Email communication from a Legal Officer of the Trial Division on 3 December 2010. The defence filed its abuse of process motion on 10 December 2010: *Requête de la Défense aux fins d'arrêt définitif des procédures*, ICC-01/04-01/06-2657-Conf. A translation was notified on 4 February 2011: *Defence Application Seeking a Permanent Stay of the Proceedings*, ICC-01/04-01/06-2657-Conf-tENG.

<sup>18</sup> ICC-01/04-01/06-2660-Conf.

<sup>19</sup> Prosecution's Response to the "Cinquième requête de la Défense aux fins de dépôt de documents" of 15 December 2010, 6 January 2011, ICC-01/04-01/06-2670-Conf.

<sup>20</sup> ICC-01/04-01/06-2690-Conf. A public redacted version of this decision was issued on 7 March 2011 and notified on 8 March 2011, ICC-01/04-01/06-2690-Red2.

[...] will be able, in due course, to reach final conclusions on the alleged impact of the involvement of the intermediaries on the evidence in this case, as well as on the wider alleged prosecutorial misconduct or negligence based on the suggested failure by the Office of the Prosecutor to supervise or control the individual intermediaries and to act on indications of unreliability (together with the consequences of any adverse findings in this regard, which the defence alleges taints all the prosecution's evidence).<sup>21</sup>

and later:

[...] it is unnecessary, at this point, for the Chamber to reach any decision as to (the alleged failure of the prosecution to ensure that it was submitting reliable evidence) [...] The alleged failings on the part of the prosecution can be addressed as part of the ongoing trial process.<sup>22</sup>

9. The Chamber reached similar conclusions on the defence allegation that the prosecution had failed to disclose material in a timely manner,<sup>23</sup> and the evidence relating to all the allegations in the defence abuse application will, therefore, be considered by the Chamber in due course.

## II. Applicable Law

10. In accordance with Article 21(1) of the 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.

[...]

<sup>21</sup> ICC-01/04-01/06-2690-Red, paragraph 198.

<sup>22</sup> ICC-01/04-01/06-2690-Red, paragraph 205.

<sup>23</sup> ICC-01/04-01/06-2690-Red, paragraph 213.

## **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.

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.

### **III. Submissions and case-by-case analysis**

11. The defence requests the admission of 16 documents pursuant to Articles 64 and 69 of the Statute and Rule 63 of the Rules.

***A. Documents related to witness DRC-OTP-WWWW-0555***

12. The defence applies to introduce a written statement signed by this witness, along with a document from the REDACTED school for the academic year 2002 – 2003, containing the name REDACTED under the heading “N.B. Passera la seconde session en Septembre”.<sup>24</sup> The defence submits the document demonstrates that the witness attended school during the relevant period.<sup>25</sup> The accused argues that this material will therefore support its claim that the prosecution failed to investigate information given by the witness, which would have revealed (contrary to information provided in the statement) that DRC-OTP-WWWW-0555

<sup>24</sup> ICC-01/04-01/06-2660-Conf, paragraph 6; ICC-01/04-01/06-2660-Conf-Anx2 (DRC-OTP-0228-0023) and ICC-01/04-01/06-2660-Conf-Anx 3 (DRC-D01-0003-5548).

<sup>25</sup> ICC-01/04-01/06-2660-Conf, paragraph 6.

("Witness 555") never enrolled in the military.<sup>26</sup> The defence suggests, therefore, that it is entitled to demonstrate important contradictions that are said to exist between the school records and the written statement of the witness.<sup>27</sup> The defence refers to paragraphs 256 and 257 of its abuse of process application where this material is addressed.<sup>28</sup>

13. The prosecution contends that since this witness has not been called to give evidence, in accordance with previous decisions of the Chamber his written statement should not be admitted.<sup>29</sup> The prosecution additionally suggests that the school record has not been authenticated or verified by any witness, and that as a result it is without probative value.<sup>30</sup> It is argued that the school record does not prove that the prosecution failed either to verify the witness's reliability or to carry out proper investigations.<sup>31</sup> In the statement, the witness indicates he joined the UPC in February or March 2002; he left in June or early July 2003; and he resumed studies when the following school year commenced.<sup>32</sup> The prosecution submits that the presence of the witness's name in a school record for the year 2002 – 2003 is not necessarily inconsistent with his statement that he had been recruited, given the witness is said to have indicated that he attended school during his time in the UPC.<sup>33</sup> On the basis that the documents do not substantiate the defence claims and the relevant individual was not called as a witness, the prosecution submits the documents in Annexes 2 and 3 should be excluded.<sup>34</sup>

<sup>26</sup> ICC-01/04-01/06-2660-Conf, paragraph 7.

<sup>27</sup> ICC-01/04-01/06-2660-Conf, paragraphs 3 – 9, Anx2 (DRC-OTP-0228-0023), Anx 3 (DRC-D01-0003-5548).

<sup>28</sup> ICC-01/04-01/06-2660-Conf, paragraph 9, referring to ICC-01/04-01/06-2657-Conf, paragraphs 256 and 257.

<sup>29</sup> ICC-01/04-01/06-2670-Conf, paragraph 4.

<sup>30</sup> ICC-01/04-01/06-2670-Conf, paragraphs 4 – 7.

<sup>31</sup> ICC-01/04-01/06-2670-Conf, paragraphs 4 – 7.

<sup>32</sup> ICC-01/04-01/06-2670-Conf, paragraph 6.

<sup>33</sup> ICC-01/04-01/06-2670-Conf, paragraph 7.

<sup>34</sup> ICC-01/04-01/06-2670-Conf, paragraphs 7 and 8.

14. The prosecution initially requested to call Witness 555 as a rebuttal witness to “provide evidence on the pressure and intimidation applied by Hema supporters on those suspected of involvement with the ICC”.<sup>35</sup> However, once the witness became unavailable to testify,<sup>36</sup> he was withdrawn from the prosecution’s list of witnesses relating to the defence abuse of process application, and it was proposed that he should be replaced by Witness DRC-OTP-WWWW-598 (“Witness 598”). The Court held that the substitution was permissible

[...] to the extent that he is in a position to replace the evidence that would have been given by 555. However, his account before the Court is to be limited to those areas that substantively reflect or cover the ‘lost’ evidence of 555, including a present challenge by the Defence that 555 lied in an account which in turn has been inadequately researched by the Prosecution.<sup>37</sup>

15. Therefore, as just rehearsed, Witness 555 has not appeared before the Court, nor was his testimony recorded in the presence of, or tested by, both parties.

16. Pursuant to Rule 68 of the Rules a Trial Chamber can permit the introduction of “previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony” provided either that the witness is present in Court and thus is available for questioning by the parties and the Bench, or, if the witness is not present in Court, the parties have had the opportunity to examine the witness during the recording of his or her out-of-court testimony. In its Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses,<sup>38</sup> the Chamber held that “Rule 68 permits the introduction of witness statements, in addition to video- or

<sup>35</sup> Prosecution’s Provision of Information on the witnesses dealing with the abuse of process and intermediaries, 11 June 2010 (notified on 14 June 2010), ICC-01/04-01/06-2473-Conf, paragraphs 16, 21 and 44. A public redacted version was filed on 18 June 2010, ICC-01/04-01/06-2473-Red, and notified on 21 June 2010.

<sup>36</sup> Transcript of hearing on 25 November 2010, ICC-01/04-01/06-T-337-CONF-ENG ET, page 54, lines 2 – 19.

<sup>37</sup> Transcript of hearing on 25 November 2010, ICC-01/04-01/06-T-337-CONF-ENG ET, page 64, line 24 to page 65, line 6.

<sup>38</sup> 15 January 2009, ICC-01/04-01/06-1603.

audio-taped records or transcripts, of a witness's testimony because these are all clear examples of the 'documented evidence' of a witness's testimony."<sup>39</sup> In that decision, the Chamber admitted the recorded statements of two witnesses who later appeared to testify at trial.<sup>40</sup>

17. In this instance, the statement is inadmissible under Rule 68 of the Rules, because the exceptions relating to prior-recorded testimony in that Rule do not apply (in particular, the defence did not have any opportunity to examine the witness during the recording).<sup>41</sup>

18. However, that conclusion does not resolve this application, and it is of relevance to note that the Chamber concluded its oral decision substituting Witness 598 for Witness 555 by stating:

Notwithstanding his absence, he [Witness 555] remains relevant to the current abuse application because the Defence argues that the evidence gathered regarding his position reveals the insufficiency and lack of integrity of the Prosecution's investigation. Indeed, on the 4th of November, 2010 (T-325, page 25), the Chamber ordered the Prosecution to disclose his identity because "... the suggested failure by the Prosecution adequately to investigate the reliability and probity of its intermediaries and witnesses is a legitimate area to be explored by the Defence as part of the present abuse of process application and, more generally, during the trial. It forms part of a pattern of an alleged failure to investigate these suggested crimes reliably. On the basis of the material investigated by the Defence ... the Chamber is of the view that in this context evidence relating to 555 has been materially called into question and the threshold for disclosure has been crossed, as regards the detail of the contacts between 555 and the Office of the Prosecutor."<sup>42</sup>

19. Furthermore, as part of its recent abuse of process application, the defence reiterated the allegation that the prosecution had been negligent in carrying out its investigations, and that erroneous or false evidence has

<sup>39</sup> ICC-01/04-01/06-1603, paragraph 18.

<sup>40</sup> ICC-01/04-01/06-1603, paragraphs 24 – 26.

<sup>41</sup> The Chamber made a similar finding with regard to transcripts of interviews with non-trial witnesses in ICC-01/04-01/06-2595-Red-Corr, paragraph 55.

<sup>42</sup> Transcript of hearing on 25 November 2010, ICC-01/04-01/06-T-337-CONF-ENG ET, page 54, line 20 to page 55, line 10.

been introduced at trial as a result.<sup>43</sup> The defence cited the statement and school record of Witness 555 in support of this argument.<sup>44</sup>

20. The evidence of Witness 598 was given on 1 December 2010 in the form of a Rule 68 deposition attended by both parties and presided over by the Legal Advisor to the Trial Division.<sup>45</sup> In its ruling on certain objections raised during this procedure, the Chamber re-emphasised that Witness 598 had been called solely as a replacement for Witness 555.<sup>46</sup>

21. Given that the testimony of Witness 598 was focussed essentially on matters about which Witness 555 would have been able to give evidence, the written statement of Witness 555 is relevant to Witness 598's testimony, and it is potentially probative of several contested issues raised in the course of Witness 598's evidence, including threats allegedly received by Witness 555 and the extent of the prosecution's investigation into this witness. In these circumstances, it falls to the Chamber to consider whether this statement should be admitted under Article 69(4) of the Statute. As the Chamber has already observed:

[...] 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.<sup>47</sup>

22. The statement was taken under the supervision of the prosecution and contains the signature of the witness, thereby indicating that the

<sup>43</sup> ICC-01/04-01/06-2657-Conf-tENG, paragraph 22.

<sup>44</sup> ICC-01/04-01/06-2657-Conf-tENG, paragraphs 256 – 259.

<sup>45</sup> ICC-01/04-01/06-Rule68Deposition-CONF-ENG.

<sup>46</sup> Order on the objections raised during the depositions of DRC-OTP-WWWW-0582 and DRC-OTP-WWWW-0598, 13 December 2010, ICC-01/04-01/06-2658-Conf, paragraphs 11 – 28.

<sup>47</sup> ICC-01/04-01/06-2595-Red-Corr, paragraph 47.

information contained therein is accurate.<sup>48</sup> The introduction of the statement into evidence will not prejudice the prosecution, who had an opportunity to examine the witness when it originally took the statement, and who clearly considered his account is reliable, given it intended to call the witness to testify at trial.<sup>49</sup> By requesting the introduction of the statement the defence has indicated that it does not consider that the accused is prejudiced by virtue of the lack of an opportunity to examine the witness and thus it is not suggested his rights have been undermined. It follows the statement is relevant and its probative value outweighs any prejudice. Accordingly, the Chamber admits the statement of Witness 555 in Annex 2, under Article 69 (4) of the Statute.

23. The prosecution opposes the introduction of the school record in Annex 3, arguing that since it has not been authenticated by a witness, its probative value is uncertain.<sup>50</sup> However, given this document bears the seal of the school and the signature of the school prefect,<sup>51</sup> it bears sufficient indicia of reliability and in all the circumstances it is, on a *prima facie* basis, probative of the dates when Witness 555 attended the REDACTED school. The prosecution additionally argues that this document ought to be excluded on the basis that the inclusion of Witness 555's name in this record is not necessarily inconsistent with his service in the military at the same time – indeed, the prosecution cites portions of the witness's statement in support of this argument.<sup>52</sup> In the judgment of the Chamber, given the statement of Witness 555 is to be admitted into evidence, the prosecution will not be prejudiced by the admission of the school record, particularly since the Chamber will be able to consider the two documents together.

<sup>48</sup> ICC-01/04-01/06-2660-Conf-Anx2.

<sup>49</sup> ICC-01/04-01/06-2473-Red, paragraphs 16, 21 and 44 and transcript of hearing on 29 June 2010, ICC-01/04-01/06-T-307-CONF-ENG ET, page 1, line 18 to page 3, line 11.

<sup>50</sup> ICC-01/04-01/06-2670-Conf, paragraphs 4 and 7.

<sup>51</sup> ICC-01/04-01/06-2660-Conf-Anx3 (DRC-D01-0003-5548).

<sup>52</sup> ICC-01/04-01/06-2670-Conf, paragraph 7.

Accordingly, the Chamber admits the school record in Annex 3 into evidence under Articles 64(9) and 69(4) of the Statute.

24. The Chamber stresses that these admissibility decisions as regards the statement of Witness 555 and the related school document in Annex 3 are independent of the later assessment that will be made as to their significance and weight, and in particular on the issue of the alleged failure by the prosecution adequately to investigate the reliability and probity of Witness 555 (who has not been called to give evidence). In due course, the Chamber will decide what, if any, significance and weight is to be attributed to this material in that context.

***B. Documents related to witnesses DRC-OTP-WWWW-0581 and  
DRC-OTP-WWW-0321***

25. The defence seeks to introduce document DRC-D01-0003-5884, which consists of two email exchanges between the defence and the prosecution, dated 11 June 2010. In the first email, the defence requests disclosure of several documents, including a proposed list of individuals who were to be screened, that had been provided by DRC-OTP-WWWW-0321 ("Intermediary 321") to Witness DRC-OTP-WWWW-581 ("Witness 581").<sup>53</sup> In the second email, the prosecution indicates that it did not have a list of this kind in its possession, in written form.<sup>54</sup> Thereafter, on 29 or 30 June 2010 (the exact date is unclear) after the testimony of Witness 581 had concluded, the prosecution provided the defence with an email sent by Witness 581 to his supervisors in the OTP, providing the names of children to be screened which he had "received verbally from W-0321", along with a second list the prosecution had compiled.<sup>55</sup> As a result of this disclosure,

<sup>53</sup> ICC-01/04-01/06-2660-Conf-Anx4 (DRC-D01-0003-5884).

<sup>54</sup> ICC-01/04-01/06-2660-Conf-Anx4 (DRC-D01-0003-5885).

<sup>55</sup> ICC-01/04-01/06-2670-Conf, paragraph 12 and DRC-OTP-0231-0333.

Witness 581 was recalled (via video-link), in particular in order for him to address the names set out in the recently disclosed lists.<sup>56</sup>

26. The defence submits that these emails should be admitted because they demonstrate that, despite being sent a request for a specific document that was said to be necessary for the preparation of the defence, the prosecution failed to effect disclosure in a timely fashion.<sup>57</sup> The defence refers to paragraph 272 of its abuse of process application, in which it includes this event as part of the suggested proof of “deliberate delays in the disclosure of evidence”.<sup>58</sup>

27. The prosecution resists this application. First, the prosecution argues that the emails do not tend to demonstrate an intention on its part to avoid its disclosure obligations. Second, it is alleged that since Witness 581 was recalled, the accused has not suffered any prejudice. Third, it is said that the defence has failed to explain why it waited nearly six months to request the introduction of these emails.<sup>59</sup>

28. Without making any determination on the merits of the defence suggestion that this exchange of emails demonstrates that the prosecution deliberately withheld relevant material, the Chamber considers that this evidence is relevant to, and probative of, the issues raised by the defence as regards the way in which the prosecution has discharged its disclosure obligations, a matter that will be considered in due course as part of the Article 74 Decision. Any prejudicial effect is outweighed by the *prima facie* probative value of the documents.

<sup>56</sup> Transcript of hearing on 6 July 2010, ICC-01/04-01/06-T-310-Red-ENG CT WT, page 67, line 2 to page 70, line 1. The defence created a chart containing the information from these lists, EVD-D01-00328, which was presented to Witness 581 when he was recalled on 25 October 2010. Transcript of hearing on 25 October 2010, ICC-01/04-01/06-T-317-Red-ENG WT, page 18, line 20 to page 19, line 7.

<sup>57</sup> ICC-01/04-01/06-2660-Conf, paragraphs 10 – 12, Anx4 (DRC-D01-0003-5884).

<sup>58</sup> ICC-01/04-01/06-2657-Conf-tENG, paragraph 272.

<sup>59</sup> ICC-01/04-01/06-2670-Conf, paragraphs 9 – 14.

29. For these reasons, the Chamber admits into evidence the email exchange contained in Annex 4 under Articles 64(9) and 69(4) of the Statute.

***C. Documents related to witness DRC-OTP-WWWW-0028***

30. The defence seeks to introduce the complete record of the testimony of DRC-OTP-WWWW-0028 ("Witness 28") before Trial Chamber II in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("Katanga case").<sup>60</sup>

31. During the course of his testimony, Witness 28 stated, *inter alia*, that DRC-OTP-WWWW-0183 ("Intermediary 183"; also REDACTED, or "person number 14" in the *Katanga* transcripts), the "person who put me in contact with the investigators", told him to give a certain account of his schooling to the prosecution.<sup>61</sup> He indicated that "with respect to that statement, the statement about schooling was made up by [REDACTED]. No, it is false."<sup>62</sup>

32. The defence argues that this testimony is relevant since Witness 28, who it is submitted was introduced to the OTP by DRC-OTP-WWWW-0316 ("Intermediary 316"), testified that he was encouraged by Intermediary 183 to lie to prosecution investigators. In addition, Witness 28 testified that he was in contact with Intermediary 316. The defence submits that according to the evidence, Intermediary 183 acted as the assistant of Intermediary 316 as regards his work for the Court.<sup>63</sup> The defence refers to paragraph 73 of its abuse of process application, in which it advances this

<sup>60</sup> ICC-01/04-01/06-2660-Conf, paragraphs 13 – 15, Anx5 to Anx 12.

<sup>61</sup> Transcript of hearing on 23 November 2010, ICC-01/04-01/07-T-221-Conf-ENG ET, page 22, line 24 to page 24, line 23.

<sup>62</sup> Transcript of hearing on 23 November 2010, ICC-01/04-01/07-T-221-Conf-ENG WT, page 38, line 10 to page 40, line 6.

<sup>63</sup> ICC-01/04-01/06-2660, paragraph 14.

information to support its allegation that the prosecution was informed that Intermediary 316 was providing false information.<sup>64</sup>

33. The prosecution objects to the introduction of this testimony, arguing that the evidence of Witness 28 is not relevant to the allegations against Intermediary 316.<sup>65</sup> The prosecution contends that it was Intermediary 183 and not Intermediary 316 who introduced Witness 28 to the prosecution. The prosecution further objects to the admission of the testimony on the basis that it is suggested that the defence should have offered Intermediary 316 an opportunity to respond to these allegations when he testified before Trial Chamber I.<sup>66</sup> The prosecution argues that at the time of the examination of Intermediary 316 before Trial Chamber I, the defence was then in possession of the allegations made by Witness 28 against Intermediary 183 (from his written statement).<sup>67</sup>

34. The prosecution further submits that although the defence questioned Intermediary 316 about Intermediary 183, it should have “made suggestions and put any allegations to W-0316 regarding his involvement with W-0183 and W-0028.”<sup>68</sup> The prosecution submits that “[w]hilst it is true that W-0316 stated in evidence that he did not remember W-0028, the Defence could still have put more general questions on any connivance or wrongdoing between W-0316 and W-0183, but did not do so.”<sup>69</sup> The prosecution argues that the defence ought to make an application to call Witness 28 as a witness, and that the prosecution and the participants should be afforded the opportunity to respond, and, if necessary, the prosecution should be entitled to seek to introduce further evidence.<sup>70</sup>

<sup>64</sup> ICC-01/04-01/06-2660-Conf, paragraph 15, referring to ICC-01/04-01/06-2657-Conf, paragraph 73.

<sup>65</sup> ICC-01/04-01/06-2670-Conf, paragraph 15.

<sup>66</sup> ICC-01/04-01/06-2670-Conf, paragraph 23.

<sup>67</sup> ICC-01/04-01/06-2670-Conf, paragraph 23.

<sup>68</sup> ICC-01/04-01/06-2670-Conf, paragraph 24.

<sup>69</sup> ICC-01/04-01/06-2670-Conf, paragraph 24.

<sup>70</sup> ICC-01/04-01/06-2670-Conf, paragraphs 25 and 26.

35. Finally, the prosecution argues that the defence has failed to provide a statutory basis for the admission of this testimony, which effectively constitutes the prior recorded testimony of a witness under Rule 68 of the Rules.<sup>71</sup> The prosecution observes that Rule 68(a) provides for the introduction of previously recorded testimony if both the prosecution and the defence had the opportunity to examine the witness during the recording.<sup>72</sup> The prosecution submits that in this instance, although the prosecution in the *Katanga* case examined Witness 28 during his testimony before Trial Chamber II, the interests of the prosecution in the *Katanga* case are not the same as the interests of the prosecution in the *Lubanga* case. The prosecution submits that there has been no abuse of process application advanced in the *Katanga* case nor direct allegations against Intermediary 316,<sup>73</sup> and that accordingly the prosecution in the *Katanga* trial did not put any relevant questions to Witness 28 concerning Intermediary 316.<sup>74</sup> It is submitted that it would be both unfair to the prosecution and contrary to Rule 68(a) of the Rules to admit the testimony of Witness 28 into evidence.<sup>75</sup>

36. Given Witness 28 has only testified before Trial Chamber II, and accordingly neither the prosecution nor the defence in this case have had the opportunity to examine him during his testimony, the criteria for admitting the transcripts as prior recorded testimony pursuant to Rule 68(a) of the Rules are not satisfied.

37. However, that conclusion does not resolve this application. As already described above, the Chamber has previously decided that, even in

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<sup>71</sup> ICC-01/04-01/06-2670-Conf, paragraph 28.

<sup>72</sup> ICC-01/04-01/06-2670-Conf, paragraph 28.

<sup>73</sup> ICC-01/04-01/06-2670-Conf, paragraph 29.

<sup>74</sup> ICC-01/04-01/06-2670-Conf, paragraph 30.

<sup>75</sup> ICC-01/04-01/06-2670-Conf, paragraph 30.

circumstances where the criteria of Rule 68(a) are not met, recorded testimony may be admitted into evidence pursuant to Article 69(4), which gives the Chamber the discretion to rule on the relevance or admissibility of evidence, taking into account, *inter alia*, any prejudice that the evidence may cause to a fair trial or a fair evaluation of the testimony of a witness.<sup>76</sup> 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.

38. Witness 28's testimony before Trial Chamber II is relevant to the issues that have arisen in the *Lubanga* case. The alleged involvement of Intermediary 316 (and, to a lesser but nonetheless significant extent, his assistant Intermediary 183<sup>77</sup>) in the corruption of the evidence of witnesses has been of primary importance in the context of the abuse of process application by the defence.<sup>78</sup> Even though this application was refused by the Chamber, it has been stressed that:

[...] the Chamber will be able, in due course, to reach final conclusions on the alleged impact of the involvement of the intermediaries on the evidence in this case, as well as on the wider alleged prosecutorial misconduct or negligence based on the suggested failure by the Office of the Prosecutor to supervise or control the individual intermediaries and to act on indications of unreliability (together with the consequences of any adverse findings in this regard, which the defence alleges taints all the prosecution's evidence).<sup>79</sup>

<sup>76</sup> See ICC-01/04-01/06-2595-Red.

<sup>77</sup> The prosecution has acknowledged that the two intermediaries had a "close working relationship". Transcript of hearing on 9 November 2010, ICC-01/04-01/06-T-329-Red-ENG WT, page 2, lines 14 – 20. Intermediary 183 is said to have had contact with, *inter alia*, witnesses DRC-OTP-WWWW-0038 (see transcript of hearing on 25 November 2010, ICC-01/04-01/06-T-337-CONF-ENG ET, page 12, line 13 to page 15, line 24) and DRC-OTP-WWWW-0015 (see transcript of hearing on 18 March 2010, ICC-01/04-01/06-T-265-CONF-Red-ENG-CT, page 49, line 18 to page 50, line 14).

<sup>78</sup> ICC-01/04-01/06-2657-Conf-tENG, paragraphs 29 – 74.

<sup>79</sup> ICC-01/04-01/06-2690-Conf paragraph 198.

39. It follows that the activities of Intermediaries 316 and 183, along with the suggestion that members of the prosecution team were aware, or should have been aware, of their alleged improper behaviour continue to be of relevance to this case. Further, the allegation that the prosecution failed to supervise, investigate or control Intermediaries 316 and 183 or to scrutinise the evidence from the witnesses with whom they were in contact also continues to be of relevance. Hence, as the Chamber has already anticipated,<sup>80</sup> the parties and participants may seek to introduce additional evidence on these issues. 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 the transcripts have not been the subject of examination before this Chamber by the parties and participants involved in this trial.

40. It is not suggested that the transcripts of Witness 28's evidence fail to reflect accurately his recorded testimony, as conducted before Trial Chamber II. The witness provided evidence under oath and the Chamber is satisfied that the transcript reflects his account.

41. Finally, the Chamber has to weigh the probative value of the evidence against its prejudicial effect.<sup>81</sup> Under the jurisprudence of this Chamber, when considering this important issue, it is of relevance that the prosecution will have an opportunity to apply to introduce further material on this area of the case.<sup>82</sup>

42. In this context, the prosecution suggested that it will seek to counter the evidence of Witness 28 to the extent that it assists the accused:

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<sup>80</sup> ICC-01/04-01/06-2690-Conf paragraph 196.

<sup>81</sup> ICC-01/04-01/06-1399-Corr, paragraph 31.

<sup>82</sup> ICC-01/04-01/06-2694 paragraph 22.

MR. SACHDEVA: [...] The initial request has gone to Trial Chamber II for obtaining the evidence of Witness 0028. We haven't reviewed that evidence. We can't comment on the relevance to this trial at this stage. What we would submit is that it is potentially a large issue. **It's potentially an issue that if accepted the Prosecution would, we submit, have the right for a response, in terms of countering any evidence the Defence suggests is beneficial to their abuse of process case (...)**<sup>83</sup> (emphasis added)

43. Article 69(2) of the Statute provides that the Court may introduce documents or written transcripts "subject to th[e] Statute and in accordance with the Rules". Applying Article 64(9) of the Statute, in this instance the probative value of this evidence is not outweighed by any prejudice that may result from its admission. Accordingly, the defence request to admit into evidence the transcripts contained in Annexes 5 – 12, strictly for the purposes set out above in paragraph 38, is granted.

#### *D. Documents related to intermediary DRC-OTP-WWWW-0143*

44. The defence requests the introduction of two investigator's notes related to intermediary DRC-OTP-WWWW-0143 ("Intermediary 143"). The defence submits that the investigator's report in Annex 13 is relevant since it refers to the excessive and unjustifiable financial requests allegedly made by the intermediary which, it is said, should have raised suspicions as to his reliability.<sup>84</sup> Annex 14 relates to Intermediary 143's communication with the guardians of several witnesses in order to obtain their consent for x-rays to be taken.<sup>85</sup> The defence refers to paragraphs 151 and 179 of its abuse of process application, in which it relies on these two documents to support its allegations that Intermediary 143 acted on behalf of the prosecution, and that the prosecution was in possession of information

<sup>83</sup> ICC-01/04-01/06-T-337-Red-ENG WT, page 75, lines 13 – 24.

<sup>84</sup> ICC-01/04-01/06-2660-Conf, paragraphs 16 – 17 and Anx13 (DRC-OTP-0233-0168).

<sup>85</sup> ICC-01/04-01/06-2660-Conf, paragraphs 19 – 20 and Anx14 (DRC-OTP-0191-0119).

that raised serious doubts about the impartiality and reliability of this intermediary.<sup>86</sup>

45. The prosecution resists the introduction of these two documents, which it suggests are irrelevant. The prosecution contends that there is no indication “on the face of [the investigator’s note in Annex 13] that [Intermediary 143’s] financial requests detrimentally affected or otherwise influenced the quality of his work” and that therefore the information contained in the note has no bearing on the issues in this trial.<sup>87</sup> With respect to Annex 14, the prosecution submits that this document is irrelevant to any issue in the case.<sup>88</sup>

46. The investigator’s note in Annex 13 provides details of the financial relationship between the prosecution and Intermediary 143 and it is, on a *prima facie* basis, relevant to the defence allegations that the prosecution was in possession of information concerning allegedly suspicious expense claims, which, it is suggested, should have raised doubts about Intermediary 143’s impartiality and reliability. The document is *prima facie* reliable, as it was produced by the prosecution in the ordinary course of its investigations, and its contents are not disputed. The prosecution will not suffer prejudice as a result of the introduction of this document, as its admission does not presuppose a finding vis-à-vis the defence allegations. In due course the Chamber will decide what, if any, significance and weight is to be attributed to this material.

47. As regards Annex 14, this document is relevant to the issues raised in the defence abuse of process application, as it contains details concerning

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<sup>86</sup> ICC-01/04-01/06-2660-Conf, paragraphs 18 and 21, referring to ICC-01/04-01/06-2657-Conf, paragraphs 151 and 179.

<sup>87</sup> ICC-01/04-01/06-2670-Conf, paragraphs 32 – 33.

<sup>88</sup> ICC-01/04-01/06-2670-Conf, paragraph 34.

Intermediary 143's suggested collaboration with the prosecution in order to obtain x-rays from certain prosecution witnesses' (who were addressed in the abuse application), namely witnesses DRC-OTP-WWWW-0011, 0007, 0008 and 0009. The prosecution does not dispute the detail of the information in this report, and it will not be prejudiced by its admission into evidence. In due course, the Chamber will assess the significance and weight, if any, of this material.

48. Consequently, the Chamber grants the defence request to admit the two documents related to Intermediary 143 in Annexes 13 and 14 from the bar table under Articles 64(9) and 69(4) of the Statute.

*E. Document related to Witness DRC-OTP-WWWW-0213*

49. The defence seeks to introduce an investigator's report which contains an account of a telephone conversation between an OTP investigator and the REDACTED of Witness DRC-OTP-WWWW-0213 ("Witness 213"), in which REDACTED stated that REDACTED was born on REDACTED 1989, thus contradicting the witness's evidence before the Chamber.<sup>89</sup> The defence submits that this document, in particular, demonstrates that the prosecution has received contradictory information on Witness 213's date of birth.<sup>90</sup> The defence also refers to paragraph 129 of its abuse application, in which the report is mentioned in support of the allegation that the evidence of Witness 213 contains a number of contradictions.<sup>91</sup>

50. The prosecution resists this application, arguing that given the defence "was in possession of the note before closing the abuse of process portion

<sup>89</sup> ICC-01/04-01/06-2660-Conf, paragraphs 22 – 24, referring to ICC-01/04-01/06-2660-Conf-Anx15 (DRC-OTP-0194-0252).

<sup>90</sup> ICC-01/04-01/06-2660-Conf, paragraph 23.

<sup>91</sup> ICC-01/04-01/06-2657-Conf, paragraph 129.

of their case” it should have called REDACTED of Witness 213 to give evidence about this conversation and REDACTED age. The prosecution further submits that this individual, who was originally on the defence witness list, was withdrawn without explanation.<sup>92</sup>

51. Putting aside the prejudice that may be caused to the prosecution by introducing information given by Witness 213[REDACTED] via this investigator’s note, the probative value of this material is extremely low. Witness 213[REDACTED] provided the information in the course of a telephone conversation about security matters relating to Witness 213, and [REDACTED] would not have been aware that information provided in this context might be used in legal proceedings. Consequently, the Chamber refuses the defence request for the admission of the investigator’s note contained in Annex 15 from the bar table: it has insufficient *prima facie* probative value.

#### *F. Document related to intermediary DRC-OTP-WWWW-0316*

52. The defence seeks to introduce an investigator’s note relating to Intermediary 316, given it is submitted that this document demonstrates that he continued collaborating with the prosecution until 2008.<sup>93</sup> The defence refers to paragraphs 29 and 52 of its abuse of process application in support of this submission.<sup>94</sup>

53. The prosecution resists this application on the basis that the document has been in the possession of the defence since February 2010, and the latter has failed to provide a sufficient reason for its failure to request its

<sup>92</sup> ICC-01/04-01/06-2670-Conf, paragraphs 36 – 37.

<sup>93</sup> ICC-01/04-01/06-2660-Conf, paragraphs 25 – 27, Anx16 (DRC-OTP-0222-0434).

<sup>94</sup> ICC-01/04-01/06-2657-Conf, paragraphs 29 and 52.

admission at an earlier stage.<sup>95</sup> Moreover the prosecution challenges the relevance of the information contained in this note, arguing “[the fact] that W-0316 contacted the OTP to report an unsolicited approach by a witness in January 2008 [...] can hardly be characterised as ‘collaboration’”.<sup>96</sup> Furthermore, the prosecution sets out that the intermediary has already given evidence to the effect that he was in contact with the prosecution as late as July 2008, when the OTP relocated him.<sup>97</sup>

54. As noted by the prosecution, this document was disclosed to the defence prior to the testimony of Intermediary 316 before the Court. The defence received the document in question on 4 February 2010, and in November 2010 it questioned Intermediary 316 extensively on the nature and duration of his collaboration with the prosecution after 31 March 2006.<sup>98</sup> In the course of this examination the witness explicitly referred to his relocation by the prosecution in July 2008.<sup>99</sup> In light of this testimony and the fact that the defence seeks admission of the investigator’s note to show that collaboration between Intermediary 316 and the prosecution continued until 2008, the Chamber is of the view that the investigator’s note has no additional probative value, bearing in mind the evidence already before the court.

55. Therefore, the Chamber refuses the defence application to admit the document contained in Annex 16 as evidence from the bar table.

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<sup>95</sup> ICC-01/04-01/06-2670-Conf, paragraph 40.

<sup>96</sup> ICC-01/04-01/06-2670-Conf, paragraph 39.

<sup>97</sup> ICC-01/04-01/06-2670-Conf, paragraph 39.

<sup>98</sup> Transcript of hearing on 11 November 2010, ICC-01/04-01/06-T-331-CONF-ENG ET, page 45, line 11 to page 50, line 25 and page 55, line 14 to page 79, line 23.

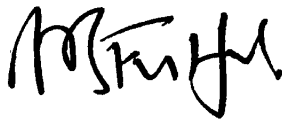
<sup>99</sup> Transcript of hearing on 11 November 2010, ICC-01/04-01/06-T-331-CONF-ENG ET, page 47, line 8.

#### IV. Orders

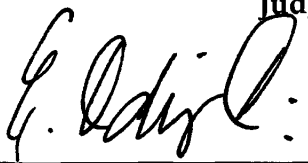
56. Accordingly, the Chamber:

- a. Grants the defence request to introduce the documents contained in Annexes 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 and instructs the Registry to assign EVD numbers to these documents;
- b. Refuses the defence request to introduce the documents contained in Annexes 15 and 16.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 6 April 2011

At The Hague, The Netherlands