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**International
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Court**



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

Date: **14 May 2014**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

***THE PROSECUTOR
v. THOMAS LUBANGA DYILO***

Confidential

**Prosecution's Response to « Requête de la Défense aux fins d'admission en preuve
des éléments relatifs à D-0041 »**

Source: Office of the Prosecutor

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

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Introduction

1. The Defence seeks to admit on appeal D-0041's statement in lieu of his live testimony, a photocopy of D-0041's voting card and two letters with supporting material from the *Commission Electorale Nationale Independante* (CENI) of the Democratic Republic of the Congo (DRC) dated 4 July 2013 and 21 April 2014.¹ The Defence bases its request on Regulation 62 of the Regulations of the Court and Rule 68(2)(c) of the Rules of Procedure and Evidence.² The Prosecution opposes the admission of the statement of D-0041 and the photocopy of his voting card, Annexes 1 and 2 of the Defence Application respectively. First and foremost, both documents fail to meet the rigorous standard for the admission of additional evidence on appeal pursuant to Regulation 62 and existing international criminal practice. In addition, the two documents do not meet the general criteria for the admission of prior recorded testimony under Rule 68. As a result, the Defence Application must be denied in these respects.

2. The Chamber will note that the Defence merely attaches the two letters from CENI-DRC – Annexes 3 and 4 of the Application – and does not even attempt to meet the demanding standards for their admission on appeal. Despite this procedural irregularity, given the stage of these proceedings and in the interests of fairness, the Prosecution does not object in principle to the admission of the two letters. The Prosecution, however, objects to the admission of the supporting documents attached to the CENI-DRC letters as they pertain directly to personal information of D-0041. These include the identification material of D-0041 contained in Annex 3, and the photocopies of D-0041's voting card and application form contained in Annex 4. For the same reasons advanced opposing the admission of Annexes 1 and 2, these documents cannot be admitted without the live testimony of D-0041.

¹ ICC-01/04-01/06-3088-Conf ("Defence Application"), including Annexes 1–4.

² Defence Application, paras.8, 10.

3. The Prosecution understands that the current Defence Application does not relate to the one document on the identification material of D-0040 also contained in Annex 3. D-0040 is due to testify in person before this Chamber and may be examined on the document,³ following which any necessary application may be made. Further, it would be inappropriate to try to adduce evidence relating to D-0040 through an application pertaining to D-0041's evidence, which itself is not going to be tested.

Procedural History

4. On 26 November 2012, the Defence filed a motion to call D-0041 as a witness and in the alternative, to admit his statement as evidence on appeal. It also sought the admission of D-0041's voting card.⁴ In its response brief, the Prosecution opposed the admission of the entirety of the evidence relating to D-0041.⁵ On the request to admit the statement without live witness testimony, the Prosecution argued that the statement had little or no weight particularly when it remained untested if the witness could not be called to testify before the Chamber.⁶

5. On 12 May 2014, the Defence filed a motion, requesting the following to be admitted as additional evidence on appeal: (1) the statement of D-0041 (Annex 1); the photocopy of D-0041's electoral card (Annex 2); the letter from CENI-DRC dated 4 July 2013 (Annex 3); and the letter from CENI-DRC dated 21 April 2014 (Annex 4).⁷ The Defence claims that it was unable to make contact with D-0041 to testify at the appeals hearing scheduled for 19 and 20 May 2014, and it withdraws its request for his testimony before the Chamber. Accordingly, it seeks the admission of his written statement and his electoral card tendered as prior recorded testimony in place of live testimony pursuant to Regulation 62 and Rule 68(2)(c).⁸ The Defence had previously sought the admission of D-0041's written statement in lieu of oral testimony as an

³ See ICC-01/04-01/06-3087, para.1.

⁴ ICC-01/04-01/06-2942-Conf, para.6(b).

⁵ ICC-01/04-01/06-2969-Conf ("Prosecution Response to Lubanga's Appeal under Article 74"), paras.37–71.

⁶ Prosecution Response to Lubanga's Appeal under Article 74, para.71.

⁷ Defence Application and Annexes 1–4.

⁸ Defence Application, paras.6–8, 10, 15.

alternative relief under Regulation 62 in its initial motion of 26 November 2012.⁹ The Defence also requests the admission of the two CENI-DRC letters, claiming that they confirm the authenticity of the electoral card.¹⁰

6. Pursuant to Regulation 23bis(2), the Prosecution files its response confidentially because the Defence Application was filed with the same classification.

Submissions

(i) *Applicable Law*

7. Regulation 62 is the relevant provision governing the admission of additional evidence before the Appeals Chamber. However, Regulation 62 is not designed or intended to authorise a re-opening of the evidentiary phase of the trial or allow for the liberal admission of evidence at the appellate stage. As previously submitted,¹¹ the admissibility of additional evidence on appeal must be governed by the corrective nature of the appellate proceedings. The Appeals Chamber has repeatedly held that appellate proceedings are corrective in nature, and not *de novo*.¹² This principle, together with the requirements of finality, means that the admission of evidence on appeal should be exceptional and governed by strict requirements.

8. Existing international criminal practice prescribes that additional evidence may only be admitted on appeal if three cumulative conditions are satisfied: (a) it was not available at trial to duly diligent counsel; (b) it is relevant and credible; and (c) it could have been a decisive factor in the decision.¹³ International criminal

⁹ *Ibid.*, paras.4, 8.

¹⁰ *Ibid.*, paras.7, 8, 24–29, 32.

¹¹ Prosecution Response to Lubanga's Appeal under Article 74, para.38.

¹² See ICC-02/05-03/09-295 OA2, para.20; ICC-01/09-02/11-202 OA, para.11; ICC-01/09-01/11-234 OA, para.12.

¹³ See for example, Rule 115 of the ICTR and ICTY Rules of Procedure and Evidence. Further, it is established that where the evidence is relevant and credible, but was available at trial and could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal providing the moving party can establish that the exclusion of it would amount to a miscarriage of justice, such that it would have affected the verdict. See *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Decision on Mićo Stanišić's Motion Seeking Admission of Additional Evidence Pursuant to Rule 115, IT-08-91-A, 14 April 2014, paras.12-16; *Prosecutor v. Vujadin Popović et al.*, Decision on Drago Nikolić's First Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, IT-05-88-A, 19 November 2013, pp.2-3; *Prosecutor v. Vujadin Popović et al.*, Decision on Radivoje Miletić's First and Second Motions for Admission of

practice is also clear that this is the *only* route through which an applicant may seek the admission of evidence on appeal.¹⁴

9. Regulation 62, read in light of the existing international criminal practice on the admission of additional evidence on appeal, is the essential condition for the admission of evidence on appeal.¹⁵ Irrespective of other general rules on the admission of evidence, such as Rule 68, all evidence tendered for admission at the appellate stage must meet this threshold. In relation to D-0041's statement and related documents, as demonstrated in the Prosecution's previous response,¹⁶ the Defence has not met the strict criteria for the admission of evidence on appeal and accordingly they should not be admitted in these appeal proceedings.

(ii) D-0041's statement and photocopy of his electoral card are not admissible

10. The evidence contained in D-0041's statement and the electoral card meets neither the conditions for admissibility of additional evidence on appeal prescribed

Additional Evidence on Appeal Pursuant to Rule 115, IT-05-88-A, 15 April 2013, paras.6-11; *Prosecutor v. Ante Gotovina and Mladen Markač*, Public Redacted Version of the 21 June 2012 Decision on Ante Gotovina and Mladen Markač's Motions for the Admission of Additional Evidence on Appeal, IT-06-90-A, 2 October 2012, paras.7-12; *Prosecutor v. Vujadin Popović et al.*, Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, IT-05-88-A, 20 October 2011, paras.7-12; *Prosecutor v. Théoneste Bagosora et al.*, Decision on Anatole Nsengiyumva's Motions for the Admission of Additional Evidence, ICTR-98-41-A, 21 March 2011, paras.5-7; *Prosecutor v. Tharcisse Renzaho*, Decision on Tharcisse's Renzaho's Motions for Admission of Additional Evidence and Investigation on Appeal, ICTR-97-31-A, 27 September 2010, paras.3-5; *Prosecutor v. Emmanuel Rukundo*, Decision on Rukundo's Motion for the Admission of Additional Evidence on Appeal, ICTR-2001-70-A, 4 June 2010, paras.5-7; *Prosecutor v. Ildephonse Hategekimana*, Decision on Request to Admit Additional Evidence, ICTR-00-55B-R11bis, 2 October 2008, paras.5-6. The ICC Appeals Chamber has previously allowed the consideration of ICTR/ICTY practice and jurisprudence. See ICC-01/09-02/11-425 OA4, para. 37. See also Article 21.

¹⁴ See *Prosecutor v. Zoran Kupreškić et al*, Appeal Judgement, IT-95-16-A, 23 October 2001, paras.49, 57, stating "if the Appeals Chamber considered that the proposed additional evidence related to a fact or issue already litigated at trial, Rule 115 was usually applied"; *Prosecutor v. Stanislav Galić*, Decision on Prosecution's Motion to Strike Portions of the Appellant's Appeal Brief, Book of Authorities and Reply Brief, IT-98-29-A , 3 December 2004, p.3, stating "finding that the Letter is intended to refute a finding of fact made by the Trial Chamber and is additional evidence intended to prove a fact not proved at trial, it is therefore subject to admission pursuant to Rule 115 of the Rules; *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Appeals Judgement, ICTR-96-10-A and ICTR-96-17-A ,13 December 2004, para.379 stating "the Appeals Chamber recalls there is a settled procedure for the introduction of evidence on appeal (Rule 115)"; *Prosecutor v. Augustin Ndindiliyimana et al.*, Decision on Augustin Bizimungu's Rule 92bis Motion and on his Rule 115 Motion for Admission of Additional Evidence, ICTR-00-56-A, 11 June 2012, paras.5, 8, where Bizimungu withdrew his request to admit transcripts from the *Setako* trial initially filed under Rules 89 and 92bis, as the Prosecution argued *inter alia* that it was "the incorrect procedural vehicle" for admission of evidence on appeal. Bizimungu then filed a portion of that material under Rule 115.

¹⁵ *Ibid.* See also ICC-01/09-02/11-425 OA4, para.37. See also Article 21.

¹⁶ Prosecution Response to Lubanga's Appeal under Article 74, paras.37-71.

by Regulation 62 (read in light of existing international criminal practice), nor the general conditions for admissibility in Rule 68. Accordingly, the two documents should not be admitted as additional evidence in this appeal.

11. First and foremost, D-0041's statement and the photocopy of his electoral card fail to meet the rigorous standard for the admission of evidence on appeal. As detailed in the Prosecution's response, the evidence contained in D-0041's statement would have been available at trial to counsel acting with due diligence, was not on its face reliable, and could not have been a decisive factor in the Judgement.¹⁷ These serious concerns about the unreliability of the two documents are further heightened in the absence of D-0041's live testimony. The information contained in the two documents is not corroborated by other evidence on the record, it cannot be appropriately tested and scrutinised through cross-examination of D-0041, and the value of these documents, if any at this late stage, is greatly diminished.

12. The Prosecution notes that there are fundamental questions that should be explored in cross-examination in order to attach any probative value to the evidence, and which cannot be otherwise answered. These include questions pertaining to the identity of the witness, the manner in which he obtained the purported identifying documents, and his late identification as a potential witness by the Defence. None of these questions can be properly dealt with without the witness being called and cross-examined. Without these questions being asked of the witness before the Chamber, and without any corroboration from other evidence, the information in the documents simply lacks any meaningful probative value. As such, they lack the indicia of credibility or reliability necessary for their admission as evidence in the appellate phase. For the same reasons, assessed against the totality of the credible and corroborated evidence on which the findings of the Trial Chamber were based, the information in these two documents could not impact the verdict.¹⁸

¹⁷ Prosecution Response to Lubanga's Appeal under Article 74, paras.48–70.

¹⁸ See Prosecution Response to Lubanga's Appeal under Article 74, paras.66–70.

13. In addition, the Defence Application to admit the two documents under Rule 68(2)(c) also fails. Rule 68(2)(c) does not constitute an independent vehicle for the admission of evidence on appeal; rather, a party seeking admission on appeal of a written statement in lieu of live testimony must make a double showing, namely: that the evidence meets both the requirements of Rule 68(2)(c) *and* the requirements of Regulation 62. As already demonstrated, the Defence has failed to meet the requirements of Regulation 62.

14. The documents lack the sufficient indicia of reliability needed to meet the requirements of Rule 68(2)(c).¹⁹ Rule 68 presupposes a minimum probative value and quality that can be accorded to the documents before they will be allowed in as evidence. However, D-0041's statement is cursory and lacks detail, and only makes bald assertions with little or no verifiable independent support. The statement fails to address fundamental questions such as: how he obtained his electoral card and in particular how he proved his age at that time to the electoral officials – including whether he had any other documentation (which has not been tendered by the Defence) or whether he simply provided his own verbal confirmation of his purported age; and what, if any, additional support he can provide as to his age; the dates and manner in which he joined the UPC/FPLC; his role in that armed group; what he was doing in the location where the video was shot and additional questions aimed at establishing that he is indeed the person portrayed in the video. In relation to the electoral card itself, there is no information on the nature of the corroborating evidence, if any, that was provided to obtain it.²⁰

15. Further, the Defence fails to meet the requirements of Rule 68(2)(c) because it has not established that it has exhausted all possible efforts to locate this witness and secure his testimony. From the Defence Application, it is unclear if the witness has refused to testify or if he may still be willing to come to the seat of the Court.²¹

¹⁹ See Rule 68(2)(c)(i). See also Article 69(4).

²⁰ See also Prosecution Response to Lubanga's Appeal under Article 74, para.70.

²¹ Defence Application, paras.5, 6, 11–13.

Indeed, D-0041 informed the Defence as early as December 2013 that he would be located in a place where it would be difficult to contact him. He appears to have forewarned the Defence that his work commitments might make it difficult for him to be in contact. However, the Defence has provided no information on the steps it took at that time to secure his presence and testimony, ensure that he was contactable and understood the importance of his attendance in court. The Defence only appears to have tried to contact D-0041 after the dates for the appeal hearing were notified in March 2014.²²

16. The deficiencies in these two documents tendered cannot be remedied at this late stage of the proceedings, in the absence of the witness himself who is apparently unavailable to testify. Without subjecting the witness to cross-examination and questioning him about these documents, the documents themselves are simply not probative to resolving the issues raised by the Defence in this appeal, including whether D-0041 is the person in the video excerpt, and if he is, his age at the relevant time.²³ The Defence's application to admit D-0041's statement and the photocopy of the electoral card in lieu of his live testimony under Rule 68(2)(c) must therefore fail.

(iii) No attempt to show that the CENI-DRC letters meet the stringent appellate standards for admission

17. Apart from claiming that the two CENI-DRC letters confirm the authenticity of the electoral card, the Defence makes no effort to demonstrate that they meet the criteria for the admission of additional evidence on appeal. In so far as the Defence advances these documents to contest the Prosecution's rebuttal evidence, namely the letter from the Ministry of the Interior and Security of the DRC dated 30 January 2013 indicating that electoral cards are not official identity documents and cannot

²² *Ibid.*, paras.5, 6, 11–13.

²³ The letter from the DRC Ministry of Interior and Security attached to the Prosecution Response casts considerable doubt on the validity of the electoral cards to establish civil status and age. See ICC-01/04-01/06-2969-Conf-Anx2.

guarantee the civil status of the holder, including the date of birth,²⁴ it has failed to seek leave from the Appeals Chamber to do so.

18. While the Prosecution had alerted the Appeals Chamber in advance of its intention to file rebuttal evidence,²⁵ the Defence has merely included the proposed evidence in its motion. The Defence cannot simply proffer evidence on appeal as though the appellate process was a second instance trial on the merits. The Appeals Chamber has not granted explicit authorisation to the Defence to file additional rejoinder evidence at this late stage to further contest that proffered by the Prosecution to rebut the Defence's proposed additional evidence.²⁶

19. If the Appeals Chamber considers that it is in the interests of fairness and a proper determination of the issues to admit the letters, then the Prosecution does not object to their admission. However, the Defence should be reminded that it must abide by the framework established by the Appeals Chamber, more so now that the appellate proceedings in this case are reaching their conclusion. The Prosecution reiterates its opposition to the admission of the supporting material attached to the two CENI-DRC letters through this application, because the documents relating to D-0041 do not meet the rigorous test for admission on appeal as shown above, and in any event, the Chamber should exclude from consideration here the document relating to D-0040.

Relief Sought

20. For the reasons above, the Prosecution

- (i) Requests the Chamber to deny the Defence Application to admit as evidence on appeal Annex 1 and Annex 2;

²⁴ ICC-01/04-01/06-2969-Conf-Anx2.

²⁵ See ICC-01/04-01/06-2947-Conf, paras.9–10. See also ICC-01/04-01/06-2958, para.9 where the Appeals Chamber directs the Prosecution to attach the list of additional evidence adduced in response, as well as the evidentiary material, to its response.

²⁶ The Appeals Chamber had previously allowed the Defence to respond to evidence adduced by the Prosecution in response to the request for additional evidence by way of its consolidated reply. See ICC-01/04-01/06-2982, para.7.

- (ii) Requests the Chamber to deny the Defence Application to admit the supporting materials relating to D-0041 (and D-0040) contained in Annexes 3 and 4; and
- (iii) Does not object to the admission of the letters contained in Annexes 3 and 4.



Fatou Bensouda, Prosecutor

Dated this 14th day of May 2014

At The Hague, The Netherlands