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Date: **5 June 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***

Public

Prosecution's Response to « Requête de la Défense aux fins de présentation d'éléments de preuve supplémentaires dans le cadre des appels à l'encontre du « Jugement rendu en application de l'article 74 du Statut » et de la « Décision relative à la peine, rendue en application de l'article 76 du Statut » conformément à la Norme 62 du Règlement de la Cour »

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Introduction

1. On 23 May 2014, the Defence filed a request to present additional evidence on appeal pursuant to Regulation 62 of the Regulations of the Court.¹ It seeks the admission of the following documents: the list of 11 names and photos purportedly from the UPC Presidential Guard (DRC-OTP-0003-0032); the “*liste nominative des éléments “GP”*” containing 33 names of persons purportedly nominated to the UPC/FPLC Presidential Guard (DRC-OTP-0014-0280); the photocopy of D-0041’s voting card issued in 2011 (DRC-D01-0003-5983); and two letters from the *Commission Electorale Nationale Indépendante*, Democratic Republic of the Congo (CENI-DRC) dated 4 July 2013 and 21 April 2014 along with various supporting materials relating to D-0040 and D-0041 (confidential Annexes 1 and 2) (DRC-OTP-0236-0487 – DRC-OTP-0236-0489 and DRC-OTP-0236-0491 – DRC-OTP-0236-0494).²

2. The Prosecution maintains its opposition to the Defence request to admit as additional evidence on appeal the two lists purportedly relating to the Presidential Guard, the photocopy of D-0041’s voting card, and the supporting materials related to D-0040 and D-0041 attached to the two CENI-DRC letters. All these documents have already been presented to the Appeals Chamber by the Defence in previous filings, and the current application is merely duplicative of those motions. For this reason alone, and keeping in mind the advanced stage of this appeal, the Defence request should be rejected. In any event, as previously submitted by the Prosecution in its written and oral submissions, these documents do not satisfy the stringent standards for the admission of additional evidence on appeal.

3. Regarding the two CENI-DRC letters, the Prosecution considers them as sur-rebuttal evidence, and will not object to their admission if its own rebuttal evidence (CENI-DRC letter dated 30 January 2013)³ is admitted by the Chamber. In all other

¹ ICC-01/04-01/06-3105 (“Defence Request”). The Defence files its submission pursuant to the Appeals Chamber’s Scheduling Order of 15 May 2014, see Defence Request, para.1.

² Defence Request, para.2.

³ ICC-01/04-01/06-2969-Anx2-Red.

respects, the Defence Request should be dismissed.

Procedural History

4. On 26 November 2012, the Defence filed a motion to admit D-0041's voting card, among other documents.⁴ In its response brief, the Prosecution opposed the admission of the entirety of the evidence relating to D-0041.⁵ On 23 December 2013, the Defence sought the admission of the two lists purportedly relating to the UPC/FPLC Presidential Guard (DRC-OTP-0003-0032 and DRC-OTP-0014-0280) as additional evidence at the appellate phase.⁶ Once again, the Prosecution opposed their admission for failure to meet the conditions of admission under Regulation 62.⁷

5. On 12 May 2014, the Defence requested yet again, in a motion to admit evidence in lieu of oral testimony, the admission of D-0041's voting card. In the same filing, the Defence also requested the admission of the two CENI-DRC letters and their supporting material, now under consideration.⁸ On 14 May 2014, the Prosecution objected to the admission of D-0041's voting card and the supporting materials attached to the CENI-DRC letters, for failing to meet, *inter alia*, the Regulation 62 standard for admission on appeal. Further, the Defence made no attempt to show that the CENI-DRC letters meet the stringent appellate standards for admission.⁹

Submissions

(i) Applicable Law

6. 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 underscored

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

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

⁶ ICC-01/04-01/06-3056-Red, paras.13-18, Confidential Annexes 5-6.

⁷ ICC-01/04-01/06-3058-Red ("Prosecution 17 January 2014 Response"), paras.23-27.

⁸ ICC-01/04-01/06-3088, paras.7, 8, 24–29, 32.

⁹ ICC-01/04-01/06-3091, paras.10-20 ("Prosecution 14 May 2014 Response").

in both written and oral submissions,¹⁰ the admissibility of additional evidence on appeal must be governed by the corrective nature of appellate proceedings. The Appeals Chamber has repeatedly held that appellate proceedings are corrective in nature, and not *de novo*.¹¹ This principle, together with the requirements of finality, means that the admission of evidence on appeal should be exceptional and governed by strict requirements.

7. 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.¹² 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.¹³ All of

¹⁰ Prosecution Response to Lubanga's Appeal under Article 74, para.38; Prosecution 14 May 2014 Response, paras.7-9; ICC-01/04-01/06-T-363-Red-ENG ("Prosecution Oral Submissions"), p.20 line.10-p.21 line. 2.

¹¹ 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.

¹² 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 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.

¹³ 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*

the documents submitted by the Defence fail to meet these rigorous criteria, and therefore are not admissible on appeal.

(ii) The documents tendered are already the subject of pending additional evidence motions before the Chamber

8. The Defence misreads the order of the Appeals Chamber and seeks the admission of documents that are already the subject of previously filed motions now pending before the Appeals Chamber. Indeed, the 15 May 2014 Scheduling Order stated in clear terms that only documents that were *not* the subject of a current application should be filed before the Chamber by 23 May 2014.¹⁴ This was then confirmed by the Presiding Judge at the appeals hearing.¹⁵ Contrary to the express words of the Chamber's order, the Defence re-submits the very same documents already under consideration.

9. The two purported Presidential Guard lists were previously tendered through the Defence 23 December 2013 motion; the Defence concedes as much.¹⁶ The photocopy of D-0041's voter's card was included in the Defence 26 November 2012 filing for additional evidence.¹⁷ The CENI-DRC letters and the supporting material were included in the Defence Motion of 12 May 2014.¹⁸ The Prosecution has comprehensively responded to all of the Defence arguments relating to these documents—both in its written responses and in its oral submissions at the appeals hearing.¹⁹ Apart from referring to selective parts of testimonies of D-0040 and D-0041

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

¹⁴ ICC-01/04-01/06-3097, para.5.

¹⁵ ICC-01/04-01/06-T-362-Red-ENG, p.3 line 23-p.4 line 4.

¹⁶ Defence Request, paras.4-11.

¹⁷ ICC-01/04-01/06-2942-Red, Confidential Annex 4.

¹⁸ ICC-01/04-01/06-3088, Confidential Annexes 3-4.

¹⁹ See Prosecution Response to Lubanga's Appeal under Article 74, paras.37-71; Prosecution 17 January 2014 Response, paras.12-41; Prosecution 14 May 2014 Response, paras.7-20; Prosecution Oral Submissions, p.19 line 23-p.40 line 11; p.50 line 7 – p.52 line 9; p.57 line 20 – p. 60 line 8; p. 61 line 10 – p. 62 line 19.

before the Appeals Chamber, the Defence does not present any new arguments to warrant a separate consideration of these documents as additional evidence at this stage of the appeal. In any event, and as shown below, the documents fail to meet the requirements for admission on appeal. Moreover, as all the documents pertain to the testimonies of D-0040 and D-0041, even if taken at their highest, their evidence cannot disturb the “sheer volume of credible evidence presented and discussed at trial” supporting the Trial Chamber’s findings on the presence of children below the age of 15 within the ranks of the UPC/FPLC.²⁰

(iii) The two purported Presidential Guard lists are not admissible

10. As submitted earlier, the two purported UPC Presidential Guard lists do not satisfy the three-pronged test for the admission of additional evidence on appeal.²¹ Firstly, the composition of the Presidential Guard—which is the purported subject of the two lists—was available to counsel at trial, with the exercise of due diligence.²² Indeed, Thomas Lubanga was the Commander in Chief of the FPLC and, according to D-0040, he was one of only 11 bodyguards to Lubanga at one point in time.²³ Thomas Lubanga and his counsel were best placed to access information on this core small group of his *own* personal guards. Moreover, D-0041 testified that he was part of Thomas Lubanga’s bodyguards and he confirmed that Thomas Lubanga knew him.²⁴

11. Secondly, the Defence has not shown that the two lists are relevant to the material findings and could have been a decisive factor in the Article 74 Decision and

²⁰ Prosecution Oral Submissions, p. 27 line 11–p. 31 line 17.

²¹ Prosecution 17 January 2014 Response, paras.23–41.

²² See for example, *Prosecutor v. Vujadin Popović et al*, Decision on Radivoje Miletić’s First and Second Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, IT-05-88-A, 15 April 2013, para. 6; *Prosecutor v. Ante Gotovina and Mladen Markač*, Public Redacted Version of the 21 June 2012 Decision on Ante Gotovina’s and Mladen Markač’s Motions for the Admission of Additional Evidence on Appeal, IT-06-90-A, 2 October 2012, para.7; *Ephrem Setako v. the Prosecutor*, Decision on Ephrem Setako’s Motion to Amend His Notice of Appeal and Motion to Admit Evidence, ICTR-04-81-A, 23 March 2011, para.17; *Renzaho v. the Prosecutor*, Decision on Tharcisse Renzaho’s Motions for Admission of Additional Evidence and Investigation on Appeal, ICTR-97-31-A, 27 September 2010, para.19, stating that the additional evidence must not have been available to the applicant at trial, in any form.

²³ ICC-01/04-01/06-T-362-Red-ENG, p.15 lines 13–16, stating “[a]t that time they were talking of Bunia without weapons, but Mr Thomas Lubanga was authorised to have eleven bodyguards. So we were members of that guard unit.”

²⁴ ICC-01/04-01/06-T-362-Red-ENG, p.37 line 22–p.38 line 2.

the Article 76 Sentencing Decision. These documents provide no information on the age of the persons, and so are silent on the critical issue the Trial Chamber had to determine, namely whether children under the age of 15 were part of the UPC/FPLC. Accordingly, even if the documents had sufficient probative value, they could not disturb the Article 74 Decision. This, together with the fact that neither list is dated, signed nor stamped, and does not possess any other indicia of reliability, militates against admission at this advanced stage of the proceedings. Nor does D-0040's testimony on appeal provide any greater insight, which was limited to identifying himself and others included in the list of persons allegedly belonging to the Presidential Guard.²⁵

12. Moreover, and as previously submitted, the disclosure of the two lists does not demonstrate any violation of the Prosecution's disclosure or investigative obligations.²⁶

13. Thus, the two lists are inadmissible as they fail to meet the rigorous standard for admission on appeal. But, even if admissible, these lists have very little weight, if any, as they fail to address the central issues on this appeal, and D-0040's testimony did not assist in advancing the Defence's claims.

(iv) The photocopy of D-0041's voting card, and the supporting materials related to D-0040 and D-0041 attached to the CENI-DRC letters are not admissible

14. The photocopy of D-0041's voting card does not meet the conditions for admissibility of additional evidence on appeal prescribed by Regulation 62 (read in light of existing international criminal practice).

15. As detailed in the Prosecution's response and in oral submissions, D-0041's evidence: (i) would have been available at trial to counsel acting with due diligence, (ii) is not on its face reliable, and (iii) could not have been a decisive factor in the

²⁵ ICC-01/04-01/06, T-362-Red-ENG, p.13 line 2-p.16 line 2.

²⁶ Prosecution 17 January 2014 Response, paras.28-32, 36-40; Prosecution Oral Submissions, p.22 line 9-p.23 line 22; p.31 line 20-p.40, line 11.

Judgement.²⁷ Significantly, the birth certificate which was the basis for both his 2006 and 2011 voting cards has not been produced. At this stage, the Chamber is left only with two unreliable sources of information to determine his age: the photocopy of D-0041's voting card containing unverified and/or inaccurate information,²⁸ and D-0041's testimony as to his date of birth, which has been called into question given the mistake he made on his place of birth.²⁹

16. Similarly, as rehearsed in the Prosecution's previous submissions, the supporting materials relating to D-0040 and D-0041—namely the identification materials of D-0040 and D-0041 in Annex 1, and the photocopies of D-0041's 2006 voting card and his application form for the voting card in Annex 2—fail to meet the standards for admission on appeal.³⁰ In particular, the information they contain are all based on the uncertain understanding of the two witnesses of their dates of birth, and therefore these documents can have no impact on the Chamber's decision.

17. Following the examination of the two witnesses on appeal, fundamental questions remain on the probative value of the voting cards, and the manner in which they were obtained. Indeed, D-0040 testified that his voting card was issued despite the presence of several known errors such as his place of birth and the name of his mother because "they were in a hurry to issue the card".³¹ D-0041 obtained his voting card in Lopa, a place 32 kilometres away from his permanent place of residence in Bunia.³² In this context, it is impossible to assign any probative value to the voting cards, and the documents presented to secure them. As such, they lack the indicia of credibility or reliability necessary for their admission as evidence in the appellate phase. Further, assessed against the totality of the credible and

²⁷ Prosecution Response to Lubanga's Appeal under Article 74, paras.48–70; Prosecution 14 May 2014 Response, paras.10-16; Prosecution Oral Submissions, p.19 line 23-p.31 line 17.

²⁸ ICC-01/04-01/06-2969-Anx2-Red .

²⁹ Prosecution Oral Submissions, p.26 line 16-p.27 line 10.

³⁰ Prosecution 14 May 2014 Response, paras.7-20.

³¹ ICC-01/04-01/06-T-362-Red-ENG, p.18 lines 12-25, p.23 line 1-p.25 line 10. When asked by Defence Counsel on how he learned of his date of birth, D-0040 stated that he did not know how to answer the question.

³² ICC-01/04-01/06-T-362-Red-ENG, p.38 line 10-p.40 line 1. It seems unclear if D-0041 recognised DRC-OTP-0236-0493 as his 2006 voting card. Instead, he said that it was his second voting card, which could imply his voting card of 2011: see ICC-01/04-01/06-T-362-Red-ENG, p.32, lines 8-9.

corroborated evidence on which the findings of the Trial Chamber were based, the information in these documents could not impact the verdict.³³

18. Moreover, as amply demonstrated through the cross-examinations of D-0040 and D-0041, there are serious doubts as to the credibility of their claims on their dates of birth. Critically, neither of the underlying documents purportedly used as identity documents to secure the voting cards were presented as additional evidence on this appeal and neither are available to the Chamber. D-0040 stated that he had lost the university student identity card which he had used as a basis for his date of birth in his voting card.³⁴ Furthermore, D-0040 could not recall how he knew his date of birth and never saw his birth certificate.³⁵

19. Likewise, D-0041's birth certificate, which he claims is the basis for his voting card, is not available to the Chamber.³⁶ Curiously, although D-0041 claims to have seen a certificate of his birth *from the hospital* since his first year in primary school,³⁷ and claims that at that time, his mother also told him where he was born,³⁸ he suddenly provided a different place of birth when questioned during his pre-testimony interview, including the name of a hospital located in Bunia, not in Dheu.³⁹ That he could forget the location where he was born - after allegedly being told the precise location of his birth by his mother and having allegedly had access to a record issued from the hospital since primary school - raises questions as to whether he ever did see any such birth certificate, or used one to obtain his election card.

(v) The CENI-DRC letters are sur-rebuttal evidence

³³ See Prosecution Response to Lubanga's Appeal under Article 74, paras.66–70.

³⁴ ICC-01/04-01/06-T-362-Red-ENG, p.20 line 19-p.21 line 4.

³⁵ ICC-01/04-01/06-T-362-Red-ENG, p.17 lines 6-9; p. 22 lines 1-3; p.25 lines 9-10.

³⁶ Prosecution Oral Submissions, p.26 line 16-p.27 line 15.

³⁷ ICC-01/04-01/06-T-362-Red-ENG, p.30 lines 14-17.

³⁸ ICC-01/04-01/06-T-362-Red-ENG, p.30 lines 14-17.

³⁹ ICC-01/04-01/06-T-362-Red-ENG, p.30 lines 14-17, p.35 line10-p.36 line 16. Regarding the inconsistency between the information he provided in the pre-interview meeting and his testimony on consecutive days, D-0041 indicated that "Yesterday when I tried to remember what I had said, I realised that I had made a mistake and in fact I was woken up while I was sleeping and that person woke me up abruptly and this was just before I went to the office." ICC-01/04-01/06-T-362-Red-ENG, p.35 lines 10-16.

20. The Prosecution considers the two CENI-DRC letters dated 4 July 2013 and 21 April 2014 as sur-rebuttal evidence to the Prosecution's own rebuttal evidence (DRC letter dated 30 January 2013) annexed to its response brief.

21. The Prosecution rebuttal evidence meets the standard for the admission of rebuttal evidence on appeal, as "it directly affects the substance of the additional evidence admitted by the Appeals Chamber.⁴⁰ As such, if the Appeals Chamber is minded to admit this evidence tendered in rebuttal, the Prosecution will not object to the admission of the two CENI-DRC letters on the same basis.

Relief Sought

22. For the reasons above, the Prosecution

- (i) Requests the Chamber to deny the Defence Request to admit documents DRC-OTP-0014-0280, DRC-OTP-0003-0032, DRC-D01-0003-5983;
- (ii) Requests the Chamber to deny the Defence Request to admit the supporting attached materials in Annexes 1 and 2; and
- (iii) Does not object to the admission of the two CENI-DRC letters in Annexes 1 and 2 (without the supporting attached materials), in the event the Prosecution's rebuttal evidence is admitted.



Fatou Bensouda, Prosecutor

Dated this 5th day of June 2014
At The Hague, The Netherlands

⁴⁰ See *Prosecutor v. Ramush Haradinaj et al.*, Decision on Lahi Brahimaj's Request to Present Additional Evidence under Rule 115, IT-04-84-AR65.2, 3 March 2006, para.44; *Prosecutor v. Miroslav Kvocka et al.*, Decision on Prosecution's Motion to Adduce Rebuttal Material, IT-98-30/1-A, 12 March 2004, p.3; *Prosecutor v. Tihomir Blaskic*, Decision on Evidence, IT-95-14-A, 31 October 2003, p.5.