

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

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

Date: 23 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 THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**Public Document
With confidential Annexes 1 and 2**

**Defence application to present additional evidence in the appeals against the
*Judgment pursuant to Article 74 of the Statute and the Decision on sentence
pursuant to Article 76 of the Statute, in accordance with regulation 62 of the
Regulations of the Court***

Source: Defence team for Mr Thomas Lubanga Dyilo

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

Office of the Prosecutor

Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Ms Caroline Buteau

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

PURPOSE OF THE APPLICATION

1. Pursuant to the Appeals Chamber's order of 15 May 2014, the Defence hereby requests leave, under regulation 62 of the Regulations of the Court, to file additional evidence at the appeals stage, for the reasons set out below.
2. This application concerns the following documents:
 - DRC-OTP-0014-0280
 - DRC-OTP-0003-0032
 - DRC-D01-0003-5983
 - DRC-OTP-0236-0487 to DRC-OTP-0236-0489 (Annex 1)
 - DRC-OTP-0236-0491 to DRC-OTP-0236-0494 (Annex 2)
3. The Defence will demonstrate that these documents are admissible under regulation 62 of the Regulations of the Court, specifically in view of their relevance and reliability and the fact that they were clearly unavailable during the trial.

OBSERVATIONS

1. Documents presented during the testimony of Witness D-0040

4. In an application of 23 December 2013, the Defence sought the admission into evidence of documents DRC-OTP-0014-0280 and DRC-OTP-0003-0032,¹ as they support three grounds of appeal: breaches by the Office of the Prosecutor of its investigation obligations, breaches by the Prosecution of its disclosure obligations, and factual errors with regard to the age of the soldiers composing the Appellant's presidential guard during the material period.²
5. On the basis of these documents, the Defence further sought leave to add a new ground of appeal to those presented in its Appeal Briefs, essentially consisting of submitting that the failure to disclose documents DRC-OTP-

¹ ICC-01/04-01/06-3056.

² *Idem*, para. 11.

0003-0032 and DRC-OTP-0014-0280 in a timely manner deprived the Defence of key evidence which would have enabled it to carry out thorough, specific investigations into the ages of the soldiers comprising the Appellant's presidential guard. The Defence submitted that, given such conditions, it is manifestly unfair to make findings on the basis of evidence presented by the Prosecution in order to establish that the Appellant's bodyguard included children under the age of 15.³

6. During Witness D-0040's testimony, the Defence presented him with these two documents. The Defence therefore wishes to add the following observations to those submitted on 23 December 2013:
7. Firstly, D-0040's testimony confirms that his name appears on these two documents, as submitted by the Defence in its application of 23 December 2013, and that the Prosecution was therefore duty-bound to disclose them to the Defence, at the very least when it was informed that D-0040 had been called to testify before the Trial Chamber in June 2012.⁴
8. Moreover, when testifying before the Appeals Chamber, Witness D-0040 recognised a photograph of himself at the top right of page DRC-OTP-0003-0034.⁵ He was also able to recognise and identify the 10 other individuals photographed in the document.⁶
9. Furthermore, Witness D-0040 recognised his name amongst the 33 in the list of names of the members of the presidential guard (document DRC-OTP-0014-0280).⁷
10. Secondly, the Prosecutor failed to respect her obligation to disclose documents DRC-OTP-0003-0032 and DRC-OTP-0014-0280 automatically and without

³ *Idem*, para.11.

⁴ ICC-01/04-01/06-3056, para. 30.

⁵ T-362-CONF-FRA-ET, p. 16, lines 6-7.

⁶ T-362-CONF-FRA-ET, p. 14, line 11, to p. 16, line 9.

⁷ T-362-CONF-FRA-ET, p. 16, line 25, to p. 17, line 8.

delay, even though she was required to do so because of their direct link with the charges brought against the Appellant.

- Witness D-0040 confirmed that the photograph of him in appearing document DRC-OTP-0003-0032 was taken when the interim multinational force Operation Artemis arrived in Bunia.⁸ The document must thus have been created during the period relevant to the charges against Mr Lubanga, that is, between 1 September 2002 and 13 August 2003.
- Document DRC-OTP-0003-0032 contains the photograph of Thomas Lubanga's 11 guards who had been authorised to remain in Bunia with Mr Lubanga at the time when "*Bunia sans arme*" [Bunia without arms] was established in June 2003.⁹

11. In light of the foregoing and of the Defence's observations in its application of 23 December 2013, the Defence requests that the Appeals Chamber admit into evidence documents DRC-OTP-0003-0032 and DRC-OTP-0014-0280.¹⁰

2. Documents presented during the testimony of Witness D-0041

12. During his examination before the Appeals Chamber, Witness D-0041 confirmed that document DRC-D01-0003-5983 was his voter's card and that the information on it was correct, including the fact that he was born on 2 December 1984.¹¹
13. The Defence submits that Witness D-0041's voter's card, authenticated by the witness himself and by the documents examined below provided by the National Independent Electoral Commission, establishes the witness's date of

⁸ Operation Artemis commenced in June 2003; see Judgment, footnote 3081.

⁹ T-362-CONF-FRA-ET, p. 16, lines 18-23. The Defence wishes to note that the expression "*Bunia sans arme*" was transcribed as "*Bunia Sazame* (sic)".

¹⁰ ICC-01/04-01/06-3056.

¹¹ T-362-CONF-FRA-ET, p.33, lines 1-11.

birth and, consequently, that he was more than 15 years old when he was enlisted into the FPLC. Its reliability and relevance are thus indisputable.

3. Other documents pertaining to Witnesses D-0040 and D-0041

14. Following the Defence's disclosure to the Prosecutor of the identity of Witnesses D-0040 and D-0041, the Prosecutor approached the Congolese authorities for the purpose of obtaining certain information pertaining to their voter's cards.
15. In response to these requests, the National Independent Electoral Commission (CENI) provided the Office of the Prosecutor with two communications:

– *DRC-OTP-0236-0487 to DRC-OTP-0236-0489 (Annex 1)*
16. On 15 July 2013, the Prosecution disclosed to the Defence a letter dated 4 July 2013 from CENI confirming that the information on the voter's cards of Witnesses D-0040 and D-0041 matched that contained in the database of cards issued in 2011.¹² The letter further confirmed that the information is exactly the same for 2006.
17. In addition, the identity data for Witnesses D-0040 and D-0041 appear at pages DRC-OTP-0236-0488 and DRC-OTP-0236-0489; they confirm that the dates of birth provided by the witnesses during their testimonies are correct. Witness D-0040 confirmed that the information in document DRC-OTP-0236-0488 is identical to that on his voter's card.¹³
18. Moreover, the document states that the voter's card may be used as proof of an individual's civil status because it "[TRANSLATION] serves as a provisional identity card", as stated on the back of the card.¹⁴

¹² Annex 1: DRC-OTP-0236-0487 to DRC-OTP-0236-0489.

¹³ T-362-CONF-FRA-ET, p. 9, line 26, to p. 10, line 5.

¹⁴ See p. DRC-OTP-0236-0487.

– DRC-OTP-0236-0491 to DRC-OTP-0236-0494 (*Annex 2*)

19. On 2 May 2014, the Prosecutor disclosed three documents pertaining to Witness D-0041 (*Annex 2*)¹⁵ received from the CENI on 21 April 2014.
20. In a letter to the Office of the Prosecutor, the CENI confirmed that in order to obtain a voter's card, a "[TRANSLATION] Voter Identification Record" must be completed "[TRANSLATION] containing all the identity and location data supplied by the applicant on the basis of one of his or her documents serving as proof of identity, as provided for by law." The CENI also confirmed the authenticity of both witnesses' voter's cards. Lastly, it provided the Office of the Prosecutor with annexed copies of Witness D-0041's 2006 voter's card and "[TRANSLATION] Voter's Card Application Form".
21. During his testimony before the Appeals Chamber, Witness D-0041 recognised document DRC-OTP-0236-0493 as being a copy of the voter's card issued to him in 2006.¹⁶
22. Document DRC-OTP-0236-0494 is a copy of D-0041's Voter Identification Record, prepared when his voter's card was issued. This document confirms that documentary evidence (see section "Type and number of document presented") or, failing that, the production of witnesses was required in order to obtain a voter's card. Accordingly, it corroborates the statements of Witnesses D-0040 and D-0041 that they provided documentary evidence of their dates of birth to obtain their first voter's card in 2006.

– *Reliability and relevance of documents DRC-OTP-0236-0487 to DRC-OTP-0236-0489 and DRC-OTP-0236-0491 to DRC-OTP-0236-0494*

23. The Defence submits that it is essential that these documents be presented because they attest to the authenticity of the voter's cards of Witnesses D-0040 and D-0041 issued in 2006 and 2011. These documents further confirm that

¹⁵ DRC-OTP-0236-0491, DRC-OTP-0236-0493 and DRC-OTP-0236-0494.

¹⁶ T-362-CONF-FRA-ET, p. 33, lines 13-28.

specific procedures must be completed by a citizen in order to obtain a voter's card¹⁷ and that the card thus delivered may be used as proof of an individual's civil status.¹⁸

24. The Defence obtained the documents from the Office of the Prosecutor in July 2013 and May 2014.¹⁹ They pertain specifically to Witnesses D-0040 and D-0041. The documents were thus not in the Defence's possession at the trial stage and are of relevance at the appeals stage only to corroborate the testimony of the two witnesses called by the Defence in support of certain grounds of appeal.
25. Documents DRC-OTP-0236-0487 to DRC-OTP-0236-0489 and DRC-OTP-0236-0491 to DRC-OTP-0236-0494 are of the highest degree of reliability, as they were obtained by the Office of the Prosecutor directly from the CENI, which was responsible for the identification and registration of voters in 2006 and 2011 under Congolese law.²⁰
26. The Defence submits that the admission of these documents in no wise prejudices the Prosecutor, firstly because their admission is limited to demonstrating the authenticity of the voter's cards of Witnesses D-0040 and D-0041 and, secondly, because she herself obtained them after approaching the Congolese authorities in order to verify the authenticity of the voter's cards of the two Defence witnesses.
27. Accordingly, there can be no obstacle to admitting into the record the documents covered by this application, which meets the requirements of regulation 62 of the Regulations of the Court.

¹⁷ *Supra*, para. 20.

¹⁸ *Supra*, para. 18.

¹⁹ Documents DRC-OTP-0236-0487 to DRC-OTP-0236-0489 were disclosed to the Defence by the Prosecutor on 15 July 2013; documents DRC-OTP-0236-0491 to DRC-OTP-0236-0494 were transmitted by email dated 2 May 2014.

²⁰ Law No. 04/028 of 24 December 2004 governing voter identification and registration in the DRC, referred to in document DRC-OTP-0236-0487, Annex 1.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO

GRANT this application;

And

ADMIT into the record of the case the documents listed in paragraph 2.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 23 May 2014

At The Hague, The Netherlands