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Pénale
Internationale**



**International
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Court**

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TRIAL CHAMBER I

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

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

Public Document

Prosecution's Submission on the Admissibility of Four Documents

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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I. Introduction

1. During the status conference on 12 March 2008, the Trial Chamber ordered the Prosecution and the Defence to file written submissions on the admissibility of five documents.¹
2. These five documents are the subject of an application by the Prosecution for authorization to lift redactions to the names and identifying features of former child soldiers who had been demobilized from armed groups in Ituri.² As determined by the Trial Chamber, the issue of the admissibility of these five documents precedes a decision on the appropriate manner of their disclosure.

II. Overview

3. Only four of the five documents are being relied upon by the Prosecution. One of the five documents was disclosed due to its potentially exonerating value.³ At issue for determination is whether the four documents on which the Prosecution intends to rely ought to be admitted into evidence, thereby allowing the Trial Chamber to consider them at the end of the trial along with all other pieces of admitted evidence, or whether the admission of these documents would on balance be too prejudicial to a fair trial.

Two Notebooks

4. Two of the four documents are exercise books ("**Notebooks**") in which information about former child soldiers has been set out in handwritten form.⁴ The Prosecution is limiting its present submissions on admissibility to these two Notebooks on which it is seeking to rely.
5. The two Notebooks were disclosed with authorized redactions covering only the identifying biographical data of the child at issue. Both Notebooks were prepared at the same [REDACTED].

¹ The documents are DRC-OTP-0140-0009; DRC-OTP-0140-0146; DRC-OTP-0140-0152; DRC-OTP-0160-0002 and DRC-OTP-0160-0190 and they were disclosed on 25 September and 19 October 2006.

² ICC-01/04-01/06-1081 with Confidential, *ex parte* Annexes.

³ The Notebook at DRC-OTP-0140-0496 (Annex 47) was disclosed for its potentially exonerating value due to the fact that the former child soldier is identified as having been a member of the Lendu militia (FNI) from 2001 to in or about 2004

⁴ DRC-OTP-0140-0009 (Annex 46) and DRC-OTP-0140-0152 (Annex 48). These two Notebooks were disclosed as incriminatory evidence.

6. The Notebook at DRC-OTP-0140-0009 indicates that: the named individual was 16 years old at the time [REDACTED]⁵; [REDACTED]. In the Notebook it is written that [REDACTED].
7. The Notebook at DRC-OTP-0140-0152 provides that: the named individual was 13 years old at the time [REDACTED], [REDACTED]. The Notebook contains information pertaining to [REDACTED].

Two Logbooks ([REDACTED] Logbook and [REDACTED] Logbook)

8. The remaining two of the five documents are logbooks, both of which were disclosed for their incriminatory value.⁶ The first logbook⁷ ([REDACTED] **Logbook**) records [REDACTED] between [REDACTED] of approximately 600 youth under the age of 18 years in [REDACTED] upon [REDACTED] in Ituri.⁸ The second logbook⁹ ([REDACTED] **Logbook**) records the [REDACTED] approximately 563 youth from the same [REDACTED], registered between [REDACTED].

Admissibility of the Four Documents

9. Articles 64(9), 69(3) and (4) and Rule 63 give the Trial Chamber broad discretion to admit documents, in accordance with the emphasis of the Court's legal texts on the determination of the truth.
10. The Prosecution seeks to tender the documents for truth of their contents but is not calling the authors of the four documents or the individuals who provided the information contained therein.¹⁰ The Prosecution submits that those documents should be determined to be admissible. In the Prosecution's view, the documents are relevant and probative to issues in the proceedings and there are sufficient indicia of reliability to warrant their admission into evidence, in order for the Trial Chamber to assess freely the weight of these documents against the entire record of the trial.

⁵ [REDACTED]: DRC-OTP-0162-0002 at paragraph 180.

⁶ DRC-OTP-0160-0190 and DRC-OTP-0160-0002.

⁷ DRC-OTP-0160-0190.

⁸ See also Investigator's Note at DRC-OTP-0162-0056 which provides information on the creation and chain of custody of these two Logbooks.

⁹ DRC-OTP-0160-0002.

¹⁰ [REDACTED].

III. Provisions on the Admissibility of Evidence in the Rome Statute

11. The Prosecution submits that relevant evidence should be deemed *prima facie* admissible under the Rome Statute (Statute). The party tendering the evidence must show that the evidence has relevance and probative value¹¹ and that it is *prima facie* reliable.
12. Article 69(4) of the Statute provides that the Court “may rule on the relevance or admissibility of any evidence” and in so doing it may consider “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial”. In exercising its discretion, the Court may either first determine whether evidence is sufficiently relevant to warrant admission and subsequently evaluate its weight, or admit the evidence and consider relevance, admissibility and weight together.¹² In either option, the Chamber is entitled to assess freely all evidence for that purpose.¹³
13. The goals of the ICC include the promotion of fair and expeditious trials and the search for truth.¹⁴ In achieving these goals, the Statute and the Rules do not limit the Chamber in the way it governs the admissibility of documents.¹⁵ To that end, for example, the ICC law provides that the Chambers are not bound by national rules of evidence other than in accordance with Article 21.¹⁶
14. The documents presented may be considered “hearsay”, a term used in certain national jurisdictions to describe evidence that is not given by individuals with direct knowledge of events. However, it is respectfully submitted that the *ad hoc* importation of certain rules of evidence stemming from one legal tradition into the ICC context would be inconsistent with the object and purpose of the Statute.
15. Furthermore, the Statute and the Rules of the ICC were drafted in large part based on the long established practice and legal rules developed by earlier international criminal

¹¹ Articles 69(3) and (4).

¹² Lee, R., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 351.

¹³ Rule 63(2) and Lee, R., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 352. The Prosecution notes the provisions of Article 69(7) on the express exclusion of documents obtained by means of a violation of the Statute or internationally recognized human rights, but submits that the provision does not apply to the facts of the instance case.

¹⁴ Articles 54(1), 64(2) and 69(3).

¹⁵ Tochilovsky, V., *Jurisprudence of the International Criminal Courts: Procedure and Evidence* (2006), 276 citing *Prosecutor v. N. Orić*, Case No. IT-03-68-T, Trial Chamber II, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October 2004, para. 8 and *Prosecutor v. Z. Aleksovski*, Case No. IT-95-14/1, Appeals Chamber, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 19.

¹⁶ Rome Statute, Rule 63(5).

tribunals and reflect the particular circumstances in which international criminal trials must proceed.¹⁷ The legal principles that provide the framework for the admission of evidence in the ICC texts are set out in greater detail below.

The Nuremberg and Tokyo Tribunals

16. The Nuremberg and Tokyo Charters favoured the admission of relevant evidence¹⁸ with determinations of weight made at a later stage,¹⁹ taking into account both the unique circumstances under which international criminal prosecutions take place and the fact that without juries there is no need to guard against the admission of potentially prejudicial evidence that could not be removed from the mind of the judges.²⁰ The Tribunals could admit relevant hearsay evidence and this was considered not to render the trial unfair.²¹

The International Criminal Tribunals for the Former Yugoslavia (ICTY), Rwanda (ICTR) and Sierra Leone (SCSL)

17. Rule 89(C) of the ICTY, ICTR and SCSL provides that “A Chamber may admit any relevant evidence which it deems to have probative value”. Rule 89(D) additionally exists in the Rules of the ICTY: “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”. These provisions are the precursors to Articles 69(3) and (4) of the Rome Statute which state that the parties “may submit evidence relevant to the case”, that the Court “shall have the

¹⁷ Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court* (1999), 892-898 in which the primary sources of the rules of evidence are cited as the Nuremberg Charter and the Rules of the ICTY.

¹⁸ Article 19 of the Charter of the International Military Tribunal for Nuremberg (IMT) provided that: “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.” Article 13 of the Charter of the International Military Tribunal for the Far East (IMTFE) provided that: “(a) *Admissibility*: The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible. (b) *Relevance*: The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule on its relevance.”

¹⁹ *Hostage Case*, Nuremberg Military Tribunal, Vol. XV, 94.

²⁰ May, R. and Wierke, M., *International Criminal Evidence* (2002), 95. See also Tochilovsky, V., *Indictment, Disclosure, Admissibility of Evidence* (2004), 57. This rationale remains prevalent at the ICTY where professional judges are able to consider each piece of evidence and determine appropriate weight: Tochilovsky, V. “Admissibility of Evidence”, *Jurisprudence of the International Criminal Courts* (2006), 275, citing in support of this principle the decisions rendered in *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber II, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October 2004, para. 11; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Chamber II, Decision on the Admissibility of Certain Challenged Documents and Documents for Identification (Public Amended Version), 2 August 2005, para. 17. See also, *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, Appeals Chamber, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, para. 26.

²¹ *The Flick Trial*, Trial of Friedrich Flick and Five Others, United States military Tribunal, Nuremberg, 20 April – 22 December 1946, UNWCC, Vol. IX, 6.

authority to request the submission of all evidence that it considers necessary for the determination of the truth” and that the Court may “rule on the evidence or admissibility of any evidence” by considering “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial”.

18. The general approach of ICTY, ICTR and SCSL on the admissibility of evidence is a broad one whereby the evidence is generally accepted and freely evaluated.²²

19. Relevant evidence has been held to be “clearly admissible”.²³ The approach adopted by the Rules of the ICTY, ICTR and SCSL and its jurisprudence favours a broad admission of evidence when the evidence is (i) relevant to an element of a crime, and (ii) has probative value in proving the elements of the crime.²⁴

20. The jurisprudence of the *ad hoc* international courts and tribunals has also articulated the need for a Trial Chamber to consider whether the evidence bears sufficient “indicia of reliability”²⁵ to warrant admission.²⁶

²² At the ICTY, the Trial Chamber in *Blaškić* held that the principle “is one of extensive admissibility of evidence” where “questions of credibility or authenticity are determined according to the weight given to each of the materials by the Judges at the appropriate time”: *Prosecutor v. T. Blaškić*, Case No. IT-95-14-I, Trial Chamber, Judgement, 3 March 2000, para. 34. In *Musema*, the Trial Chamber of the ICTR stated that the principle for evaluating evidence is based on the “free assessment of evidence”: *Prosecutor v. A. Musema*, ICTR-96-13-A, Trial Chamber I, Judgement and Sentence, 27 January 2000, para. 75. See Tochilovsky, V., *Jurisprudence of the International Criminal Courts: Procedure and Evidence* (2006), 276 that the Rules in international tribunals are necessarily broader than those of the common and civil law systems, citing *Prosecutor v. T. Bagosora*, Case No. ICTR-96-7-T, Trial Chamber II, Decision on the Defence Motion for Pre-determination of Rules of Evidence, 8 July 1998, pp 4-5. In *Sesay*, the Trial Chamber of the SCSL noted that “the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing probative value of the totality of the evidence”: *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber I, Ruling on the Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, para. 4.

²³ *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, Appeals Chamber, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, para. 27.

²⁴ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Trial Chamber I, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 4.

²⁵ *Prosecutor v. D. Kordic and M. Cerkez*, Case No IT-95-14/2-AR73.5, Appeals Chamber, Decision on Appeal Regarding Statement of a Deceased Witness 21 July 2000, paras 23, 24, 27. In *Prosecutor v. Z. Delalić et al. (Celebici Case)*, the Appeals Chamber held that “a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the relevant evidence is reliable”, *Prosecutor v. Z. Delalić et al. (Celebici Case)*, Case no IT-96-21, Appeals Chamber, Judgement, 20 February 2001, para. 533; See also *Prosecutor v. D. Kordic and M. Cerkez*, Case No IT-95-14/2-AR73.6, Appeals Chamber, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 Sept 2000; *Prosecutor v. Kupreskic et al.*, Case No IT-95-16-AR73.3, Decision on Appeal by Dragan Papic Against Ruling to Proceed by Deposition, 15 July 1999; *Prosecutor v. Z. Delalić et al. (Celebici Case)*, Case no IT-96-21, Appeals Chamber, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998; *Prosecutor v. Z. Aleksovski*, Case no IT-95-14/1, Appeals Chamber, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999.

²⁶ The ICTY Appeals Chamber, for example, in the *Delalić* case held that “[t]he implicit requirement that a piece of evidence be prima facie credible - that it have sufficient indicia of reliability - is a factor in the assessment of its relevance and probative value”: *Prosecutor v. Z. Delalić et al. (Celebici Case)*, Case no IT-96-21, Appeals

21. In considering reliability, moreover, the ICTY Appeals Chamber held with respect to out-of-court statements that relevant indicia included their voluntariness, truthfulness and trustworthiness, opining that a Trial Chamber may consider the content of the statement and the circumstances under which the evidence arose.²⁷
22. The jurisprudence of the *ad hoc* international courts and tribunals shows that a Trial Chamber nonetheless retains discretion to exclude evidence that is not relevant or where its probative value is manifestly outweighed by any prejudicial effect.²⁸ In the context of the overall framework for admission of documents, the SCSL Appeals Chamber has held that while the “probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be available” for consideration by the Chamber.²⁹ In effect, a piece of evidence may have less probative value when viewed in isolation but greater probative value when viewed together with all of the other evidence before the Court, and therefore meriting admission into evidence.³⁰ The approach of the SCSL here corresponds to the approach towards the admission of evidence adopted at the Tribunals, favouring broad admission and a subsequent determination of weight upon review of the totality of the evidence presented.³¹
23. In terms of documentary evidence, the ICTY jurisprudence indicates that such evidence must have *some* relevance and probative value and must be reliable on its face in order to allow its admission while a precise determination of its probative value can be conducted at a later stage.³² Indicia of reliability in documentary

Chamber, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para 20.

²⁷ *Prosecutor v. Z. Aleksovski*, IT-95-14/1, Appeals Chamber, Appeals Chamber Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

²⁸ *Prosecutor v. Sesay et al.*, Trial Chamber I, Ruling on the Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, Case No. SCSL-04-15-T, 23 May 2005, paras. 6-8.

²⁹ *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, Appeals Chamber, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, para. 23.

³⁰ *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, Appeals Chamber, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, paras 23 and 25. See also, *Prosecutor v. Sesay et al.*, Trial Chamber I, Ruling on the Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, Case No. SCSL-04-15-T, 23 May 2005, para. 9.

³¹ *Prosecutor v. Nyiramashujuko*, Case No ICTR-98-42-AR73.2, Appeals Chamber, Decision on Pauline Nyiramashujuko’s Appeal on the Admissibility of Evidence, 4 October 2004, paras. 6-7. See also: Guariglia, F. “The Admission of Documentary Evidence and of Alternative Means to Witness Testimony in Proceedings before the International Criminal Tribunal for the Former Yugoslavia”, *International and National Prosecution of Crimes under International Law* (2001), 673, citing in support of this position the decision rendered in the *Kordic* case.

³² *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Chamber II, Decision on the Admissibility of Documents of the Defence of Enver Hadžihasanović, 22 June 2005, para. 21: “The Chamber would first note that it is ruling on the admissibility of only documentary evidence. For a document to be admitted, the party wishing to rely on it must first prove that it satisfies the standards of relevance and probative

evidence includes³³: the source of the document; the place where it was seized; testimony on the chain of custody since the seizure of the document; as well as the nature of the document itself such as its form (signature, stamp), its structure (fax, letter) method of transmission, content or the purpose for which the document was created and when it was created.³⁴

24. There is no legal basis in the jurisprudence of the ICTY, ICTR or SCSL that proof of authenticity is a threshold requirement for the admissibility of documentary evidence.³⁵ A Chamber may admit documents when objections to authenticity are

value set out in Rule 89(C) of the Rules. The document must have "some relevance" and "some probative value". This means that for evidence to be declared admissible, the Chamber need not determine its precise probative value since this will be done only at a later stage. The Chamber must merely be sure that it has *some* probative value and *some* relevance. In addition, the Chamber must determine whether the document is reliable. This notwithstanding, for an exhibit to be admissible as evidence, *prima facie* evidence of its reliability suffices".

³³ Tochilovsky, V., *Jurisprudence of the International Criminal Courts: Procedure and Evidence* (2006), 294 citing *Prosecutor v. Z. Delalic et al. (Celebici Case)*, Case no IT-96-21, Appeals Chamber, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998; *Prosecutor v. Kordic and Cerkez*, Case No IT-95-14/2, Trial Chamber, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts, 1 December 2000; *Prosecutor v. Bagasora et al.*, Case No. ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C), 25 May 2006, at para 4. Additionally, the purpose for which the document was created may be relevant to its reliability. Reliability may be shown where the document was not created by either party or prepared for the purpose of litigation, but rather was prepared contemporaneously with the event it purports to record: *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Evidence Tendered through Sandra Mitchell and Frederick Abrahams, 1 September 2006. Reliability is generally enhanced where evidence was made during the normal course of business and was part of a credible and reliable system.

³⁴ The Trial Chamber in the *Kordic* case considered an application by the Prosecution to admit a series of documents at a late stage in the trial proceedings: *Prosecutor v. D. Kordic and M. Cerkez*, Case No IT-95-14/2, Trial Chamber, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts, 1 December 2000. The Trial Chamber assessed the admissibility of the documents by considering whether the documents 'speak for themselves' such that their origin could be established before a Trial Chamber: *Prosecutor v. D. Kordic and M. Cerkez*, Case No IT-95-14/2, Trial Chamber, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts, 1 December 2000, para 43. In applying this criterion, a number of military orders and reports were admitted. Similarly, a war diary was admitted into evidence on the basis that it was 'an important document, contemporaneously made'. The war diary was held to carry 'its own authenticity' having been written in the handwriting of several people and bearing signs of being what it purported to be and that the author(s) had little reason to fabricate the entries: *Prosecutor v. Kordic and Cerkez*, Case No IT-95-14/2, Trial Chamber, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts, 1 December 2000, para 44. Lastly, the Chamber noted that it was 'under a duty to try and ascertain the truth and to deprive itself of the document would put that duty at risk': *Prosecutor v. D. Kordic and M. Cerkez*, Case No IT-95-14/2, Trial Chamber, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts, 1 December 2000, para 44. See also *Prosecutor v. Z. Delalic et al. (Celebici Case)*, in which the Appeals Chamber stated that: "To require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89 (C)", *Prosecutor v. Z. Delalic et al. (Celebici Case)*, Case no IT-96-21, Appeals Chamber, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para 20.

³⁵ Tochilovsky, V., *Jurisprudence of the International Criminal Courts: Procedure and Evidence* (2006), 296 citing *Prosecutor v. Z. Delalic et al. (Celebici Case)*, Case no IT-96-21, Appeals Chamber, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para 20.

raised and later decide their appropriate weight within the context of the entire trial record.³⁶

25. Finally, there is no express provision excluding documents simply on the grounds that the author has not been called to testify.³⁷ Where a document contains information upon which no witness under oath can directly provide information, international criminal jurisprudence has not prohibited the admission of this evidence.³⁸ Rather, the same legal principle is applied: if the documents are relevant, have probative value and are reliable they are admissible.³⁹

IV. Prosecution's Submissions on the Admissibility of the Four Documents

The Documents are Relevant and Probative to the Charges

26. While the jurisprudence cited above is not binding on the Chambers of the ICC, to the extent that it may be considered of persuasive authority, the Prosecution outlines how the documents at issue satisfy the legal principles elaborated above and in the context of the framework set out by the ICC Statute and Rules.
27. All four documents upon which the Prosecution is seeking to rely are relevant and probative of issues to be determined during the trial.
28. The two Notebooks are relevant and probative of the presence and enlistment of children under the age of 15 into the UPC/FPLC at the relevant time and of their use to participate actively in hostilities.

³⁶ Tochilovsky, V., *Jurisprudence of the International Criminal Courts: Procedure and Evidence* (2006), 297 citing *Prosecutor v. D. Kordic and M. Cerkez*, Case No IT-95-14/2-AR73.5, Appeals Chamber, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000.

³⁷ Tochilovsky, V., *Jurisprudence of the International Criminal Courts: Procedure and Evidence* (2006), 297 citing *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Chamber II, Decision on the Admissibility of Certain Challenged Documents and Documents for Identification (Public Amended Version), 2 August 2004., para 44.

³⁸ The Appeals Chamber of the ICTY has affirmed the principle that relevant hearsay evidence is *prima facie* admissible, and further stated that "the fact that the evidence is hearsay does not necessarily deprive it of probative value" but that "the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence": *Prosecutor v. Z. Aleksovski*, Case No. IT-95-14/1, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

³⁹ Tochilovsky, V., *Jurisprudence of the International Criminal Courts: Procedure and Evidence* (2006), 288 citing *Prosecutor v. Z. Aleksovski*, Case No. IT-95-14/1, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

29. The [REDACTED] Logbooks are also relevant to and probative of the presence of children under the age of 15 in the UPC/FPLC at the relevant time. In one instance, the [REDACTED] Logbook also contains information on the use to participate actively in hostilities of one child in or about August 2002.⁴⁰
30. Additionally, the information contained in the [REDACTED] Logbook is relevant and probative to the plan and systematic policy to conscript and enlist children into the UPC/FPLC. This inference can be made by considering the scope of the presence of children under the age of 15 in the UPC/FPLC as identified in the [REDACTED] Logbook, which may assist in refuting any allegations that these were isolated instances. Firstly, during the period recorded in the [REDACTED] Logbook that is of relevance to the current charges [REDACTED], the names of approximately 122 individuals are recorded as having been members of the UPC/FPLC. 92 of the 122 named children were under the age of fifteen during this period.
31. Secondly, the [REDACTED] Logbook records that approximately 67 of the 92 children (which is equal to 70%) came to the [REDACTED] from places known to have been the site of hostilities or military training camps related to the UPC/FPLC [REDACTED]. This information supports the inference that the UPC/FPLC was conducting a systematic recruitment of children under the age of 15. Thirdly, the [REDACTED] Logbook identifies approximately 83 of the 92 individuals (equalling 90%) who were demobilized from an area that differed from their place of origin. From this, the Trial Chamber may infer, having regard to other evidence, that a high mobility trend existed that is indicative of a systematic plan or policy requiring a level of coordination to mobilize troops (children) across areas of operations and beyond their original villages.

The Documents are Reliable

32. The Prosecution submits that the documents bear sufficient indicia of reliability to be admissible.

(i) The Two Notebooks – Indicia of Reliability: Source and Purpose

⁴⁰ [REDACTED] Logbook at pages DRC-OTP-0160-0191-0192 and 0194.

33. The two Notebooks were created by staff members of a [REDACTED] based in [REDACTED], and were provided to the OTP by the same source. [REDACTED].⁴¹
34. [REDACTED] Based on information contained in [REDACTED] statements, it is anticipated that [REDACTED] can refer to the Notebooks and provide information on the organization, methodology and processes of [REDACTED], and on the collection of information by [REDACTED] staff, including how the age of the children was determined.⁴²
35. The Notebooks were handwritten by [REDACTED] working at [REDACTED]. The information is recorded in different handwriting, depending on which [REDACTED] was responsible for a certain child.⁴³ In the case of Notebook DRC-OTP-0140-0009, [REDACTED] can identify the staff member who recorded the information.⁴⁴
36. The Notebooks were prepared contemporaneously with the events they purport to record, namely, the [REDACTED]. The Prosecution submits that the Notebooks are reliable because they were created during the normal course of business at [REDACTED] and were prepared in accordance with a credible and reliable system.
- (ii) *The [REDACTED] Logbooks – Indicia of Reliability: Source, Purpose, Chain of Custody, Consistency in Recording and with Other Evidence*
37. The [REDACTED] Logbooks were created by staff members of a [REDACTED] based in [REDACTED], and were provided to the OTP by the same source. [REDACTED]
38. The [REDACTED] Logbook consistently records [REDACTED].
39. The [REDACTED] Logbook consistently records [REDACTED].
40. The Prosecution submits that the Notebooks and the [REDACTED] Logbook and [REDACTED] Logbook were prepared contemporaneously with the events, namely, the [REDACTED] an armed group in Ituri and [REDACTED], and the information

⁴¹ Statement of [REDACTED], DRC-OTP-0162-0006 at paras 23, 38, 121, 180, 181. A document with details on the chain of custody of the [REDACTED] Logbook and the [REDACTED] Logbook has been disclosed at DRC-OTP-0162-0056 in which information from [REDACTED] is given as well as information from [REDACTED], the [REDACTED] of the [REDACTED] from which the [REDACTED] Logbook and [REDACTED] Logbook emanated and who created certain early entries in the [REDACTED] Logbook. [REDACTED].

⁴² Statement of [REDACTED], DRC-OTP-0162-0002 at paras 38, 74-82, 115-130, 180 and 181.

⁴³ Statement of [REDACTED], DRC-OTP-0162-0002 at paras 121 and 180.

⁴⁴ Statement of [REDACTED], DRC-OTP-0162-0002 at para 180.

contained in the documents was recorded at the time of the interviews with the children. The documents were not created by either party to these proceedings or for litigation or judicial purposes. They were created in order to properly track the [REDACTED] efforts of children who had been [REDACTED] armed groups. The Prosecution submits that the individuals recording the information in the documents had no reason to falsify these reports. The Prosecution further submits that the Logbooks are reliable because they were created during the normal course of business at the [REDACTED] and were prepared in accordance with a credible and reliable system.

41. The Prosecution submits that an additional factor that enhances the reliability of the [REDACTED] Logbooks is the degree of consistency in each and between the two logbooks. Of the 92 entries of children in the [REDACTED] Logbook who were reported as under 15 years and as members of the UPC/FPLC during the relevant time period, 68 names also appear in the [REDACTED] Logbook regarding the [REDACTED] of the same individuals [REDACTED] or other persons. The entries in the documents reveal consistency both internally and between the entries of the two books.⁴⁵

42. It is anticipated that [REDACTED] will testify to having had regular contact with the organizations who were involved in the issue of child soldiers in Ituri, and to the fact that [REDACTED] of the [REDACTED] where the [REDACTED] Logbooks were created.⁴⁶ [REDACTED] can also speak to the fact that [REDACTED] was the primary overseer of [REDACTED] and that [REDACTED] of an organization called [REDACTED] of [REDACTED].⁴⁷

43. In terms of the initial procedures aimed at registering child soldiers at the [REDACTED], [REDACTED] will speak to the fact that [REDACTED].⁴⁸ Following these meetings, and based on the information compiled, [REDACTED].⁴⁹

⁴⁵ Although submissions on the need to lift redactions are not necessary at the present stage, the Prosecution notes that in order to allow the Defence and the Trial Chamber to properly analyze and assess the entries and the consistencies (or inconsistencies) between the two logbooks, and to assess their reliability, the disclosure of the names of the children is necessary. None of the children are Prosecution witnesses. Lifting of redactions is equally important in the Prosecution's view is to enhance any weight assessment of the evidence by avoiding anonymous hearsay.

⁴⁶ Statement of [REDACTED], DRC-OTP-0162-0002 at paras 28 and 74.

⁴⁷ Statement of [REDACTED], DRC-OTP-0162-0002 at para 74. See also information contained in the Investigator's Note at DRC-OTP-0162-0056.

⁴⁸ Statement of [REDACTED], DRC-OTP-0162-0002 at para 78.

⁴⁹ Statement of [REDACTED], DRC-OTP-0162-0002 at para 80.

[REDACTED].⁵⁰ Although [REDACTED] did not participate in the record taking at this [REDACTED], [REDACTED].⁵¹

44. While [REDACTED] is not in a position to discuss the content of the [REDACTED] Logbooks, it is anticipated that [REDACTED] will provided information as to the creation of the [REDACTED], its staff and the methodology used to retrieve and record information from children.⁵²

45. As noted above, approximately 70% of the children listed in the [REDACTED] Logbook are recorded as having [REDACTED] from places known to have been the site of hostilities or military training camps related to the UPC/FPLC or UPC/FPLC offices such as [REDACTED]. [REDACTED].

46. [REDACTED].⁵³ [REDACTED].⁵⁴ [REDACTED].⁵⁵

47. The Prosecution submits that this anticipated evidence enhances the reliability of the Logbooks and can assist in the assessment of the value of the evidence at the end of the trial.

The Probative Value outweighs any Prejudicial Effect

48. The Prosecution submits that the documents are of such relevance and probative value that they ought to be admitted, in order to be considered with the totality of the evidence at the end of the trial.

49. The Prosecution submits that fair trial interests will not be affected by the admission of these documents, for the reasons outlined herein. One factor that is often considered when making an assessment on the admissibility of documents is the ability of the Defence to challenge the veracity of the evidence. In respect of the Notebooks, the Prosecution is calling [REDACTED], and with the chain of custody of the documents, such that [REDACTED] can be challenged on these points.

⁵⁰ Statement of [REDACTED], DRC-OTP-0162-0002 at para 80.

⁵¹ Statement of [REDACTED], DRC-OTP-0162-0002 at para 80.

⁵² Statement of [REDACTED], DRC-OTP-0162-0002 at paras 72-80. [REDACTED] Statement of [REDACTED], DRC-OTP-0155-0009 at paras 87, 107, 132, 136, 145-154. Similarly, [REDACTED] (DRC-OTP-WWW-0111) [REDACTED], DRC-OTP-0152-0072.

⁵³ See [REDACTED] statement at DRC-OTP-0184-0011 at paragraphs 76-82.

⁵⁴ See [REDACTED] statement at DRC-OTP-0180-0128 at paragraphs 15, 21 and 26.

⁵⁵ See [REDACTED] statement at DRC-OTP-0180-0090 at paragraphs 92-105.

[REDACTED] can be examined by both parties on the reliability and authenticity of the Notebooks.

50. Regarding the [REDACTED] Logbook, the Prosecution states that [REDACTED] can provide relevant information pertaining to [REDACTED] and chain of custody.

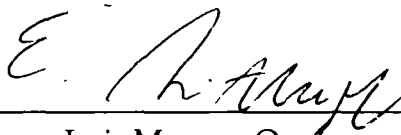
51. The Prosecution submits that the testimony of [REDACTED] will provide the Defence with sufficient opportunities to test the evidence and prevent unfairness.

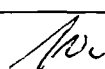
IV. Conclusion

52. The Chamber is vested with a broad discretion to admit relevant evidence. The Prosecution submits that the four documents upon which it seeks to rely should be determined as admissible. In the Prosecution's view, they are relevant and probative to the charges, they are reliable on their face and at least one witness will be called who can be examined on the documents. As a result of the foregoing, the Prosecution submits that these four documents should be admitted into evidence, and taken into consideration with all other relevant evidence at the end of the trial.

V. Relief Requested

53. The Prosecution respectfully requests a ruling from the Trial Chamber that the four documents may be admitted into evidence, in unredacted form.



 Luis Moreno-Ocampo
Prosecutor

Dated this 1st day of April 2008

At The Hague, The Netherlands