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TRIAL CHAMBER I

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

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

Public with Confidential Annexes 1 to 86, Prosecution, Defence and Legal Representatives Only Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)

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

In accordance with Articles 64(9) and 69 (2), (3) and (4) of the Rome Statute (Statute) and Rule 63(2) and (5) of the Rules of Procedure and Evidence (Rules), the Prosecution herewith submits its application for the admission into evidence from the bar table of contemporaneous documents emanating from the UPC/FPLC during the period relevant to the charges¹ against Thomas Lubanga Dyilo.

The Prosecution submits that these documents are relevant and probative of issues in the instant proceedings and are *prima facie* reliable. They are pertinent to the "...determination of the truth" as stipulated in Article 69(3)². Accordingly, the Prosecution submits that the admission of the documents satisfy the Trial Chamber's obligation to ensure that the trial is fair and expeditious, under Article 64(2).

The procedure of tendering documents from the bar table is an established one³, and, more importantly, is a vital tool for streamlining large and complex war crimes cases.⁴ The Trial Chamber has itself contemplated the tendering of documents from

¹ Descriptions of the documents and a determination of their relevance to the case are contained in a confidential chart annex 1 appended to this application, along with the documents in a further set of confidential annexes.

² See Trial Chamber Decision ICC-01/04-01/06-1398-Conf, 13 June 2008, paragraph 20.

³ See ICTY Cases *Prosecutor v. Sefer Halilovic*, case No. IT-01-48-T "Decision on Motion for Exclusion of Statement of Accused", 8 July 2005, para 18; *Prosecutor v. Milutinovic* Case No.: IT-05-87-T "Decision on Lukic Defence Motions for Admission of Documents from Bar Table", 11 June 2008.

⁴ *Prosecutor v. Milutinovic* Case No.: IT-05-87-T, "Decision on Prosecution Motion to Admit Documentary Evidence", 10 October 2006, wherein the Trial Chamber stated: "given the depth and breadth of this case, the Trial Chamber is generally sympathetic to parties presenting documents from the bar table. However, if that is to be the case, the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into the case..."

the bar table in this trial by the parties,⁵ and has already set parameters for the admissibility of documentary evidence (Admissibility Decision).

Prosecution's Submissions

1. In its Admissibility Decision, the Trial Chamber promulgated three “key considerations” to consider when evidence other than oral testimony is being introduced: i) *prima facie* relevance; ii) probative value and, iii) the balance between probative value of the evidence and any prejudicial effect.⁶
2. The Prosecution avers that the documents sought to be tendered here satisfy the aforementioned criteria, as explained in greater detail below.

Relevance

3. The documents sought for admission are relevant to the current proceedings and would be of critical assistance to the Trial Chamber in determining the truth in this case.
4. For each document the Prosecution sets out in detail in the attached confidential Annex 1 a brief description of the document and its content, details on the form of the document (existence of a signature, stamp, date, author, and

⁵ See ICC-01/04-01/06-T-104-ENG, page 38 lines 20 to 21.

⁶ Paragraphs 27 to 32 inclusive of the Admissibility Decision.

recipient(s)), its relevance to the discreet areas in the Prosecution's case and its source.

5. The documents comprise orders, decrees, letters, reports, and other forms of correspondence from the UPC/FPLC. Many are signed by the Accused or contain his name and/or position; many originate from persons within the Accused's hierarchy and other departments within the UPC and FPLC and are copied to the Accused.
6. In the Prosecution's submission the documents are contemporaneous records that, at the very least, demonstrate that the UPC/FPLC was a functioning, efficient organisation commanded and lead by the Accused. Further, they tend to show effective internal communication within the UPC/FPLC, knowledge of the Accused of the underlying facts constituting the charges and his ability to know of the crimes.

Probative value

7. In determining the probative value of an item of evidence, the Trial Chamber ruled in its Admissibility Decision that it "must be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness"⁷. The Prosecution submits that this consideration applies here. Further, the Prosecution notes

⁷ Paragraph 29 of the Admissibility Decision.

that the documents in question possess several indicia of reliability that militate in favour of admission.⁸

8. First, they are contemporaneous with the events in question, created in the normal course of business and the administration of the UPC/FPLC. They were not created for judicial purposes.⁹
9. Second, they all contain either a UPC/FPLC header or stamp and many are signed by the Accused or other senior members of the UPC/FPLC. In the Prosecution's submission these characteristics of the form of the document demonstrate their authenticity, at a minimum.¹⁰
10. Third, the Prosecution is calling several witnesses who were integrally involved politically and militarily¹¹ with the UPC/FPLC and to whom, if need be, questions regarding the documents could be put in order to test their veracity, thereby reducing any prejudice to the Accused.¹² The Prosecution notes that WWW-0041 has already testified on the form and substance of some UPC/FPLC documents.¹³

Search and Seizure

⁸ It is noted that in the Admissibility Decision, the Trial Chamber ruled that although "indicia of reliability" is a "helpful tool",...the Chamber must be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness" – paragraph 29.

⁹ See paragraph 37 of Admissibility Decision.

¹⁰ Paragraph 39 of the Admissibility Decision is instructive and is invoked.

¹¹ WWW-0004, 0012, 0055, 0015, 0016, 0187, 0017, 0089, 0026.

¹² In this regard, paragraph 36 of the Admissibility Decision is instructive wherein it states that the fact that the authors of the documents were not being called as witnesses is a fact "...although important, is not in itself determinative of admissibility..."

¹³ ICC-01/04-01/06-CONF-ENG T.69 to 72, T.74, 75., 76. 11 February 2009.

11. The Prosecution notes that some of the documents in question were obtained through a search and seizure exercise carried out by the Office of the Prosecutor of the Tribunal de Grande Instance of Bunia (see annexes 31 to 63). This was the subject of litigation during the confirmation stage¹⁴ and was ruled upon in the “Decision on the confirmation of charges” (Confirmation Decision)¹⁵. After careful scrutiny in accordance with Article 69(7) of the Statute, the Pre-Trial Chamber ruled that the materials in question were admissible for the purposes of the confirmation hearing.¹⁶

12. The Prosecution submits that the documents in question are admissible for the purposes of the trial and that Article 69(7) is not applicable for several reasons.

13. First, Article 69(7) is not absolute. A bar to admission is not the automatic result, so long as the evidence is reliable and its admission into evidence would not damage the integrity of the proceedings.¹⁷

14. Second, the violation of the principle of proportionality found by the Pre-Trial Chamber did not affect the reliability of the evidence¹⁸. This is not evidence obtained through coercion or torture which would seriously cast doubt on its

¹⁴ ICC-01/04-01/06-674, ICC-01/04-01/06-726.

¹⁵ ICC-01/04-01/06-803, Section II (3), page 26 onwards.

¹⁶ *Ibid*, paragraphs 62 to 90. The Pre-Trial Chamber found that the search and seizure in which the materials were obtained did violate internationally recognised human rights, namely the right to privacy, because the search violated the principle of proportionality – see paragraphs 82 and 83 of the Confirmation Decision.

¹⁷ Paragraph 84 of the Confirmation Decision.

¹⁸ Paragraph 85 of the Confirmation Decision.

reliability; the procedural violation by the DRC authorities¹⁹ did not affect the authenticity of the documents. Accordingly, the Prosecution submits that Article 69(7) (a) is inapplicable in this instance.

15. Third, the Prosecution submits that the admission of the documents would not be antithetical to and would not seriously damage the integrity of the proceedings. In this regard, the Prosecution invokes the reasoning of the Pre-Trial Chamber in its Confirmation Decision contained in paragraphs 86 to 90. The violation of the principle of proportionality in this instance is not a human rights violation that is of a standard of seriousness envisaged in Article 69(7) (b)²⁰. Further, the Accused's rights were not violated when the evidence was obtained, as the search and seizure order was made against a different person. What primarily renders a violation sufficiently serious so as to place it within Article 69(7) (b) is that an accused's right is violated. This is not the case here.

16. Fourthly, the Prosecution submits that principle of the 'integrity of the proceedings does not solely pertain to the rights of the accused, but also to the rights of the victims, and the public. The victims and the public are entitled to the truth arising from the trial and are entitled to expect that the Trial Chamber has all the means available to it to determine the matters before it properly.

¹⁹ Article 33 of the Congolese Criminal Procedure Code.

²⁰ Paragraph 86 of the Confirmation Decision. See also ICTY Decision in *Prosecutor v Sefer Halilović*, "Decision on Interlocutory Appeal Concerning the Admission of the Record of Interview of the Accused from the Bar Table", Case: IT-01-48-AR73.2, 19 August 2005, wherein the record of interview of the accused was excluded from evidence.

17. Lastly, the fact that the materials were admitted by the Pre-Trial Chamber for the purposes of confirming the charges militates in favour of admission. Notwithstanding that the standard of proof is different at the confirmation stage, it is inconceivable that the Pre-Trial Chamber would admit evidence that violated Article 69 (7) (b). The litigation at the confirmation stage on this matter was detailed and lengthy. If the evidence is deemed admissible in the confirmation stage because it does not violate the integrity of the proceedings, then, the Prosecution submits, it is *prima facie* admissible in the trial. The standards of integrity foreseen for the confirmation are no less than those foreseen for the trial.

Probative value of the evidence against its prejudicial effect

18. The Prosecution submits that the potential probative value of the evidence outweighs the prejudicial effect, if any, of its admission. As stated, the documents are reliable and provide a contemporaneous record of events stemming from the organisation led by the Accused. They are, therefore, critically relevant to the issues in this case.

19. In conclusion, the Prosecution submits that the admission of the documents from the bar table confers upon the Accused the right enshrined in Article 67(1) (c), as it would streamline the proceedings and increase the rapidity of the trial.

Relief sought

20. In light of the foregoing, pursuant to Articles 64(9) and 69 (2),(3) and (4) of Statute and Rule 63(2) and (5) of the Rules the Prosecution seeks the admission of documents listed in confidential annex 1 and attached in confidential annexes 2 to 86 into evidence from the bar table.



Luis Moreno-Ocampo
Prosecutor

Dated this 17th day of February 2009

At The Hague, The Netherlands