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TRIAL CHAMBER I

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

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

Public

Decision on the admission of material from the "bar table"

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of The Prosecutor v. Thomas Lubanga Dyilo, delivers the following decision ("Decision") on the "Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)".[1]

I. The Issue

1. The prosecution submitted an application on 17 February 2009, entitled the "Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)",[2] regarding various documents, seeking their "admission into evidence from the bar table". This latter expression – "from the bar table" – in essence describes the situation when documents or other material are submitted directly by counsel, rather than introduced via a witness as a part of his or her testimony. As regards each of the documents that are the subject of this application, it was suggested that they were "contemporaneous" with the events they concern, having been created within the UPC/FPLC during the period covered by the charges against the accused. The prosecution argued that they are relevant and probative of the issues in the instant proceedings, and that they are *prima facie* reliable. Further it was submitted they are pertinent to the "determination of the truth" for the purposes of Article 69(3) of the Rome Statute ("Statute").

2. Some of these documents were obtained during a search and seizure exercise carried out by the Office of the Prosecutor of the *Tribunal de Grande Instance* of Bunia.[3] They were the subject of litigation during the

[1] Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), 17 February 2009, ICC-01/04-01/06-1703.
[2] *Ibid.*
[3] *Ibid.*, Annexes 31 to 65.

confirmation stage of this case,[4] and in the decision on the confirmation of charges,[5] the Pre-Trial Chamber described one of the main procedural issues in the case as the use on the part of the Office of the Prosecutor ("prosecution") of evidence alleged by the defence to have been procured illegally from an individual's home in the Democratic Republic of the Congo ("DRC") while he was detained on the order of the national authorities. The search had been conducted by Congolese officials in the presence of an investigator from the prosecution. According to the statement of the prosecution's investigator, he was present during the search and seizure procedure, after "permission to assist" was granted to him and his assistant by the Congolese authorities. At the confirmation stage of this case, 71 of the documents from the prosecution's list of evidence were among the items seized in this way.[6]

3. The current issue for the Chamber is whether it is permissible for the prosecution to rely on the contested "bar table" documents as part of its trial evidence, howsoever they were obtained by the Prosecutor.

II. The Submissions

4. By way of a more detailed summary, in its filing of 17 February 2009, the prosecution relied particularly on Articles 64(9) and 69(2), (3) and (4) of the Statute and Rules 63(2) and (5) of the Rules of Procedure and Evidence ("Rules"). Further, it submitted that these documents satisfy the criteria outlined by the Trial Chamber in its decision on admissibility,[7] those

[4] Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-796-Conf-tEN, and public redacted version ICC-01/04-01/06-803-tEN, paragraphs 62-66.
[5] *Ibid.*, paragraph 62.
[6] *Ibid.*
[7] Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1398-Conf, and public redacted version ICC-01/04-01/06-1399.

being: (i) *prima facie* relevance, (ii) probative value, and (iii) the balance between probative value of the evidence and any prejudicial effect.[8]

5. In support of its submission, the prosecution attached a document as confidential Annex 1, which outlined the nature, content and suggested relevance of the documents, as well as their source. The prosecution highlighted that the documents are contemporaneous with the events under consideration by the Chamber; that they each contain a UPC/FPLC header, stamp and/or signature of the accused or other senior members of the UPC/FPLC; and that their veracity is supported by several prosecution witnesses, thereby reducing any prejudice to the accused.[9]

6. The prosecution addressed separately the discrete category of documents that were obtained through the process of search and seizure in the DRC (described above), and it summarised the way in which the legality of this material was explored in the pre-trial proceedings (*viz.* the "Request to exclude evidence obtained in violation of Article 69(7) of the Statute" of 7 November 2006,[10] the "Prosecution's further response to the defence 'Request to exclude evidence obtained in violation of article 69(7) of the Statute'" of 22 November 2006,[11] and the ruling of the Pre-Trial Chamber as part of the "Decision on the confirmation of charges" of 29 January 2007[12]). It requests the admission of these documents into evidence at trial, submitting that this is in accordance with Article 69(7) of the Statute, since the conduct of the search affects neither the reliability of the evidence nor the integrity of the proceedings.

[8] ICC-01/04-01/06-1398-Conf, and public redacted version ICC-01/04-01/06-1399, paragraphs 27-31; ICC-01/04-01/06-1703, paragraph 2 (on page 4).
[9] ICC-01/04-01/06-1703-Conf-Anx1.
[10] Public Redacted Version of Request to exclude evidence obtained in violation of article 69(7) of the Statute, 7 November 2006, ICC-01/04-01/06-683.
[11] Prosecution's Further Response to the Defence "Request to exclude video evidence obtained in violation of article 69(7) of the Statute", 22 November 2006, ICC-01/04-01/06-726-Conf.
[12] ICC-01/04-01/06-796-Conf-tEN, and public redacted version ICC-01/04-01/06-803-tEN, paragraph 62.

7. The defence filed its "Réponse de la Défense à la "Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)"[13] on 11 March 2009. The accused submitted that the documents do not all emanate from the UPC or the FPLC, and that some of those referred to in Annex 1 do not correspond to the contents of the documents provided. The defence divided the documents into three groups: (i) those whose admission it does not oppose,[14] (ii) those for which there may be later admissibility objections,[15] and (iii) those which it will be argued are inadmissible, on the basis of suggested lack of relevance to the charges or because the prosecution has failed to provide the best means of proof.[16] The defence contended that the application should be dismissed for those in category (iii), and it then sought to reserve its position on the authenticity and evidential value of those in category (ii).[17]

8. It is of note that the defence has not suggested that any of the documents are inadmissible on the basis that they were obtained as a result of a (flawed) search and seizure procedure in the DRC. As indicated above, this contrasts with its position at the pre-trial stage of the proceedings, when the accused was represented by other counsel and requested the exclusion of the documents obtained as a result of this process because, it then submitted, this had not occurred in accordance with the Statute and internationally recognised human rights.[18] The Trial Chamber interpolates to observe that since the issue of the potential incompatibility of this process of search and seizure with the Statute was addressed by the Pre-

[13]Réponse de la Défense à la "Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)", 11 March 2009, ICC-01/04-01/06-1771.
[14] Annexes 3, 13, 14, 16, 19, 20, 21, 22, 23, 24, 25, 35, 37, 38, 40, 41, 42, 54, 55, 57, 59, 60, 61, 62, 64, 65, 71, 72, 75, 77, 80, 81, 83 and 84.
[15] Annexes 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 17, 18, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 58, 63, 66, 67, 68, 69, 70, 73, 74, 76, 78, 79, 82, 85 and 86.
[16] Annexes 6, 7, 8, 33, 43, 48, 74 and 82.
[17] ICC-01/04-01/06-1771, pages 6 and 7.
[18] ICC-01/04-01/06-683.

Trial Chamber in its decision on the confirmation of charges, and given the potential significance of this event, the Trial Chamber has addressed the issue in order to ensure that its final decision is based only on admissible evidence.

9. The response of the victims' legal representatives was filed on 10 March 2009,[19] in which they rehearsed what was described as the Chamber's existing approach, namely that the determining factor is not the method used to tender a document, but its underlying admissibility.[20] The representatives also argued that a flexible approach to admissibility had been adopted during the drafting history of the Statute framework, which is reflected in Article 69(4), and which has been followed in the criteria laid down by the Chamber in its decision on admissibility. In all the circumstances, the representatives concur with the arguments of the prosecution as to the application of these criteria, and they support the admission into evidence of the documents, observing that they affect the general interests of the victims they represent.[21]

10. On the particular issue of the admissibility of documents obtained during the search and seizure procedure, the representatives join the arguments raised by the prosecution regarding Article 69(7) of the Statute. They note the determination of the Chamber that it would only revisit decisions of the Pre-Trial Chamber where necessary,[22] and they highlight a number of points made in the decision on the confirmation of charges, namely (i) the necessity of responding to the expectations of victims and the international

[19] Réponse des représentants légaux des victimes à la demande d'admission de documents comme éléments de preuve presentée par le Bureau du Procureur le 17 février 2009, 10 March 2009, ICC-01/04-01/06-1768.
[20] See transcript of the hearing on 20 November 2007, ICC-01/04-01/06-T-61-ENG, pages 5 - 8; and Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, paragraph 7.
[21] ICC-01/04-01/06-1768, paragraphs 21 to 23.
[22] ICC-01/04-01/06-1084, paragraph 44.

community in the interpretation of Article 69(7), (ii) the distinction between the violation of a national rule and the violation of an internationally recognized human right, (iii) the fact that the Chamber is not bound by decisions made in other jurisdictions (Articles 21(1)(c) and 69(8) of the Statute), and (iv) human rights jurisprudence tends to show that a violation of human rights can lead to the exclusion of evidence if it is of a "serious" nature.[23]

11. The Chamber held a status conference on 7 May 2009 to ask questions on the documents.[24] At the Chamber's request, the prosecution emailed additional information on some of the documents on 8 May 2009.[25] The defence was instructed to file a written submission setting out its objections to certain documents by 16.00 on 11 May 2009.[26] The response of the defence was notified on 14 May 2009 due to a technical error.[27] The defence submitted that those documents in relation to which it had previously reserved its position as regards their authenticity and evidential value (category (ii), paragraph 7 above)[28] did not present sufficient guarantee of authenticity and reliability to be admitted into the proceedings.[29]

III. Proceedings before the Pre-Trial Chamber

12. It is of assistance to consider briefly the submissions advanced before the Pre-Trial Chamber on these issues. The defence filed its "Request to exclude evidence obtained in violation of article 69(7) of the Statute" on 7

[23] ICC-01/04-01/06-1768, paragraphs 23 to 27.
[24] Transcript of hearing on 7 May 2009, ICC-01/04-01/06-T-107-ENG.
[25] Email communication from the prosecution to the Trial Chamber through the Legal Adviser to the Trial Division on 8 May 2009.
[26] ICC-01/04-01/06-T-107-ENG, page 29, lines 18 to 23.
[27] Réponse de la Défense aux observations formulées par le Procureur lors de l'audience du 7 mai 2009 relatives aux 85 documents, 11 May 2009 (notified on 14 May 2009), ICC-01/04-01/06-1872.
[28] See note 15 above.
[29] ICC-01/04-01/06-1872, paragraph 10.

November 2006.[30] It submitted that the prosecution was not entitled to collect evidence "directly" from within the territory of the DRC: this step was not in accordance with the provisions of the Statute, because, first, Article 54(2) authorises the prosecution to conduct investigations on the territory of a State either in accordance with the terms of Part 9, or as authorised by the Pre-Trial Chamber under Article 57(3)(d); second, no such authorisation was granted under Article 57(3)(d), nor would this article be applicable since the DRC authorities were willing and able to execute the request; and, third, Article 99(4) enables the Prosecutor to collect evidence directly on the territory of a State Party only if this is carried out on a voluntary basis. In addition, the defence submitted that the search and seizure excercise was in violation of the right to privacy of the owner of the property due to the fact that the search was carried out without a legal or factual basis, and that all the materials at the residence – rather than a properly identified selection – were seized.[31]

13. The defence submitted to the Pre-Trial Chamber that admitting evidence collected in violation of Article 93 of the Statute had the capacity seriously to damage the integrity of the proceedings, such as to warrant its exclusion under Article 69(7). It noted that Article 54(1)(c) requires the Prosecutor to conduct its duties in a manner which is consistent with the rights of individuals under the Statute, and it highlighted the presence of an investigator from the prosecution during this procedure. Finally, it submitted that whereas Article 69(4) provides for a degree of discretion in the admission of evidence, if the criteria set out in Article 69(7) are met, the Chamber is obliged exclude the evidence in question from the proceedings.[32]

[30] ICC-01/04-01/06-683.
[31] *Ibid.*, paragraphs 22, 23 and 35.
[32] *Ibid.*, paragraph 34.

14. In all the circumstances, the defence applied to the Pre-Trial Chamber to exclude all the seized items from the prosecution's list of evidence.[33]

15. Thereafter, the prosecution filed the "Prosecution's further response to the defence 'Request to exclude evidence obtained in violation of article 69(7) of the Statute'" on 22 November 2006.[34] It submitted that the request of the defence lacked any proper legal basis. In the alternative, it filed a chart detailing materials within the Prosecution's Amended List of Evidence that could serve as alternative evidence, should the Pre-Trial Chamber grant the defence application.[35] The prosecution also attached a statement of an investigator who was present during the search and seizure.[36]

16. In their closing statements at the confirmation hearing, the Legal Representative of victims a/0001/06, a/0002/06 and a/0003/06 resisted the application (to exclude evidence "from the bar table") on the grounds, *inter alia*, that the judgment of the national Court of Appeal had no effect on these proceedings.[37]

17. As set out above, the Pre-Trial Chamber, in its "Decision on the confirmation of charges" of 29 January 2007, ruled on the suggested reliance by the prosecution on evidence procured in a manner contrary to Congolese rules of procedure (as determined by the national Court of Appeal) and in violation of internationally recognized human rights.[38]

[33] *Ibid.*, paragraph 38.
[34] ICC-01/04-01/06-726-Conf.
[35] ICC-01/04-01/06-726-Conf Annex 2.
[36] ICC-01/04-01/06-726-Conf Annex 1.
[37] ICC-01/01-01/06-T-47-EN, 28 November 2006, page 60, line 12 to page 64, line 15.
[38] ICC-01/04-01/06-796-Conf-tEN, and public redacted version ICC-01/04-01/06-803-tEN, paragraphs 62-90.

18. The Pre-Trial Chamber held it was not bound by decisions of national courts on the admissibility of evidence. In particular it observed that while under Article 21(1)(c) of the Statute the Chamber shall apply general principles of law as derived by the Court if Articles 21(1)(a) and (b) are not applicable, Article 69(8) makes clear that the decision of a national Court of Appeal does not bind the Court. [39]

19. The Pre-Trial Chamber found, however, that the evidence had been obtained in violation of the right to privacy. By reference to the jurisprudence of the European Court of Human Rights ("ECtHR"), the Pre-Trial Chamber addressed the question of whether the search and seizure exercise was proportional (given a breach of this principle is one of the factors to be considered when establishing whether there had been unlawful interference with an individual's privacy). The Pre-Trial Chamber held that this principle had been violated because, first, the interference was not proportionate to the objective sought by the national authorities; and, second, hundreds of items were indiscriminately seized. In all the circumstances, the Pre-Trial Chamber determined that the infringement of the principle of proportionality resulted in a violation of the internationally recognized human right to privacy.[40]

20. The Pre-Trial Chamber concluded, however, that this violation, given the particular facts in this case, did not justify the exclusion of the items seized, pursuant to Article 69(7)(b). In assessing any adverse impact the admission of this evidence may have on the integrity of the proceedings, the Chamber determined that a balance must be achieved between the seriousness of the violation and the fairness of the trial as a whole, and that only serious violations of human rights should lead to the exclusion of evidence. Having taken account of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the Pre-Trial

[39] *Ibid.*, paragraph 63.
[40] *Ibid.*, paragraph 81.

Chamber held that minor breaches of procedural rules should not result in exclusion of evidence of high probative value, as this would constitute an obstacle to the administration of justice. [41]

IV. Relevant Jurisprudence of other Jurisdictions

21. The right to privacy is afforded to individuals under Article 17 of the International Covenant on Civil Political Rights ("ICCPR"), as well as by regional human rights instruments including the European Convention on Human Rights (Article 8) and the Inter-American Convention on Human Rights (Article 11). However, the right to privacy under each of these instruments is not absolute, and can lawfully be restricted. The range of approach is illustrated by the cases summarised below.

22. In the *Case of Camenzind v. Switzerland,*[42] the ECtHR acknowledged the necessity of search and seizure, indicating that in each case, "[t]he Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to".[43] In *Camenzind,* the interference with the applicant's right to privacy caused by the search of the applicant's home and seizure of a telephone (which the authorities believed to have been unlawfully used) was found to be justified.

23. In the *Case of Miailhe v. France,*[44] the ECtHR concluded that the search and seizure under consideration were disproportionate because "[t]he seizures made on the applicant's premises were wholesale and, above all,

[41] *Ibid.*, paragraph 88.
[42] Judgment of 16 December 1997, Application No. 21353/93.
[43] *Ibid.*, paragraph 45.
[44] Judgment of 25 February 1993, Application No. 12661/97, paragraph. 39.

indiscriminate, to such an extent that the customs considered several thousand documents to be of no relevance to their inquiries and returned them to the applicants".[45]

24. In the more recent *Case of Iliya Stefanov v. Bulgaria,*[46] the ECtHR emphasised the disproportionate scope of the particular search and seizure in finding a breach of Article 8.[47] However, this case concerned privileged material belonging to a lawyer, a factor that was significant in the finding of the Court.

25. In the case of *Garcia v. Peru,* the Inter-American Commission on Human Rights ("IACHR") found that there had been a violation of the right to privacy under Article 11 of the Convention when the applicant's house was searched and papers seized without warrant by soldiers who did not have authority to conduct such procedures. The violent nature of the search, which included firing guns in the property, were significant factors taken into consideration by the Commission.[48]

26. As to admissibility, the ECtHR, depending on the circumstances, has held that admission of evidence in breach of Article 8 will not necessarily affect the fairness of the trial.[49] In *Khan v. UK,* the Court stressed that admissibility is in general a matter for national authorities, whilst its own role is an assessment of the fairness of proceedings as a whole.[50] Although in that case there had been a violation of Article 8 in the use of a

[45] *Ibid.*, paragraph 39.
[46] Judgment of 22 May 2008, Application No. 65755/01.
[47] *Ibid.*, paragraph 42.
[48] Report No. 1/95, Case 11.0006, IACHR 71 OEA/Ser.L/V/II.88, Doc. 9 rev. (1995).
[49] *Case of Schenk v. Switzerland,* Judgment of 12 July 1988, Application No. 10862/84, para. 46; *Khan v UK* (2001) 31 EHRR 1016, at paragraph 214, Judgment of 12 May 2000, Application No. 35394/97; *PG v. UK* [2002[Crim LR 308; *Saunders v. UK,* Judgment of 17 December 1996, Application No. 19187/91; and *Van Mechelen and others v. The Netherlands,* Judgment of 23 April 1997, Application No. 21363/93.
[50] *Case of Khan v. UK* (2000) 31 E.H.R.R. 1016.

surveillance device, there was, in the Court's estimation, no violation of Article 6.[51] Indeed, the Court has tended to find breaches of Article 6 only in cases where the impact on the fairness of proceedings has been substantial.[52]

27. The IACHR arguably takes a less flexible approach to the use of evidence in court proceedings following violations of this kind. For instance, in *Garcia v. Peru* (referred to in paragraph 25 above), the approach taken by the Commission is more suggestive of an exclusionary rule, one that excludes illegally obtained evidence. However, it is important to note that in that case the only incriminating evidence forming the basis for the prosecution of the petitioner had been unlawfully obtained, and the violation of the petitioner's human rights had been of a serious nature.[53]

28. Turning to the *ad hoc* tribunals, in the case of *Prosecutor v. Delalić et al.*, a Trial Chamber of the ICTY considered the impact of procedural illegality by the Austrian authorities in their execution of a search request for the house of Zdravko Mučić on the admissibility of evidence before the Tribunal.[54] In determining whether the evidence is "not antithetical to, and would not seriously damage the proceedings", under Rule 95 of the Rules of Procedure and Evidence, the Chamber determined:

> 19. It would seem to be consistent with the Rules that where evidence is relevant and has probative value, it is immaterial how it has been obtained. Except that is, if it is obtained by methods which cast doubts on its reliability, or if its admission would be antithetical to, and would

[51] Judge Loucaides dissented, asserting that evidence obtained in violation of article 8 necessarily rendered the trial unfair.
[52] For example, in cases of physical harm (*Austria v. Italy* (1963) 6 YB 740), forced use of emetics (*Jalloh v. Germany* (54810/00)), compulsion (*Saunders v. UK* (1997) 23 EHRR 313) and incitement to commit crimes (*Teixeira de Castro v. Portugal* (1998) 28 EHRR 101).
[53] Report No. 1/95, Case 11.0006, IACHR 71 OEA/Ser.L/V/II.88, Doc. 9 rev. (1995).
[54] *Prosecutor v. Zejnil Delalić et. al.*, IT-96-21-T, "Decision on the Tendering of Prosecution Exhibits 104 – 108", 9 February 1998.

> seriously damage the integrity of the proceedings. Mr. Mučić has not disputed that the passports, identity card and Pass belonged to him. He has also not claimed that they were fraudulently obtained from him by methods which are unconscionable.
>
> 20. The Trial Chamber is not satisfied that the method by which the evidence was obtained amounts to such conduct as to induce the exercise of our discretion to exclude it. The Trial Chamber is of the opinion that it would constitute a dangerous obstacle to the administration of justice if evidence which is relevant and of probative value could not be admitted merely because of a minor breach of procedural rules which the Trial Chamber is not bound to apply.[55]

29. In the case of *Prosecutor v. Kordić,*[56] the admission of evidence obtained by intercepting an enemy's telephone conversations during the conflict was held not to have undermined the integrity of the proceedings under Rule 95. In an oral decision delivered on 2 February 2000, the Trial Chamber observed:

> [E]ven if the illegality was established [...] [w]e have come to the conclusion that [...] evidence obtained by eavesdropping on an enemy's telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings.[57]

30. In the later case of *Prosecutor v. Radoslav Brđanin,*[58] the Trial Chamber considered the admissibility of intercept evidence gathered by national authorities. The Chamber noted that unlawfully obtained evidence is not automatically excluded under the Rules of Procedure and Evidence;

[55] *Ibid.*, paragraphs. 18-20.
[56] *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, T. 13670.
[57] Oral Decision delivered on 2 February 2000 in *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, at T. 13694, referred to in *Prosecutor v. Brđanin*, paragraph 19.
[58] *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, "Decision on the Defence 'Objection to Intercept Evidence", 3 October 2003.

rather, it is generally admissible unless obtained by methods which "cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings" (see Rule 95).[59] Having reviewed the relevant national and international jurisprudence, the Chamber considered it clear that "evidence obtained illegally is not, *a priori*, inadmissible, but rather that the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings will determine its admissibility".[60] Furthermore, the Chamber stressed its focus on the integrity of the proceedings, rather than (in this context) the need to discipline law enforcement agencies, which is frequently a consideration in national proceedings.[61] In admitting the intercept evidence, the Chamber emphasised:

> This Tribunal has a mandate to bring to justice persons allegedly responsible for serious violations of international law, to render justice to the victims, to deter further similar crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia. This mandate imposes on this Tribunal a tremendously heavy burden which it needs to carry in an efficient and successful manner. In the light of this responsibility under the Statute towards the international community and considering the seriousness of the crimes that this Tribunal is entrusted to adjudicate, it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.[62]

31. Trial Chambers of the ICTY, on occasion, have found that procedural illegality has undermined the integrity of the proceedings, leading to the exclusion of evidence, for instance in the context of the restriction of the right to legal counsel during questioning (because of the breach of the

[59] *Ibid.*, paragraphs 54, 61.
[60] *Ibid.*, paragraph 55.
[61] *Ibid.*, paragraph 64.
[62] *Ibid.*, paragraph 63.

unfettered right to counsel provided for by the ICTY Statute and Rules of Procedure and Evidence).[63]

V. Relevant Provisions

32. The following provisions are relevant:

Article 64(9) of the Statute

Functions and Powers of the Trial Chamber

The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

a) Rule on the admissibility or relevance of evidence

[...]

Article 69 of the Statute

Evidence

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

[63] *Prosecutor v. Delalić et. al.*, IT-96-21, "Decision on Zdravko Mučić's Motion for the Exclusion of Evidence", 2 September 1997.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Rule 63 of the Rules

General provisions relating to evidence

2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

5. The Chambers shall not apply national laws governing evidence, other than in accordance with article 21.

Rule 64 of the Rules

Procedure relating to the relevance or admissibility of evidence

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

VI. Analysis and Conclusions

33. The Statute and the Rules set out the principles to be applied to the admissibility of evidence, other than witness evidence, in various provisions.[64] These provided the basis for the Chamber's general approach to the admissibility of documents, as described in its "Decision on the admissibility of four documents on 13 June 2008".[65] The Chamber ruled that it will focus, *first*, on the **relevance** of the material (*viz.* does it relate to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims); *second*, on whether or not it has **probative value** (bearing in mind, for instance, "the indicia of reliability"); and, *third*, on **the probative value of the evidence as against its prejudicial effect.**

34. Both common law and Romano Germanic legal systems usually contain rules setting out specific principles that are to be applied when addressing illegally obtained evidence. Article 69(7) of the Statute expressly regulates the admissibility of evidence obtained by means of a violation of the Statute or internationally recognized human rights. This provision is *lex specialis*, when compared with the general admissibility provisions set out elsewhere in the Statute.[66] Furthermore, Article 69(7) represents a clear exception to the general approach, set out above.

35. The Statute prescribes that evidence is inadmissible if it was obtained by means of a violation of the Statute or internationally recognized human rights, if particular criteria are met. Notably, the Statute does not "quantify" the violation of the Statute, or the internationally recognized

[64] See Section V "Relevant provisions" above.
[65] ICC-01/04-01/06-1399, paragraphs 27 - 31.
[66] See Kai Ambos, *Die transnationale Verwertung von Folterbeweisen*, StV 3/2009, page 154.

human right, by reference to the degree of "seriousness". Therefore, even a non-serious violation may lead to evidence being deemed inadmissible, provided that one of the two limbs of the test in Article 69(7) is satisfied (namely: (a) the violation creates doubts about the reliability of the evidence; or (b) the admission is antithetical to or would seriously damage the integrity of proceedings). It is only in the second limb of the test that a requirement of a degree of "seriousness" is introduced, although this is unconnected to the seriousness of the violation.[67]

36. The Statute clearly stipulates that the violation has to impact on international, as opposed to national, standards on human rights. Furthermore, the Court "[...] shall not rule on the application of a State's national law" (Article 69(8) of the Statute), and the Court is not bound by the decisions of national courts on the admissibility of evidence. Instead, the Court shall apply the sources of law set out in Article 21 of the Statute. Although the Court must take into account, under Article 21(1)(c), "the national laws of the States that would normally exercise jurisdiction over the crime", these take second (and third) place to "the statute, the Elements of Crimes and its Rules of Procedure and Evidence" and "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". Therefore, evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of Article 69(7) of the Statute.

[67] The drafting history of this article confirms this interpretation (see also Article 32 of the Vienna Convention on the Law of Treaties). The 1994 International Law Commission Draft Statute for an International Criminal Court contained a proposed rule that evidence shall not be admissible if obtained "by means of a *serious* violation of this statute or other rules of international law" (emphasis added). This revised an earlier draft in 1993 that provided for an exclusionary rule triggered by obtaining evidence "directly or indirectly by illegal means which constitutes a *serious* violation of internationally recognized human rights" (emphasis added). However, the text adopted by the Rome Conference contains no reference to this requirement within the first limb (Article 69(7)).

37. The fact that a violation involved the right to privacy of a third party is not relevant when deciding whether the first step of the test for inadmissibility of evidence under Article 69(7) is satisfied. The Statute states that "[e]vidence obtained by means of a violation of [...] internationally recognized human rights shall not be admissible if [...]". Accordingly, the identity of the person whose human rights were infringed is not a material consideration. In other words, evidence does not become admissible simply because the violation did not involve the human rights of the accused. The Statute establishes the benchmark that evidence obtained otherwise than in compliance with internationally recognized human rights standards (or in breach of the Statute) shall be excluded, if it is potentially unreliable or would undermine the proceedings.

38. Turning to the issue of the documents seized in the DRC, the Pre-Trial Chamber decided that the process of search and seizure infringed the right to privacy of the owner of the property and, as set out above, the national Court of Appeal ruled that the search and seizure was conducted in a manner that was contrary to national procedural law. Moreover, the Pre-Trial Chamber found that the conduct was disproportionate to the objective of the national authorities, as hundreds of documents were indiscriminately seized that were unrelated to the purpose of the search. There is no reason for this Chamber to reach a different conclusion on these issues, and in particular that an unjustified violation of the individual's right to privacy occurred.

39. This violation of the right to privacy may have rendered the evidence inadmissible had the drafting history of the Statute concluded in 1994. The 1994 International Law Commission Draft Statute contained a rule that evidence obtained by means of a violation of rules of this Statute or other

rules international law shall be automatically deemed inadmissible.[68] However, after the extensive negotiations at the March and April 1998 sessions of the Preparatory Committee, the Rome Conference adopted a different formulation of this rule.[69] Consensus was reached that evidence obtained by means of a violation of the Statute or internationally recognized human rights shall be inadmissible only *if* the violation casts substantial doubt on the reliability of the evidence *or* its admission would be antithetical to and would seriously damage the integrity of the proceedings (the dual test).

40. As described above, Article 69(7)(a) relates to the impact of the violation on the reliability of the evidence. The Pre-Trial Chamber found that the violation did not affect the reliability of the evidence in this case. If the search and seizure had been conducted in full adherence to the principle of proportionality the content of the items seized would have been the same.[70]

41. Some scholars have suggested that *any* violation of internationally recognized human rights will necessarily damage the integrity of proceedings before the ICC.[71] This argument does not take into account the fact that the Statute provides for a "dual test", which is to be applied following a finding that there has been a violation. Therefore, should the Chamber conclude that the evidence had been obtained in violation of the Statute or internationally recognized human rights, under Article 69(7) it is always necessary for it to consider the criteria in a) and b), because the

[68] *Ibid.*
[69] See the drafting history of this provision as described by Donald K. Piragoff, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. 2008, page 1310.
[70] ICC-01/04-01/06-796-Conf-tEN, and public redacted version ICC-01/04-01/06-803-tEN, paragraph 85.
[71] Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, 2005, "[...] it seems correct to argue that any violation of internationally recognized human rights ipso facto meets the requirement that the integrity of proceedings shall not be impaired", page 152; Fabricio Guariglia, *Las prohibiciones probatorias en el derecho penal*, page 245.

evidence is not automatically inadmissible. It is important that artificial restrictions are not placed on the Chamber's ability to determine whether or not evidence should be admitted in accordance with this statutory provision.

42. When deciding whether there has been serious damage to the "integrity of proceedings" as provided in Article 69(7)(b), it has been stressed that "the respect for the integrity of proceedings is necessarily made up of respect for the core values which run through the Rome Statute".[72] It has been suggested that applying this provision involves balancing a number of concerns and values found in the Statute, including "respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes".[73] In respect of the latter, the effective punishment of serious crimes has been said to render it "utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed".[74]

43. The Chamber considers that the probative value of the evidence in question cannot inform its decision on admissibility, if it has been obtained in violation of internationally recognized human rights or the Statute. This conclusion results, in part, from the aforementioned *lex specialis* nature of Article 69(7) vis-à-vis the general admissibility

[72] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. 2008, page 1335.
[73] *Ibid.*, page 1335.
[74] The complete quotation is as follows: "This Tribunal has a mandate to bring to justice persons allegedly responsible for serious violations of international law, to render justice to the victims, to deter further similar crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia. This mandate imposes on this Tribunal a tremendously heavy burden which it needs to carry in an efficient and successful manner. In the light of this responsibility under the Statute towards the international community and considering the seriousness of the crimes that this Tribunal is entrusted to adjudicate, it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed." *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, "Decision on the Defence 'Objection to Intercept Evidence'", 3 October 2003, paragraph 63.

provisions set out in the Statute. For instance, Article 69(4) enables the "probative value of the evidence" to be weighed along with other considerations, such as the fair evaluation of a witness's testimony and, more broadly, any prejudice the evidence may cause to the fairness of the trial. However, when addressing the exclusionary criteria of Article 69(7), it is impermissible to introduce this further factor, namely adding the probative value of the evidence as a criterion of admissibility. Therefore, arguments directed at its probative value (even that it alone provides proof of an element of the charges) are irrelevant.

44. Similarly, the seriousness of the alleged crimes committed by the accused is not a factor relevant to the admissibility of evidence under Article 69(7). As set out in the Preamble and Article 1 of the Statute, the Court has jurisdiction over the most serious crimes of international concern. Article 17(1)(d) of the Statute renders cases inadmissible that do not possess sufficient gravity to justify further action by the Court. Therefore, the core crimes and the cases which justify "further action" by the Court will always be of high seriousness, but the public interest in their prosecution and punishment cannot influence a decision on admissibility under this statutory provision. Indeed, there is no basis within the Rome Statute framework generally for an approach that would allow the seriousness of the alleged crimes to inform decisions as to the admissibility of evidence.

45. Particular consideration needs to be given to the presence of a member of the prosecution during the search and seizure exercise conducted by the Congolese authorities. The defence stressed during the Pre-Trial stage (in its filing of 7 November 2006) the significance of the presence of an investigator of the prosecution: "the Prosecution was not merely the 'fortunate recipient' of the 'fruits of the poisoned tree: the Prosecution

investigator was physically present at the scene".[75] This submission highlights one possible purpose of exclusionary rules of evidence: they have the effect, *inter alia*, of disciplining or deterring irregular or unlawful conduct by law enforcement officials.[76] It is to be observed that it may turn out to be the case that this kind of evidence-gathering exercise is not normally carried out by investigators of the prosecution, particularly since the Court is said to be "a giant without arms and legs".[77] It has not been endowed with an enforcement apparatus enabling it readily to obtain evidence in this way, but instead it must rely on the assistance of sovereign States. Whatever the future may hold in this regard, it is of note that the ICTY has held that the exclusionary rules contained in the framework of the Tribunal were not intended to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence in international proceedings. The ICTY Trial Chamber stated:

> Domestic exclusionary rules are based, in part, on the principle of discouraging and punishing over-reaching law enforcement. [...] The function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence.[78]

46. In the current case, an investigator from the prosecution was in attendance during the search and seizure exercise, as opposed to performing a more active role, but it would seem that it any event mere presence at an event of this kind does not serve to engage this exclusionary rule. Deterrence and discipline, if they are to be given any sustainable meaning and

[75] ICC-01/04-01/06-683, paragraph 30.
[76] See references by Guariglia, *Las Prohibiciones Probatorias en el Derecho Penal*, page 46, ff.
[77] Antonio Cassese, "On the current Trend towards Criminal Prosecution and Punishment of Breaches of International Law", in 9 *EJIL* (1998) 1/13.
[78] *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, "Decision on the Defence 'Objection to Intercept Evidence'", 3 October 2003, paragraph 63.

purpose within the framework of exclusionary rules,[79] should be directed at those in authority – the individuals who control the process or who have the power, at least, to prevent improper or illegal activity. In this case, the search was the sole responsibility of the Congolese authorities, and they carried it out; in contrast, the prosecution's investigator was only "permitted to assist". There are no indicators that the investigator controlled or could have avoided the disproportionate gathering of evidence, or that he acted in bad faith. Therefore, even if the purpose of this exclusionary rule is, *inter alia*, to discourage or discipline irregular activity, it would not apply in this instance as regards the prosecution.

47. By Article 69(7)(b) of the Statute, it is for the Chamber to determine the seriousness of the damage (if any) to the integrity of the proceedings that would be caused by admitting the evidence. The Chamber notes particularly the following points as regards these documents: (i) the violation was not of a particularly grave kind; (ii) the impact of the violation on the integrity of the proceedings is lessened because the rights violated related to someone other than the accused; and (iii) the illegal acts were committed by the Congolese authorities, albeit in the presence of an investigator from the prosecution.

48. In all the circumstances, the Chamber has concluded that the breach of privacy in this instance does not affect the reliability of the evidence; nor should the material be excluded because of an argument that the breach was antithetical to, or damaged the integrity of proceedings. Put otherwise, applying Article 69(7), the relevant documents obtained during the search and seizure exercise are admissible, notwithstanding the breach of the fundamental right to privacy.

[79] See Blackstone's, Criminal Practice, 2009, p. 2343.

49. Against that background, as regards the entirety of this material, the Chamber has applied a document-by-document approach. As outlined above, the probative value of the documents obtained during the search and seizure exercise carried out by the Office of the Prosecutor of the *Tribunal de Grande Instance* of Bunia is an irrelevant consideration for the reasons that have been extensively rehearsed.[80] Otherwise, the Chamber has applied the test established in its Decision on the admissibility of four documents.[81] In the Annex to the present Decision, the Chamber has addressed the admissibility of each of these documents, following the status conference on 7 May 2009,[82] during which the prosecution supplied further information, at the Chamber's request, on a number of the individual annexes. The Chamber has particularly borne in mind the arguments of the defence, first, that the category (ii) documents (in relation to which it had previously reserved its position as regards their authenticity and evidential value) did not present sufficient guarantee of authenticity and reliability to be admitted into the proceedings; second, that the category (iii) documents are inadmissible, on the basis of suggested lack of relevance to the charges or because the prosecution has failed to provide the best means of proof, together with the argument that the documents do not all emanate from the UPC or the FPLC; and, third, that some of those referred to in Annex 1 to the prosecution's application do not correspond to the contents of the documents provided, as described above.[83]

50. The Chamber notes that the documents contained in annexes 6, 43, 46 and 74 have been withdrawn, and for the individual reasons set out in the Annex to this Decision decides:

[80] See above paragraph 43.
[81] ICC-01/04-01/06-1399, paragraphs 27 - 31.
[82] Transcript of hearing on 7 May 2009, ICC-01/04-01/06-T-170-ENG, pages 1-32.
[83] See paragraph 7 above.

a. The document contained in annex 53 does not satisfy the test for admissibility.

b. All of the remaining documents contained in the Annex satisfy the test for admissibility.

Done in both English and French, the English version being authoritative.

Judge Adrian Fulford

Judge Elizabeth Odio Benito **Judge René Blattmann**

Dated this 24 June 2009

At The Hague, The Netherlands