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No.: ICC-01/04-01/06
Date: 18 November 2009

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

**Prosecution's Response to the Defence's "Requête de la Défense aux fins de
dépôt en preuve des documents présentés dans le cadre des contre-
interrogatoires de la Défense et portant les numéros MFI-D-00105 à MFI-D-
00152"**

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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Other

1. On 28 October 2009, the Defence filed a request to admit into evidence 15 documents used in the Defence's cross-examination of Prosecution witnesses (Defence Request).¹ The Defence does not seek to admit into evidence a further 32 documents that it had used during the examination of Prosecution witnesses.²
2. The Prosecution does not oppose the Defence Request in respect of 12 documents.³ The Prosecution has no observations on the Defence's position not to seek to tender into evidence the further 32 documents that are listed.
3. The Prosecution opposes the Defence Request in respect of three documents: MFI-D-00132, 00133 and 00134. These three documents are purported to be school registers that were put to witness 157 during the Defence's examination of this witness. At the time, the Prosecution opposed showing these documents to the witness and indicated that it would oppose a request to admit the documents into evidence through the witness.⁴ The witness was not involved in the creation of the documents. Although the Trial Chamber permitted the Defence to put the documents to the witness, the Defence expressly accepted that it was not asking the witness to authenticate the documents.⁵
4. The Chamber has defined the approach to admissibility of evidence and set out three factors that must be assessed on a case-by-case basis for documents

¹ ICC-01/04-01/06-2177, 28 October 2009, pages 3-4, concerning 15 documents : MFI-D-00111, 00112, 00114, 00115, 00131-00134, 00139-00145.

² ICC-01/04-01/06-2177, 28 October 2009, pages 4-5, concerning 32 documents : MFI-D-00105-00109, 00113, 00116-00130, 00135-00138, 00146-00152.

³ The 12 documents whose admission into evidence the Prosecution does not oppose are: MFI-D-00111, 00112, 00114, 00115, 00131, 00139-00145.

⁴ ICC-01/04-01/05-T-188-CONF-ENG, pages 54-60, 64, 67-68.

⁵ ICC-01/04-01/05-T-188-CONF-ENG, page 57, lines 13-17. Despite the fact that the witness confirmed certain personal details that appear in the documents (ICC-01/04-01/05-T-188-CONF-ENG, pages 66-69 and pages 79-80), the witness did not compile the document and cannot attest to its reliability.

whose admission has been opposed.⁶ On the first consideration, *prima facie* relevance, the Prosecution concedes that the subject matter of the documents may be *prima facie* relevant to issues in the current proceeding if it reliably records information on date of birth and schooling.

5. On the second consideration, the Prosecution submits that the Defence has not yet demonstrated the *prima facie* probative value of the documents. There is currently nothing in evidence indicating who prepared the documents, how they were prepared, who provided the information contained in the documents, or where or how the documents were stored. Without this information, in the Prosecution's submission, it is impossible for the Chamber (or the Prosecution) to conduct an independent evaluation of the evidence or to determine the reliability of the documents. Nor do we believe the documents on their face are necessarily reliable. For instance, in document MFI-D-00132 (DRC-D01-0003-1754) at page 1756 (line 579) other lettering appears to be visible underneath the relevant entry. In the Prosecution's submission, only once the reliability of the documents is sufficiently demonstrated should they be admitted into evidence.
6. On the third consideration, the probative value of the evidence against its prejudicial effect, the Prosecution submits that it would be unfair to admit the school records into evidence in these circumstances, given the reason to question their reliability and, along with these questions, the absence of any indication where they came from, who recorded or provided the information contained therein, and whether and when they may have been altered.

⁶ 'Decision on the admissibility of four documents', ICC-01/04-01/06-1398-Conf, 13 June 2008.

Relief sought

7. In light of the foregoing, the Prosecution respectfully asks for the Defence Request to be rejected in relation to the three documents MFI-D-00132, 00133 and 00134.



Luis Moreno-Ocampo
Prosecutor

Dated this 18th day of November 2009

At The Hague, The Netherlands