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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 Annex A and Confidential Annexes 1 to 8 – Prosecution,
Defence and Legal Representatives Only**

**Prosecution's Third 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 submits its application for the admission of eight documents into evidence from the bar table and requests the Trial Chamber's authorisation to add these documents to its list of evidence to be relied on at trial.

Following the testimony of the last Prosecution witness, DRC-OTP-WWWW-0116, on 17 July 2009, the Prosecution raised the possibility of this application,¹ which addresses an issue the Trial Chamber had earlier identified as being important to resolve, namely the dates on which the x-rays of some trial witnesses were taken.² The documents are hospital records, and affidavits from investigators of the Office of the Prosecutor (OTP), attesting to the date on which these x-rays were taken.³

Considering, *inter alia*, the non-contentious nature of the evidence sought to be admitted, the fact that the hospital certificates were only available after the close of the Prosecution case, and the early notice of this application, the Prosecution submits that tendering these documents is proportionate, necessary to establish the truth and will not prejudice the position of the Accused.⁴

The Prosecution seeks to tender the eight documents for the truth of their content but is not calling the authors of the documents. The documents are relevant and probative to issues in the proceedings and are *prima facie* reliable. The documents are pertinent to the "...determination of the truth" as stipulated in Article 69(3).⁵ Accordingly, the Prosecution submits that the admission of the documents satisfy

¹ See the transcript of the hearing ICC-01/04-01/06-T-209-CONF-ENG ET at page 82, line 15 to page 83, line 2.

² See the transcript of the hearing on 12 May 2009, ICC-01/04-01/06-T-172-CONF-ENG CT (rev.dec.1974) at page 58, line 2 to page 60, line 3.

³ Descriptions of the documents and a determination of their relevance to the case are contained in a confidential chart annex A appended to this application, along with the documents in a further set of confidential annexes.

⁴ See for example *Prosecutor v Delalic et al*, Case No.: IT-96-21-T, "Decision on the Prosecution's Alternative Request to Re-Open the Prosecution's Case", 19 August 1998, wherein the Trial Chamber said: "21. The principle that the Prosecution cannot re-open its case once it has closed, however, is not without exception. While the limits of the Trial Chamber's discretion to grant leave to the Prosecution to call additional evidence cannot be precisely defined, a number of circumstances can be identified in which the Trial Chamber may admit further evidence after the close of the Prosecution case." and paras. 25-27.

⁵ See ICC-01/04-01/06-1398-Conf, 13 June 2008, paragraph 20.

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 has been accepted by this Trial Chamber⁶ and is a vital tool for streamlining large and complex war crimes cases.⁷ In an earlier decision, the Trial Chamber determined the parameters for the admissibility of documentary evidence (Admissibility Decision).⁸

Overview of the documents

1. The documents are (i) certificates, obtained from two hospitals, and (ii) affidavits from OTP investigators, attesting to the date on which hand-wrist and/or mandible x-rays were taken of a number of Prosecution witnesses. The x-rays themselves, as well as the reports discussing the results of analysis of the x-rays, were admitted into evidence during the testimony of expert witnesses DRC-OTP-WWWW-0358 and DRC-OTP-WWWW-0359 on 12 and 13 May 2009.⁹
2. The affidavits and certificates are dated from (respectively) June 2009 and July 2009 and were received by the Prosecution team in July 2009.
3. The certificates were disclosed to the Defence on 7 September 2009, and the affidavits on 17 December 2009¹⁰. In order to save court time, the Prosecution

⁶ See "Decision on the admission of material from the 'bar table'", 24 June 2009, ICC-01/04-01/06-1981.

⁷ *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...".

⁸ "Decision of the admissibility of four documents", 13 June 2008, ICC-01/04-01/06-1398-Conf.

⁹ The ERNs and evidence numbers for the x-rays relevant to each of the hospital certificates are included in the chart appended to this application as confidential annex A.

¹⁰ Courtesy copies of the affidavits were provided to the Defence on 3 December 2009.

had been attempting to secure agreement from the Defence as to dates when the x-rays were taken,¹¹ hence the timing of the present application.

Prosecution's Submissions

4. 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.¹²
5. The Prosecution submits that the documents sought to be tendered in this application satisfy these three key considerations, as explained in greater detail below.

The documents are relevant and probative of issues to be determined at trial

6. First, the documents sought for admission are relevant to the current proceedings and would be of assistance to the Trial Chamber in determining the truth in this case. The documents attest to the dates on which the x-rays were taken, which the Trial Chamber recognised was an issue in the present case,¹³ and will assist in determining the evidential value of both the x-rays and the expert reports analysing the x-rays.
7. Second, 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".¹⁴ The Prosecution submits that this consideration applies here. Additionally, the fact that the authors of the documents are not testifying is not fatal to the application to admit the

¹¹ See the transcript of the hearing on 12 May 2009, ICC-01/04-01/06-T-172-CONF-ENG CT (rev.dec.1974) at page 60, lines 4-6 and the transcript of the hearing on 17 July 2009, ICC-01/04-01/06-T-172-CONF-ENG ET at page 82, lines 22-24.

¹² Paragraphs 27 to 32 inclusive of the Admissibility Decision.

¹³ See the transcript of the hearing on 12 May 2009, ICC-01/04-01/06-T-172-CONF-ENG CT (rev.dec.1974).

¹⁴ Paragraph 29 of the Admissibility Decision.

documents.¹⁵ Further, the Prosecution notes that the documents in question possess several indicia of reliability that militate in favour of admission.¹⁶ The certificates are all printed on official paper and bear the stamp of the hospital where the x-ray was taken, and are signed by individuals employed in the respective hospital administrations. The affidavits are written on official OTP letterhead and are signed by the investigators who personally collected the x-rays from the hospitals. In the Prosecution's submission these characteristics demonstrate their authenticity, at a minimum.¹⁷

8. For each document the Prosecution sets out in detail in the attached confidential Annex A a brief description of the document and its content, its relevance to the discrete areas in the Prosecution's case, indicia of reliability for the document, its source and the x-rays and reports to which each relates.
9. While the x-rays were taken for judicial purposes, there is no suggestion that there was a motive to fabricate or distort the record.¹⁸
10. Based on the foregoing, in the Prosecution's submission, the documents are relevant and probative of issues to be determined at trial.

Probative value of the evidence against its prejudicial effect

11. 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 will assist in determining the evidential value of the x-rays and reports tendered through, and the testimony of, expert witnesses DRC-OTP-WWWW-0358 and DRC-OTP-WWWW-0359. They are, therefore, relevant to the issues in this case.

¹⁵ 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...".

¹⁶ 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.

¹⁷ Paragraph 39 of the Admissibility Decision is instructive and is invoked.

¹⁸ See paragraph 37 of Admissibility Decision.

12. Furthermore, the admission of these documents will avoid the calling of additional witnesses, or recalling previous witnesses, to testify on this issue.
13. 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

14. 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 A and attached in confidential annexes 1 to 8 into evidence from the bar table, and requests the Trial Chamber's authorisation to add these documents to its list of evidence to be relied on at trial.



Luis Moreno-Ocampo
Prosecutor

Dated this 26th day of March 2010
At The Hague, The Netherlands