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No.: ICC-01/04-01/06

Date: 31 May 2010

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 Redacted Version
with Confidential Annexes A and 1 – Prosecution, Defence and Legal
Representatives Only**

**Prosecution's Fourth Application for Admission of a Document 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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Mr Jean-Marie Biju-Duval

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Legal Representatives of Applicants

Mr Luc Walley

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**Unrepresented Applicants for
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**The Office of Public Counsel for
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REGISTRY

Registrar

Defence Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. 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 one document into evidence from the bar table and requests the Trial Chamber's authorisation to add this document to its list of evidence to be relied on at trial.
2. In an oral decision on 9 December 2009, the Trial Chamber admitted into evidence 15 documents that were used during the questioning of witnesses by the Defence.¹ This included 3 documents ("School Registers") presented to witness DRC-OTP-WWWW-0157,² the introduction and admission of which the Prosecution opposed on the basis *inter alia* that in at least one instance it appeared that the records may have been tampered with.³ In the oral decision, the Trial Chamber noted that it would be open to both parties to call further evidence on this issue, and that it may be helpful to the Chamber in its investigation of this area of the case to hear further evidence.⁴ The document which is the subject of this application is a forensic report analysing, *inter alia*, the originals of the School Registers presented to witness W-0157 and thus directly addresses this issue.
3. Considering that this issue only arose definitively first during the cross-examination of W-0157 by the Defence and thereafter more concretely upon the admission of the School Registers in December 2009 and taking into

¹ ICC-01/04-01/06-T-222-ENG ET WT at page 30, line 11 to page 34, line 1.

² The 3 documents are DRC-D01-0003-1754 (MFI-D-00132), DRC-D01-0003-1748 (MFI-D-00133) and DRC-D01-0003-1750 (MFI-D-00134).

³ The Prosecution resisted the introduction of this material at the time of witness W-0157's testimony and opposed the Defence's subsequent application for admission; see transcript of the decision ICC-01/04-01/06-T-222-ENG ET WT at page 31, lines 2-5. The Defence application is ICC-01/04-01/06-2177. The Prosecution response is ICC-01/04-01/06-2188.

⁴ ICC-01/04-01/06-T-222-ENG ET WT at page 33, lines 2-9.

account the Chamber's specific acknowledgment that further evidence on this may be helpful, the Prosecution seeks to admit this document into evidence.⁵

4. The Prosecution seeks to tender the document for the truth of its contents as an expert report but is not calling the authors of the document. The document is relevant and probative to issues in the proceedings and is *prima facie* reliable. The document is pertinent to the "...determination of the truth" as stipulated in Article 69(3).⁶ Accordingly, the Prosecution submits that the admission of the document satisfies the Trial Chamber's obligation to ensure that the trial is fair and expeditious, under Article 64(2).
5. The procedure of tendering documents from the bar table has been accepted by this Trial Chamber⁷ and is a vital tool for streamlining large and complex war crimes cases.⁸ In an earlier decision, the Trial Chamber determined the parameters for the admissibility of documentary evidence (Admissibility Decision).⁹

Overview of the document

6. The document is an expert report presenting the results of forensic analyses on the originals of the School Registers, copied extracts of which were presented by the Defence during the questioning of witness W-0157 and which were admitted into evidence by the Chamber in its oral decision on 9 December 2009.

⁵ 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.

⁶ See ICC-01/04-01/06-1398-Conf, 13 June 2008, paragraph 20.

⁷ See "Decision on the admission of material from the 'bar table'", 24 June 2009, ICC-01/04-01/06-1981.

⁸ *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..."

⁹ "Decision of the admissibility of four documents", 13 June 2008, ICC-01/04-01/06-1398-Conf.

7. The report is comprised of three sections. The Prosecution received a preliminary report on one issue on 31 December 2009 (Preliminary Report) and thereafter received the final report containing all three sections on 15 February 2010.
8. The complete report was disclosed to the Defence on 9 March 2010.
9. The first section of the report¹⁰ contains a forensic examination of the entry on line [Redacted] of the Rwampara School Register which purportedly relates to W-0157. The forensic examination has revealed that the current entry on line [Redacted] has been superimposed over an original entry that is partially visible underneath. The paper on which the underlying entry is written shows signs of scraping, indicating that the original entry was rubbed away with an eraser or other scraping device before the new entry was inserted.
10. The second section of the report¹¹ contains a forensic examination of the Rwampara and [Redacted] records to determine, *inter alia*, whether the original school records contain other modified or replaced entries. This section of the report concludes, first, that there are other modified entries and, second, that there appear to be errors in the recording of the entries. These errors include the assignment of the same matriculation numbers to different students and matriculation numbers that in places do not continue consecutively (that is, the consecutive numbering either skips forward or backward).
11. The third section of the report¹² contains answers to two questions: (i) whether in the Rwampara school register the name of W-0157 appears for the school year [Redacted] and (ii) whether the date of birth appearing in the entry at line [Redacted] in the [Redacted] primary school register, purportedly related to W-0213, overwrites an earlier entry.

¹⁰ Forensic Report, pages 3-15 and Annexes 1 and 2.

¹¹ Forensic Report, pages 5-59 and Annexes 1, 2 and 3.

¹² Forensic Report, pages 3-6 and Annexes 1 and 2.

12. In response to the first question, the W-0157's full name ("[Redacted]") does not appear in the Rwampara school register for the [Redacted] school year.
13. In response to the second question, the forensic examination has concluded that the date of birth appearing in line [Redacted] does indeed replace an entry underneath. The experts are unable to determine the original, underlying reference.

Prosecution's Submissions

14. 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.¹³
15. The Prosecution submits that the document sought to be tendered in this application satisfies these three key considerations, as explained in greater detail below.

The document is relevant and probative of issues to be determined at trial

16. First, the document sought for admission is relevant to the current proceedings and would be of assistance to the Trial Chamber in determining the truth in this case. 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 document are not testifying is not fatal to the application to admit the documents.¹⁵ Further, the Prosecution notes that the

¹³ Paragraphs 27 to 32 inclusive of the Admissibility Decision.

¹⁴ Paragraph 29 of the Admissibility Decision.

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...".

document in question possesses several indicia of reliability that militate in favour of admission.¹⁶

17. 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 and its source.
18. The report presents the results of examinations on the authenticity of the School Registers, further evidence on which the Trial Chamber recognised was open to both parties to introduce,¹⁷ and will assist in determining the evidential value of the School Registers.
19. While it was created for judicial purposes, there is no suggestion that there was a motive to fabricate or distort the record.¹⁸
20. The report is printed on paper bearing the official hallmarks of the Technical and Scientific Police, Ministry of the Interior, France and is signed by the authors, who are individuals working within that ministerial agency. In the Prosecution's submission these characteristics demonstrate its authenticity, at a minimum.¹⁹
21. Based on the foregoing, in the Prosecution's submission, the document is relevant and probative of issues to be determined at trial.

Probative value of the evidence against its prejudicial effect

22. The Prosecution submits that the potential probative value of the evidence outweighs the prejudicial effect, if any, of its admission. As stated, the document is reliable and will assist in determining the evidential value of the

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 ICC-01/04-01/06-T-222-ENG ET WT at page 33, lines 3-8.

¹⁸ See paragraph 37 of Admissibility Decision.

¹⁹ Paragraph 39 of the Admissibility Decision is instructive and is invoked.

School Registers tendered by the Defence through Prosecution witness W-0157. It is, therefore, relevant to the issues in this case.

23. Furthermore, the admission of this document will avoid the calling of additional witnesses to testify on this issue.
24. In conclusion, the Prosecution submits that the admission of the document 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

25. 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 the document listed in confidential Annex A and attached in full in confidential Annex 1 into evidence from the bar table, and requests the Trial Chamber's authorisation to add this document to its list of evidence to be relied on at trial.



Luis Moreno-Ocampo
Prosecutor

Dated this 31st day of May 2010
At The Hague, The Netherlands