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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 Redacted Version
with Confidential Annex A and Confidential Annexes 1 to 5 – Prosecution,
Defence and Legal Representatives Only**

**Prosecution's Application for Admission of Documents related to Witness 297
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:

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Jean Chrysostome Mulamba

Nsokoloni

Mr Paul Kabongo Tshibangu

Mr Hervé Diakiese

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Ms Paolina Massidda

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution requests the admission of five documents related to trial witness DRC-OTP-WWWW-0297 and requests the Trial Chamber's authorisation to add two of these documents to its list of evidence to be relied on at trial.¹ The Prosecution relies on 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).
2. The five documents are (i) a hand-wrist x-ray of witness 297; (ii) a mandible x-ray of witness 297; (iii) an affidavit from an investigator of the Office of the Prosecutor (OPT) attesting to the date on which the x-rays of witness 297 were taken; (iv) the Pre Registration Form (PRF) referred to in the affidavit; and (v) an expert report from expert witnesses DRC-OTP-WWWW-0358 and DRC-OTP-WWWW-0359 outlining the results of the x-ray evaluation and the expert opinion on the age of witness 297.
3. The Prosecution seeks to tender the five documents for the truth of their contents but will not be calling (or, in the case of expert witnesses 358 and 359, re-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).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).
4. The Prosecution did not tender the five documents during the presentation of its case because it had withdrawn witness 297 from its list of witnesses for health reasons. The witness has since testified by order of the Chamber, and

¹ The two x-rays and expert report related to witness 297 are already on the Prosecution's list of evidence to be relied upon at trial.

² See ICC-01/04-01/06-1398-Conf, 13 June 2008, para. 20.

stated that he turned [REDACTED] in 2010.³ A Defence witness also confirmed under oath that witness 297 – [REDACTED] – is as of February 2010 either [REDACTED] of age.⁴ Nonetheless, when cross-examining witness 297 using purported school records, the Defence has put his age in issue by suggesting that he was born in [REDACTED], and therefore is [REDACTED] years old this year. The expert results of the x-rays for witness 297, namely that witness 297 was either [REDACTED], will assist the Court in its consideration of this issue.

5. The procedure of tendering documents from the bar table has been accepted by this Trial Chamber⁵ and is a vital tool for streamlining large and complex war crimes cases.⁶ In an earlier decision, the Trial Chamber determined the parameters for the admissibility of documentary evidence (Admissibility Decision).⁷

Overview of the documents

6. The five documents are (i) a hand-wrist x-ray taken of witness 297;⁸ (ii) a mandible x-ray taken of witness 297;⁹ (iii) an affidavit from an OTP investigator attesting to the date on which the x-rays were taken of witness 297;¹⁰ (iv) the PRF referred to in the affidavit;¹¹ and (v) the report of expert witnesses 358 and 359 recording the results of their analyses of the x-rays¹².

³ ICC-01/04-01/06-T-285-CONF-ENG ET, page 7, lines 8-9.

⁴ Defence witness 3, ICC-01/04-01/06-T-239-CONF-ENG ET, page 13, lines 25 and page 14, lines 1-2: "He was born – I can't tell you precisely when he was born, but he is approximately [REDACTED] of age."

⁵ See "Decision on the admission of material from the 'bar table'", 24 June 2009, ICC-01/04-01/06-1981.

⁶ *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..."

⁷ "Decision of the admissibility of four documents", 13 June 2008, ICC-01/04-01/06-1398-Conf.

⁸ Bearing the ERN DRC-OTP-0191-0219, a copy of the x-ray is attached as Confidential Annex 1.

⁹ Bearing the ERN DRC-OTP-0191-0220, a copy of the x-ray is attached as Confidential Annex 2.

¹⁰ Bearing the ERN DRC-OTP-0229-0066, a copy of the affidavit (and PRF) is attached as Confidential Annex 3.

7. The x-rays and report were obtained by the Prosecution in January 2008 and disclosed to the Defence on 28 March 2008 and 8 April 2008 respectively. The affidavit was prepared by the OTP investigator who accompanied witness 297 to have the x-rays taken, and was received and disclosed (together with the PRF, a contemporaneous record of the collection of the x-rays) by the Prosecution in June 2010.
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 and its source and chain of custody.

Prosecution's Submissions

9. 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
10. The Prosecution submits that the documents proffered 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

11. 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. 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

¹¹ Bearing the ERN DRC-OTP-0229-0067, a copy of the PRF (and affidavit) is attached as Confidential Annex 3.

¹² Bearing the ERN DRC-OTP-0182-0432, a copy of the report is attached as Confidential Annex 4.

¹³ Paragraphs 27 to 32 inclusive of the Admissibility Decision.

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 documents.¹⁵ Further, the Prosecution notes that the documents in question possess several indicia of reliability that militate in favour of admission.¹⁶

12. While the documents were all prepared for judicial purposes, there is no suggestion that there was a motive to fabricate or distort the record.¹⁷
13. The report is authored and signed by expert witnesses 358 and 359 and the x-rays and report are identical in form to the x-rays and reports tendered through these witnesses in respect of trial witnesses 7, 8, 10, 11, 157, 213, 294 and 298. The affidavit is written on official OTP letterhead and is signed by the investigator who personally collected the x-rays from the hospital. The PRF is referred to in the affidavit as being the PRF completed by the investigator at the time of collection and is signed by both the investigator and witness 297. In the Prosecution’s submission these characteristics demonstrate their authenticity, at a minimum.¹⁸
14. Due to the withdrawal of witness 297 prior to the testimony of expert witnesses 358 and 359, the experts did not testify about the results of their examination of witness 297’s x-rays,¹⁹ and the x-rays and report in relation to

¹⁴ Paragraph 29 of the Admissibility Decision.

¹⁵ In this regard, paragraph 36 of the Admissibility Decision states that the fact that the authors of the documents would not be called as witnesses is a fact that “...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” – para. 29.

¹⁷ See paragraph 37 of Admissibility Decision.

¹⁸ Paragraph 39 of the Admissibility Decision is instructive and is invoked.

¹⁹ On 8 April 2009, the Prosecution withdrew witness 297 from its list of trial witnesses for medical reasons; ICC-01/04-01/06-T-167-ENG ET, page 19, line 23 to page 20, line 5. Following an interview with the witness on 3 and 4 December 2009, the Defence applied for him to be called as a witness by the Court; ICC-01/04-01/06-2307-Conf. This request was granted by the Trial Chamber and witness

this witness were not tendered into evidence. The Defence application and Chamber decision to call this witness occurred after the testimony of witnesses 358 and 359. Notwithstanding this, the Prosecution submits that these documents may be admitted into evidence as proof of the truth of their contents, on the basis that:

- a. In his testimony, witness 297 confirmed that he agreed for x-rays to be taken, and that he was accompanied by an investigator of the OTP and the x-rays were taken in [REDACTED].²⁰
- b. Defence witness DRC-D01-WWWW-0003 also testified that [REDACTED], and that he [REDACTED].²¹
- c. During the course of their testimony, expert witnesses 358 and 359 confirmed that they received all x-rays on which evaluations were conducted in sealed envelopes, the seals of which they broke themselves to commence their evaluation.²²
- d. Expert witnesses 358 and 359 confirmed the conclusions in the reports as being accurate representations of their conclusions at the time of assessment.²³
- e. The Defence questioned the witnesses on the general scientific methodology underpinning their analysis rather than the specific conclusions reached in their reports. The Prosecution submits that the

297 testified between 17 and 24 May 2010. Expert witness 359 testified on 12-13 May 2009, and expert witness 358 testified on 13 May 2009.

²⁰ Transcript of the hearing on 18 May 2010; ICC-01/04-01/06-T-288-CONF-ENG ET at page 5, lines 6-22.

²¹ Transcript of the hearing on 8 February 2010; ICC-01/04-01/06-T-240-CONF-ENG ET at page 4, line 12 to page 5, line 1. A copy of this [REDACTED] is attached as Confidential Annex 5.

²² For witness 359: ICC-01/04-01/06-T-172-CONF-ENG CT at page 38, lines 19-22; and for witness 358: ICC-01/04-01/06-T-173-CONF-ENG CT at page 35, lines 9-11.

²³ For witness 359: ICC-01/04-01/06-T-172-CONF-ENG CT at pages 39-75; and for witness 358: ICC-01/04-01/06-T-173-CONF-ENG CT at pages 31-33. Moreover, for witness 358, the x-rays and conclusions were automatically incorporated as part of the witness's evidence; ICC-01/04-01/06-T-173-CONF-ENG CT at page 33, lines 8-15.

questions posed and evidence elicited by the Defence are equally applicable to the report related to witness 297.²⁴

15. Taken together, the x-rays, affidavit (with PRF) and report will assist in determining an important issue in the case, namely the age of trial witness 297, a former UPC child soldier.
16. 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

17. 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 age of trial witness 297. They are, therefore, relevant to the issues in this case.
18. Furthermore, the admission of these documents will avoid recalling the expert witnesses to testify on this issue.
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. 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:

²⁴ For witness 359: ICC-01/04-01/06-T-172-CONF-ENG CT at pages 84-95; and for witness 358: ICC-01/04-01/06-T-173-CONF-ENG CT at pages 45-48.

- a. the admission of documents listed in confidential annex A and attached in confidential annexes 1 to 4 into evidence from the bar table, and
- b. requests the Trial Chamber's authorisation to add the affidavit and PRF (confidential annex 3) to its list of evidence to be relied on at trial.



Luis Moreno-Ocampo
Prosecutor

Dated this 11th day of June 2010
At The Hague, The Netherlands