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**International
Criminal
Court**

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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***

**URGENT
Public**

**Decision on the "Prosecution's Second Application for Admission of Documents
from the Bar Table Pursuant to Article 64(9)"**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

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

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for the Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)” (“Second Application”):¹

I. Background

1. On 17 July 2009, the Office of the Prosecutor (“prosecution”) submitted the “Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)” (“Second Application”), which sought the admission of fourteen documents into evidence from the “bar table”.² As set out in the Chamber’s first “Decision on the admission of material from the ‘bar table’”, this 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 part of his or her testimony”.³
2. The prosecution attaches a list of the fourteen documents at confidential Annex 1, outlining the nature, content, indicia of reliability, and suggested relevance of the documents, as well as their sources.⁴
3. Confidential Annexes 2 – 15 of the prosecution’s Second Application contain the 14 documents for which admission is sought and they are described or can be summarized as follows:

- i) A *curriculum vitae* of Thomas Lubanga Dyilo signed and dated 1 June 2004 (DRC-OTP-0092-0378);⁵

¹ Prosecution’s Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9), with Confidential Annexes 1 to 15, 17 July 2009, ICC-01/04-01/06-2055-Conf; public redacted version, 31 July 2009, ICC-01/04-01/06-2070.

² ICC-01/04-01/06-2055-Conf, page 3; ICC-01/04-01/06-2070, page 3.

³ Decision on the admission of material from the “bar table”, 24 June 2009, ICC-01/04-01/06-1981, paragraph 1.

⁴ ICC-01/04-01/06-2055-Conf-Anx1.

- ii) A handwritten UPC/FPLC logbook, with entries in French and Swahili, providing a contemporaneous record of radio communications sent on a daily basis between UPC/FPLC units in the field and the main staff headquarters between 19 November 2002 and 22 February 2003 (DRC-OTP-0017-0033);⁶
- iii) A typed French translation of the handwritten logbook (DRC-OTP-0171-0926);⁷
- iv) The MONUC "Special report on the events in Ituri, January 2002 - December 2003" (DRC-OTP-0074-0422).⁸
- v) The "Special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo", dated 10 September 2002 (DRC-OTP-0180-0643);⁹
- vi) The "Second special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo", dated 27 May 2003 (DRC-OTP-0074-0167);¹⁰
- vii) The "Twelfth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo", dated 18 October 2002 (DRC-OTP-0131-0389);¹¹

⁵ ICC-01/04-01/06-2055-Conf-Anx2.

⁶ ICC-01/04-01/06-2055-Conf-Anx3.

⁷ ICC-01/04-01/06-2055-Conf-Anx4.

⁸ ICC-01/04-01/06-2055-Conf-Anx5.

⁹ ICC-01/04-01/06-2055-Conf-Anx6.

¹⁰ ICC-01/04-01/06-2055-Conf-Anx7.

¹¹ ICC-01/04-01/06-2055-Conf-Anx8.

- viii) The “Thirteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo”, dated 21 February 2003 (DRC-OTP-0131-0045);¹²
- ix) The “Fourteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo”, dated 17 November 2003 (DRC-OTP-0074-0215);¹³
- x) The “Fifteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo”, dated 25 March 2004 (DRC-OTP-0130-0434);¹⁴
- xi) The United Nations Organization (“UN”) Security Council “Resolution 1484 (2003)”, adopted on 30 May 2003 (DRC-OTP-0154-0671);¹⁵
- xii) The French version of the UN Security Council “Résolution 1484” (2003) (DRC-OTP-0154-0668);¹⁶
- xiii) The UN Security Council “Resolution 1493 (2003)”, adopted on 28 July 2003 (DRC-OTP-0131-0167);¹⁷ and
- xiv) A press article from “Le Soir” transmitted on 4 June 2003 (DRC-OTP-0172-0134).¹⁸

¹² ICC-01/04-01/06-2055-Conf-Anx9.

¹³ ICC-01/04-01/06-2055-Conf-Anx10.

¹⁴ ICC-01/04-01/06-2055-Conf-Anx11.

¹⁵ ICC-01/04-01/06-2055-Conf-Anx12.

¹⁶ ICC-01/04-01/06-2055-Conf-Anx13.

¹⁷ ICC-01/04-01/06-2055-Conf-Anx14.

¹⁸ ICC-01/04-01/06-2055-Conf-Anx15.

4. The issue for the Chamber is whether it is permissible for the prosecution to rely on these “bar table” documents as part of its trial evidence.

II. Submissions

The prosecution's submissions

5. In this Second Application to admit documents in this way, the prosecution submits that “[t]he procedure of tendering documents from the bar table has been accepted by this Trial Chamber and is a vital tool for streamlining large and complex war crimes cases”.¹⁹ The prosecution argues that the documents it seeks to tender satisfy the Chamber’s test for admissibility when evidence other than oral testimony is being introduced, as set out in the Decision on the admissibility of four documents (“Admissibility Decision”),²⁰ namely “i) *prima facie* relevance; ii) probative value and iii) the balance between probative value of the evidence and any prejudicial effect”.²¹ It is submitted that the documents are “relevant and probative to issues in the proceedings and there are sufficient indicia of reliability to warrant their admission into evidence in order for the Trial Chamber to assess freely the weight of these documents against the entire record of the trial”.²² Furthermore, it is submitted that the “potential probative value of the evidence outweighs the prejudicial effect, if any, of their admission”²³ and that the documents are pertinent to the “determination of the truth”, as stipulated in Article 69(3) of the Rome Statute (“Statute”).²⁴

¹⁹ ICC-01/04-01/06-2055-Conf, page 3; ICC-01/04-01/06-2070, page 3.

²⁰ Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1398-Conf; public redacted version, 13 June 2008, ICC-01/04-01/06-1399.

²¹ ICC-01/04-01/06-2055-Conf, paragraph 8; ICC-01/04-01/06-2070, paragraph 8.

²² ICC-01/04-01/06-2055-Conf, page 3, see also paragraphs 10 and 32; ICC-01/04-01/06-2070, page 3, see also paragraphs 10 and 32.

²³ ICC-01/04-01/06-2055-Conf, paragraph 32; ICC-01/04-01/06-2070, paragraph 32.

²⁴ ICC-01/04-01/06-2055-Conf, pages 3 and 4 and paragraph 10; ICC-01/04-01/06-2070, pages 3 and 4 and paragraph 10.

6. The prosecution cites the Trial Chamber's Admissibility Decision²⁵ in submitting that the Chamber should "be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness".²⁶ Similarly, the prosecution submits that the fact the authors will not be called to testify is not fatal to the admissibility of the documents,²⁷ quoting the Chamber's observation that the fact the author of a document is not called to testify "is not in itself determinative of admissibility".²⁸
7. Addressing the *curriculum vitae* of Thomas Lubanga Dyilo, the prosecution submits that this document is relevant to the proceedings as it constitutes "the best evidence of the biographical information related to the accused up to 2002, including confirmation of the date of creation of the UPC and his title as President since 2000". The prosecution argues that the fact that the document is signed by the accused, with a solemn undertaking as to the truth of the content, demonstrates its probative value.²⁹
8. The prosecution concedes that this document was obtained through an illegal search and seizure exercise carried out by the Office of the Prosecutor of the Tribunal de Grande Instance of Bunia in relation to domestic proceedings in the Democratic Republic of Congo ("DRC").³⁰ However, the prosecution submits that this does not affect its admissibility since Article 69(7) of the Statute does not apply in this instance, as the evidence is reliable and its admission would not be antithetical to, or damage the integrity of, the proceedings. The prosecution avers that, as the evidence was "not obtained through coercion or torture", the procedural violation by the DRC

²⁵ ICC-01/04-01/06-1399, paragraph 29.

²⁶ ICC-01/04-01/06-2055-Conf, paragraph 10; ICC-01/04-01/06-2070, paragraph 10.

²⁷ ICC-01/04-01/06-2055-Conf, paragraph 10 and footnote 14; ICC-01/04-01/06-2070, paragraph 10 and footnote 14.

²⁸ ICC-01/04-01/06-1399, paragraph 36.

²⁹ ICC-01/04-01/06-2055-Conf, paragraph 23; ICC-01/04-01/06-2070, paragraph 23.

³⁰ ICC-01/04-01/06-2055-Conf, paragraph 24; ICC-01/04-01/06-2070, paragraph 24.

authorities does not affect the document's authenticity or reliability.³¹ Finally the prosecution submits that the Trial Chamber has ruled on the admissibility of documents obtained through this search and seizure operation, concluding that the breach of the right to privacy did not affect the reliability of the evidence, and its admission would not damage the integrity of the proceedings.³²

9. As regards the UPC/ FPLC logbook, the prosecution submits that it is relevant because it is a "contemporaneous record of radio communications sent on a daily basis from UPC/FPLC units in the field to the main staff headquarters between 19 November 2002 and 22 February 2003, during the period relevant to the charges against Thomas Lubanga Dyilo".³³ The prosecution submits that this document shows effective internal communication within the UPC/FPLC, knowledge on the part of the accused of the underlying facts constituting the charges and his ability to know about the crimes, through recorded messages which, on occasion, he received directly or by way of copies.³⁴

10. In addition, the prosecution submits that this document was created in the normal course of business and as part of the internal operation of the UPC/FPLC, rather than for judicial purposes, and it is submitted that "no suggestion has been made that there was a motive to fabricate or distort the record".³⁵ It is argued that the existence, form and typical content of logbooks of this kind within the UPC/FPLC have also been verified by witness testimony during the trial.³⁶ Furthermore, it is maintained that the logbook is internally consistent and the events it records are corroborated by

³¹ ICC-01/04-01/06-2055-Conf, paragraphs 24 – 27; ICC-01/04-01/06-2070, paragraphs 24 – 27.

³² ICC-01/04-01/06-1981, paragraph 48; ICC-01/04-01/06-2055-Conf, paragraph 28; ICC-01/04-01/06-2070, paragraph 28.

³³ ICC-01/04-01/06-2055-Conf, paragraph 13; ICC-01/04-01/06-2070, paragraph 13.

³⁴ ICC-01/04-01/06-2055-Conf, paragraph 15; ICC-01/04-01/06-2070, paragraph 15.

³⁵ ICC-01/04-01/06-2055-Conf, paragraph 14; ICC-01/04-01/06-2070, paragraph 14.

³⁶ ICC-01/04-01/06-2055-Conf, paragraphs 16 – 19; ICC-01/04-01/06-2070, paragraphs 16 – 19.

other evidence.³⁷ The prosecution submits that these factors indicate the authenticity and reliability of this document in its entirety.³⁸

11. In relation to the UN reports and resolutions, the prosecution submits that they are relevant to the proceedings, as they provide “contemporaneous records documenting the conflict in Ituri, in particular [...] the existence and nature of the armed conflict and human rights violations during the period relevant to the charges against the Accused” (with the exception of DRC-OTP-0130-0434 which covers a period from November 2003).³⁹
12. The prosecution contends that the United Nations, as a source, is reliable and reputable, as it is a neutral organisation that discharges a mandate from the international community, producing accurate reports for the international and local communities alike.⁴⁰
13. As to the press article, the prosecution submits that this document is “relevant and probative of the authority that Thomas Lubanga Dyilo exercised within the UPC/FPLC in June 2003”.⁴¹ The prosecution submits that the article was created during or before June 2003⁴² by a journalist who was “an independent, neutral observer of the events in Ituri”, who is named in the article, as are her sources.⁴³

³⁷ ICC-01/04-01/06-2055-Conf, paragraphs 20 – 21; ICC-01/04-01/06-2070, paragraphs 20 – 21.

³⁸ ICC-01/04-01/06-2055-Conf, paragraphs 16 and 22; ICC-01/04-01/06-2070, paragraphs 16 and 22.

³⁹ ICC-01/04-01/06-2055-Conf, paragraph 29; ICC-01/04-01/06-2070, paragraph 29.

⁴⁰ ICC-01/04-01/06-2055-Conf, paragraph 29; ICC-01/04-01/06-2070, paragraph 29.

⁴¹ ICC-01/04-01/06-2055-Conf, paragraph 30; ICC-01/04-01/06-2070, paragraph 30.

⁴² ICC-01/04-01/06-2055-Conf, paragraph 31; ICC-01/04-01/06-2070, paragraph 31.

⁴³ ICC-01/04-01/06-2055-Conf, paragraph 31; ICC-01/04-01/06-2070, paragraph 31.

The defence submissions

14. The defence filed its “Réponse de la Défense à la ‘Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)’, déposée le 17 juillet 2009” on 31 August 2009.⁴⁴
15. The defence does not resist the introduction of the *curriculum vitae* of Thomas Lubanga Dyilo, or the United Nations Security Council resolutions.⁴⁵ However, objections are raised with respect to all the other documents.
16. As regards the UPC/FPLC logbook, the defence submits that it is irrelevant – even if its authenticity is established – as the fact that it shows the communication methods used within the FPLC is insufficient to make it relevant in this case.⁴⁶
17. The defence points out that none of the messages in the logbook are related to the recruitment or use of children under the age of fifteen by the FPLC, or generally to the facts contained in the charges. As such, the messages would not give the accused knowledge, directly or indirectly, of the facts relevant to the charges; moreover there is no evidence that the accused actually received any of the messages. None emanate from him and there are very few that name him amongst their recipients; it is said that those that do are without any relevance to the charges.⁴⁷

⁴⁴ Réponse de la Défense à la “Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)”, déposée le 17 juillet 2009, 31 August 2009, ICC-01/04-01/06-2102. The response was filed on time as the Chamber had suspended the time limits during the summer recess between 17 July and 10 August 2009, Transcript of hearing on 3 July 2009, ICC-01/04-01/06-CONF-ENG ET, page 65, lines 1 – 4.

⁴⁵ ICC-01/04-01/06-2102, paragraph 2.

⁴⁶ ICC-01/04-01/06-2102, paragraph 9.

⁴⁷ ICC-01/04-01/06-2102, paragraph 10.

18. The defence also submits that the logbook is not sufficiently reliable.⁴⁸ It is pointed out that no witness has identified this document specifically. Indeed, the defence points out that Witness DRC-OTP-WWWW-0017 said he did not recognise it, and Witness DRC-OTP-WWWW-0055 expressed surprise that the document did not identify its owner. The defence highlights that comments upon a document by witnesses other than the author have little probative value.⁴⁹ The authenticity of the logbook is questioned,⁵⁰ especially as the lack of a signature, seal, official paper or other features demonstrating its official character mean there is no proof that the document emanated from the FPLC.⁵¹ Furthermore, the defence submits that the fact that some events recorded in the logbook have been corroborated by other evidence is insufficient to demonstrate the reliability of the main body of the contents.⁵²

19. In relation to all the United Nations reports, the defence raises admissibility rather than authenticity questions.⁵³ The defence specifically objects to the admission of report DRC-OTP-0180-0643 as it covers a period prior to that covered by the charges and accordingly, in the submission of the defence, it is irrelevant.⁵⁴ The defence equally objects to the admission of report DRC-OTP-0130-0434, which it argues is irrelevant as it covers a period subsequent to the ambit of the charges.⁵⁵

20. It is submitted that the reliability of the reports cannot be established because they do not identify their sources or the methodology used to

⁴⁸ ICC-01/04-01/06-2102, paragraph 13.

⁴⁹ ICC-01/04-01/06-2102, paragraphs 15 to 16.

⁵⁰ ICC-01/04-01/06-2102, paragraph 15.

⁵¹ ICC-01/04-01/06-2102, paragraphs 19 to 21.

⁵² ICC-01/04-01/06-2102, paragraph 17.

⁵³ ICC-01/04-01/06-2102, paragraph 22.

⁵⁴ ICC-01/04-01/06-2102, paragraph 23.

⁵⁵ ICC-01/04-01/06-2102, paragraph 24.

collect and process information.⁵⁶ The defence notes that the ICTY has refused to admit NGO reports on this basis.⁵⁷

21. The defence contends that the reports contain allegations concerning the acts and conduct of the accused; as such, it is asserted that they are prejudicial and should not be admitted as evidence, given the clear lack of proportionality between their low probative value and high prejudicial effect.⁵⁸

22. As regards the press article, the defence, whilst not questioning its authenticity, objects to its admission into evidence,⁵⁹ emphasising that it is undated and the only date provided comes from the website from which the report is taken. Thus, it is argued that it has not been established that the article refers to the period relevant to the charges.⁶⁰

23. The defence submits that the article does not itself prove the facts alleged – instead, it merely reflects the opinions of the reporter. As a result, it is argued that the reliability of its content can only be established if the reporter appears as a witness,⁶¹ to avoid infringing the rights of the accused and particularly his right to examine prosecution witnesses.⁶² The defence observes that the prosecution has not suggested that it is impossible to call the journalist as a witness.⁶³

24. The defence suggests that the article provides no indication as to the origin of the information reported by the journalist, so it is not possible to distinguish between evidence and opinions. The journalist does not indicate

⁵⁶ ICC-01/04-01/06-2102, paragraphs 25 to 30.

⁵⁷ ICC-01/04-01/06-2102, paragraph 28.

⁵⁸ ICC-01/04-01/06-2102, paragraphs 31 to 35.

⁵⁹ ICC-01/04-01/06-2102, paragraphs 37 to 38.

⁶⁰ ICC-01/04-01/06-2102, paragraph 42.

⁶¹ ICC-01/04-01/06-2102, paragraph 38.

⁶² ICC-01/04-01/06-2102, paragraph 39.

⁶³ ICC-01/04-01/06-2102, paragraph 40.

whether she personally witnessed the events she recounts; nor has she revealed her sources of information.⁶⁴

25. The defence submits that the jurisprudence of the international criminal tribunals has demonstrated the potential unreliability of newspaper and other media reports.⁶⁵ Finally, the defence highlights the imbalance between the low probative value of the article and its high prejudicial effect.⁶⁶

III. Relevant Provisions

26. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 64 of the Statute Functions and powers of the Trial Chamber

[...]

9. 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.

⁶⁴ ICC-01/04-01/06-2102, paragraph 41.

⁶⁵ ICC-01/04-01/06-2102, paragraph 43.

⁶⁶ ICC-01/04-01/06-2102, paragraphs 44 to 46.

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.

[...]

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 of Procedure and Evidence ("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.

3. A Chamber shall rule on an application of a party or on its own motion, made under article 64, subparagraph 9(a), concerning admissibility when it is based on the grounds set out in article 69, paragraph 7.

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.

IV. Analysis and Conclusions

General approach

27. The Chamber's general approach to the admission of "bar table" documents was established in its first "Decision on the admission of material from the 'bar table'", when it was held, *inter alia*, that the approach to admissibility applied in the Admissibility Decision⁶⁷ should be applied in these circumstances:

The Statute and the Rules set out the principles to be applied to the admissibility of evidence, other than witness evidence, in various provisions. 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". 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**. (emphasis in original)⁶⁸

28. As regards the entirety of this material, the Chamber has applied a document-by-document approach in applying the three-step test just rehearsed, and in the Annex to the present Decision, the Chamber has addressed the admissibility of each of these documents.

Curriculum vitae

29. Addressing discretely the *curriculum vitae*, the Chamber notes that this document was obtained during a search and seizure operation carried out by the Office of the Prosecutor of the Tribunal de Grande Instance of Bunia,⁶⁹ which was held by the domestic Court of Appeal to be illegal because it breached the right to privacy of the owner of the relevant

⁶⁷ ICC-01/04-01/06-1399, paragraphs 27 to 31.

⁶⁸ ICC-01/04-01/06-1981, paragraph 33.

⁶⁹ ICC-01/04-01/06-2055-Conf, paragraph 24; ICC-01/04-01/06-2070, paragraph 24.

property.⁷⁰ Article 69(7) of the Statute prohibits the admission of this document if a breach of an internationally recognised human right casts “substantial doubt on the reliability of the evidence” or if the admission of the evidence would “be antithetical to and would seriously damage the integrity of the proceedings”. The issue of admissibility of documents obtained in this manner was considered extensively by the Chamber in its “Decision on the admission of material from the ‘bar table’”.⁷¹

30. Having considered the approach of the Pre-Trial Chamber to this issue, as well as the jurisprudence of the *ad hoc* tribunals and other international courts, the Chamber held that:

40. [...] 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.

41. [...] [T]he 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 to consider the criteria in a) and b), because the evidence is not automatically inadmissible.

[...]

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

⁷⁰ See ICC-01/04-01/06-1981, paragraphs 17 and 19; see also Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-796-Conf-tEN, paragraphs 62 – 90; public redacted version, 29 January 2007, ICC-01/04-01/06-803-tEN, paragraphs 62 – 90.

⁷¹ ICC-01/04-01/06-1981.

documents obtained during the search and seizure exercise are admissible, notwithstanding the breach of the fundamental right to privacy.⁷²

31. This is the approach the Chamber has followed in this instance, and, applying the three-stage admissibility test, it has determined that the *curriculum vitae* is, *prima facie*, admissible.

Logbook

32. Turning to the logbook, the Chamber notes that it was introduced on 1 April 2009 during the examination of witness DRC-OTP-WWWW-0017,⁷³ although an admissibility challenge resulted in the following decision:

In August of 2006, the Office of the Prosecutor disclosed to the Defence a document that has been the subject of an admissibility argument this morning. It is a log-book that is contained within a book that has on its cover the words "FIS Manuscript." It runs to just under 200 pages and consists of numerous handwritten entries that appear to have been made during 2002 and 2003. Originally, the author of this log-book, who, as we understand it, acted as a communications operator, was to be called as a witness in the case, and he or she would have been in a position, no doubt, to give evidence as to its contents. However, that witness, number 290, has declined to come to The Hague to give evidence during this trial. As a result, on the 13th of March, 2009, the Prosecution indicated that this document was to be linked with and to feature in the evidence of the current witness, number 17. We are told that there were discussions between the Prosecution and the Defence about this evidence on the 25th of March, which was Wednesday of last week, although it is unclear as to exactly what the result of that discussion was. There appears to have been some misunderstanding. By last night it was evident that the Defence objects to this document being introduced as part of the evidence of the current witness. It is necessary for us to emphasise that this witness was not at any stage the author of any of the entries within the log-book. Indeed, it would appear to be the position that he was not shown it until he met with an investigator during the research by the Office of the Prosecutor into these alleged crimes. When he was shown this particular item, he indicated, as we understand it, that he had never seen this particular log-book before, although he may well be able to indicate that it is similar in style and content to other log-books that he has seen when they were compiled by one or more operators who he knew. We are persuaded that it is appropriate for this witness to be shown the document for that limited purpose, for him to say one way or the other whether or not looked at, as it were, generally and in its entirety the document appears to be the kind of log-book which operators were compiling during the relevant time-frame. However, Mr. Sachdeva, on behalf of the Prosecution, wishes to take the matter further than that in this sense: He wishes, first, to ask the witness, by reference to particular entries, if he is able to comment on particular terms which are found within certain entries, and in particular, at page 62 the reference to

⁷² ICC-01/04-01/06-1981, paragraphs 40, 41, 47 and 48.

⁷³ Transcript of hearing on 1 April 2009, ICC-01/04-01/06-160-Red-ENG WT, page 4, page 11 *et seq.*

"Commander-in-Chief" and "President of the movement"; at page 190 where there is a reference to "Standby Class 0," and page 205 where there is a reference to "Tiger 1." There may be other similar entries which Mr. Sachdeva wishes to refer the witness to which I have omitted to refer to, but for the purposes of this decision those that I have listed are sufficient. The second way in which Mr. Sachdeva wishes to develop this evidence by reference to the document is by asking the witness to give evidence about particular incidents which he has already seemingly described during the course of his testimony. Page 48 reveals a reference to a soldier killed during an ambush. Page 83 contains reference to training at Bule. At page 160, there is a reference to an incident at Kilo. The Kobu operation and a commander who refused to advance are set out at page 176, as is a reference to Lubanga apparently being involved in communications. At page 212, there is a reference to the president, and at page 213, there is some detail given of an incident that involved an aeroplane. In our judgement, there is either no or negligible value in the witness giving evidence about those terms and those incidents by reference to a log-book which he did not compile and which he did not see until it was shown to him by an investigator some little time ago. He is no better placed than anyone else in this court to comment on the content and the meaning of 290, the witness who is not going to be attending, when that individual made the relevant entries. It is highly likely to lead to speculation on the part of the present witness as to what 290 had in mind when he made the particular handwritten entries which have been brought to our attention. Given in our view there would be no or negligible evidential value in this exercise, it is one that should not take place. The witness can be asked about the terms. Mr. Sachdeva can quote exactly the particular terms that he seeks assistance on without showing the relevant entries to the witness. "Standby Class zero," "Tiger 1," "Commander-in-Chief," and "President of the movement," et cetera, are all terms which the witness can be asked questions or further questions about. Similarly, the witness has been asked and can be asked further questions about the ambush and a soldier being killed, training at Bule, the incident at Kilo, et cetera, et cetera. Again here, there is no need for the particular log-book to be shown to him when any further description is provided by the witness as to those incidents. Finally, it is wholly correct of Mr. Sachdeva to observe that consistently with the decision that we have handed down on the admission of hearsay evidence, it may be that there is a proper basis for this document to be admitted in due course as a hearsay document. If the Prosecution wish to consider making an application of that kind in relation to some or all of the contents of this document, it should be set out in the usual way with an explanation being provided to the Chamber as to why we should admit a part or all of the document, thereby enabling the Defence and the participants to bring to our attention any objections that they may have. What, in our view, is impermissible is for the Prosecution to seek to introduce a document that was not created by this witness during the course of his evidence.⁷⁴

33. On the basis of later submissions by the prosecution, the Chamber has reconsidered the admissibility of this logbook as a hearsay document or indirect evidence. The Chamber has already ruled that evidence of this kind can be admissible:

⁷⁴ ICC-01/04-01/06-160-Red-ENG WT, page 22, line 11 – page 26, line 1.

[...] In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to "apply national laws governing evidence". For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling - for credible reasons - to give evidence.⁷⁵

34. For the reasons set out in the annex to this Decision, the logbook, *prima facie*, fulfils the three-stage admissibility test.

Second special report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (DRC-OTP-0074-0167)

35. The "Second special report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo" ("MONUC report"), dated 18 October 2002, has in the meantime been admitted into evidence. It was introduced by the defence in the course of its examination of prosecution witness DRC-OTP-WWWW-0046 on 13 July 2009,⁷⁶ and was assigned the MFI number MFI-D-00151.⁷⁷ On 28 October 2009, the defence submitted an application dealing with the admission into evidence of documents, and excerpts from documents, that had been assigned MFI numbers in the course of the hearings.⁷⁸ As regards several of these, including the MONUC report numbered MFI-D-00151, the defence submitted that it was unnecessary to admit them into evidence because the relevant sections – those brought to the attention of the witness and the Chamber – had been recorded in the transcript during the evidence.⁷⁹ The

⁷⁵ ICC-01/04-01/06-1399, paragraph 24.

⁷⁶ Transcript of hearing on 13 July 2009, ICC-01/04-01/06-T-208-ENG WT, page 29, line 23 – page 30, line 19.

⁷⁷ Transcript of hearing on 13 July 2009, ICC-01/04-01/06-T-208-CONF-ENG ET, page 37, lines 14 – 17.

⁷⁸ Requête de la Défense aux fins de depot en prevue des documents présentés dans le cadre des contre-interrogatoires de la Défense et portent les numéros MFI-D-00105 à MFI-D-00152, 28 October 2009, ICC-01/04-01/06-2177.

⁷⁹ ICC-01/04-01/06-2177, paragraph 5.

Chamber dealt with this application in an oral ruling of 9 December 2009,⁸⁰ in which it held:

[a]lthough the Defence referred to 32 other documents in its application, it does not seek to introduce them into evidence and accordingly the Chamber does not need to consider that part of this application further.⁸¹

36. In consequence, MFI-D-00151 was not admitted into evidence. However, later in the proceedings (on 11 June 2010), in compliance with the Chamber's Order on numbering items of evidence,⁸² the document was assigned the EVD number EVD-D01-00269, given the absence of objections on the part of the parties and the participants. The defence has subsequently brought to the attention of the Chamber that it only recently understood the implications of that order as regards MFI-D01-00151, and it has applied for its removal from the case file.⁸³

37. The Chamber accepts that this document was mistakenly admitted into evidence at that stage, and it should not have been assigned an EVD number.

38. The Chamber has, therefore, disregarded the earlier assignment of an EVD number, and it has reviewed the admissibility of the MONUC report solely on the basis of the prosecution's present application. For the reasons set out in the annex, this document (set out at annex 7 to the prosecution's application) does not satisfy the admissibility criteria.

⁸⁰ Transcript of hearing on 12 December 2009, ICC-01/04-01/06-T-222-ENG ET WT, page 30, line 8 – page 33, line 25.

⁸¹ ICC-01/04-01/06-T-222-ENG ET WT, page 33, lines 23 – 25.

⁸² Ordering on numbering of evidence, 12 May 2010, ICC-01/04-01/06-2432 with three confidential annexes.

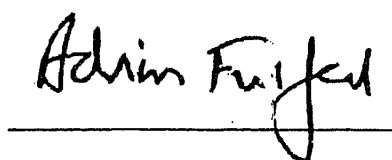
⁸³ Requête de la Défense aux fins de reconsideration de l'ordonnance de la Chambre de première instance I portent le numéro ICC-01/04-01/06-2432, date du 12 mai 2010, 11 October 2010, ICC-01/04-01/06-2584-Conf. The Chamber will deal with the rest of the application in a separate decision.

V. Orders

39. The Chamber, for the reasons set out in the Annex to this Decision, determines:

- a) The document at annex 7 was erroneously assigned the EVD number EVD-D01-00269, and should be removed from the record.
- b) The documents in annexes 6, 7, 11 and 15 of the prosecution's Application are inadmissible.
- c) All the remaining documents, as listed in the Annex to this Decision, are admitted into evidence.
- d) The Registry is instructed to assign EVD numbers to the documents in annexes 2, 3, 4, 5, 8, 9, 10, 12, 13 and 14.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 21 October 2010

At The Hague, The Netherlands