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No.: **ICC-01/04-01/06**
Date: **20 December 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

**with Confidential – Prosecution, Defence and Legal Representatives of Victims
Only Annexes 1-3**

**Prosecution's Application for Admission of three 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:

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. 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 three documents into evidence from the bar table and requests the Trial Chamber's authorisation to add these statements to its list of evidence to be relied on at trial.
2. The Prosecution seeks to tender these documents for the truth of their content. In the Prosecution's view, the documents are highly relevant and probative to the credibility of the witnesses and their evidence relating to the Accused's guilt. The documents are also highly relevant and probative with respect to the Defence's specific challenge to the witnesses in its abuse of process application. Accordingly, the documents are directly pertinent to the "...determination of the truth" as stipulated in Article 69(3).¹ In addition to their relevance, there are sufficient indicia of reliability to warrant their admission into evidence.
3. Nor will their admission be unfairly prejudicial to the Defence. The statements were obtained in direct response to the unanticipated Defence application for admission of documents from the bar table, which the Defence now cites in its abuse of process case to challenge the witnesses' credibility. The statements respond directly to that argument and to the underlying bar table evidence that the Defence itself introduced; they provide the explanations that the witnesses would have been given in court had the Defence adhered to its obligation to put the allegations to them at the time of their testimony. Indeed, exclusion of the documents will be

¹ "Decision of the admissibility of four documents", ICC-01/04-01/06-1390, para. 20 ('Decision on Admissibility').

substantially prejudicial to the Prosecution. It will deny the Prosecution the ability to answer specific factual allegations that it could not have anticipated during its opening case or even during its response to the abuse of process case. Accordingly, the Prosecution submits that tendering these documents is proportionate, necessary to establish the truth and will not unfairly prejudice the position of the Accused.

Background

4. On 15 November 2010, the Defence requested the admission of extracts from the Independent Electoral Commission (IEC) of the Democratic Republic of the Congo relating to *inter alia* trial witnesses DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008 and DRC-OTP-WWWW-0010.² In response, the Prosecution did not oppose the admission of the IEC extracts but noted that it might seek admission of statements by the witnesses that explain how those documents came to be created.³ In an email on 6 December 2010 the Trial Chamber informed the parties and participants that the Defence request for admission in respect of these three documents was granted, with reasons to be provided later in a written decision.⁴
5. On 26 November 2010, prior to the Chamber's decision, the Office of Public Counsel for Victims (OPCV) disclosed to the Prosecution and the Defence three written statements of interviews it conducted with dual status victims/witnesses Witness 7 (victim a/0047/06), Witness 8 (victim a/0048/06) and Witness 10 (victim a/0050/06). In the statements⁵ the witnesses describe how and why they obtained the electoral cards at issue, and they explain the discrepancy between the birthdates and names on the cards and those given

² ICC-01/04-01/06-2604-Conf-Corr2 ('3rd Defence Request for admission of documents from the bar table'); see paras. 50-55 and Annexes 39 and 42.

³ ICC-01/04-01/06-2650-Conf, para. 5.

⁴ Email from the Legal Officer of the Chamber on 06 December 2010 at 18:14, Subject: Decision on defence request 2604-Conf-Corr2.

⁵ These statements are annexed as Confidential Annexes 1-3.

in evidence. On 29 November 2010, the OPCV requested leave to tender these same statements from the bar table.⁶

6. On 1 December 2010, the Defence filed the “Réponse de la Défense à la requête du BCPV”⁷ in which it opposed the OPCV Application. The Defence submits that the written statements do not correspond to the requirements outlined in Rule 68 and because they are written statements and not transcripts of recordings they are not in the same form as those admitted by the Chamber in its 26 October 2010 decision.⁸ Further, the Defence argues that the statements are not sufficiently reliable, a factor aggravated by the fact that they emanate from the participating victims that seek their admission, and that it did not have the opportunity to question the witnesses on the supplementary information (and does not waive its rights in this respect under article 67(1)(e)).⁹
7. On 10 December 2010, the Defence filed the “Requête de la Défense aux fins d’arrêt définitif des procédures” (Requête). Among other claims, it alleges that trial witnesses Witness 7, Witness 8, and Witness 10 lied at trial about their ages and birthdates.¹⁰ In support of this allegation, the Defence, in its “Requête”, relies on the information provided on the electoral cards and the IEC extracts of these witnesses.¹¹

Prosecution’s Submissions

8. As indicated in its response to the 3rd Defence bar table request,¹² the Prosecution seeks the admission of the written statements of Witness 7 (including annexes), Witness 8 (including annex) and Witness 10 dated 15

⁶ ICC-01/04-01/06-2647 (‘OPCV Application’).

⁷ ICC-01/04-01/06-2652 (‘Defence Response’).

⁸ ICC-01/04-01/06-2595.

⁹ ICC-01/04-01/06-2652, paras. 3-4.

¹⁰ ICC-01/04-01/06-2657-Conf, paras 155-168.

¹¹ ICC-01/04-01/06-2657-Conf, para. 181 and footnote 388.

¹² ICC-01/04-01/06-2650-Conf, para. 5.

November 2010. Alternatively, the Prosecution supports the OPCV Application to admit the same exhibits.

9. The procedure of tendering documents from the bar table has been accepted by this Trial Chamber¹³ and is a vital tool for streamlining large and complex war crimes cases.¹⁴ In its Decision on Admissibility, the Trial Chamber determined the parameters for the admissibility of documentary evidence. 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.¹⁵
10. The Prosecution submits that the documents proffered in this application satisfy these three key considerations, as explained in greater detail below.

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

11. First, the statements sought for admission are relevant to the current substantive proceedings and the Defence abuse of process application 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 Decision on Admissibility 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”.¹⁶ The Prosecution submits that this consideration applies here.

¹³ See “Decision on the admission of material from the ‘bar table’”, 24 June 2009, ICC-01/04-01/06-1981.

¹⁴ *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...”.

¹⁵ ICC-01/04-01/06-1399, paras. 27-32.

¹⁶ ICC-01/04-01/06-1399, para. 29.

12. The statements are directly relevant to the determination of an important issue in the substantive case: namely the reliability of the evidence (particularly, with respect to their ages) given by three former child soldier witnesses. Moreover, the relevance of the statements is also “to be judged in the context of both the issues and the issues that have arisen during the Defence abuse application”,¹⁷ particularly in respect of the admission of electoral cards and extracts from the IEC.¹⁸
13. As part of its abuse case, the Defence alleges that Prosecution witnesses provided false evidence about their ages. The Chamber has accepted that this is an allegation it must determine.¹⁹ The Defence sought admission of the electoral cards and IEC extracts relating to these Prosecution trial witnesses because it claimed that they are relevant to credibility.²⁰ The statements were taken to allow the witnesses to explain the credibility issue – that is, the discrepancies in information on their electoral cards (and/or the extracts thereof). To be sure, had the Defence not failed to raise the issue during the witnesses’ cross-examination or had it not sought, long after the witnesses testified, to admit the impeachment evidence from the bar table, there would be no need to take the out-of-court statements and request their admission. But they did not follow either course. Hence, the Prosecution’s and the Legal Representative’s proffer of the supplementary information contained in these statements is a direct consequence of the course chosen by the Defence. Permitting a partial story – the Defence documents – to be presented without the witnesses’ explanation is unfair to the Prosecution

¹⁷ Decision on the « Seconde requête de la Défense aux fins de dépôt de documents », ICC-01/04-01/06-2596-Conf, para. 27.

¹⁸ Several election cards have been tendered into evidence through relevant witnesses and via bar table applications; see ICC-01/04-01/06-2484-Conf (‘2nd Defence Request for admission of documents from the bar table’) and ICC-01/04-01/06-2596-Conf (‘Decision on 2nd Defence Request’); 3rd Defence Request for admission of documents from the bar table and Email from the Legal Officer of the Chamber on 06 December 2010 at 18:14, Subject: Decision on defence request 2604-Conf-Corr2 (Decision on 3rd Defence Request).

¹⁹ ICC-01/04-01/06-2596-Conf-Corr2, paras. 28-29. See also ICC-01/04-01/06-2657-Conf-paras. 155-168.

²⁰ ICC-01/04-01/06-2484-Conf, paras. 3, 7-9 (witness 10), ICC-01/04-01/06-2604-Conf-Corr2, paras. 50-51 (witness 10), and para. 55 (witness 7 and witness 8).

and contrary to the Trial Chamber's obligation to determine the truth. Or following the other alternative, permitting the Prosecution to recall the witnesses, will not serve the Prosecution's right and ability to timely respond to the allegations of false testimony contained in the pending abuse of process application.

14. The Trial Chamber has previously accepted that post-testimony interviews of trial witnesses are relevant and may be admitted into evidence from the bar table, and held that Rule 68 is not applicable in this instance.^[1] The Defence suggests that that principle does not apply to written statements. However, there is no principled reason underlying this inherently artificial distinction between transcripts of recorded interviews, which under the Defence approach may be admitted, and written statements, that cannot be.
15. Further, and in support of this application, the Chamber has ruled that a signed witness statement can be admitted without that person providing oral testimony.²¹ The Chamber added that the Defence may raise any issues if it considers that its concerns have not been satisfactorily met. In the Chamber's view, this approach is appropriate for trials at ICC and respects the interests of the accused.²²
16. The statements were taken by two OPCV staff members assisted by an interpreter of the Interpretation and Translation Section of the Court. The OPCV is the legal representative of the witnesses, so it is clear that the statements were taken with the advice of counsel. That factor should support, rather than being a bar, to admission. As officers of the Court bound by the Code of Professional Conduct for counsel, counsel of the

²¹ ICC-01/04-01/06-2189-Red.

²² ICC-01/04-01/06-2189-Conf, paras. 14-18.

OPCV must adhere to certain duties towards the Court and maintain the integrity of evidence which is submitted to the Court.²³ The statements have been signed by the witnesses and contain the signatures of all attendees, date and place of the interview. Therefore, they conform to the requirements outlined in Rule 111. There is nothing to indicate that the statements are anything other than a true and accurate account of the information provided by the witnesses. In the circumstances, there is no reason to doubt their reliability.

17. Based on the foregoing, in the Prosecution's submission, the documents are relevant and probative of issues to be determined at trial and their admission from the bar table will not cause prejudice to the Accused.²⁴

The evidence is not unfairly prejudicial

18. The Prosecution submits that the potential probative value of the evidence outweighs the prejudicial effect, if any, of its admission. As stated, the statements are reliable and will assist in the Trial Chamber's determination of the credibility and reliability of the relevant witnesses as well as the evidential value of the electoral cards. They are, therefore, relevant to the issues in this case. Moreover, the need to admit the out of court statements to shed light on the truth is attributable exclusively to the Defence tactics of (a) failing to ask appropriate questions of the witnesses during cross-examination, and (b) moving the introduction of the documentary evidence regarding the witnesses without recalling the witnesses.

²³ Code of Professional Conduct for counsel, Article 25(1).

²⁴ 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.

19. Furthermore, the admission of these documents will avoid recalling the relevant witnesses to testify on this issue. That in turn will respect the Defence right enshrined in Article 67(1)(c) by streamlining the proceedings to avoid unnecessary delay.

Relief sought

20. Based on the foregoing and 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 written statements attached in full in confidential Annexes 1-3 into evidence from the bar table, and requests the Trial Chamber's authorisation to add these statements to its list of evidence to be relied on at trial.
21. In the alternative, the Prosecution requests that the Trial Chamber grant the OPCV Application for admission of the three statements.



Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of December 2010
At The Hague, The Netherlands