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**TRIAL CHAMBER III**

**Before:** **Judge Sylvia Steiner, Presiding Judge**
**Judge Joyce Aluoch**
**Judge Kuniko Ozaki**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF**
***THE PROSECUTOR***
***v.* Jean-Pierre Bemba Gombo**

*Public*
*With 2Confidential Annexes A and B*

**Defence Response to the Prosecution's Application for Admission of Evidence from the Bar Table**

**Source:** **Defence for Mr. Jean-Pierre Bemba Gombo**

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## A. BACKGROUND

1. The initial procedure for the admission of documents in the present proceedings was contained in the **19 November 2010** *Decision on the admission of evidence of materials contained in the prosecution's list of evidence.*[1] A Majority of Trial Chamber III held that "any materials, including witnesses' written statements and related documents previously disclosed to the defence and which will form part of the prosecution's Revised List of Evidence are *prima facie* admitted as evidence for the purposes of the trial."[2]

2. The parties followed this procedure until **3 May 2011** when, after an appeal from both parties, the Appeals Chamber held that the Majority of the Chamber "had acted outside the legal framework of the Court", and that "the admission into evidence of the witnesses' written statements without a cautious item-by-item analysis and without satisfying rule 68 of the Rules of Procedure and Evidence was incompatible with the principle of orality established by article 69 (2) of the Statute."[3]

3. A month later, on **31 May 2011**, the Chamber set out the second procedure for the admission of documents in these proceedings, in its *Order on the procedure relating to the submission of evidence*.[4] In summary, the parties were now required to identify in advance any materials on their lists of documents for which admission was being sought, and any objections to admissibility were to be raised in advance via email, and formally at the time that the material is "submitted" to the Chamber. Where no objections were raised, the material would be admitted into evidence.[5]

[1] ICC-01/05-01/08-1022.
[2] ICC-01/05-01/08-1022, para. 35.
[3] ICC-01/05-01/08 OA 5 OA 6, paras. 2-3.
[4] ICC-01/05-01/08-1470
[5] ICC-01/05-01/08-1470, para.7.

4. On **28 February 2012**, the Prosecution filed the *Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute* ("Bar Table Motion").[6]

5. Through this Bar Table Motion, the Prosecution seeks the admission of **85 documents and 12 audio/video recordings**.[7] Most notably, the Prosecution states that it "submits the proposed items **for the truth of their content** without calling the authors of these materials or the individuals who provided the information contained therein to testify at trial."[8]

## B. ADMISSION OF DOCUMENTS FROM THE BAR TABLE

6. The Defence does not dispute that certain material can, in particular circumstances, be admissible in criminal proceedings when introduced other than through a witness who is giving oral evidence.[9] However, the Defence recalls its position that the principle of the "primacy of orality", which is enshrined in Article 69(2) of the Rome Statute is "one of the cornerstones of the proceedings under the Rome Statute."[10] The Prosecution cannot resort to simply introducing swathes of un-tested documentary material for the truth of is contents, in lieu of calling witnesses whose evidence can be tested through questioning by the Defence and the Chamber. Nor is it appropriate for the Prosecution to invite the Chamber to delegate its judicial function by simply accepting the facts as asserted by NGOs or other agencies as to the existence of particular events or crimes, rather than making independent findings based on the evidence heard in the courtroom.

7. The Prosecution argues that the tendering of documents from the bar table has been accepted at the ICC and the *ad hoc* tribunals.[11] On 18 October 2011, Her Honour Presiding Judge Steiner, during a debate on the admissibility of certain

[6] ICC-01/05-01/08-2147
[7] ICC-01/05-01/08-2147, para. 1.
[8] ICC-01/05-01/08-2147, para. 4.
[9] *Prosecutor v. Lubanga*, "Decision on the Prosecution's application for admission of four documents from the bar table pursuant to Article 64(9)"; 16 December 2010; ICC-01/04-01/06-2662; Decision on the Bar Table Motion of the Defence of Germain Katanga"; 21 October 2011; ICC-01/04-01/07-3184
[10] ICC-01/05-01/08-1028, para. 8.
[11] ICC-01/05-01/08-2147, para. 2.

materials, stated that "Personally, I do not very much appreciate the notion of Bar Table motions…".[12] Her Honour's position is reflective of recent developments at the ICTY that bar table motions should be kept to a minimum. Most recently, the Trial Chamber in *Karadžić* denied a Prosecution motion for admission of bar table documents, and held that a bar table motion is only a supplementary method of introducing evidence and to be used only **exceptionally**:[13]

> "Thus, while evidence does not need to be introduced through a witness in every circumstance, and there may be instances where it is appropriately admitted from the bar table, it is the Chamber's view that the most appropriate method for the admission of a document or other item of evidence is through a witness who can speak to it and answer questions in relation to it. The bar table should not generally be the first port of call for the admission of evidence. It is, rather, a supplementary method of introducing evidence, which should be used sparingly to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings."[14] […]
>
> The bar table is now an established means by which evidence may be admitted at the Tribunal. Notwithstanding that it may result in the saving of time inside the courtroom, in the circumstances of the present case, the Chamber considers that it is essential to view the bar table as mechanism to be used on an exceptional basis and not simply as another means by which evidence may be introduced wholesale into the court record. **In particular, the scope of this case requires that evidence is clearly contextualised by items being put to a witness or witnesses who can speak to them**. Thus, the Chamber encourages the parties to introduce evidence through a witness wherever possible, and to resort to the tendering of evidence from the bar table only if necessary.[15]

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[12] ICC-01/05-01/08-T-173-ENG ET WT 18-10-2011 49/64.

[13] *Prosecutor v. Karadžić*, Decision on Prosecution First Bar Table Motion, para 7; *Prosecutor v. Karadžić*, Order on Procedure for Conduct of Trial, Appendix A, Part VII, para. R, 8 October 2009; see also *Prosecutor v. Prlić et al*, Decision on Admission of Evidence, 13 July 2006, p. 6:"the admission of several thousand documents without prior discussions over them in court may unduly delay the proceedings, to the extent that the Chamber would not have the benefit of explanations from a witness who could help to put these documents in their context and establish their relevance and probative value; WHEREAS the Chamber would therefore be required to spend much of its resources examining and assessing thousands of documents, which could take several months and would delay the pronouncement of the Judgement;

[14] *Prosecutor v. Karadžić*, Decision on Prosecution First Bar Table Motion, para 9.

[15] *Prosecutor v. Karadžić*, Decision on Prosecution First Bar Table Motion, para 15.

8. Other Trial Chambers have also recognised that "the failure to put the document to such a witness is relevant to the exercise of the Chamber's discretion to admit the document. Further, if the document is admitted, the failure is likely to limit the value of the document in evidence."[16] This is because "[t]endering evidence from the bar table rarely allows for proper contextualization."[17] The Prosecution's Bar Table Motion has put the Chamber in the position of having to assess the appropriate weight which should be subscribed to this material, in the absence of any basis upon which to make this assessment. The Chamber has also been deprived of the opportunity to determine the extent to which this material is corroborative of other evidence, or whether an erroneous fact or assertion is simply being repeated across various similar reports.

9. The Defence accordingly submits that the Prosecution's attempt to introduce such a significant volume of documents and video material cannot be reconciled with the consistent jurisprudential recognition that admission of materials through a bar table motion is an exception to the rule that they should be properly tendered through a witness appearing to give evidence.

10. Nor can the Prosecution's Bar Table Motion be reconciled with several of the fundamental rights afforded to Mr. Bemba under the Rome Statute. The Prosecution superficially skims over the prejudice which the accused would suffer should the documents be admitted, arguing that "the admission of these documents will not unfairly prejudice the accused since the Defence has been possession of the proposed materials for a considerable time."[18] With respect, the fact that a document has been disclosed has no bearing on its admissibility. Moreover, this

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[16] *Prosecutor v. Djordjević*, Decision on Prosecution's Motion to Admit Exhibits from the Bar Table, 28 April 2009, para. 5; *Prosecutor v. Boskoski and Tarculovski*, Decision on Tarculovski's Second Motion for Admission of Exhibits from the Bar Table with Annex A, 7 April 2008, para. 5.
[17] *Prosecutor v. Popović et al*, Decisión on Prosecution's Motion for Admission of Exhibits from the Bar Table, Motion to Amend the Bar Table Motion, and Oral Motion for Admission of Additional Exhibit", 14 March 2008, para. 15; *Prosecutor v. Haradinaj et al*, Decision on Prosecution's Motion to Tender Documents on its Rule 65*ter* Exhibit List, 30 November 2007, para. 4;
[18] ICC-01/05-01/08-2147, para. 5.

cursory analysis ignores the fact that the admission of such a significant swathe of documents and video material will inevitably increase the evidentiary record which the Chamber will be required to analyse and take into account during its deliberations. It will also necessarily increase the scope and length of the Defence case, given that Mr. Bemba's defence team will now need to bring evidence not only to combat the Prosecution case as it stands (and the upcoming victim's presentation of evidence), but will also be obligated to bring evidence to rebut the facts being alleged in these multiple videos, reports, and media broadcasts and publications. As such, the admission of this bulk of evidence undermines the right of Mr. Bemba to be tried without undue delay, particularly in a situation where he has already been incarcerated for nearly 4 years of pre-Judgement imprisonment.

11. The Prosecution also ignores Mr. Bemba's right to examine or have examined adverse witnesses. The majority of documents contained in the Bar Table Motion should properly have been introduced through their authors; those who were responsible for collecting the information on which they rely; or those who have direct knowledge of the information contained therein. An attempt by the Prosecution to simply insert these documents *en masse* into the record of the case cannot be reconciled with Article 67(1)(e) which guarantees the right of Mr. Bemba to examine witnesses against him.

12. Moreover, the admission of purportedly inculpatory material through a bar table motion means that the Prosecution was never put to proof as to the reliability or credibility of the material, and is simply asking the Chamber to accept this significant volume of material at face value, and for the truth of its contents. Neither the Chamber nor the Defence was able to test the reliability (or even relevance) of any of this material by examining witnesses who are able to testify as regards the provenance, methodology, authenticity or content of the documents themselves. Should any ambiguity in these admitted documents be interpreted in a manner adverse to the accused, the prejudice is plain.

## C. ENDEMIC FAILINGS IN THE PROSECUTION REQUEST

13. The Prosecution is asking the Chamber to admit numerous entire reports into evidence. These reports, sometimes running to over 100 pages, are sought to be admitted in whole "for the truth of their contents".

14. In the *Katanga* case, when a party wished to admit a document through a bar table motion, it was required to submit a table providing a short description of its content, and **an index of the most relevant portions**.[19] The Prosecution in this case has not done so, and has made no attempt to highlight the relevant extracts or paragraphs in these lengthy reports. The Defence submits Prosecution's failure to identify relevant portions of undermines its request for their admission, and accordingly submits that the Chamber should reject the Prosecution request for at least documents 1 – 11; 80 – 82; and 84 – 87.

15. The second endemic failing is the lack of explanation given by the Prosecution as to why the admission of these documents was not sought during the presentation of its witnesses. In *Milutinović*, the Chamber refused to admit OSCE documents when no explanation was given as to why the documents were not used with witnesses who could have commented upon them.[20] This is relevant to a large number of the 97 documents on the Prosecution list, the most obvious example perhaps being documents 90 – 93, authored by a Prosecution witness. The Defence submits that a Bar Table Motion should not be a means through which to seek to correct a failure to admit documents through witnesses testifying in court.

16. Nor should the Bar Table Motion be used as a means to obviate the need to call witnesses through which documents could have been properly introduced. The fact that the Prosecution had the majority of these documents in their possession since before (and often well before) the beginning of the trial can only lead to the

[19] See "Directions for the conduct of the proceedings and testimony in accordance with rule 140", 20 November 2009; ICC-01/04-01/07-1665-Corr; para. 101-102 (V. Documentary Evidence / B. Tendering of documentary evidence without being introduced by a witness):

[20] *Prosecutor v. Milutinovic et al*, Decision on Lukic Defence Motions for Admission of Documents from Bar Table, 11 June 2008, para. 35, 37-38.

conclusion that a conscious decision was made not to seek to introduce them in the normal manner through Prosecution witnesses. On this point, the Defence simply recalls the Prosecution's own objections to the Defence's request to admit a video through a Prosecution witness on the grounds that "the witness is not the author of the document, he does not appear in the video, he did not participate in the making of the video…".[21] The Prosecution is now seeking to admit videos and many other documents without in any way going through the procedure of having these materials recognized or authenticated by witnesses. The Prosecution's failure to ask any of its witnesses to comment on any of these documents certainly raises the question as to the relevance of these materials to the facts in issue in the present case.

17. Lastly, the Defence simply notes that the timing of the Prosecution Bar Table Motion (after 39 of its 40 witnesses had given evidence) precludes both the Chamber and the Defence from testing the reliability or credibility of this material with Prosecution witnesses. No cause has been shown for this request having been brought in the absolute closing stages of the Prosecution case.

## D. DEFENCE RESPONSE TO THE DOCUMENTS OFFERED FOR ADMISSION

18. The Defence appends confidential Annex A, which summarises the Defence position in relation to each of the documents. The basis for the Defence position is set out in full below.

### (a) Category 1 - UN Documents

19. The Prosecution seeks to introduce four separate UN Reports in whole "for the truth of their contents." The Prosecution asserts that the four UN documents are sufficiently reliable to be admissible, and relies on an ICTR decision from the

[21] ICC-01/05-01/08-T-150-CONF-ENG ET 30-08-2011 4/78 (Open Session).

*Bagosora* case in which UN documents were admitted. Its reliance on this decision is inapposite. In that case, the documents admitted were all:[22]

> official United Nations correspondence arising from the UNAMIR peacekeeping mission in Rwanda in 1994. Each document is authored by one of three senior officials: Jacques-Roger Booh-Booh, former Special Representative of the Secretary-General to Rwanda; Kofi Annan, former Under-Secretary-General for Peacekeeping Operations; or Lieutenant-General Roméo Dallaire, former Force Commander of UNAMIR.

20. In this case, the Prosecution is not seeking to introduce official UN correspondence, but rather reports from various UN agencies or missions. As such, they cannot be automatically invested with the same probative value. The ICTR has declined to take judicial notice of the content of United Nations reports from, for example, the United Nations Independent Commission of Experts, or the Special Rapporteur on the Commission on Human Rights on the basis that "the documents are position papers setting out opinions of authors who, though commissioned by the United Nations cannot and do not claim to speak for the United Nations."[23]

21. In any event, these four reports fail to meet the requirements for admission. Firstly, none of these reports identify the author(s). The Prosecution lists the authors of each of the UN documents as "Open Source". The identity of the individual author of a document is a key component in its reliability. While an organization can attest to the authenticity of the report, namely that it is a report which comes from that organization, it cannot attest to its reliability. Hence, when assessing the reliability of such information, the Trial Chamber in *Hadzihasanović* held that to assess probative value it was necessary to know the source of the information, the identity of the initial source, how the source learned about the facts

[22] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Request to Admit United Nations Documens into Evidence under Rule 89(C), 25 May 2009, para. 1.
[23] *Prosecutor v. Casimir Bizimungu*, *Justin Mugenzi*, *Jerome Bicamumpaka*, *Prosper Mugiraneza*, Case No. ICTR-99-50-I, Decision on Prosecution's Motion for Judicial Notice pursuant to rules 73, 89, and 94, p. 37 (2 Dec. 2003).*Prosecutor v. Edouard Karemera*, *Mathieu Ngirumpatse*, *Joseph Mzirorera*, *Andre Rwamakuba*, Case No. ICTR-98-44-T, Decision on the Prosecutor's Motion for Judicial Notice pp. 19, 41 (30 April 2004), at p. 41.

and the number of intermediaries through which the information had passed.[24] Similarly in *Milutinović*, the Chamber refused to admit OSCE documents for which there was no indication as to who generated the documents.[25]

22. Moreover, none of the UN reports reveal their sources of information with sufficient detail. In *Katanga*, it was found that for UN Reports which lacked this detail, the Chamber was unable to determine whether the content of these reports had been imparted by an eyewitness or some other reliable source. When such particulars were not available, the Chamber held that it was unable to assess the reliability and content of the reports, and was therefore unable to qualify these documents as sufficiently reliable to be admitted into evidence.[26] The Defence submits that the same standard should be applied in the present case, and the Prosecution's request for admission of these UN documents should be rejected.

23. It is also worth noting the existence of significant criticisms as to the reliability of UN fact-finding missions and UN reports on human rights violations. Professor Cherif Bassiouni asserts that "UN was established as a political organization, and, as such, it is largely governed by political considerations [...] the Security Council is unbridled in its determination of peace and security issues. These considerations are elevated above judicial or other forms of review, although always subject to self-review whenever considerations of power and interest require it." [27] Fact-finding missions are largely shaped by (1) the organ that establishes them and determines their subject matter, scope, political authority and influence over the bureaucracy (2) the mandate given to them and (3) the degree of political support from the five permanent members, specifically the three Western

[24] *Prosecutor v. Hadzihasanovic*, Trial Chamber Judgment, 15 March 2006, para. 272
[25] *Prosecutor v. Milutinovic et al*, Decision on Lukic Defence Motions for Admission of Documents from Bar Table, 11 June 2008, para. 35, 37-38.
[26] See, "Decision on the Prosecutor's Bar Table Motions"; 17 December 2010; ICC-01/04-01/07-2635, paras. 29-33.
[27] M. Cherif Bassiouni, The UN and Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions, 5 Wash. U. J.L. & Pol'y 35, 37-38 (2001).

members, of the Security Council.[28] He also notes that accountability of such missions has been given little attention. It "has yet to be clearly established as one of the goals of fact-finding missions. Indeed, to date the UN has not promulgated guidelines for accountability."[29] The Defence merely raises the existence of such commentary in response to the Prosecution's assertion that UN reports are admissible and that "the risk of error and fabrication in respect of their creation is negligible."[30]

**(b) Category 2 – Reports Issued by NGOs**

24. The Prosecution seeks to admit five extensive reports from NGOs "for the truth of their contents". The Prosecution asserts that these reports "provide information about widespread rapes, pillaging and murders against the CAR population in areas of the country where the MLC troops were deployed."[31] The Defence is concerned that in seeking to admit these reports, the Prosecution is undermining the fact-finding role of the Chamber. The Chamber has heard lengthy evidence from Prosecution witnesses concerning alleged crimes committed in the CAR, and has authorised the Legal Representatives for Victims to also present evidence of alleged crimes. To admit reports of un-tested and often-times anonymous allegations of crimes which neither the Chamber nor the Defence have had the opportunity to examine, impinges on the role of the Chamber to determine the existence, nature and scope of crimes based on the evidence heard by it in the courtroom.

25. Moreover, the admission of these reports would be inconsistence with the Chamber's practice. In deciding on Mr. Bemba's admissibility challenge in 2010, the Chamber noted that the Defence had cited excepts from various NGO reports, including FIDH reports, the same organisation which produced the reports the

[28] Id. at p. 38.
[29] Id. at p. 45-46.
[30] ICC-01/05-01/08-2147, para. 24.
[31] ICC-01/05-01/08-2147, para. 8.

Prosecution now seeks to introduce. The Chamber held that "given their provenance and reliability is entirely uninvestigated and untested, these materials carry little, if any evidential weight."[32] This ruling is notable given that it was issued in the context of an admissibility and abuse of process motion, in which the Chamber held that the relevant burden of proof was the balance of probabilities rather than beyond reasonable doubt. As such, the Defence submits that it follows that uninvestigated or untested NGO reports are not reliable when a lower burden of proof applies, they would certainly not meet the more rigorous standard required to admit them into the proceedings at this stage.

26. The Tribunals have regularly refused to admit reports of the kind for which the Prosecution seeks admission. At the ICTY, Chambers have emphasized the hearsay nature of NGO reports, and have required that their admissibility be contingent on a prior demonstration that the methodology employed in compiling the report is sufficiently reliable to justify admission. This is particularly difficult to do if the sources cited in the report are anonymous.[33] In cases where reports have contained no explanation of the conditions of interviews, duration of interviews, number of interviewed persons and similar details, and which have constituted second hand hearsay, their admission has been denied.[34]

27. Requests for admission of reports detailing alleged crimes have also been denied on the basis that, *inter alia*, the reports set out allegations of criminal conduct made by people who claimed to be the victims of, or witnesses to crimes, and the court had no opportunity of hearing any of the people upon whose statements the reports were based; and the Chamber was not in position to assess the reliability of

[32] ICC-01/05-01/08-802; Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010; paras. 235, 254-255.
[33] *Prosecutor v. Milutinovic*, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006.
[34] See, for example, *Prosecutor v. Milutinovic et al*., Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92Bis, 13 September 2006, para. 14.

factual connections contained therein.[35] The Defence submits that these concerns are directly relevant to the FIDH reports of which the Prosecution seeks admission.

28. The Defence further notes that it has been held at the ICTY that while members of international organizations were supposed to be impartial, this impartiality is impossible to verify.[36] An ICTY Trial Chamber approached the evidence of a senior Human Rights Watch researcher with caution, on the basis that, *inter alia*, the HRW report was based on unchallenged accounts which had not been tested against other differing accounts, and that aspects of his observations may have been influenced by media reports.[37] Simply because a report carries the letterhead of an international organization does not necessarily impute it with the reliability required for admission in judicial proceedings.

29. Moreover, the Prosecution has failed to identify an author for three of the reports of which it seeks admission, and in none of the reports are the sources of information revealed in sufficient detail. As such, the Defence also opposes their admission for the reasons outlined directly above.

30. In addition, the Defence notes that two of the reports (documents 6 and 7) are dated from October 2006. Their preparation long after the events impacts on their admissibility. On this point, the Defence notes that an ICTY Trial Chamber treated the observations of a senior Human Rights Watch researcher on the basis that, *inter alia*, his observations were made 11 days after the events.[38] At the ICTR, a Chamber refused to admit an NGO report on the basis that, *inter alia*, it had not been made contemporaneously with the events.[39]

[35] *Prosecutor v. Milutinovic*, , Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 21; See also, *Prosecutor v. Milutinovic*, Decision on Lukic Defence Motions for Admission of Documents from Bar Table, 11 June 2008, para. 120.
[36] *Prosecutor v. Hadzihasanovic*, Trial Chamber Judgment, 15 March 2006, para. 303.
[37] *Prosecutor v. Boskoski*, Trial Chamber Judgement, 10 July 2008, para. 134.
[38] *Prosecutor v. Boskoski*, Trial Chamber Judgement, 10 July 2008, para. 134.
[39] *Prosecutor v. Karemera et al*, Decision on Oral Motions by Edouard Karemera and The Prosecution to Admit Certain Documents into Evidence, 29 May 2008, para. 6.

31. The Defence also notes that two other of the reports (documents 9 and 10) date from January and February 2002. Given that these reports pre-date the events, they are irrelevant to the charges as set out in the Revised Second Amended DCC, and as such the Prosecution's request for their admission should be denied. At the ICTY, for example, a Chamber refused to admit a human rights report which was prepared two years before the events relevant to the Indictment.[40]

**(c) Category 3 – Documents belonging to the Accused**

32. While the Defence does not oppose the admission of these documents for the truth of their contents, it disputes the legal basis offered for their admission by the Prosecution, as detailed in Confidential Annex A.

**(d) Category 4 – Documents disclosed by the Defence**

33. While the Defence does not oppose the admission of these documents for the truth of their contents, it disputes the legal basis offered for their admission by the Prosecution, as detailed in Confidential Annex A.

**(e) Category 5 – Media articles on the situation in the CAR**

34. The Prosecution seeks to admit 26 media reports into evidence "for the truth of their contents". For 11 of these 26 media reports, the Prosecution is unable to provide the author. As such, the Defence repeats and relies on its arguments in respect of documents for which no author is provided.

35. Moreover, the Prosecution's request to admit these 26 media reports cannot be reconciled with the consistent jurisprudence of the *ad hoc* Tribunals and the ICC

[40] *Prosecutor v. Boskoski*, Trial Chamber "Decision on Boskoski Defence Motion to Amend Its Rule 65ter List and Admit Exhibits from the Bar Table", 20 March 2008, para. 21: "Document Rule 65ter 1D832 is a report on human rights and media organisation in the Republic of Macedonia. The Defence submits that the report refers to the goals of the NLA.33 The Prosecution argues that the report does not mention the NLA and is of no relevance.34 The Chamber notes that, contrary to the submission of the Defence, the document does not make reference to the NLA. No other matters of relevance to the present case are dealt with in the report. In addition, it appears that it was prepared in May or June 1999 and thus two years before the events alleged in the Indictment took place. For these reasons, document Rule 65ter 1D832 will not be admitted into evidence."

that media reports are generally not considered a source of reliable evidence and their admission is often rejected for lack of probative value.

36. Most recently, in the *Katanga* case, the Chamber rejected the admission of media reports which the Prosecution had sought to admit through a bar table motion. The Chamber held that media reports often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources. Opinion evidence is, in principle, only admissible if it is provided by an expert. In the case of the newspaper accounts proffered by the Prosecution, the Chamber found that it had failed to provide information either of the background or qualifications of the journalists or of their sources, in order to satisfy the Chamber as to their objectivity and professionalism. In such circumstances, the Chamber held it was unable to attach sufficient probative value to the opinions of even informed bystanders such as journalists in relation to the contested facts.[41]

37. This is reflective of the practice at the ICTY, summarised well in the *Kupreškić* case, where it was held that "newspapers and other kinds of media are very often a highly unreliable source of information is common knowledge. Their reports, unsubstantiated by other material, cannot by themselves be sufficient evidence for a court of law."[42] As such, the Defence submits that the Prosecution's request to admit these 26 media reports should be rejected.

**(f) Category 6 – Audio Recordings from RFI**

38. The Prosecution also seeks to admit 10 audio recordings from RFI for the "truth of their contents". The Defence repeats and relies on the arguments made

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[41] See, Decision on the Prosecutor's Bar Table Motions; 17 December 2010; ICC-01/04-01/07-2635, paras. 29-33:

[42] *The Prosecutor v. Kupreskic et al*. Decision, 3 September, 1999, para. 7

7. To decide the question of whether the accused are still indigent and whether the alleged payments may be taken into account for the purposes of determining that issue, the Trial Chamber must satisfy itself that the evidence before the Registrar is sufficient. Having considered the evidence before the Registrar, the Trial Chamber finds that the evidence is not sufficient. Media reports may serve as a first step to launch an investigation into the veracity of the reported facts. That newspapers and other kinds of media are very often a highly unreliable source of information is common knowledge. Their reports, unsubstantiated by other material, cannot by themselves be sufficient evidence for a court of law.

directly above in relation to the consistent practice that media reports are not sufficiently reliable to be considered admissible.

39. This is particular so in the present case, given the Prosecution's own evidence heard by the Chamber during the proceedings that RFI made baseless allegations against the MLC, and at the time there was doubt as to the truth of RFI reports.[43] The Defence submits that in such circumstances, these radio reports do not contain sufficient indicia of reliability to be admissible.

40. The Defence also refers to the practice in *Katanga*, that before audio material can be admitted, the Chamber will require evidence of originality and integrity.[44] The Prosecution has produced no such evidence in relation to these audio recordings, providing further support for the Defence submission that they are of insufficient reliability and probative value to warrant their admisison.

**(g) Category 7 – Other documents**

41. The Defence objects to all miscellaneous documents listed under the category of "Other documents" on the grounds set out in Confidential Annex A.

42. As regards all documents for which no author is cited, the Defence repeats and relies on the arguments made above.

43. As regards the US State Department documents (documents 80 and 83), the Defence submits that these documents do not have sufficient probative value to be considered admissible. At the ICTY, a Chamber refused to admit a document from the embassy of a foreign state (originating from the defence department of that state). Although it came from a country which was actively involved in that region,

[43] See Confidential Annex B.
[44] See Decision on the Prosecutor's Bar Table Motions; 17 December 2010; ICC-01/04-01/07-2635; para. 24

the creator and the source of the document were unknown and as such there was not sufficient reliability to justify its admission.[45]

44. There has also been widespread criticism of the use of US Government reports in judicial proceedings, with even US Courts noting that a report produced by a government entity inherently could not be completely objective and accurate.[46] Various NGOs have criticised reports coming from the US Government for their inaccuracy. The Lawyer's Committee for Human Rights noted that such reports have "serious omissions and distortions" that appear "to reflect political pressures".[47] On this basis, the Defence submits that they are not of sufficient probative value or reliability to be admitted.

45. As regards the photographs (documents 90 – 93), these should have been introduced through their author who testified for the Prosecution. Without having been introduced through the relevant witness, the photos have no context, cannot be authenticated, nor can the Chamber or the Defence even know what or who they are purported to represent. Under such circumstances, the Defence submits that they are not admissible through the current Bar Table Motion.

46. As regards the two medical reports (documents 94 and 95), at least one of which the Prosecution itself qualifies as an "expert report", the Defence submits that the Prosecution should have properly sought to have the authors qualified as experts, admitted to the ICC register of experts, and that they should have been called to give the Defence and Chamber a chance to examine and test their alleged expertise. The Chamber in *Lubanga* rejected the admission of an expert report on the basis that, *inter alia*, the authors of the report were not being called, and as such

[45] *Prosecutor v. Boskoski*, Transcript page: T. 7793-7795, 14 November 2007:T. 7795
[46] *Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004).
[47] Lawyer's Committee for Human Rights, Holding the Line: A Critique of the Department of State's Annual Country Report on Human Rights Practices, p. ii-iii (2003).

counsel will be unable through questioning to investigate criticisms which had bene made of its content.[48]

47. While the Defence notes that in *Lubanga*, a forensic report on fingerprints was admitted through a bar table motion, the Chamber held it needed to consider, *inter alia*, whether it was fair to admit the material without calling the relevant witness to give oral evidence. However, given that the Defence had not objected to the documents being admitted, and given the lack of objection, the report was admitted.[49] This is not the situation in the present case.

48. As regards the alleged telephone records of the accused, the records fall predominantly outside the time relevant to the events. The Prosecution has also offered absolutely no basis for their provenance or authentication, or even any foundation for its assertion that the telephone number cited belonged to the accused. The Defence submits that in the absence of having been introduced through a witness who has knowledge of these records and who can provide the Chamber with a basis for their

49. Similarly, the Prosecution has provided no information regarding the provenance alleged "logbooks" (documents 88 and 89), and no information or evidence has been provided to support their authentication. Such documents should properly be introduced through witnesses who have knowledge of the documents and who can provided a basis for the Chamber to accept that they are in fact logbooks from the relevant

[48] ICC-01/04-01/06-2135, Decision of the Trial Chamber of 22 September 2009, rejecting the Bar Table Motion by Legal Representatives ( "Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence"; 22 September 2009, ICC-01/04-01/06-2135.

[49] ICC-01/04-01/06-2662, Decision on the Prosecution's application for admission of four documents from the bar table pursuant to Article 64(9), 16 December 2010;

## E. RELIEF REQUESTED

50. As such, the Defence respectfully requests that the Chamber:

**REJECT** the Prosecution request for the admission of documents 1 – 11 and 42 – 97; and

**ADMIT** documents 12 – 41 on the basis as set out by the Defence in the attached Confidential Annex A.

The whole respectfully submitted.

Aimé Kilolo Musamba
Lead Counsel

Peter Haynes
Co-Lead Counsel

Done on the 19th of March 2012

At The Hague, the Netherlands