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Date: **3 March 2014**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Confidential – Prosecution and Defence Only
With Confidential – Prosecution and Defence Only Annexes A1-A7

Prosecution's Response to the "*Requête de la Défense relative à l'admissibilité de certains éléments de preuve que le Procureur entend présenter à l'audience de confirmation des charges et en radiation de certaines parties du Document contenant les charges*" (ICC-01/04-02/06-250-Conf)

Source: **Office of the Prosecutor**

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Introduction

1. The Defence seeks to exclude a number of documents as inadmissible and to strike several paragraphs of the Document Containing the Charges ("DCC").[1] With the exception of one document, the request should be rejected in its entirety.

2. First, all documents referred to by the Defence, with the exception of one document, are relevant and probative to issues in these proceedings and warrant admission into evidence in order for this Chamber to freely assess their weight.

3. Article 69(4) of the Rome Statute (the "Statute") expressly grants the Chamber the ability to rule on the admissibility of evidence taking into account the probative value of the evidence and any prejudice that such evidence may cause to a fair trial. The legal texts also provide Chambers with broad discretionary powers to admit evidence. In particular, article 69(3) of the Statute provides the authority to request "the submission of all evidence that it considers necessary for the determination of truth". Further, rule 63(2) of the Rules of Procedure and Evidence (the "Rules") grants the Chamber the authority to "assess freely all evidence" in determining its relevance and admissibility.

4. These broad powers are particularly relevant at this early stage of the proceedings. Chambers of the Court, including this one, have consistently maintained that the confirmation hearing is "neither a trial before the trial nor a mini-trial".[2] Rather, the purpose of the confirmation hearing is to determine if there is sufficient evidence to establish substantial grounds to believe the person committed the crimes charged.[3] The Appeals Chamber has ruled that the

[1] ICC-01/04-02/06-250-Conf.
[2] ICC-01/04-02/06-T-7-ENG, lines 9-10. See also: ICC-01/04-01/07-412, page 4; ICC-02/05-02/09-35, para. 10; ICC-01/04-01/07-474, para. 100; ICC-01/04-01/07-717, para. 64; and ICC-01/04-01/07-T-25-ENG, p. 14, lines 5-11.
[3] ICC-01/04-01/06-774, para. 47; ICC-01/04-01/07-717, para. 63; ICC-01/04-01/07-428-Corr, para. 5; and ICC-01/04-01/06-803-tEN, para. 37.

confirmation hearing does not require a full testing of each item of evidence: "As the threshold for the confirmation of charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold has been reached even if the reliability of the witnesses and other evidence was not fully tested".[4]

5. Second, in relation to the Defence's request to strike paragraphs 29 to 33 of the DCC, these paragraphs relate to Bosco Ntaganda's conduct from December 2004 until March 2013, which provides valuable context and demonstrates a consistent pattern of conduct. This evidence is relevant, probative and not unfairly prejudicial. Courts consistently admit evidence going to context and pattern of conduct even when outside the temporal scope of the charges.

Confidentiality

6. The present filing and annexes are classified as 'Confidential – Prosecution and Defence Only' under regulation *23bis* of the Regulations of the Court as they respond to a filing bearing that confidentiality level.

Procedural history

7. On 17 June 2013, the Single Judge issued a decision setting a calendar for the disclosure of evidence between the parties.[5] Pursuant to this decision, the Prosecution disclosed to the Defence the evidence upon which it intended to rely for the purposes of the confirmation hearing. Following each disclosure, the Prosecution provided the Defence with a consolidated in-depth analysis chart of incriminating evidence (the "IDAC").[6]

[4] ICC-01/04-01/06-774, para. 47.
[5] ICC-01/04-02/06-73.
[6] In compliance with ICC-01/04-02/06-47, paras. 30-32.

8. On 10 January 2014, the Prosecution filed its DCC and List of Evidence upon which it intended to rely for confirmation.[7] On 17 January 2014, the Prosecution filed the final version of its IDAC.[8]

9. On 6 February 2014, the Defence filed a request to exclude a number of documents and to strike several paragraphs of the DCC (the "Application").[9]

Prosecution's Submissions

Legal requirements for admissibility of evidence

10. In accordance with the Court's legal texts, this Chamber has broad discretion to freely assess all evidence submitted,[10] to rule on the relevance or admissibility of evidence taking into account its probative value relative to any potential prejudice,[11] and to request any evidence necessary to determine the truth.[12] Further, the Chamber must assess the criteria for admissibility in light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness or a document, that piece of evidence may be corroborated by other evidence leading the Chamber to conclude that the witness is credible or the document reliable. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.[13]

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[7] ICC-01/04-02/06-203-Conf-AnxB.
[8] ICC-01/04-02/06-217-Conf-AnxC.
[9] ICC-01/04-02/06-250-Conf, para. 3.
[10] Rule 63(2) of the Rules.
[11] Article 69(4) of the Statute.
[12] Article 69(3) of the Statute.
[13] ICC-01/04-01/06-803-tEN, para. 39; ICC-01/05-01/08-2299-Red, para.124; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision, 7 July 2006, para.174 *Prosecutor v. Halilovic*, IT-01-48-A, Decision, 16 October 2007, para.125 (emphasis added).

11. A Chamber's broad discretion to freely assess evidence is particularly relevant at the confirmation hearing, given the nature of the proceedings and the lower threshold at this stage.[14] Pre-Trial and Trial Chambers have repeatedly stated that evidence which could be considered hearsay is admissible,[15] with any objections going not to the admissibility of a piece of evidence, but to its probative value.[16]

12. Chambers of this Court have assessed the admissibility of documentary evidence based on the relevance of the material, its probative value (bearing in mind, for instance, the indicia of reliability) and by weighing its probative value against its prejudicial effect.[17] Trial Chamber I cautioned that because all evidence that tends to incriminate a suspect or accused can be considered 'prejudicial', a Chamber must be careful to ensure that it is *unfair* to admit the disputed material, for instance, because its slight probative value may unduly prejudice the Chamber's fair assessment of an issue.[18]

13. The Defence's challenge to the admissibility of these documents lacks merit. In large part, the Application merely lists documents under headings without providing relevant details to justify its request. Moreover, although the Defence states that it seeks to exclude 237 documents, it actually seeks to exclude a total of 252 documents, a number of which are referred to multiple times in various categories. In oral submissions, the Defence amended the Application to include deceased witnesses P-0103 and P-0106, but did not specify which documents were being challenged.[19] The Prosecution's response refers to all incriminatory material disclosed with respect to these two witnesses.

[14] ICC-01/04-01/06-774, paras. 40 and 47.
[15] ICC-01/04-01/06-803-tEN, para. 101; ICC-01/04-01/06-1351, para. 41; ICC-01/05-01/08-424, para. 46; and ICC-01/04-01/07-717, para. 118.
[16] ICC-01/04-01/06-803-tEN, paras. 101 and 103.
[17] ICC-01/04-01/06-1399, paras. 27-31; ICC-01/04-01/06-1981, para. 33; and ICC-01/05-01/08-2299-Red, paras. 7-9.
[18] ICC-01/04-01/06-1399, para. 31.
[19] ICC-01/04-02/06-T-7*bis*-ENG, page 2, lines 7-14.

A. Documents the Defence Classifies as Irrelevant and the Request to Strike Paragraphs of the Document Containing the Charges

14. The Defence submits that the documents listed in this category of its Application lack sufficient nexus to the charges and their admission is prejudicial. The Defence further divides this category into three sub-categories. The Prosecution submits that with the exception of one document, all of the documents are relevant and admissible.

i. Documents related to events after the period of the charges

15. The Defence states that 33 documents are inadmissible because they relate to events that occurred *after* the period of the charges.[20] The Defence does not dispute the relevance or probative value of these documents, nor does it cite any jurisprudence in support. Chambers have deemed admissible evidence falling outside the temporal scope of the charges, including where it is logically connected to a fact in issue,[21] provides context, or evidence of the relationship between the accused and his alleged co-perpetrators or his role within the organisation.[22] All but one[23] of the documents relate to matters that are properly to be considered by the Chamber. The Prosecution withdraws its reliance on this one document that does not contain relevant information. The Prosecution annexes a chart explaining the relevance of each of these documents (Annex A-1).

16. The Defence further asserts that on the same basis, paragraphs 29 to 33 of the DCC should be struck.[24] These paragraphs relate to Bosco Ntaganda's conduct from December 2004 until March 2013. The Defence does not develop its argument further or cite any case law in support. Contrary to the Defence's

[20] ICC-01/04-02/06-250-Conf, paras. 5-6.
[21] ICC-01/05-01/08-2299-Red, paras. 8 and 12.
[22] ICC-01/04-01/06-2842, para. 1022; and ICC-01/05-01/08-2299-Red, paras. 51, 61 and 67.
[23] DRC-OTP-0011-0075.
[24] ICC-01/04-02/06-250-Conf, para. 7.

assertions, Bosco Ntaganda's subsequent conduct provides valuable background and historical context, demonstrates a pattern, and is admissible evidence.

17. At the *Lubanga* confirmation hearing, Pre-Trial Chamber I found that "nothing prevents the Prosecution from mentioning any event which occurred before or during the commission of the acts or omission with which the suspect is charged, especially if that would be helpful in better understanding the context in which the conduct charged occurred."[25] The same Chamber at the *Katanga and Ngudjolo* confirmation hearing also admitted the similar conduct evidence of a charged person in relation to prior and subsequent attacks, stating that "evidence which may assist it in establishing the overall context in which the crimes are alleged to have occurred is not only helpful to its understanding of the evidence supporting the charges but is also highly relevant and probative in respect of the contextual elements of the crimes under articles 7 and 8 of the Statute."[26]

18. Indeed, a similar *modus operandi* and/or the commission of similar acts can constitute corroborative evidence from which this Chamber can infer intent and knowledge under both article 30 and as part of the contextual elements of the crimes.[27] Moreover, Bosco Ntaganda's subsequent conduct can establish the existence of an organisational policy to commit an attack on the civilian population, as required under articles 7 and 8 of the Statute. Evidence of his role and authority in subsequent assaults is also corroborative of his role and authority during the acts charged.

19. Trial Chamber I in the *Lubanga* proceedings also found that evidence falling outside the period of the charges is admissible where it concerns "issues and

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[25] ICC-01/04-01/06-803-tEN, para. 152.
[26] ICC-01/04-01/07-717, paras. 225-228.
[27] The Elements of Crimes for crimes against humanity require the Prosecution to prove the perpetrator "knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population".

events (or information) that are of sufficient proximity to the charges the accused faces to be of potential assistance in this trial."[28]

20. Other international criminal tribunals have admitted evidence falling outside the indictment period to demonstrate the accused's intent to commit the crimes charged. Rule 93 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL) provides that: "Evidence of a *consistent pattern of conduct* relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice."[29] At the ICTY, evidence of other incidents has been deemed admissible for the purpose of proving an accused's state of mind in connection to acts charged in the indictment.[30] Similar fact evidence that occurred outside the period of the indictment has also been used to show a systematic pattern of conduct.[31] Similarly, the ICTR has admitted evidence falling outside the period of the indictment to show intent,[32] to prove on-going conduct, background and context, and 'similar fact evidence' pursuant to rule 93.[33] Similar conduct evidence has also been treated as akin to circumstantial (or indirect) evidence.[34]

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[28] ICC-01/04-01/06-1981-Anx at page 4 (Anx. 7), page 5 (Anxs. 8-9), page 20 (Anx. 36), page 22 (Anx. 39), page 26 (Anx. 48) and page 43 (Anx. 82).
[29] Rules of Procedure and Evidence, rule 93 – *Evidence of Consistent Pattern of Conduct*.
[30] *Prosecutor v Pavle Strugar*, 'Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence', IT-01-42-T, 22 January 2004, p. 3; *Prosecutor v Kunarac et al.*, Judgment, IT-96-23-T & IT-96-23/I-T, 22 February 2001, para. 589; and *Prosecutor v Kupreskic et al.*, Appeal Judgment, IT-95-16-A, 23 October 2001, para. 322.
[31] *Prosecutor v Kvocka et al.*, Judgment, IT-98-30/1-T, 2 November 2001, para. 652.
[32] *Prosecutor v Aloys Simba*, 'Decision on Interlocutory Appeal Regarding Temporal Jurisdiction', ICTR-01-76-AR72, 29 July 2004, p. 3.
[33] *Prosecutor v Nahimana et al.*, 'Decision on the Interlocutory Appeals', ICTR-96-11-AR72, App. Ch., Separate Opinion of Judge Shahabuddeen, 5 September 2000, paras. 20-24; and *Prosecutor v Nahimana et al*, Appeal Judgment, ICTR-99-52-A, 28 November 2007, para. 315. In his separate opinion, Judge Shahabuddeen held that "evidence of prior offences is admissible to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense" (at para. 20).
[34] *Prosecutor v Milorad Krnojelac*, Judgment, IT-97-25-T, 15 March 2002, para. 67; and *Prosecutor v Kunarac et al.*, Judgment, IT-96-23-T & IT-96-23/I-T, 22 February 2001, para. 589.

ii. Documents the Defence states are insufficiently connected to the charges

21. The Defence requests the exclusion of 11 documents on the basis that they are not connected to the charges.[35] All of the documents listed are sufficiently relevant and probative to outweigh any prejudicial effect and should be admitted and assessed against all other relevant evidence.

22. The Prosecution annexes a chart which describes each document listed by the Defence under this category and explains its relevance to assist the Chamber in making its assessment.[36]

23. As set out above, the Prosecution urges the Chamber to assess the relevance and admissibility of this evidence in light of the current stage of the proceedings and its broad mandate, pursuant to article 69(3) and rule 63(2) to freely consider *all* evidence relevant to a determination of truth.

iii. Documents the Defence states are not in the IDAC

24. The Defence requests the Chamber to exclude 16 documents on the basis that they are not in the IDAC or their relevance is not adequately explained.[37]

25. 11 of the 16 documents listed by the Defence in this category *are* included in the IDAC, as set out in the annexed chart (Annex A-3).[38] The Prosecution seeks to rely on the remaining five documents as they provide relevant contextual information as explained in the attached annex, and submits that their inadvertent non-inclusion in the IDAC does not render them inadmissible.

26. Rule 121(3) obliges the Prosecutor to provide a list of evidence which she intends to present at the confirmation hearing. Pre-Trial Chamber II found that it was the

[35] ICC-01/04-02/06-250-Conf, paras. 8-9.
[36] Annex A-2.
[37] ICC-01/04-02/06-250-Conf, paras. 10-11.
[38] The content in documents DRC-OTP-0037-0243 and DRC-OTP-0214-0223 is identical with the exception of the last page; they are simply formatted differently.

provision of the document containing the charges and an exhaustive list of evidence that satisfies the Prosecutor's statutory duties as regards the presentation of her case.[39] All of the documents listed by the Defence are included in the Prosecution's List of Evidence.

27. The Single Judge ordered the Prosecution to provide an IDAC with the aim of "streamlining the process of evidence disclosure."[40] In this decision, the Single Judge referred to the IDAC as an "auxiliary instrument [that would] be useful and efficient for both parties and the Chamber."[41] There was no language in this decision to suggest that material *not* referred to in the IDAC would necessarily be excluded from consideration by the Chamber.

28. Moreover, there is no provision in the Statute, Rules or Regulations of the Court for an in-depth analysis chart. Rather, it is a "creature of judicial practice,"[42] meant "to structure the presentation of evidence and to ensure that the Prosecution's evidentiary case is easily accessible and comprehensible."[43]

29. Pre-Trial Chamber II expressly found that the "non-reference of certain items of disclosed evidence in the in-depth analysis chart in the view of the Single Judge does not amount to such a violation of disclosure obligations which could justify the exclusion of the non-referenced."[44]

B. Documents the Defence Classifies as Inadmissible

30. The Defence sets out several categories of documents that it states are inadmissible. The Application simply provides lists of registration numbers of Prosecution documents with insufficient justification grounding the request.

[39] ICC-01/05-01/13-134, para. 6.
[40] ICC-01/04-02/06-47, para. 31.
[41] ICC-01/04-02/06-47, para. 32.
[42] ICC-01/05-01/13-134, para. 5.
[43] ICC-01/05-01/08-682, para. 23.
[44] ICC-01/09-02/11-348, para. 14.

31. While each piece of evidence must possess sufficient indicia of reliability to warrant admission, this requires only a *prima facie* case of reliability, that is, whether the document is what the Prosecution purports it to be.[45]

32. Trial Chamber I held that:

> The drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. 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 different 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.[46]

33. In assessing the reliability of documents submitted by the Prosecution in the *Lubanga* proceedings as part of a bar table motion, Trial Chamber I considered features such as stamps, signatures and seals on documents, as well as considerations such as the identification of the author, the date of the document (*ie.* its contemporaneousness) and whether it is consistent with or corroborated by other evidence to be *prima facie* evidence of authenticity.[47]

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[45] To this end, Trial Chamber I cautioned that "demonstrable lack of apparent reliability does not mean automatic exclusion of evidence". *See* ICC-01/04-01/06-1399-Corr, para. 30. See also: *Prosecutor v. Delalic et al*, 'Decision on Application of Defendant Zejnic Delalic for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, Appeals Chamber', IT-96-21-Ar73.2, 7 September 2007, para. 17.
[46] ICC-01/04-01/06-1399, para.24.
[47] The factors identified above have been considered in determining *prima facie* reliability of evidence sought to be tendered from the bar table [ICC-01/04-01/06-1399-Corr, paras. 37-40]. See also: *Prosecutor*

34. The determination of the probative value of an item of evidence will always be a fact-specific inquiry that may take into account multiple factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inhere in the item of potential evidence, as well as the circumstances in which the evidence arose.[48] The Prosecution asserts that each of the documents contested by the Defence is relevant, probative and admissible. The probative value of the documents outweighs any prejudicial effect. Each contested group of documents is considered below.

i. Documents without a Signature, Date or Author

35. The Defence provides a list of 122 documents that it states are inadmissible on the basis that they are unsigned, undated, or do not identify an author.[49] The Defence fails to indicate if all three points relate to each document, or provide any further rationale for their alleged inadmissibility. Attached as Annex A-4, is a chart wherein the Prosecution provides a description of each of these documents, an explanation of its relevance to the case, and its indicia of reliability to assist the Chamber in its assessment.

36. The Prosecution notes that Pre-Trial Chamber I held that "the fact that a document is not signed or dated does not automatically make it inauthentic."[50] In this decision, the Chamber referred to ICTY jurisprudence and paragraph 5 of the "Guidelines on the Standards Governing the Admission of Evidence", that reads:

> There is no general prohibition on the admission of documents simply on the grounds that their purported author has not been called to testify. Similarly, the fact that a document is unsigned or unstamped does not, *a priori*, render it void of authenticity. Authenticity and proof of authorship will assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces in the framework of the free evaluation of evidence.

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v.Boskoski and Tarculovski, 'Decision on Prosecution's Third Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A through B', IT-04-82-T, 5 December 2007, para. 4.

[48] ICC-01/05-01/08-2012-Red, para. 15; and ICC-01/04-01/06-1399, para. 29.

[49] ICC-01/04-02/06-250-Conf, para. 12.

[50] ICC-01/04-01/17-717, para. 112.

37. Similarly, this Pre-Trial Chamber in the *Kenyatta* proceedings found the "undated, unsigned, unverified, incomplete notes" relied upon by the Defence to challenge the credibility of two Prosecution witnesses to be admissible, despite ultimately disregarding the proffered line of argument.[51]

38. Further, it is well-established that anonymous hearsay is admissible at the confirmation stage.[52]

ii. Documents that have been altered, are not authentic or are in draft form

39. Under this category, the Defence sets out a list of 18 documents that it argues are inadmissible on the basis that they have been altered, are not authentic or are in draft form.[53] The Defence also makes a general note that upon inspection, the Prosecution *"n'a pas été en mesure de montrer les versions originales de certains documents à la Défense"*.[54] The Defence entirely fails to provide any further grounds or analysis and provides no legal basis for the exclusion of these documents.

40. The Prosecution attaches, as Annex A-5, a chart that provides a description of each of these documents, an explanation of its relevance to the case, and its indicia of reliability to assist the Chamber in its assessment. A document is not void of authenticity and, therefore inadmissible, on the basis that it is not an original. Such considerations may go to the weight to be assigned to each piece of evidence, an assessment that assumes greater importance at the trial than at this preliminary stage of the proceedings.[55]

[51] ICC-01/09-02/11-382-Red, para. 96.
[52] ICC-01/04-01/06-803-tEN, paras. 103 and 106; ICC-01/04-01/07-717 paras. 118, 119 and 159; and ICC-01/04-01/10-465-Red, para. 49.
[53] ICC-01/04-02/06-250-Conf., paras. 13-15.
[54] ICC-01/04-02/06-250-Conf, para. 14.
[55] ICC-01/04-01/06-774, para. 47.

iii. Documents the Defence refers to as internal and opinions of non-witnesses

41. The Defence contends that 55 documents are inadmissible because they are internal documents, contain the opinions of individuals that the Prosecution is not calling to testify, or for which the Defence is unable to verify their credibility.[56] The Defence does not provide any individual assessment of these documents, except to refer to three documents emanating from MONUC and seven forensic reports prepared by Dr. Baccard.[57]

42. The Prosecution annexes a chart in which it provides a description and an individual assessment of the relevance of each document.[58] All of these documents are relevant, probative of matters in issue, and admissible.

43. Pursuant to article 61(5) of the Statute, the Prosecutor need not call witnesses, but may rely on documentary or summary evidence at the confirmation hearing. This has been confirmed by Pre-Trial Chamber II and the Appeals Chamber.[59] For the purposes of the confirmation hearing, Pre-Trial Chambers have repeatedly stated that evidence which could be considered hearsay is admissible.[60]

44. With respect to the documents prepared by the United Nations and other NGOs, the Prosecution asserts that the relevance and reliability of the documents is sufficiently apparent on their face. These documents are akin to business records created contemporaneously, with a high degree of reliability on the basis that they were created in the ordinary course of the operation of the organisation and

[56] ICC-01/04-02/06-250-Conf, paras. 16-19.
[57] ICC-01/04-02/06-250-Conf, paras. 18-19. The Prosecution notes that Pre-Trial Chamber I opined: "it is preferable for the Chamber to have as much forensic and other material evidence as possible" [ICC-02/11-01/11-432, para. 27].
[58] Annex A-6.
[59] ICC-01/09-01/11-153, para. 8; ICC-01/05-01/08-1386, para. 80; and ICC-01/04-01/10 OA 4, para. 47. Documents have also been admitted as part of a bar table motion at trial where the author is not called as a witness. For example, see: ICC-01/04-01/06-1399, paras. 36-42.
[60] ICC-01/04-01/06-803-tEN, para. 101; ICC-01/05-01/08-424, para. 46; ICC-01/04-01/06-1351, para. 41; and ICC-01/04-01/07-717, para. 118.

without any apparent motive to fabricate or distort.[61] Pre-Trial Chambers have also found media reports admissible indirect evidence,[62] where any objection goes to their weight, not their admissibility.[63]

45. Dr. Baccard is a qualified medical forensic expert who testified in the *Katanga and Ngudjolo* proceedings[64] and submitted forensic reports to the Chamber.[65] The Chamber held that it "considered scientific evidence to be objective, even if the expert was appointed by only one party or by the Court in accordance with regulation 44 of the Regulations of the Court."[66]

C. Witness statements and documents of Deceased Witnesses

46. The Defence seeks to exclude the evidence of four witnesses on the basis that they are deceased.[67] There is no merit to the Defence request.

47. The Prosecution attaches as Annex A-7 a chart with the documents of witnesses P-0022 and P-0167 that the Defence seeks to exclude in the Application, as well as the materials related to witnesses P-0103 and P-0106. All of these materials are relevant and probative to the issues in the case and their admission would not unfairly prejudice the Defence.

48. The recent amendment to rule 68, which took effect on 27 November 2013,[68] specifically provides for the admission of the prior statements of deceased individuals at trial, which is equally applicable at the confirmation hearing stage.

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[61] ICC-01/04-01/06-1399, paras. 37-38.
[62] ICC-01-09/01-11-373, para. 69 and 87; ICC-01/09-02/11-382-Red, para. 330; ICC-01/04-01/10-465-Red, paras. 216 and 320; and ICC-01/05-01/08-424, paras. 118, 123, 427 and 486.
[63] ICC-01/04-01/06-803, para. 103.
[64] ICC-01/04-01/07-T-126-Conf-Eng, p.6 *et seq.*
[65] ICC-01/04-01/07-988-tENG, para. 4.
[66] ICC-01/04-02/12-3-tENG, para. 60.
[67] ICC-01/04-02/06-250-Conf., paras. 20 and 28 (witness DRC-OTP-P-0022) and paras. 21-22 and 28 (witness DRC-OTP-P-0167 [Tampwo]) and ICC-01/04-02/06-T-7*bis*-ENG, page 2, lines 7-14 (DRC-OTP-P-0103 and DRC-OTP-P-0106).
[68] Resolution ICC-ASP/12/Res.7, Amendments to the Rules of Procedure and Evidence.

49. Pursuant to article 51(2) of the Statute, amendments to the Rules of Procedure and Evidence enter into force immediately upon their adoption by the Assembly of States Parties. This new amendment came into effect prior to the presentation of the evidence to the Pre-Trial Chamber and the Defence was on notice of the new rule and not prejudiced by it.[69]

50. The Defence submits it is not in the interests of justice to admit the statements of these witnesses as they go directly to the acts and conduct of Bosco Ntaganda.[70] This is factually and legally incorrect. At the ICTY, the phrase "acts and conduct of the accused" has been understood to mean the "deeds and behaviour of the accused *stricto sensu* and not extended to acts and conduct of subordinates or co-perpetrators, the latter only being relevant to the question as to whether cross-examination of the maker of a statement should be allowed and not whether a statement should be admitted..."[71]

51. None of this evidence goes directly to the acts and conduct of Bosco Ntaganda. Witnesses P-0022, P-0103 and P-0106 are crime-base witnesses who do not directly implicate him. Further, the evidence of witnesses P-0103 and P-0106 is corroborated by numerous other witnesses of the UPC attack on the *Walendu-Djutsi collectivité*.[72] Witness P-0167's evidence is his written account of events recorded in a series of diaries, which provide historical context. This same

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[69] In the *Sesilj* decision cited by the Defence (footnote 11 of the Application), the Trial Chamber held that retroactive application of rule 92*quater* (similar to rule 68) was permissible and did not prejudice the accused. In that case, rule 92*quater* came into effect on 13 September 2006 and the trial began December 2007 such that the accused was on notice of the new rule (at paras 33-37).
[70] ICC-01/04-02/06-250-Conf, para. 27.
[71] *Prosecutor v Oric*, 'Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92 *bis*', IT-03-68-T, 6 December 2005, page 1 [citing *Prosecutor v Slobodan Milosevic*, 'Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92*bis*', IT-02-54-T, 21 March 2002, para. 22; and *Prosecutor v Stanislav Galic*, 'Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)', IT-98-29-AR73.2, 7 June 2002, para. 13]. See also: *Prosecutor v Tolimir*, 'Decision on Prosecution Motion for Admission of Written Evidence Pursuant to Rules 92*bis* and 94*bis*', IT-05-88/2-T, 7 July 2010, para. 30; and *Prosecutor v Bizimungu et al*, 'Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber', ICTR-99-50-T, 26 September 2008, para. 10.
[72] For instance, P-0027, P-0018, P-0019, P-0113, P-0100, P-0105, P-0300, P-804, P-0805.

evidence of witness P-0167 was admitted at the confirmation in the *Katanga and Ngudjolo* proceedings, although he was deceased at that time. Pre-Trial Chamber I held that:

> …the fact that it is impossible to call the deceased author of the manuscript as a witness at trial is not in itself determinative of evidentiary admissibility in the pre-trial stage. Rather, the parties' inability to cross-examine a Prosecution source is simply one factor in the Chamber's determination of the probative value accorded to the evidence in question.[73]

52. The Defence cites ICTY jurisprudence to support its assertion. Both decisions refer to trial proceedings, where there are different evidentiary considerations. With respect to *Seselj*, the Defence ignores a decision the following year in the same case where the same Chamber admitted into evidence the statement of a deceased witness that directly went to proof of the acts and conduct of the accused.[74] This decision demonstrates the discretionary nature of rule 92*quater* (the rule resembling the amended rule 68) and the inherent power of a Chamber to admit such evidence even where it goes directly to the acts and conduct of the accused. The *Kordic* decision referred to by the Defence pre-dates the coming into effect of rule 92*quater* and is, accordingly, of no relevance.[75]

53. Even if the statements or documents did go to the acts and conduct of the person charged (which they do not), rule 68 does not preclude the admission of prior recorded testimony on the basis that it goes to proof of the acts and conduct of an accused, rather it "*may* be a factor against its introduction."[76]

54. Further, in recognition of the limited scope of the confirmation hearing, article 61(5) expressly permits the Prosecutor to rely on documentary and summary

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[73] ICC-01/04-01/07-717, para. 109.
[74] *Prosecutor v Seselj*, 'Decision on Prosecution's Motion for Admission of Evidence of Mujo Dzafic Pursuant to Rule 92*quater* of the Rules of Procedure and Evidence', IT-03-67-T, 13 May 2009, paras. 17 and 20. See also: *Prosecutor v Karadzic*, 'Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92*Quater*', IT-95-5/18-T, 13 April 2010, para. 43.
[75] *Prosecutor v Kordic*, 'Decision on Appeal Regarding Statement of a Deceased Witness', IT-95-14/2-A, 21 July 2000, paras. 27-28.
[76] Rule 68(c)(ii) of the Rules [emphasis added].

evidence without the necessity of calling witnesses to testify. Pre-Trial Chamber I found this provision to constitute a *lex specialis* which would prevail over the general evidentiary rules provided for in article 69 of the Statute.[77]

55. The Defence argues that the ability to rely on a summary evidence provided for in article 61(5) is premised on the Prosecutor calling those same individuals to testify at trial, and that therefore the Prosecution is precluded from relying on evidence from witnesses it cannot later call to testify. The wording of article 61(5) does not support this interpretation.

56. Article 61(5) states that the Prosecution "need not call the witnesses expected to testify at the trial". This provision does not create a requirement for the Prosecution to call, at trial, the witnesses relied upon at confirmation. These witnesses may not be available for a variety of credible reasons – such as inability or unwillingness to testify.[78] The Defence's interpretation of article 61(5), does not accord with the provisions of the legal texts that recognise a variety of other means of introducing evidence, including rule 68, which expressly permits the admission of the prior recorded statements of deceased individuals.

57. The inability to examine a deceased witness does not cause undue prejudice to the Defence, particularly at the confirmation hearing stage when the Prosecution is not required to call *any* witnesses to testify. The Defence may challenge the evidence by other means, such as contesting its intrinsic coherence, arguing factors that may undermine its reliability and arguing that it is not corroborated or supported by other evidence. Any limitations in a deceased witness' evidence, such as the Defence's inability to examine the witness, would ultimately go to its weight. It does not render this evidence inadmissible.

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[77] ICC-01/04-01/07-412, page 5.
[78] See Trial Chamber I, ICC-01/04-01/06-1399, para.24.

58. The materials related to each of the deceased witnesses at issue are *prima facie* relevant and reliable, allowing the Chamber to assess their probative value.

D. <u>Consent of witnesses</u>

59. The Defence seeks to exclude the witness statement(s) and related materials where the Prosecution has not obtained the consent of the witness.[79] There is no provision in the Statute or the Rules that premises the admissibility of evidence on having obtained an individual's prior consent to the use of his or herstatement in legal proceedings against a specifically-named person. Similarly, the absence of an individual's consent to use his or her statement against a particular accused person does not render this evidence inadmissible under article 69(7).

60. In any event, the issue does not arise in the instant case. The Prosecution obtained the consent of all witnesses it relied upon at the confirmation hearing to disclose their materials to Bosco Ntaganda as incriminating evidence in the proceedings.

Relief

61. Based on the foregoing, the Prosecution requests that the Chamber dismiss the Application.

Fatou Bensouda,
Prosecutor

Dated this 3rd day of March 2014
At The Hague, The Netherlands

[79] ICC-01/04-02/06-250-Conf, paras. 29 and 33.