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Date: **17 December 2015**

TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public
With confidential Annexes A and B

Prosecution's first request for the admission of documentary evidence

Source: **Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Office of the Prosecutor ("Prosecution") seeks the admission of 21 documents, in accordance with articles 64(9)(a), 69(3) and 69(4) of the Rome Statute ("Statute") and rule 63(2) of the Rules of Procedure and Evidence ("Rules"). The documents are relevant to material issues at trial, are probative, and bear sufficient indicia of reliability to be admitted. Their admission would assist Trial Chamber VI's ("Chamber") determination of the truth and ensure an expeditious trial.

2. The submitted items consist of 21 UPC documents signed by the Accused.

3. In accordance with the Chamber's Decision on the conduct of proceedings,[1] and in respect of each item proposed for admission, the attached Annex lists the: (i) evidence registration number ("ERN"); (ii) document description; (iii) authenticity; (iv) reason for tendering without witness; (v) most relevant portions of document; (vi) document's relevance and *prima facie* probative value; and (vii) Defence submissions.

4. The Defence does not object to the admission of 16 of the 21 submitted exhibits. The Defence objects to the admission of four exhibits arguing, *inter alia*, that the date of the document renders the document irrelevant to the charges.[2] The Defence objects to the admission of one exhibit arguing, *inter alia*, that the document is not the original document and that the Accused does not recognise his signature.[3]

5. The Prosecution requests the Chamber to reject the Defence objections and admit all 21 items into evidence.

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[1] ICC-01/04-02/06-619, para. 52.
[2] DRC-OTP-0138-0257; DRC-OTP-0102-0038; DRC-OTP-0113-0131; DRC-OTP-0141-0009.
[3] DRC-OTP-0132-0239.

Confidentiality

6. This filing is classified as "Public" and its Annex is classified as "Confidential", as it refers to the content of confidential documents.

Submissions

Applicable Law

7. Article 69(4) guides the factors to be considered when making admissibility assessments.[4] According to Article 69(4), a Chamber may rule on "the relevance or admissibility of any evidence, taking into account, *inter alia*, [its] probative value [ ] and any prejudice that [it] may cause to a fair trial or to a fair evaluation of the testimony of a witness." Article 64(9)(a) of the Statute governs the Chamber's determination of the "admissibility or relevance of evidence".

8. The Statute and the Rules do not expressly stipulate the manner in which documentary evidence may be introduced. Nonetheless, Chambers have routinely admitted evidence from the 'bar table' in the absence of an authenticating witness.[5] In the *Lubanga* case, Trial Chamber I admitted evidence from the bar table,[6] reasoning that, "notwithstanding the express reference to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate."[7] The Trial Chambers in the *Katanga and Ngudjolo*,[8] *Ruto and Sang*,[9] and *Bemba*[10] cases followed the same approach. Specifically, in the *Ruto and Sang* case,

[4] ICC-01/09-01/11-1353, para.14.
[5] ICC-01/04-01/06-1399-Corr and ICC-01/04-01/06-1981 (*Lubanga* case); ICC-01/09-01/11-1353 (*Ruto and Sang* case); ICC-01/04-01/07-2635 (*Katanga and Ngudjolo* case); ICC-01/05-01/08-2012-Red and ICC-01/05-01/08-2299-Red (*Bemba* case).
[6] ICC-01/04-01/06-1399-Corr, para.42; *See also* ICC-01/04-01/06-1981.
[7] ICC-01/04-01/06-1399-Corr, para.22.
[8] ICC-01/04-01/07-2635. *See also* ICC-01/04-01/07-1665, para.100.
[9] ICC-01/09-01/11-1353.
[10] ICC-01/05-01/08-2012-Conf ; ICC-01/05-01/08-2299-Red.

Trial Chamber V(A) acknowledged that "the admission of evidence through a bar table is a practice established in the jurisprudence of the Court."[11]

9. In accordance with this practice, the admissibility of evidence other than testimony requires consideration of three key factors: (i) its relevance to the issues at trial;[12] (ii) its *prima facie* probative value;[13] and (iii) its prejudicial effect as weighed against the probative value.[14]

Analysis

10. The Prosecution seeks the admission of 21 UPC documents signed by the Accused.

(i) The material is relevant to the issues at trial

11. The 21 UPC documents are relevant evidence as they are all logically connected to one or more facts at issue, and have the capacity to make a fact at issue more or less probable than it would be without the evidence. The Prosecution offers specific submissions on the relevance of each exhibit in Annex A. As a general matter, the exhibits are all relevant because they bear the Accused's signature, indicate the Accused's position within the UPC hierarchy, and establish the methods that UPC used to communicate information within its hierarchy. Further, the documents are relevant to the Accused's role in the common plan and his command position within the FPLC.

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[11] ICC-01/09-01/11-1353, para.13.
[12] ICC-01/04-01/06-1399-Corr, para.27; ICC-01/04-01/07-2635, section B; ICC-01/05-01/08-2012-Red, paras.13-14; ICC-01/05-01/08-2299-Red, para.8; ICC-01/09-01/11-1353, para.15.
[13] ICC-01/04-01/06-1399-Corr, paras.28-30; ICC-01/04-01/07-2635, section C; ICC-01/05-01/08-2012-Red, paras.13 and 15; ICC-01/05-01/08-2299-Red, para.8; ICC-01/09-01/11-1353, para.15.
[14] ICC-01/04-01/06-1399-Corr, paras.31-32; ICC-01/04-01/07-2635, section D; ICC-01/05-01/08-2012-Red, paras.13, 16-17; ICC-01/05-01/08-2299-Red, para.8; ICC-01/09-01/11-1353, para.16.

(ii) The material has prima facie probative value

12. The 21 UPC documents are probative to issues in the case. The determination of the probative value of an item of evidence will always be a fact-specific inquiry and may take into account multiple factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inhere in the item of submitted evidence, as well as the circumstances in which the evidence arose.[15] Each of the exhibits submitted for admission provide probative value related to contested issues in the case. The submitted documents possess sufficient indicia of reliability to warrant their admission into evidence.

13. At the stage of admission of evidence, there must be sufficient indicia to make out a *prima facie* case that the evidence is reliable - that is, whether it is what the tendering party purports it to be.[16] The items may be *prima facie* reliable if they bear sufficient indicia of reliability such as logo, letter head, signature, date or stamp, and appear to have been produced in the ordinary course of the activities of the persons or organisations who created them".[17] The items proposed for admission in Annex A meet the requirements of *prima facie* reliability, including authenticity, and thus should be admitted into evidence. Features such as dates (where available), their authors or source, dates of preparation and methodology or context of preparation appear on each item proposed for admission. These indicia provide sufficient basis for the Chamber to conduct an independent evaluation of the *prima facie* reliability of each item for the purposes of its admissibility determination.

14. The Prosecution submits the 21 documents in the absence of witness testimony, as is the established practice of introducing evidence in a bar table

[15] ICC-01/05-01/08-2012-Red, para. 15.
[16] Trial Chamber I acknowledged that evidence to be admitted should satisfy minimal indicia of reliability. It nonetheless cautioned that "demonstrable lack of apparent reliability does not mean automatic exclusion of evidence," thus leaving the door open to include even such evidence.
[17] ICC-01/05-01/08-2299-Red, para. 9.

motion. The 21 documents are all signed by the Accused[18] and contain sufficient indicia of reliability to be admitted in the absence of a witness, including – variously - signatures, stamps, and letterhead. The documents are contemporaneous with the charged period or close in time to the charged period, prior to the Prosecution's investigation, and were therefore prepared *in tempore non suspecto*. On their face, the documents contain subject matter of routine and, in some cases, unremarkable events, which further supports their reliability. The documents plainly attest to the functioning of the organisation and the Accused's authority within the organisation. And the documents were all collected during routine investigation. Moreover, admitting the documents by way of bar table motion is more expeditious than seeking to admit them through any specific Prosecution witness, where the three-pronged test for admissibility is met. The parties and Chamber are not precluded from asking an appropriate witness questions about a particular document, if they deem it necessary to do so.

(iii) There is no unfair prejudicial effect

15. The admission of the material is not unfairly prejudicial to the Accused. The Accused had sufficient notice of the content of the items; and the reliability, veracity, and weight of these records are independently corroborated by other evidence in the case.

16. The Prosecution submits that the probative value of the items proposed for admission outweighs any prejudicial effect for the following reasons: (i) the Prosecution specifically outlines in Annex A how each proposed item fits into the case; (ii) each of the proposed items tends to prove one or more discrete issues in the Prosecution's case; (iii) each of the proposed items possesses enumerated indicia of reliability to warrant its admission and to enable the Chamber to fairly evaluate it;

(iv) the Accused had sufficient notice of both the content of the items and the Prosecution's intention to offer them into evidence; (v) the proposed items provide significant value related to contested issues in this case; and (vi) the proposed items corroborate the witness testimonies and other evidence received by the Chamber in the course of the trial.

(iv) Prosecution response to Defence objections

17. The Defence states that four documents are inadmissible because they relate to events that occurred *after* the period of the charges.[19] Chambers have admitted evidence falling outside the temporal scope of the charges, including where it is logically connected to a fact in issue,[20] provides context, or evidence of the relationship between the accused and his alleged co-perpetrators or his role within the organisation.[21] All of the documents relate to matters that are properly to be considered by the Chamber. Contrary to the Defence's assertions, Bosco Ntaganda's subsequent conduct provides valuable background and historical context, demonstrates a pattern, and is admissible evidence.

18. Evidence falling outside the period of the charges may establish similar *modus operandi* and/or the commission of similar acts constituting corroborative evidence from which the Chamber can infer intent and knowledge under both article 30 and as part of the contextual elements of the crimes.[22] Moreover, the Accused'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.

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[19] ICC-01/04-02/06-250-Conf, paras. 5-6.
[20] ICC-01/05-01/08-2299-Red, paras. 8 and 12.
[21] ICC-01/04-01/06-2842, para. 1022; and ICC-01/05-01/08-2299-Red, paras. 51, 61 and 67.
[22] 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".

19. Trial Chamber I in the *Lubanga* proceedings found that evidence falling outside the period of the charges is admissible where it concerns "issues and events (or information) that are of sufficient proximity to the charges the accused faces to be of potential assistance in this trial."[23]

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."[24] 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.[25] Similar fact evidence that occurred outside the period of the indictment has also been used to show a systematic pattern of conduct.[26] Similarly, the ICTR has admitted evidence falling outside the period of the indictment to show intent,[27] to prove on-going conduct, background and context, and 'similar fact

[23] 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).
[24] Rules of Procedure and Evidence, rule 93 – *Evidence of Consistent Pattern of Conduct*.
[25] *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.
[26] *Prosecutor v Kvocka et al.*, Judgment, IT-98-30/1-T, 2 November 2001, para. 652.
[27] *Prosecutor v Aloys Simba*, 'Decision on Interlocutory Appeal Regarding Temporal Jurisdiction', ICTR-01-76-AR72, 29 July 2004, p. 3.

evidence' pursuant to rule 93.[28] Similar conduct evidence has also been treated as akin to circumstantial (or indirect) evidence.[29]

21. Specifically, the Defence objects to the admission of DRC-OTP-0138-0257, a letter dated 21 February 2005, from the Accused and Brigadier General Linganga to Commander Americain. The Defence objects to the document as it falls outside the charged period. However, despite the date of the document, it is nevertheless relevant to the charges in this case. The document relates, *inter alia*, to the Accused's ongoing authority over two alleged perpetrators of crimes during the charged period[30] whose continued presence in the FPLC establishes, with the evidence taken as a whole, that the Accused intended the criminal acts carried out by his subordinates, or, in the alternative, that the Accused failed to take all necessary and reasonable measures to hold his subordinates accountable.

22. The Defence objects to the admission of DRC-OTP-0102-0038 and DRC-OTP-0141-0009, lists of UPC/FPLC members, dated 12 May 2004 and 11 December 2004, respectively. The Defence objects to the documents as they fall outside the charged period. However, the documents relate to the continued existence of the UPC/FPLC as an organised armed group including the UPC/FPLC's capacity to maintain records, assign individual ranks, positions, and serial numbers to its troops. The documents provide context to other evidence[31] of the Accused's capacity to order and structure the UPC/FPLC *manu militari* by virtue of the Accused's position of authority and leadership.

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[28] *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).

[29] *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.

[30] *See e.g.* Transcribed Interview of P-0038, DRC-OTP-0161-2458 at 2474, lns. 460-464; DRC-OTP-0175-0007 at 0029, lns. 787-88; DRC-OTP-0126-0422 at 0441, para. 104.

[31] *See e.g.* UPC/FPLC Logbook-DRC-OTP-0171-0926 at 1071 (messages at middle and bottom of page), 1076-1078 (all messages), 1079 (message at bottom of page).

23. The Defence objects to the admission of DRC-OTP-0113-0131, an agreement between the UPC/FPLC and the Shabani company for mineral exploitation rights for a fee. The Defence objects to the document as it falls outside the charged period. However, the document relates to the UPC/FPLC's capacity to conclude agreements in order to obtain money for its operations. The Accused's stamp at the bottom of the document relates to the prominence and authority the Accused had within the UPC/FPLC.

24. The Defence objects to the admission of DRC-OTP-0132-0239, a letter from the Accused to the G3 of the FPLC, dated 20/11/2003. The Defence objects arguing that the Accused does not recognise his signature on the document and that the subject matter of the document requires submission through a witness. The document contains sufficient indicia of reliability for admission and the Defence fail to cite to any legal doctrine that prevents the admission of evidence based on the "subject matter" contained in the evidence. The document's content supports its authenticity. It mentions numerous known places and persons and is consistent with other contemporaneous handwritten documents. The document relates to the Accused's position of authority within the UPC/FPLC.

25. As an additional matter, the Defence objects to the admissibility of documents due to the absence of an original document. However, the lack of an original document is but one factor for the Chamber to consider in any admissibility determination. The documents submitted by the Prosecution are originals, or in the absence of the original, true copies of the originals. In considering factors bearing on admissibility Chamber "enjoys a significant degree of discretion in considering all types of evidence."[32] This Statutory discretion is necessary considering the:

> 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

[32] ICC-01/04-01/06-1399, para.24.

> 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.[33]

26. The Prosecution submits that the documents are true copies of the originals, relevant and probative of materials issues in the case and are therefore admissible.

Requested Relief

27. For the foregoing reasons, the Prosecution requests that all items listed in the Annex to this filing be admitted into evidence.

Fatou Bensouda, Prosecutor

Dated this 17th Day of December 2015
At The Hague, The Netherlands