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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

Public redacted version of “Response on behalf of Mr Ntaganda to ‘Prosecution’s first request for the admission of documentary evidence’”, ICC-01/04-02/06-1078-Conf, 11 January 2016

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the “Prosecution’s first request for the admission of documentary evidence” submitted by the Office of the Prosecutor (“Prosecution”) on 17 December 2015 (“Prosecution Request”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s first request for the admission of documentary evidence”

“Defence Response”

INTRODUCTION

1. The Prosecution seeks the admission of 21 documents from the ‘bar table’.
2. As highlighted in confidential Annex A to the Prosecution Request (“Annex A”), the Defence does not oppose the admission of 14 of these documents, namely documents marked 1 to 5, 7 to 13, 17 and 18.² The Defence notes that document marked 16 has already been admitted through Witness P-0901.³
3. The Defence stresses that while it does not object to the admission of the above-mentioned 14 documents, it does not agree with the conclusions drawn by the Prosecution as to their relevance and probative value beyond a *prima facie* finding, and does reserve its position on the ultimate weight to be attached to these documents for a later stage. Moreover, the Defence respectfully submits that it should be given the opportunity to verify the accuracy of the translation of documents DRC-OTP-0016-0047 (#2), DRC-OTP-0016-0049 (#3), DRC-OTP-0016-0055 (#4), DRC-OTP-0016-0098 (#5), DRC-OTP-0016-0110 (#7), DRC-OTP-0016-0113 (#8), DRC-OTP-0016-0117 (#9), DRC-OTP-0016-0119 (#10), DRC-OTP-0016-0122 (#11), DRC-OTP-0018-0170

¹ ICC-01/04-02/06-1064.

² In its Request (*cf.* para.4), the Prosecution incorrectly states in its Request that the Defence does not object to the admission of 16 of the 21 submitted documents.

³ See T-29-CONF-ENG, 21 September 2015, p.8, ll.12-14.

- (#12) and DRC-OTP-0029-0255 (#13) and that these documents should be marked for identification pending such verification.
4. As further highlighted in Annex A, the Defence objects to the admission from the 'bar table' of the remaining six documents, namely documents:
- a. DRC-OTP-0016-0106 (#6);
 - b. DRC-OTP-0132-0239 (#14);
 - c. DRC-OTP-0138-0257 (#15);
 - d. DRC-OTP-0102-0038 (#19);
 - e. DRC-OTP-0113-0131 (#20); and
 - f. DRC-OTP-0141-0009 (#21).

("Six Opposed Documents")

5. This Defence Response sets out in further details the Defence objections to the admissibility into evidence of the Six Opposed Documents. To the extent that they are grounded on considerations pertaining to admissibility *per se*, the objections set out under sections I to IV below are raised irrespective of the fact that the Prosecution seeks the admission of the documents from the 'bar table'.

SUBMISSIONS

I. Document DRC-OTP-0132-0239 (#14) lacks sufficient indicia of reliability

6. The probative value of a document rests, first and foremost, on its inherent reliability.⁴ Unless an item of evidence is self-authenticating, or the parties agree that it is authentic, it is for the party tendering the item to provide

⁴ Cf. *Katanga & Ngudjolo* case, "Decision on Prosecutor's Bar Table Motions", 17 December 2010, ICC-01/04-01/07-2635 ("*Katanga & Ngudjolo* Bar Table Decision"), para.21.

admissible evidence demonstrating its authenticity.⁵ While this evidence may be direct or circumstantial, it must nevertheless provide reasonable grounds to believe that the document is authentic.⁶

7. Whereas the Prosecution attempts to downplay the importance of having an original document as a matter of admissibility,⁷ the Defence posits that the submission of the original version of a document – or an independently certified copy thereof – is a decisive factor in determining whether there are reasonable grounds to believe that the document sought to be admitted is authentic.
8. Document DRC-OTP-0132-0239 is not ‘self-authenticating’. It bears no extrinsic indications as to its origin and author; it is an entirely handwritten document, with no official letterhead or stamp on it. More importantly, Mr Ntaganda does not recognize having either drafted or signed this document.⁸ In such circumstances – where document DRC-OTP-0132-0239 is not, on its face, self-authenticating, and in the absence of agreement between the parties on the authenticity of the document – it is incumbent upon the Prosecution to bring forward evidence, either direct or circumstantial, which provides reasonable grounds to believe that the document is authentic.
9. The Prosecution fails to do so. The Prosecution merely argues that document DRC-OTP-0132-0239 is ‘consistent’ with other contemporaneous handwritten documents, without pointing out to any such documents,⁹ which is unsatisfactory “since it is not for the Chamber to start its own investigations into material which may prove a document’s authenticity and reliability”.¹⁰

⁵ *Katanga & Ngudjolo* Bar Table Decision, para.23.

⁶ *Katanga & Ngudjolo* Bar Table Decision, para.23.

⁷ Prosecution Request, para.25 (the Prosecution contends that “the lack of an original document is but one factor for the Chamber to consider in any admissibility determination”).

⁸ While it is readily apparent on the face of the document that the signature on the document is not that of Mr Ntaganda, the Defence undertakes, should the Chamber deem it appropriate, to obtain a sworn statement from Mr Ntaganda to this effect.

⁹ Prosecution Request, para.24.

¹⁰ *Katanga & Ngudjolo* Bar Table Decision, para.23.

Moreover, the Prosecution's assertion that document DRC-OTP-0132-0239 mentions 'numerous' known places and persons does not establish, by and of itself, the authenticity of the document.

10. The Prosecution's circular argument that document DRC-OTP-0132-0239's content supports its authenticity¹¹ is thus meritless.
11. The absence of the original version of document DRC-OTP-0132-0239 – or an independently certified copy thereof – further casts doubt as to its authenticity.
12. Consequently, in the absence of any proof of its authenticity, the Defence respectfully requests the Chamber not to admit into evidence document DRC-OTP-0132-0239.

II. Document DRC-OTP-0138-0257 (#15) lacks any probative value as well as sufficient indicia of reliability

13. In its submissions, the Prosecution fails to satisfactorily establish how, in spite of the fact that it postdates the temporal scope of the charges, document DRC-OTP-0138-0257 may significantly assist the Chamber in reaching a conclusion about the existence or non-existence of a material fact, or in assessing the reliability of other evidence in the case.¹²
14. Even if it were to be agreed that Mr Ntaganda had authority over two alleged perpetrators of crimes – namely Linganga and Americain – and that this fact bears some relevance to the charges laid against Mr Ntaganda, the fact that the above-mentioned letter was addressed in 2005 does not allow to conclude that Mr Ntaganda took no measures against these two individuals or that he approved their conduct.

¹¹ Prosecution Request, para.24.

¹² *Katanga & Ngudjolo* Bar Table Decision, para.34. See also ICTY, *Stanišić & Župljanin*, "Decision Granting in Part the Prosecution's Bar Table Motion and Granting the Prosecution's Supplemental Bar Table Motion", 1 February 2011, IT-08-91-T, para.21.

15. In any event, even if document DRC-OTP-0138-0257 was deemed to have some probative value, the same is significantly outweighed by its prejudicial effect. Indeed, the possibility of an inference being drawn that Mr Ntaganda intended the alleged criminal acts carried out by his subordinates in 2002-2003, on the basis of these subordinates being still part of the FPLC in 2005, and without any evidentiary basis at the relevant time, is simply too high.
16. Furthermore, as noted in Annex A, the Prosecution is not in possession of the original version of document DRC-OTP-0138-0257.¹³ The Defence inspected this document on 24 October 2013.
17. In its Request, the Prosecution contends that the copies it submits are, in the absence of the original, “true copies” of the originals.¹⁴ Strikingly, whereas it has the burden to establish reasonable grounds to believe that all documents it submits for admission into evidence are authentic, the Prosecution provides no independent certification that the copy of document DRC-OTP-0138-0257 is a ‘true copy’ of the original. Merely arguing that “[t]he appearance, contents, substance, consistency with other documents and other distinctive features of the document satisfy the indicia of reliability for admission”,¹⁵ without pointing out to any such documents, is not sufficient.¹⁶
18. In addition, the risk of falsification cannot be ruled out, especially bearing in mind the fact that: (i) document DRC-OTP-0138-0257 – including its letterhead – is entirely handwritten; and (ii) the document has been handed to the Prosecution by [REDACTED], an [REDACTED] in respect of whom Trial Chamber I found “[REDACTED]” [REDACTED] – a conclusion which [REDACTED].¹⁷

¹³ Annex A, p.12.

¹⁴ Prosecution Request, paras.25, 26.

¹⁵ Annex A, p.12.

¹⁶ *Katanga & Ngudjolo* Bar Table Decision, para.23.

¹⁷ *Lubanga* case, [REDACTED].

19. For these reasons, the Defence submits that document DRC-OTP-0138-0257 should not be admitted into evidence.

III. Documents DRC-OTP-0102-0038 (#19) and DRC-OTP-0141-0009 (#21) lack any probative value as well as sufficient indicia of reliability

20. In its submissions, the Prosecution fails to satisfactorily establish how, in spite of the fact that they postdate the temporal scope of the charges, documents DRC-OTP-0102-0038 and DRC-OTP-0141-0009 – purported lists of members of the FPLC dated 12 May 2004 and 11 December 2004, respectively – may significantly assist the Chamber in reaching a conclusion about the existence or non-existence of a material fact, or in assessing the reliability of other evidence in the case.¹⁸
21. Even if it were to be agreed that the FPLC had, at some point in time, the capacity to “maintain records, assign individual ranks, positions, and serial numbers to its troops”¹⁹ and that this fact bear some relevance to the charges laid against Mr Ntaganda, the fact that the above-mentioned lists were established in 2004 does not allow to conclude, let alone to infer, that the FPLC had such capacity between 2002 and 2003. Rather, the evidence adduced so far shows that the organizational capacity of the FPLC has significantly evolved over time.²⁰ Any post-charge evidence is thus of limited probative value for the purpose of establishing the features of the FPLC structure during the period of the charges.
22. In addition, to the extent that the exact role played by Mr Ntaganda in the establishment of the two lists is not apparent on the face of the documents themselves, the purported contextual probative value of documents DRC-

¹⁸ *Katanga & Ngudjolo* Bar Table Decision, para.34. See also ICTY, *Stanišić & Župljanin*, “Decision Granting in Part the Prosecution’s Bar Table Motion and Granting the Prosecution’s Supplemental Bar Table Motion”, 1 February 2011, IT-08-91-T, para.21.

¹⁹ Prosecution Request, para.22.

²⁰ See e.g. Testimony of Witness P-0901, 22 September 2015, T-30-CONF-ENG, p.24, ll.7-11, who stated that the ranks within the FPLC were first assigned in April or May 2003, whereas the FPLC were established in September 2002 according to the Prosecution’s updated document containing the charges: ICC-01/04-02/06-458-AnxA, para.6.

OTP-0102-0038 and DRC-OTP-0141-0009 to other ‘evidence’²¹ of Mr Ntaganda’s capacity to “order and structure” the FPLC “*manu militari*”²² is, at best, tenuous.

23. In any event, even if documents DRC-OTP-0102-0038 and DRC-OTP-0141-0009 were deemed to have some probative value, the same is significantly outweighed by its prejudicial effect. Indeed, the possibility of an inference being drawn that the FPLC had the capacity in 2002-2003 to maintain records, assign individual ranks, positions, and serial numbers to its troops, on the basis of its purported ability to do so in 2004, and without any evidentiary basis at the relevant time, is simply too high.
24. Furthermore, as noted in Annex A, the Prosecution is not in possession of the original version of documents DRC-OTP-0102-0038 and DRC-OTP-0141-0009.²³ The Defence inspected these documents on 24 October 2013.
25. In its Request, the Prosecution contends that the copies it submits are, in the absence of the original, “true copies” of the originals.²⁴ Strikingly, whereas it has the burden to establish reasonable grounds to believe that all documents it submits for admission into evidence are authentic, the Prosecution provides no independent certification that the copies of documents DRC-OTP-0102-0038 and DRC-OTP-0141-0009, are ‘true copies’ of the original. Merely arguing that “[t]he appearance, contents, substance, consistency with other documents and other distinctive features of the document satisfy the indicia of reliability for admission”,²⁵ without pointing out to any such documents, is not sufficient.²⁶

²¹ The Defence notes that the excerpts of document DRC-OTP-0171-0926 (FPLC logbook) referred to in footnote 31 of the Prosecution Request have not been admitted into evidence and, as such, do not form part of the evidentiary record.

²² Prosecution Request, para.22.

²³ Annex A, p.14,16.

²⁴ Prosecution Request, paras.25, 26.

²⁵ Annex A, p.14-16.

²⁶ *Katanga & Ngudjolo* Bar Table Decision, para.23.

26. For these reasons, the Defence submits that documents DRC-OTP-0102-0038 and DRC-OTP-0141-0009 should not be admitted into evidence.

IV. Document DRC-OTP-0113-0131 (#20) lacks any probative value

27. The purported probative value of document DRC-OTP-0113-0131 – an agreement between the UPC and a mining company dated 8 July 2004 – is to provide evidence on: (i) “the UPC/FPLC’s capacity to conclude agreements in order to obtain money for its operations”; and (ii) “the prominence and authority the Accused had within the UPC/FPLC”, as would be shown by the Accused’s stamp at the bottom of the document.²⁷
28. Even if it were to be agreed that the UPC had the capacity to conclude agreements with mining companies and that this fact is relevant to the charges laid against Mr Ntaganda, the fact that the agreement was entered into in 2004 does not allow to establish, let alone to infer, that the UPC had such capacity between 2002 and 2003. As such, document DRC-OTP-0113-0131 has no probative value.
29. The absence of probative value of document DRC-OTP-0113-0131 is further demonstrated by the fact that the agreement was signed on behalf of the UPC by the *Secrétaire national adjoint aux Mines et Énergie*. The mere mention ‘Approved by’ along with the Accused’s signature (without any date on the stamp) does not allow to conclude that the Accused played a decisive role in the conclusion of the agreement which, in turn, would show his ‘prominence and authority’ within the UPC and FPLC.
30. In any event, even if document DRC-OTP-0113-0131 was deemed to have probative value, the same is significantly outweighed by its prejudicial effect. Indeed, the possibility of an inference being drawn that the UPC/FPLC had in 2002-2003 the capacity to conclude agreements in order to obtain money for

²⁷ Prosecution Request, para.23.

its operations, on the basis of its purported ability to do so in 2004, and without any evidentiary basis at the relevant time, is simply too high.

31. For the foregoing reasons, the Defence submits that document DRC-OTP-0113-0131 should not be admitted into evidence.

V. Document DRC-OTP-0016-0106 (#6) cannot be admitted into evidence unless it is tendered through a witness

32. Considering that tendering evidence from the bar table rarely allows for proper contextualisation, leaving the Chamber to determine the documents' relevance and probative value on the basis of the proposed evidence alone,²⁸ the Defence stresses that it is desirable that documents are tendered for admission *through witnesses*, who are able to comment on them.²⁹ In the Defence's view, admission of documents from the 'bar table' is warranted only when it helps avoid the calling of witnesses solely to present documents.³⁰ The Defence posits that when the subject-matter of a document requires contextualisation for its proper understanding, such document should not be admitted from the bar table, but rather be tendered through a witness.
33. The Defence notes that the subject-matter of document DRC-OTP-0016-0106 – namely, the power to raise a '*taxe provinciale*' and the authority of the "*chef du marché*" : (i) goes beyond facts of common knowledge; (ii) has not been covered by any witness heard so far; and (iii) is not expected to be addressed in the testimony of any forthcoming Prosecution witnesses.³¹ The Defence

²⁸ ICTY, *Haradinaj et al.* case, "Decision on Prosecution's Motion to Tender Documents on its Rule 65 *ter* List", 30 November 2007, IT-04-84-T, para.4.

²⁹ Cf. ICTY, *Dorđević* case, "Decision on Prosecution's Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table", 7 December 2009, IT-05-87/1-T, para.5.

³⁰ Cf. ICTY, *Popović et al.* case, "Decision 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, IT-05-88-T, para.15.

³¹ The Prosecution's Pre-Trial Brief (ICC-01/04-02/06-503-Conf-AnxA) makes no mention of these topics.

submits that the probative value of the document can only be assessed in light of comments made by a witness thereon.

34. In spite of the above, should the Chamber be inclined to admit document DRC-OTP-0016-0106 from the bar table, the Defence respectfully submits that it should be given the opportunity to verify the accuracy of the translation provided by the Prosecution (DRC-OTP-2052-0165) and that document DRC-OTP-0016-0106 should be marked for identification pending such verification.³²

CONFIDENTIALITY

35. Pursuant to Regulations 23 *bis* (1) and (2) of the Regulations of the Court, this Defence Response is submitted as confidential as it refers to details related to confidential documents. A public redacted version of the Defence Reponse will be submitted separately.

RELIEF SOUGHT

36. In light of the above submissions, the Defence respectfully requests the Chamber:

PROVIDE the Defence with the opportunity to verify the accuracy of the translation of documents DRC-OTP-0016-0047, DRC-OTP-0016-0049, DRC-OTP-0016-0055, DRC-OTP-0016-0098, DRC-OTP-0016-0110, DRC-OTP-0016-0113, DRC-OTP-0016-0117, DRC-OTP-0016-0119, DRC-OTP-0016-0122, DRC-OTP-0018-0170 and DRC-OTP-0029-0255 and to **MARK** these documents for identification pending such verification; and

DECLINE to admit into evidence the following documents:

- a. DRC-OTP-0016-0106;

³² Annex A, p.6.

- b. DRC-OTP-0132-0239;
- c. DRC-OTP-0138-0257;
- d. DRC-OTP-0102-0038;
- e. DRC-OTP-0113-0131; and
- f. DRC-OTP-0141-0009.

RESPECTFULLY SUBMITTED ON THIS 12TH DAY OF JANUARY 2016

A handwritten signature in dark ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands