

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 19 February 2016

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 Decision on Prosecution's first request for the admission of documentary evidence

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2), 64(9)(a) and 69(4) of the Rome Statute ('Statute') and Rule 63(2) of the Rules of Procedure and Evidence ('Rules'), renders the following 'Decision on Prosecution's first request for the admission of documentary evidence'.

I. Background

1. On 17 December 2015, the Office of the Prosecutor ('Prosecution') submitted the 'Prosecution's first request for the admission of documentary evidence' ('Prosecution Request').¹ Therein, it seeks admission into evidence of 21 documents ('Documents'), as detailed in confidential Annex A to the Prosecution Request ('Annex').²
2. On 11 January 2016, the defence team for Mr Ntaganda ('Defence') responded to the Prosecution Request ('Defence Response').³

II. Submissions

3. The Prosecution submits that the Documents are relevant, each being signed by the accused and, *inter alia*, indicating his position within the UPC/FPLC, as well as the methods of communication used within the UPC hierarchy.⁴ It submits that the Documents also possess sufficient *prima facie* indicia of reliability, being authentic (bearing indicia such as dates, stamps, signatures and letterheads), contemporaneous, and collected during 'routine investigations'.⁵ The

¹ ICC-01/04-02/06-1064, with confidential annexes, ICC-01/04-02/06-1064-Conf-AnxA and ICC-01/04-02/06-1064-Conf-AnxB.

² ICC-01/04-02/06-1064-Conf-AnxA.

³ ICC-01/04-02/06-1078-Conf. A public redacted version was filed on 12 January 2016, ICC-01/04-02/06-1078-Red.

⁴ Prosecution Request, ICC-01/04-02/06-1064, paras 1 and 11.

⁵ Prosecution Request, ICC-01/04-02/06-1064, paras 1, 13 – 14.

Prosecution further submits that the probative value of each of the Documents outweighs any prejudicial effect.⁶

4. The Prosecution provides specific submissions in relation to the Documents to which the Defence objects, which are considered below.
5. The Defence submits that it does not object to the admission of 14 of the Documents, that one of the Documents has previously been admitted into evidence, and provides specific submissions, considered below, in relation to the six Documents to which it objects.⁷

III. Applicable Law

6. As has previously been noted by other chambers, admission of evidence through a 'bar table' motion is a practice established in the jurisprudence of the Court.⁸ Under the statutory framework, the Chamber has considerable discretion to assess various types of evidence.⁹ Article 64(9)(a) of the Statute gives the Chamber the power to rule on the 'admissibility or relevance of evidence' and Rule 63(2) of the Rules provides that the Chamber shall have the authority to 'assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.'¹⁰ Further, Article 69(4) of the Statute provides that the Chamber may 'rule on the admissibility or relevance of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to the fair evaluation of the testimony of a witness'. The Chamber has an overarching obligation under Article 64(2) of the Statute to ensure that the trial

⁶ Prosecution Request, ICC-01/04-02/06-1064, paras 15-16.

⁷ Defence Response, ICC-01/04-02/06-1078-Red, paras 2 and 4. The Chamber notes that the Prosecution incorrectly indicated in the Prosecution Request that the Defence does not object to 16 of the Documents (Prosecution Request, ICC-01/04-02/06-1064, para. 4).

⁸ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353 ('Ruto and Sang Admission Decision'), para. 13.

⁹ Ruto and Sang Admission Decision, ICC-01/09-01/11-1353, para. 13 (and footnotes referenced therein).

¹⁰ Ruto and Sang Admission Decision, ICC-01/09-01/11-1353, paras 13-14.

is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

7. In this light, in its 'Decision on the conduct of proceedings',¹¹ the Chamber has already indicated that it 'shall determine the admissibility of a document on the basis of its relevance, probative value, and any prejudice that its admission may cause to a fair trial or to the evaluation of the testimony of a witness'.¹² The Chamber notes that the assessment of both relevance and probative value is conducted on a *prima facie* basis.¹³ The Chamber underlines that its assessment of material for the purposes of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment once the entire case record is before it.¹⁴

IV. Analysis

Documents to which the Defence does not object

8. As a preliminary matter, the Chamber observes that, as noted by the Defence,¹⁵ **Document 16** of the Annex (**DRC-OTP-0016-0131**) has already been admitted into evidence by the Chamber,¹⁶ and therefore will not be considered further in the present decision.
9. Additionally, the Chamber notes that while it encourages the parties to have *inter partes* consultations on these matters, it is not bound by the agreement of the parties on matters of evidence or law. For this reason, notwithstanding the agreement of the parties as to certain of the items tendered, the assessment of

¹¹ ICC-01/04-02/06-619, 2 June 2015.

¹² ICC-01/04-02/06-619, para 36.

¹³ See, for example, *Prosecutor v Lubanga*, Corrigendum to Decision on the admissibility of four documents, ICC-01/04-01/06-1399-Corr, paras 27-28; and *Prosecutor v Bemba*, ICC-01/05-01/08-2012-Red, para. 13.

¹⁴ Ruto Admission Decision, ICC-01/09-01/11-1353, para. 16.

¹⁵ Defence Response, ICC-01/04-02/06-1078-Red, para. 2.

¹⁶ Transcript of Hearing on 21 September 2015, ICC-01/04-02/05-T-29-CONF-ENG, pages 6-8.

the Chamber with respect to the admissibility of each of the Documents is set out below.¹⁷

10. The Defence indicates that, while it does not agree with the ‘conclusions’ drawn by the Prosecution as to relevance and probative value,¹⁸ it does not object to the admission of the following 14 Documents:

- **Document 1** of the Annex, **DRC-OTP-0014-0272**, being a letter in French, dated 1 November 2003 from Mr Ntaganda, relating to payment for a Thuraya satellite phone;
- **Document 2** of the Annex, **DRC-OTP-0016-0047** (and accompanying translation into French, **DRC-OTP-2052-0151**), being a letter in Swahili dated 14 November 2003 from Mr Ntaganda, directing a commander, *inter alia*, to return to Lingo;
- **Document 3** of the Annex, **DRC-OTP-0016-0049** (and accompanying translation into French, **DRC-OTP-2052-0154**), being a letter in Swahili dated 18 November 2003 from Mr Ntaganda, directing a commander to come and see Mr Ntaganda at Ropa;
- **Document 4** of the Annex, **DRC-OTP-0016-0055** (and accompanying translation into French **DRC-OTP-2052-0157**), being a letter in Swahili dated 12 December 2003 from Mr Ntaganda, regarding, *inter alia*, the taking of certain hostages;
- **Document 5** of the Annex, **DRC-OTP-0016-0098** (and accompanying translation into French **DRC-OTP-2052-0162**), being a letter in Swahili dated 29 October 2003 from Mr Ntaganda to ‘G3’, regarding the urgent transfer of a Lieutenant colonel;

¹⁷ For ease of reference, the Documents are referred to herein by reference to their number in the Annex, in addition to their ERN.

¹⁸ Defence Response, ICC-01/04-02/06-1078-Red, para. 3. *See also* Annex.

- **Document 7** of the Annex, **DRC-OTP-0016-0110** (and accompanying translation into French **DRC-OTP-2086-0831**), being a letter in Swahili dated 19 November 2003 from Mr Ntaganda, in relation, *inter alia*, to security arrangements in the area;
- **Document 8** of the Annex, **DRC-OTP-0016-0113** (and accompanying translation into French **DRC-OTP-2052-0168**), being a letter in Swahili dated 19 November 2003 from Mr Ntaganda, regarding, *inter alia*, ensuring discipline;
- **Document 9** of the Annex, **DRC-OTP-0016-0117** (and accompanying translation into French **DRC-OTP-2086-0834**), being a letter in Swahili dated 19 November 2003 from Mr Ntaganda, regarding repairs to a canoe;
- **Document 10** of the Annex, **DRC-OTP-0016-0119** (and accompanying translation into French **DRC-OTP-2086-0836**), being a letter in Swahili dated 19 November 2003 from Mr Ntaganda, regarding the provision of assistance;
- **Document 11** of the Annex, **DRC-OTP-0016-0122** (and accompanying translation into French **DRC-OTP-2052-0170**), being a letter dated 6 December 2003 from Mr Ntaganda, regarding certain logistics;
- **Document 12** of the Annex, **DRC-OTP-0018-0170** (and accompanying translation into French **DRC-OTP-0173-0517**), being a letter in Swahili dated 6 August 2003 from Mr Ntaganda, regarding matters concerning troops;
- **Document 13** of the Annex, **DRC-OTP-0029-0255** (and accompanying translation into French **DRC-OTP-0161-0002**), being a letter in Swahili dated 26 August 2002 from Mr Ntaganda, *inter alia*, assigning a company to one of them;

- **Document 17** of the Annex, **DRC-OTP-0016-0133**, being a declaration in French dated 6 December 2003, signed by Mr Ntaganda, regarding changes in the UPC/FPLC General Staff; and
- **Document 18** of the Annex, **DRC-OTP-0165-0254**, being a declaration in French dated 6 December 2003, signed by Mr Ntaganda and indicating, *inter alia*, that declarations by commander Kisémbé and Mr Litsha are null and void for the UPC/RP.

11. The Chamber considers that each of the documents listed above have *prima facie* relevance and probative value. In this regard, the Chamber observes that they are each: (i) signed by Mr Ntaganda in his official capacity; (ii) bear dates falling within the time period of the charges; (iii) in most cases contain stamps and/or signatures of other members of the UPC/FLPC;¹⁹ and (iv) are addressed to other members of the UPC/FPLC or to the heads of official institutions.²⁰ Moreover, they appear to relate to, or have relevance to, operational and structural matters within the UPC/FPLC, including lines of communication and the respective roles and powers of certain individuals, including the accused.
12. The Chamber is satisfied that no unfair prejudice arises from the admission of these documents into evidence, and also notes in that regard that the Defence does not, in principle, object to their admission.

Documents to which the Defence objects

13. The Defence objects to the admission of six of the 21 Documents, which are considered in the following paragraphs.
14. As a preliminary matter, it is noted that in respect of four of the Documents (**Documents 15 and 19-21**), the Defence objections are based, in part, on the fact that the date of the documents in question falls outside the temporal scope of

¹⁹ See, for example, Documents 2-3, 7-12 and 17-18.

²⁰ In respect of the latter see, for example, Documents 17 and 18.

the charges. The Chamber considers that the fact that a document may fall outside of the temporal scope of the charges does not, as a matter of principle, automatically result in it lacking relevance or probative value. Rather, a case by case assessment is required.²¹

15. **Document 6** of the Annex, **DRC-OTP-0016-0106** (and accompanying translation into French **DRC-OTP-2052-0165**), is a letter in Swahili, dated 17 November 2003 from Mr Ntaganda to a Colonel directing that the 'Chef de marché' be sent to him regarding the hiding of taxes. The Defence objects to the admission of this document on the basis that the subject matter requires that it be tendered through a witness who can provide information on the provincial tax system and the authority of the 'Chef du marché'.²²
16. The Chamber notes that the letter is signed by the accused in his official capacity, bears a date falling within the time period of the charges, bears a stamp and appears to relate to administrative matters. Regarding the Defence submission that an understanding of the system of provincial taxes and authority of the 'Chef du marché' is required, the Chamber notes that it already has certain evidence before it regarding the system of provincial taxes,²³ which could assist in contextualising the document. Moreover, the document has certain relevance and probative value, albeit potentially cumulative with other evidence in the case, regarding the role and authority of the accused and the UPC/FPLC structure, independent of its specific subject matter. For these reasons the Chamber is satisfied that the document has *prima facie* relevance and probative value and its admission would not cause unfair prejudice.
17. **Document 14** of the Annex, **DRC-OTP-0132-0239** (and accompanying translation into French **DRC-OTP-0177-0125**) is a letter in Swahili, dated 20

²¹ See Ruto and Sang Admission Decision, ICC-01/09-01/11-1353, para. 28.

²² Defence Response, ICC-01/04-02/06-1078-Red, para. 33.

²³ See, for example, DRC-OTP-0147-0002.

November 2003 from Mr Ntaganda in which, *inter alia*, he advises that he is going to Joo to deal with some problems there. The Defence objects to the document's admission into evidence on the basis that it lacks sufficient indicia of reliability. The Defence submits that the document is not self-authenticating, being entirely handwritten, with no official letterhead or stamp on it, that Mr Ntaganda does not recognise his signature, and that the original document is not available.²⁴ The Prosecution submits, amongst other things, that the document mentions numerous known places and persons and is consistent with other contemporaneous handwritten documents.²⁵

18. The Chamber notes that the document is handwritten and lacks an official letterhead or stamp, although it appears to be dated and signed. Moreover, the content of the message is somewhat cryptic and the Prosecution does not specify the 'contemporaneous handwritten documents'²⁶ which it asserts this document is consistent with. No other information in the admitted evidence or case record has been presented to confirm the provenance of this document, and the Chamber additionally notes that the source of the document appears to be different from the other documents tendered by way of the Prosecution Request. In the circumstances, the Chamber finds that the authenticity of the document has been inadequately supported. The Chamber therefore declines to admit it into evidence at this time.
19. **Document 15** of the Annex, **DRC-OTP-0138-0257**, is a letter in French, dated 21 February 2005 from Mr Ntaganda inviting a commander to 'Central' the following day. Noting that the document falls outside the time period of the charges, the Defence challenges its relevance and probative value, and argues that its admission would be prejudicial as the possibility of drawing an adverse

²⁴ Defence Response, ICC-01/04-02/06-1078-Red, paras 6-12.

²⁵ Prosecution Request, ICC-01/04-02/06-1064, para 24. *See also* para. 27.

²⁶ Prosecution Request, ICC-01/04-02/06-1064, para 24.

inference on the basis of this document is ‘simply too high’.²⁷ Noting that the document is handwritten, the original is not available, and it was provided to the Prosecution by an intermediary for whom Trial Chamber I found there to be serious credibility concerns, the Defence also submits that the ‘risk of falsification cannot be ruled out’.²⁸ The Prosecution submits that the document relates, amongst other things, to Mr Ntaganda’s ‘ongoing authority over two alleged perpetrators of crimes’, whose ‘continued presence’ in the FPLC is relevant to the accused’s intention, or failure to take reasonable and necessary accountability measures.²⁹

20. The Chamber observes that the document, although handwritten, is dated, bears signatures purporting to be those of Mr Ntaganda and Mr Linganga, in their official capacities, as well as a stamp. The Chamber considers that the ongoing composition of the UPC/FPLC following the temporal scope of the charges may have certain *prima facie* relevance. However, noting that the origin of the document is not fully explained, the Chamber considers that the probative value of the document is outweighed by its potential prejudice and therefore declines to admit it into evidence at this time.
21. **Documents 19 (DRC-OTP-0102-0038) and 21 (DRC-OTP-0141-0009)** of the Annex, are lists of UPC/FPLC members, including name and rank, dated 12 May 2004 and 11 December 2004, respectively. The Defence objects to the admission of both of these documents on the basis, primarily, that they fall outside the temporal scope of the charges, and therefore lack relevance and probative value. The Defence also notes that the Prosecution is not in possession of the original documents.³⁰

²⁷ Defence Response, ICC-01/04-02/06-1078-Red, paras 14-15.

²⁸ Defence Response, ICC-01/04-02/06-1078-Red, paras 16-18.

²⁹ Prosecution Request, ICC-01/04-02/06-1064, para 21.

³⁰ Defence Response, ICC-01/04-02/06-1078-Red, paras 20-26.

22. The Chamber notes that both documents are signed by Mr Ntaganda and bear stamps. As indicated above, the Chamber also considers that the composition and structure of the UPC/FPLC in the period shortly after the temporal scope of the charges is *prima facie* relevant. Noting that any weight to be attached to the documents will only be considered in the light of the evidentiary record as a whole, the Chamber does not find that there would be unfair prejudice caused by the admission of these two documents into evidence.
23. **Document 20** of the Annex, **DRC-OTP-0113-0131**, is an agreement dated 8 July 2004 between the UPC/FPLC and the Shabani Company for exclusive mineral exploitation rights for a fee. The Defence objects to the document's admission primarily on the basis that it falls outside the temporal scope of the charges, and thereby lacks relevance and probative value as to the UPC's capacity to enter such agreements during the relevant timeframe.³¹
24. The Chamber notes that the document is signed by both parties to the agreement and bears three stamps. The Chamber considers that, although falling outside the time period of the charges, the entry into force of such agreements for the exploitation of mineral rights and financing of the UPC is of *prima facie* relevance. Moreover, the Chamber notes that the document provides a degree of corroboration to certain existing evidence.³² Recalling again that any weight to be attributed will only be assessed in light of the evidentiary record as a whole, the Chamber finds that admission of the document would not result in unfair prejudice.

³¹ Defence Response, ICC-01/04-02/06-1078-Red, paras 27-31.

³² See, for example, DRC-OTP-2054-5384 (noting, *inter alia*, the role of Ulyera Wele).

Confidentiality and translations

25. The Chamber notes that no specific submissions were received on the appropriate level of confidentiality for each of the items of evidence. The Chamber has therefore relied upon the confidentiality status as indicated in E-Court for the purposes of the disposition below.
26. Finally, the Chamber notes that the Defence indicated that, if **Documents 2 - 14** are admitted, it would require additional time to 'verify the accuracy of the French translation', and, as such, the translations should only be marked for identification pending verification.³³ The Prosecution makes no submissions on this point.
27. The Chamber accepts that translations provided by the Prosecution's translation unit are prepared in good faith and in an objective manner, but notes that the fact the translations are prepared by a party to the proceedings may be a factor to weigh in considering them.³⁴ Without prejudice to the Defence subsequently identifying and raising points of concrete dispute, the Chamber will admit the items in question into evidence at this time, rather than marking them for identification. The Chamber observes in this regard that the documents in question are short, should be familiar to the accused himself, and that no concrete disagreements have been identified to date.

³³ ICC-01/04-02/06-1064-Conf-AnxA; Defence Response, ICC-01/04-02/06-1078-Red, para. 3. The Chamber notes that it is currently also seised of a request for judicial review of a Registrar's decision on a matter related to this issue, *see* Application on behalf of Mr Ntaganda seeking judicial review of the Registry's decision on the defence requests for resources for review of the transcriptions and translations prepared by the Prosecution, 11 February 2016, ICC-01/04-02/06-1166.

³⁴ See similarly, *The Prosecutor v Bemba et al*, Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table', ICC-01/05-01/13-1524, para. 11.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

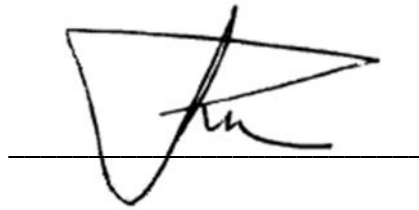
ADMITS the following documents into evidence:

DRC-OTP-0014-0272; DRC-OTP-0016-0047 (and accompanying translation DRC-OTP-2052-0151); DRC-OTP-0016-0049 (and accompanying translation DRC-OTP-2052-0154); DRC-OTP-0016-0055 (and accompanying translation DRC-OTP-2052-0157); DRC-OTP-0016-0098 (and accompanying translation DRC-OTP-2052-0162); DRC-OTP-0016-0106 (and accompanying translation DRC-OTP-2052-0165); DRC-OTP-0016-0110 (and accompanying translation DRC-OTP-2086-0831); DRC-OTP-0016-0113 (and accompanying translation DRC-OTP-2052-0168); DRC-OTP-0016-0117 (and accompanying translation DRC-OTP-2086-0834); DRC-OTP-0016-0119 (and accompanying translation DRC-OTP-2086-0836); DRC-OTP-0016-0122 (and accompanying translation DRC-OTP-2052-0170); DRC-OTP-0018-0170 (and accompanying translation DRC-OTP-0173-0517); DRC-OTP-0029-0255 (and accompanying translation DRC-OTP-0161-0002); DRC-OTP-0016-0133; DRC-OTP-0165-0254; DRC-OTP-0102-0038; DRC-OTP-0113-0131; and DRC-OTP-0141-0009.

DIRECTS the Registry to update the E-Court metadata accordingly to reflect their admission; and

REJECTS all other requests.

Done in both English and French, the English version being authoritative.

A handwritten signature in dark ink, consisting of a large, stylized 'F' followed by a cursive 'r', positioned above a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in dark ink, positioned above a horizontal line. The signature on the left is 'Kuniko Ozaki' and the signature on the right is 'Chang-ho Chung'.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated this 19 February 2016

At The Hague, The Netherlands