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**International
Criminal
Court**



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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
With Confidential Annex A**

Prosecution's request for the admission of exhibits from the bar table

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 Prosecution seeks the admission of 192 exhibits, 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 exhibits 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. 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.
3. The Defence objects to the admission of 135 of the 192 submitted exhibits. The Prosecution requests the Chamber to reject the Defence objections and admit all 192 items into evidence.

Confidentiality

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

¹ ICC-01/04-02/06-619, para. 52.

Submissions

Applicable Law

5. Article 69(4) guides the factors to be considered when making admissibility assessments.² 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”.

6. The Statute and the Rules do not expressly stipulate the manner in which documentary evidence may be introduced. Nonetheless, Chambers, including this Chamber,³ have routinely admitted evidence from the “bar table” in the absence of an authenticating witness.⁴ In the *Lubanga* case, Trial Chamber I admitted evidence from the bar table,⁵ 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.”⁶ The Trial Chambers in the *Katanga and Ngudjolo*,⁷ *Ruto and Sang*,⁸ and *Bemba*⁹ cases followed the same approach. Specifically, this Chamber has acknowledged that the “admission of evidence through a ‘bar table’ motion is a practice established in the jurisprudence of the Court.”¹⁰

² ICC-01/09-01/11-1353, para.14.

³ ICC-01/04-02/06-1181.

⁴ 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).

⁵ ICC-01/04-01/06-1399-Corr, para.42; *See also* ICC-01/04-01/06-1981.

⁶ ICC-01/04-01/06-1399-Corr, para.22.

⁷ ICC-01/04-01/07-2635. *See also* ICC-01/04-01/07-1665, para.100.

⁸ ICC-01/09-01/11-1353.

⁹ ICC-01/05-01/08-2012-Conf ; ICC-01/05-01/08-2299-Red.

¹⁰ ICC-01/04-02/06-1181, para. 6; *see also* ICC-01/09-01/11-1353, para.13.

7. 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;¹¹ (ii) its *prima facie* probative value;¹² and (iii) its prejudicial effect as weighed against the probative value.¹³

Analysis

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

8. The 192 exhibits 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.

(ii) The material has prima facie probative value

9. The 192 exhibits 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.¹⁴ 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.

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ ICC-01/05-01/08-2012-Red, para. 15.

10. 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.¹⁵ 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".¹⁶ 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.

11. The Prosecution submits the 192 exhibits in the absence of witness testimony, as is the established practice of introducing evidence in a bar table motion. The exhibits 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, largely 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.

¹⁵ 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.

¹⁶ ICC-01/05-01/08-2299-Red, para. 9.

(iii) *There is no unfair prejudicial effect*

12. 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.

13. 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*

14. The Defence objections fall into five broad categories: i) that the exhibit does not meet the minimum indicia of reliability, ii) that the exhibit is inadmissible because it relates to events that occurred *after* the period of the charges, iii) that the Prosecution must provide more specificity as to the relevance, iv) that the Defence generally disputes facts contained in the exhibit, and v) that a witness is necessary for admission – nearly all arguments having to do with the potential probative weight of the evidence, rather than admissibility. The annex provides the Prosecution's justifications for admission for each exhibit

15. In considering factors bearing on admissibility Chamber “enjoys a significant degree of discretion in considering all types of evidence.”¹⁷ 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 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.¹⁸

16. Chambers have admitted evidence falling outside the temporal scope of the charges, including where such evidence is logically connected to a fact in issue,¹⁹ provides context, or evidence of the relationship between the accused and his alleged co-perpetrators or his role within the organisation.²⁰ All of the documents adduced by the Prosecution 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.

17. The Defence arguments relating to specificity of the evidence are misplaced and illogical. In some instances the submitted evidence relates to very general propositions and in other instances the submitted evidence relates to very specific issues. The generality of the issue to which the evidence relates does not render the evidence inadmissible for that issue. The Defence arguments disputing facts contained in the exhibits is equally illogical. Were evidence to be excluded on the basis that a party disputed facts contained therein, no evidence would be admissible. Similarly illogical are the Defence objections that a witness is necessary for many of the exhibits to be admissible. While witness testimony may provide additional

¹⁷ ICC-01/04-01/06-1399, para.24.

¹⁸ ICC-01/04-01/06-1399, para.24.

¹⁹ ICC-01/05-01/08-2299-Red, paras. 8 and 12.

²⁰ ICC-01/04-01/06-2842, para. 1022; and ICC-01/05-01/08-2299-Red, paras. 51, 61 and 67.

probative value for a particular exhibit, the lack of witness testimony should not render an exhibit inadmissible.

Requested Relief

18. 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 3rd Day of February 2017
At The Hague, The Netherlands