



Original: **English**

No.: **ICC-01/04-02/06**
Date: **20 November 2017**

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-G**

**Public redacted version of “Prosecution request to admit evidence related to
Agreed Fact 69”, 10 November 2017, ICC-01/04-02/06-2108-Conf**

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. In June 2015, the Prosecution and Defence agreed on the fact that Rwanda provided weapons and ammunition to the UPC/FPLC beginning in July 2002 (“Agreed Fact 69”).¹ The Chamber took note of this and stated that there was no reason for a more complete presentation of evidence on this matter.² After the close of the Prosecution’s case-in-chief, the Defence stated that it disputes this agreed fact.³ Further to the Chamber’s authorisation,⁴ the Prosecution requests the admission into evidence of the following items relevant to Agreed Fact 69 for the truth of their contents: (i) the prior recorded testimony of Witnesses [REDACTED]⁵ and [REDACTED]⁶ pursuant to rule 68(2)(b) of the Rules;⁷ and (ii) five items⁸ from the bar table pursuant to articles 64(9)(a), 69(3) and 69(4) of the Statute⁹ and rule 63(2) (“Request”).

2. All of the items that the Prosecution seeks to admit relate to Agreed Fact 69 and, as such, are relevant to material issues at trial. They are of high probative value and bear sufficient indicia of reliability. The prior recorded testimony does not relate to the acts and conduct of the Accused; it relates to matters that are background to the charges and is of a cumulative or corroborative nature. Although the prior recorded testimony relates to issues that are now materially in dispute, namely, the provisions of weapons, ammunition and uniforms from Rwanda starting from at least July 2002, it should nevertheless be admitted in

¹ See ICC-01/04-02/06-633-AnxA-Red, p. 5.

² See ICC-01/04-02/06-662.

³ See ICC-01/04-02/06-2043-Conf, para. 5.

⁴ ICC-01/04-02/06-2058, para. 9, p. 6.

⁵ The Prosecution seeks the admission of Witness [REDACTED]’s rule 68(2) statement (DRC-OTP-2105-8187) and the excerpts from previous statements referred to therein as contained in DRC-OTP-2105-8189, see Confidential Annex A.

⁶ The Prosecution seeks the admission of Witness [REDACTED]’s rule 68(2) statement (DRC-OTP-2105-8228) and the excerpts from previous statements referred to therein as contained in DRC-OTP-2105-8230, see Confidential Annex B.

⁷ Rules of Procedure and Evidence.

⁸ DRC-OTP-0208-0272, DRC-OTP-0044-0333, DRC-OTP-0043-0063, DRC-OTP-0072-0315, and DRC-OTP-0014-0295, see Confidential Annexes C-G.

⁹ Rome Statute.

view of the specific circumstances that lead to the very late denial of an agreed fact.

3. The admission of all these items is in the interests of justice, will assist the Chamber's determination of the truth, will not prejudice the rights of the Accused, and will ensure an expeditious trial. The admission of these items will also remedy the prejudice that the Prosecution has suffered due to the Defence's late denial of Agreed Fact 69 after the close of the Prosecution's case.
4. The Defence has already acknowledged that if the Accused did not confirm Agreed Fact 69 "the Prosecution can lead the evidence it wishes to lead, because I agree this would not be appropriate to change our mind on an agreed fact at this time."¹⁰

Confidentiality

5. In accordance with regulation 23*bis*(1) and (2) of the Regulations of the Court, this response and its annexes are classified as Confidential since the response refers to filings bearing the same classification and both the response and its annexes refer to evidence and other information that is not yet available to the public.

Background¹¹

6. On 8 June 2015, the Prosecution and Defence filed their joint submission on agreed facts, setting out 82 facts that were not contested by the Parties and requesting the Chamber to consider these facts as proven.¹² Agreed fact 69 reads:

¹⁰ ICC-01/04-02/06-T-234-CONF-ENG ET, p. 19, ln. 17 – p. 20, ln. 15 (open session).

¹¹ For a more detailed procedural background *see* ICC-01/04-02/06-2046-Conf, paras. 6-29.

¹² ICC-01/04-02/06-633.

“Rwanda provided weapons and ammunition to the UPC/FPLC beginning in July 2002.”¹³

7. On 22 June 2015, the Chamber issued its decision on the joint submission, stating that it “notes the agreed facts contained in Annex A of the Joint Submission and, at this stage, does not consider there to be reason for a more complete presentation of evidence on those matters.”¹⁴
8. On 29 March 2017, the Prosecution closed its case-in-chief.¹⁵
9. On 28 June 2017, during his examination-in-chief, the Accused testified that weapons that were air-dropped for his group in July 2002 in Kudja (Mandro) had been provided by the RCD-GOMA.¹⁶
10. On 29 August 2017, during his cross-examination, the Accused maintained his testimony that his group obtained logistical support, including weapons, from RCD-GOMA, not Rwanda.¹⁷ The Prosecution referred the witness to Agreed Fact 69 and asked how the witness reconciled that agreement with his evidence, at which point Defence Counsel noted that “there is a difference between an agreed fact, whereas the fact might have been accepted, and the knowledge of the witness. So that's two different things, so we should not mix up the two.”¹⁸ The Accused then testified that he did not agree with the Prosecution that weapons were delivered from Rwanda to the UPC/FPLC beginning in July 2002 and that “whenever my counsel asks me questions I told them that I would give them a lot

¹³ ICC-01/04-02/06-633-AnxA-Red, p. 5.

¹⁴ ICC-01/04-02/06-662.

¹⁵ ICC-01/04-02/06-1839.

¹⁶ ICC-01/04-02/06-T-214-CONF-ENG ET, p. 45, lns. 14-21 (open session).

¹⁷ ICC-01/04-02/06-T-232-CONF-ENG CT, p. 49, ln. 10 – p. 50, ln. 2 (open session).

¹⁸ ICC-01/04-02/06-T-232-CONF-ENG CT, p. 50, lns. 3-13 (open session).

of evidence to show them that we received arms from RCD-Goma. That's what I told them.”¹⁹

11. Defence Counsel stated “I confirm that the agreed facts, Mr Ntaganda was not consulted as he mentioned. I did not say that before. I waited until he would say it. What Mr Ntaganda told us is what he said on the record. He never -- he was not consulted when this document was provided to the Prosecution. And this is my mistake.”²⁰

12. On 31 August 2017, the Prosecution made further submissions concerning Agreed Fact 69, seeking guidance from the Chamber as to whether it intended to accept the agreed fact as put forward or whether it was now vitiated, in which case the Prosecution may need to adduce evidence on this or any other facts that were previously agreed and accepted by the Chamber.²¹

13. Defence Counsel stated that he was “convinced that if and when I do speak to Mr Ntaganda about the issue...whether now, if you allow me to do it now, or if I can do it after his testimony, we will stand by the agreed fact. Those weapons came from Rwanda... once I speak to Mr Ntaganda, then it is very likely that we will confirm the agreed fact. And if not, we will tell the Prosecution and then the Prosecution can lead the evidence it wishes to lead, because I agree this would not be appropriate to change our mind on an agreed fact at this time.”²² Defence Counsel also submitted that he was certain that the Defence discussed the provenance of the weapons with the Accused on numerous occasions.²³ Defence Counsel stated that the Accused was not consulted about Agreed Fact 69, and

¹⁹ ICC-01/04-02/06-T-232-CONF-ENG CT, p. 50, ln. 17 – p. 51, ln. 22 (open session), *see also* p. 52, lns. 1 –13 (open session).

²⁰ ICC-01/04-02/06-T-232-CONF-ENG CT, p. 53, lns. 2-7 (open session).

²¹ ICC-01/04-02/06-T-234-CONF-ENG ET, p. 17, ln. 19 – p. 19, ln. 12, p. 24, ln. 9 – p. 25, ln. 3 (open session).

²² ICC-01/04-02/06-T-234-CONF-ENG ET, p. 19, ln. 17 – p. 20, ln. 15 (open session).

²³ ICC-01/04-02/06-T-234-CONF-ENG ET, p. 20, lns. 19-23 (open session).

certain other agreed facts, but noted that the Accused had informed Defence Counsel that he knew nothing about the weapons coming from Rwanda.²⁴

14. The Chamber “note[d] with concern the Defence submission that Mr Ntaganda has not been consulted on this issue” and ordered the Defence Counsel to consult with and obtain instructions from Mr Ntaganda after the completion of his testimony and to provide the Chamber, within two days, with further submissions on the Defence position on Agreed Fact 69 and on any other agreed fact upon which Mr Ntaganda has not yet been consulted.²⁵ The Presiding Judge also stated that upon receipt of the Defence submissions, the Chamber would evaluate whether it would require further observations on the issue, including whether it shall authorise the Prosecution to adduce additional evidence on this or any other issues flowing from the agreed facts.²⁶

15. On 22 September 2017, the Defence filed its submissions on agreed facts in which it stated that “agreed fact number 69 does not accord with Mr Ntaganda’s knowledge, who denies having any knowledge of this fact”²⁷ and that the Defence “misunderstood Mr Ntaganda’s observations regarding proposed agreed fact number 69”.²⁸

16. On 28 September 2017, the Prosecution responded to the Defence’s 22 September 2017 submissions, stating, *inter alia*, that should the Chamber vitiate Agreed Fact 69, it seeks leave to adduce further documentary evidence or statement(s) taken under rule 68(2)(b) concerning Rwanda’s role in the provision of weapons and ammunition to the Accused and his group in July 2002.²⁹

²⁴ ICC-01/04-02/06-T-234-CONF-ENG-ET, p. 20, ln. 24 – p. 22, ln. 13 (open session).

²⁵ ICC-01/04-02/06-T-234-CONF-ENG-ET, p. 28, lns. 5-18 (open session).

²⁶ ICC-01/04-02/06-T-234-CONF-ENG-ET, p. 28, lns. 19-24 (open session).

²⁷ ICC-01/04-02/06-2043-Conf, para. 3.

²⁸ ICC-01/04-02/06-2043-Conf, para. 5. These submissions reproduced the content of the email from Stéphane Bourgon to the Chamber, Prosecution and participants dated 20 September 2017 at 14:44.

²⁹ ICC-01/04-02/06-2046-Conf, paras. 2, 36.

17. On 9 October 2017, the Chamber took note of the Parties' position concerning Agreed Fact 69 and directed the Prosecution to file any request to adduce additional evidence by 10 November 2017, and the Defence and the Legal representatives of victims to file any responses by 17 November 2017.³⁰

Prosecution Submissions

18. The Chamber authorised the Prosecution to submit this request for admission of material relevant to Agreed Fact 69.³¹ The Prosecution seeks the admission of the prior recorded testimony of Witnesses [REDACTED] and [REDACTED] in relation to this fact pursuant to rule 68(2)(b) as well as five additional items from the bar table.

I. The prior recorded testimony of [REDACTED] and [REDACTED] should be admitted pursuant to rule 68(2)(b)

19. The Prosecution seeks to admit the prior recorded testimony of Witnesses [REDACTED] and [REDACTED] pursuant to rule 68(2)(b) for the truth of its contents. Pursuant to this rule, the Chamber may admit the prior recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony goes to proof of "a matter other than the acts and conduct of the accused" and is accompanied by the appropriate declaration. Rule 68(2)(b)(i) sets out a list of non-exhaustive factors that the Chamber is bound to consider in determining whether to permit the introduction of the prior recorded testimony.³²

20. The Registry will be submitting the declarations required pursuant to rule 68(2)(b)(ii) forthwith. Should the Chamber reach a decision on this Request before

³⁰ ICC-01/04-02/06-2058.

³¹ See ICC-01/04-02/06-2058, para. 9, p. 6.

³² These factors are whether the prior recorded testimony: (i) relates to issues that are not materially in dispute; (ii) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (iii) relates to background information; (iv) is such that the interests of justice are best served by its introduction; and (v) has sufficient indicia of reliability.

such time, the Prosecution requests the conditional admission of the prior recorded testimony of Witnesses [REDACTED] and [REDACTED].³³

21. Witnesses [REDACTED] and [REDACTED] both provided information relevant to Agreed Fact 69 in their respective statements to the Prosecution.

22. After the Defence disputed Agreed Fact 69, the Prosecution compiled the excerpts from Witness [REDACTED]'s prior statements that contained information relevant to Agreed Fact 69 into one document,³⁴ and conducted the same exercise in relation to Witness [REDACTED].³⁵ The Prosecution then met with Witness [REDACTED] on [REDACTED] 2017³⁶ and with Witness [REDACTED] the following day.³⁷ Both witnesses were given the opportunity to review the excerpts from their respective statements and make any changes or corrections, if necessary. Both witnesses confirmed the accuracy of the relevant excerpts.³⁸ Therefore, for each witness, the Prosecution seeks to admit as prior recorded testimony the two-page statement in which each witness verifies the accuracy of the excerpts from previous statements relevant to Agreed Fact 69 as well as the excerpts themselves.

23. As set out in DRC-OTP-2105-8189, Witness [REDACTED] stated to the Prosecution that [REDACTED].³⁹ [REDACTED].⁴⁰ [REDACTED].⁴¹ Célestin/Safari

³³ See ICC-01/04-02/06-1667-Conf, para. 7.

³⁴ See Confidential Annex A, DRC-OTP-2105-8189. The first three pages of this document contain Witness [REDACTED]'s biographical information, see DRC-OTP-2105-8189, pp. 8189-8191.

³⁵ See Confidential Annex B, DRC-OTP-2105-8230. The first two pages of this document contain Witness [REDACTED]'s biographical information, see DRC-OTP-2105-8230, pp. 8230-8231.

³⁶ See Confidential Annex B, DRC-OTP-2105-8228.

³⁷ See Confidential Annex A, DRC-OTP-2105-8187.

³⁸ See Confidential Annex B, DRC-OTP-2105-8228 and Confidential Annex A, DRC-OTP-2105-8187.

³⁹ See Confidential Annex A, DRC-OTP-2105-8189, pp. 8198-8199, 8208.

⁴⁰ See Confidential Annex A, DRC-OTP-2105-8189, pp. 8193, 8199.

⁴¹ See Confidential Annex A, DRC-OTP-2105-8189, pp. 8194, 8208.

then coordinated the airdrop of weapons in Mandro and the UPC used these weapons to chase Lompondo out of Bunia.⁴²

24. As set out in DRC-OTP-2105-8230, Witness [REDACTED] stated to the Prosecution that [REDACTED].⁴³ [REDACTED]⁴⁴ and [REDACTED].⁴⁵ [REDACTED].⁴⁶ Planes that departed from Rwanda airdropped weapons in Mandro for the UPC several times,⁴⁷ starting in June 2002.⁴⁸ At the time that the UPC was in control of Mongbwalu, Safari also coordinated the landing of planes near Mongbwalu that had departed from Kigali with weapons.⁴⁹

25. [REDACTED]. Although Witness [REDACTED] did testify, the Prosecution did not specifically seek to elicit the information that this witness had provided during his interviews regarding Rwanda providing weapons and ammunition to the UPC/FPLC beginning in July 2002 since there was no need to do so in view of Agreed Fact 69.

26. The prior recorded testimony of both witnesses satisfies the criteria for admission pursuant to rule 68(2)(b).

27. First, the prior recorded testimony relates to background information, not to the acts and conduct of the Accused.⁵⁰ In the relevant excerpts from Witness [REDACTED]'s statements, this witness states that the Accused was organising things in Mandro,⁵¹ and that the Accused was in charge of the weapons in

⁴² See Confidential Annex A, DRC-OTP-2105-8189, pp. 8195-8196, 8206-8207.

⁴³ See Confidential Annex B, DRC-OTP-2105-8230, pp. 8233-8234.

⁴⁴ See Confidential Annex B, DRC-OTP-2105-8230, p. 8234.

⁴⁵ See Confidential Annex B, DRC-OTP-2105-8230, p. 8237.

⁴⁶ See Confidential Annex B, DRC-OTP-2105-8230, p. 8232.

⁴⁷ See Confidential Annex B, DRC-OTP-2105-8230, p. 8231.

⁴⁸ See Confidential Annex B, DRC-OTP-2105-8230, p. 8235.

⁴⁹ See Confidential Annex B, DRC-OTP-2105-8230, pp. 8236-8237.

⁵⁰ The phrase "acts and conduct of the accused" should be given its ordinary meaning and "refers to the personal actions and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged", ICC-01/04-02/06-1667-Conf, para. 11; ICC-01/04-02/06-1715-Conf, para. 10.

⁵¹ See Confidential Annex B, DRC-OTP-2105-8230, p. 8235.

Mandro.⁵² Witness [REDACTED] states that the Accused was present when weapons were airdropped in Mandro.⁵³ None of these references relate to the Accused's acts and conduct. At most, Witness [REDACTED]'s reference to the Accused being in charge of weapons in Mandro is of a purely peripheral nature and does not constitute the core of his prior recorded testimony so it does not preclude admission.⁵⁴

28. Second, the prior recorded testimony is of a cumulative or corroborative nature - other witnesses have given oral testimony of similar facts.⁵⁵

29. Third, the prior recorded testimony has sufficient indicia of reliability. The statements were signed by the witnesses, both of whom attest to the accuracy of the information in their previous statements relevant to Agreed Fact 69. The statements were given in a language understood by the witnesses. Finally, the prior recorded testimony is internally consistent and potentially corroborative of the testimony of other witnesses.⁵⁶

30. Although the prior recorded testimony relates to issues that are now materially in dispute, it should nevertheless be admitted in view of the specific circumstances of this Request which has been necessitated by the Defence's recent denial of a previously agreed fact. Further, the fact that the prior recorded testimony addresses issues which are materially in dispute does not mean that it may not be admitted pursuant to rule 68(2)(b).⁵⁷

31. Introducing the prior recorded testimony would best serve the interests of justice and would not be prejudicial to or inconsistent with the rights of the Accused.

⁵² See Confidential Annex B, DRC-OTP-2105-8230, p. 8238.

⁵³ See Confidential Annex A, DRC-OTP-2105-8189, p. 8209.

⁵⁴ See ICC-01/04-02/06-1667-Conf, para. 12; ICC-01/04-02/06-1730-Conf, paras. 7, 9.

⁵⁵ [REDACTED]. In relation to this factor, the Chamber has stated that "[i]t is not required that the accounts accord in every detail", ICC-01/04-02/06-1715-Conf, para. 14.

⁵⁶ See fn. 55, above.

⁵⁷ See ICC-01/04-02/06-1715-Conf, paras. 13-14.

The prior recorded testimony relates to relevant matters, Agreed Fact 69,⁵⁸ and is of highly probative value.

II. The five items should be admitted from the bar table

32. The Prosecution also seeks to admit five items from the bar table for the truth of their contents pursuant to articles 64(9)(a), 69(3) and 69(4) of the Statute and rule 63(2). The Prosecution requests that the documents be admitted in full in order for the Chamber to be better able to assess their probative value. Alternatively, the Chamber may prefer to admit only the specific excerpts referred to below in relation to each document.

33. The Chamber has stated that admission of evidence through a bar table motion is a practice established in the jurisprudence of the Court and noted that, under the statutory framework, it has considerable discretion to assess various types of evidence.⁵⁹

34. Article 64(9)(a) gives the Chamber the power to rule on the admissibility or relevance of evidence while rule 63(2) 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 69.⁶⁰ 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.

35. The Chamber stated that in determining the admissibility of documentary evidence:

⁵⁸ See para. 50, below.

⁵⁹ ICC-01/04-02/06-1181, para. 6.

⁶⁰ See also ICC-01/04-02/06-1181, para. 6.

(i) it considers 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; (ii) its assessment of both relevance and probative value is conducted on a *prima facie* basis; and (iii) its assessment of material for the purposes of admissibility is distinct from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment, based on the entire case record before it.⁶¹

Description of the five items and their relevant excerpts

36. The first of the five items that the Prosecution seeks to admit from the bar table is **DRC-OTP-0208-0272**,⁶² [REDACTED]. [REDACTED] it was disclosed to the Defence in July 2013. The report is in the format of an [REDACTED], clearly listing the author, recipient, and subject of the report.⁶³ [REDACTED].

37. The Prosecution used this document during the Accused's cross-examination,⁶⁴ in relation to which the Accused stated: [REDACTED].⁶⁵ The Prosecution then noted that it would seek to admit this document, in particular paragraph 12, either for the truth of its contents or impeachment, depending on the final Defence position in relation to Agreed Fact 69.⁶⁶ The Prosecution inquired whether it should make the substance of this submission at the time or until the issue of Agreed Fact 69 had been determined.⁶⁷ The Presiding Judge stated that it would be better to make such submissions after there was clarity about the Defence's position in relation to Agreed Fact 69 "because it will influence also our decision."⁶⁸

⁶¹ ICC-01/04-02/06-1838, para. 6, fn. 11 citing ICC-01/04-02/06-1181, para. 7.

⁶² See Confidential Annex C.

⁶³ See Confidential Annex C, DRC-OTP-0208-0272, p. 0272.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ ICC-01/04-02/06-T-234-CONF-ENG ET, p. 29, lns. 3-7 (open session).

⁶⁷ ICC-01/04-02/06-T-234-CONF-ENG ET, p. 29, lns. 8-11 (open session).

⁶⁸ ICC-01/04-02/06-T-234-CONF-ENG ET, p. 29, lns. 12-15 (open session).

38. The second item that the Prosecution seeks to admit from the bar table is **DRC-OTP-0044-0333**,⁶⁹ [REDACTED]. [REDACTED] it was disclosed to the Defence in August 2013. [REDACTED]:

[REDACTED].⁷⁰

39. Although this item is indicated to be a draft, such a consideration should go to a determination of the weight that can be attributed to it, rather than to its admissibility.

40. The third item that the Prosecution seeks to admit from the bar table is **DRC-OTP-0043-0063**,⁷¹ a [REDACTED]. [REDACTED] it was disclosed to the Defence in December 2013. [REDACTED]:

[REDACTED]

41. Although this item contains several acronyms and some shorthand references that are not explicitly defined in the document, these are uncontroversial and do not render this document incomprehensible or inadmissible.

42. The fourth item that the Prosecution seeks to admit from the bar table is **DRC-OTP-0072-0315**,⁷² which contains satellite telephone records and was disclosed in January 2015. As set out below, this item is linked to the fifth item that the Prosecution seeks to admit. [REDACTED].⁷³ The records contained in this document refer, in the first column, to the satellite telephone number making the call; in the second column, to the telephone number receiving the call; in the third column, to the date and time of the call; in the fourth column, to the call duration, and in the fifth column, to the cost of the call in US dollars.

⁶⁹ See Confidential Annex D.

⁷⁰ [REDACTED].

⁷¹ See Confidential Annex E.

⁷² See Confidential Annex F.

⁷³ [REDACTED].

43. The records refer to satellite telephone calls for the period from 23 December 2001 to 8 October 2002, therefore including part of the timeframe relevant to Agreed Fact 69 (from July 2002). The records were produced by [REDACTED], whose contact information is listed at the bottom of each page of this document. Such records are primarily maintained for billing purposes.
44. The telephone number making all the calls in the records, [REDACTED], belongs to [REDACTED]. This is indicated at the top of each page, referring to [REDACTED]. The relevance of this item to Agreed Fact 69 is set out below due to its relation to the fifth item that the Prosecution seeks to admit from the bar table.
45. The fifth item is **DRC-OTP-0014-0295**,⁷⁴ containing a list of names together with telephone numbers associated with these names. [REDACTED]⁷⁵ [REDACTED]. The document was disclosed on 13 December 2013.
46. [REDACTED]. [REDACTED].⁷⁶
47. [REDACTED]. [REDACTED].⁷⁷ [REDACTED].⁷⁸ [REDACTED].⁷⁹ The Accused testified that Safari was involved in the air-dropping of weapons for the UPC/FPLC.⁸⁰ [REDACTED].⁸¹
48. Considered together, the fourth and fifth items show that [REDACTED]. This is consistent with the prior recorded testimony of Witness [REDACTED] that the Prosecution also seeks to admit.

⁷⁴ See Confidential Annex G.

⁷⁵ [REDACTED].

⁷⁶ See DRC-OTP-0072-0315, pp. 0316-0317.

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ See DRC-OTP-0072-0315, p. 0318.

⁸⁰ ICC-01/04-02/06-T-214-CONF-ENG ET, p. 45, lns. 14-21 (open session).

⁸¹ [REDACTED].

The five items are relevant to the issues at trial

49. The five items are relevant as they are all logically connected to Agreed Fact 69, which is now a fact at issue, and have the capacity to make this fact more or less probable than it would be without the evidence.

50. These items, and Agreed Fact 69, are relevant to the nature of the armed conflict⁸² and to the credibility of the Accused who now denies the veracity of this agreed fact. They are also relevant to the mode of liability of indirect co-perpetration, with which the Accused has been charged under article 25(3)(a). This mode of liability means that the Prosecution must prove that the co-perpetrators mutually agreed to a common plan. The contact between [REDACTED] and the Rwandan authorities and the supply of a large quantity of weapons and ammunition from July 2002 is therefore relevant to the common plan and the charges. It is with these arms and ammunition that the Prosecution alleges the Accused and his group took control of Bunia in August 2002, most of Ituri thereafter, and committed the charged crimes.

The material has prima facie probative value

51. The five items 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.⁸³ Each of the items submitted for admission provide probative value related to Agreed Fact 69. The submitted items possess sufficient indicia of reliability to warrant their admission into evidence.

⁸² The Prosecution charged the Accused with crimes occurring in the context of a non-international armed conflict.

⁸³ See ICC-01/05-01/08-2012-Red, para. 15.

52. 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. 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.⁸⁴

53. The items proposed for admission meet the requirements of *prima facie* reliability, including authenticity, and thus should be admitted into evidence. As noted above, the items contain, as applicable, dates and information on their authors and/or source. These indicia provide a 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.

54. Further, the exhibits contain sufficient indicia of reliability to be admitted in the absence of a witness. 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*. The documents were all collected during routine investigation.

There is no unfair prejudicial effect

55. The admission of the five items would not be unfairly prejudicial to the Accused. The Accused had sufficient notice of the content of the items; and their reliability, veracity, and weight are independently corroborated by other admitted evidence.⁸⁵

⁸⁴ ICC-01/05-01/08-2299-Red, para. 9.

⁸⁵ See, fn. 55, above.

56. The probative value of the five items outweighs any prejudicial effect since each item: (i) is relevant to Agreed Fact 69; (ii) possesses sufficient indicia of reliability to warrant its admission and to enable the Chamber to fairly evaluate it; (iii) has been available to the Accused for over two and a half years; and (iv) corroborates witness testimony and other evidence received by the Chamber in the course of the trial.

Conclusion

57. For the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 20th day of November 2017
At The Hague, The Netherlands