

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-02/06**

Date: **30 August 2019**

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 additional documentary evidence on
sentencing**

Source: Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

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

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. The Prosecution requests the admission of 26 documents, in accordance with articles 64(9)(a), 69(3), 69(4) and 76(2) of the Rome Statute and rule 63(2) of the Rules of Procedure and Evidence. The documents are relevant to the Chamber's determination of the Convicted Person's sentence, are probative, and bear sufficient indicial of reliability to be admitted. Their admission would assist the Chamber in determining the sentence.
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) indicia of authenticity; (iv) most relevant portion of document; and (v) details of the document's relevance and *prima facie* probative value.

Level of Confidentiality

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

Procedural History

4. On 8 July 2019, Trial Chamber VI (the "Chamber") convicted Mr Bosco Ntaganda ("Convicted Person") of 18 counts of war crimes and crimes against humanity.²
5. On the same day, the Chamber issued an order on the sentencing procedure.³ The Parties and Legal Representatives of Victims were directed to file any requests to submit further evidence or to call witnesses by 29 July 2019. The requests were to provide the details of any documentary evidence intended to

¹ ICC-01/04-02/06-619, para. 52.

² ICC-01/02-02/06-2359.

³ ICC-01/04-02/06-2360.

be submitted, the identities of any witnesses sought to be called, the estimated length of examination, a summary of anticipated testimony and any requests for protective measures, video-link testimony and/or admission of prior recorded testimony.

6. On 29 July 2019, the Prosecution and Defence filed their respective requests to submit further evidence and call witnesses.⁴ The Prosecution partially opposed the Defence Request⁵ and requested the admission of five documents and limited excerpts of a further six documents that are important for the Chamber's complete evaluation of matters raised by the Defence.⁶ The Defence opposed the Prosecution Request in its entirety.⁷
7. On 20 August 2019, the Chamber granted the Defence's request to hear three witnesses *viva voce* and rejected the Prosecution's request to hear one witness *viva voce*.⁸ On 23 August 2019, the Chamber issued its "preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing",⁹ wherein it admitted four documents submitted by the Prosecution, and directed the parties and the participants to file any requests for admission of documentary evidence other than through witnesses by 30 August 2019.¹⁰

⁴ ICC-01/04-02/06-2368-Conf and ICC-01/04-02/06-2369-Conf-Red.

⁵ ICC-01/04-02/06-2375-Conf-Corr.

⁶ ICC-01/04-02/06-2375-Conf-Corr, paras. 28-33.

⁷ ICC-01/02-02/06-2373-Conf.

⁸ ICC-01/04-02/06-2384-Conf.

⁹ ICC-01/04-02/06-2385-Conf.

¹⁰ ICC-01/04-02/06-2385-Conf, para. 54.

Submissions

Applicable law

8. As the sentencing hearing is part of the trial,¹¹ the rules applicable to the admissibility of evidence in principle remain the same. This includes article 69(4), which guides the Chamber's determination of admissibility¹² or relevance of the evidence. In accordance with the Court's practice, the admissibility of evidence other than testimony requires consideration of three key factors: (i) its relevance to the issues at trial;¹³ (ii) its *prima facie* probative value;¹⁴ and (iii) its prejudicial effect (if any) as weighed against the probative value.¹⁵
9. However, unlike the trial judgment – which pursuant to article 74(2) of the Statute may only be based on “evidence submitted and discussed before [the Chamber] at the trial” – the sentencing decision may be based on “evidence or submissions relevant to the sentence”, pursuant to article 76(2). Trial Chamber III has interpreted article 76(1) – which similarly requires the Chamber to take into account “the evidence and submissions presented and submissions made during the trial that are relevant to the sentence” – as a provision empowering it to dispense with the evidentiary pre-requisites of rule 68 at the sentencing stage.¹⁶
10. The Defence has relied on Trial Chamber III's interpretation of article 76(1) to submit that a “lower standard of proof” applies during sentencing proceedings.¹⁷ The Prosecution agrees that at the sentencing stage the Chamber

¹¹ ICC-01/05-01/08-3384, para. 18.

¹² ICC-01/09-01/11-1353, para.14.

¹³ 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.

¹⁴ 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.

¹⁵ 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.

¹⁶ ICC-01/05-01/13-2025, para. 6-7. *See also* ICC-01/04-02/06-2385-Conf, para. 10.

¹⁷ ICC-01/04-02/06-2377, para. 9.

is not limited to “evidence” for its decision, but submits that the general requirements of demonstrating the relevance, probative value and weight of the evidence continue to apply, both for aggravating circumstances – which must be proven beyond reasonable doubt¹⁸ – as well as for mitigating circumstances – to which the “balance of probabilities” test applies.¹⁹ Pursuant to test for mitigating circumstances, the inference that a party asks the Chamber to draw from the evidence presented would still need to be the most likely inference.

Analysis

11. The Prosecution seeks the admission of 26 documents relevant to sentencing, namely: (1) six excerpts of United Nations Group of Experts on the Democratic Republic of the Congo reports and one related Reuters news article;²⁰ (2) one letter from Dominique McAdams, the former director of MONUC in Bunia, and one MONUC press release;²¹ (3); one handwritten letter dated 20 November 2003 and purportedly signed by Bosco Ntaganda, its translation, and one item of related correspondence from Dominique McAdams;²² (4) fourteen MONUC reports from January and February 2004.²³

¹⁸ ICC-01/04-01/06-2901, para. 33, ICC-01/04-01/07-3484-tENG-Corr, para. 34, ICC-01/05-01/08-3399, para. 18, ICC-01/12-01/15-171, para. 73, and ICC-01/05-01/13-2123-Corr, para. 25.

¹⁹ ICC-01/04-01/06-2901, para. 34, ICC-01/04-01/07-3484-tENG-Corr, para. 34, ICC-01/05-01/08-3399, para. 19, ICC-01/12-01/15-171, para. 74, and ICC-01/05-01/13-2123-Corr, para. 24.

²⁰ DRC-OTP-2102-1032, p. 1044, para. 54; DRC-OTP-2102-1093, p. 1097, para. 19 and p. 1139, para. 191; DRC-OTP-2102-1220, p. 1228, para. 35 and p. 1239, paras. 98-99; DRC-OTP-2102-1247, p. 1292, para. 183 and p. 1432, annex 62; DRC-OTP-2102-1535, pp. 1542-1543, para. 34; DRC-OTP-2102-1560, p. 1601, para. 153; DRC-OTP-2102-1004 (entire document).

²¹ DRC-OTP-0154-0648 (entire document) and DRC-OTP-0151-0305 (entire document).

²² DRC-OTP-0132-0239 (entire document), DRC-OTP-0177-0125 (entire document), and DRC-OTP-2057-0099 (p. 0104).

²³ DRC-OTP-0010-0024, p. 0026, para. 7; DRC-OTP-2066-0380, p. 0380, para. 1(b); DRC-OTP-0204-0236, p. 0237, para. 2(c) and (d); DRC-OTP-0009-0432, p. 0432, para. 1; DRC-OTP-0185-0843, pp. 0844-0845, para. 2(e); DRC-OTP-0012-0424 (entire document); DRC-OTP-0004-0477, p. 0477, para. 1; DRC-OTP-1029-0579, pp. 0579-0580, para. 2(b) and (c); DRC-OTP-0004-0178, p. 0179, para. 6; DRC-OTP-0004-0164, p. 0164; DRC-OTP-0007-0314, p. 0316, para. 4(d)(1), (2) and (3); DRC-OTP-0004-0372, p. 0373, para. 1; DRC-OTP-1029-0465, p. 0467, para. 8(d); DRC-OTP-1029-0591, p. 0595, para. 3(b)(iv) and p. 0603, paras. 27 and 28.

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

12. The 26 documents are relevant evidence as they are all logically connected to one or more facts at issue at the sentencing stage, 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 provide information regarding Bosco Ntaganda's conduct following the commission of the charged crimes, including his lack of cooperation with and, in fact, hostility towards MONUC's presence in Ituri, as well as his belated integration into the national army of the Democratic Republic of the Congo, the *Forces Armées de la République Démocratique du Congo*. The Defence will present evidence during the sentencing phase on these contested issues.²⁴ The Chamber should admit these additional documents for a complete evaluation of the evidence on Bosco Ntaganda's conduct following the commission of the charged crimes as well as the state of his cooperation with MONUC in late 2003 and in 2004. Indeed, the Chamber has admitted four other documents relevant to this question that it assessed as relevant to a full evaluation of evidence to be presented during sentencing.²⁵ The documents in the present filing provide important and unique additional information on this issue.

(ii) *The material has prima facie probative value*

13. The 26 documents are probative to issues relevant for sentencing. 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

²⁴ See ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 6 and ICC-01/04-02/06-2369-Conf-AnxB-Red, no. 20.

²⁵ ICC-01/04-02/06-2385-Conf, paras. 52-53.

evidence arose.²⁶ Each of the 26 documents are probative of issues for sentencing. The submitted documents possess sufficient indicia of reliability to warrant their admission into evidence.²⁷

14. *Prima facie* indicia of reliability include features 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”.²⁸ The items proposed for admission in Annex A all contain sufficient indicia of reliability, including authenticity, to safely be admitted into evidence. Features such as dates of events, dates of preparation, authorship or source, 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 admission.

15. The Prosecution submits the 26 documents in the absence of witness testimony, as is the established practice of introducing evidence in a bar table motion. As outlined above and detailed in Annex A, the 26 documents contain sufficient indicia of reliability to be admitted in the absence of a witness, including – variously – author, dates, signatures, and letterhead. The documents were created close to the charged period, prior to the Prosecution’s investigation, and were therefore prepared *in tempore non suspecto*. The documents were made contemporaneously with events to which they relate. They contain subject matter of routine and, in some cases, unremarkable events, which further supports their reliability. The documents were all collected during routine investigations. The documents attest to Bosco Ntaganda’s and the UPC’s hostile

²⁶ ICC-01/05-01/08-2012-Red, para. 15.

²⁷ 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.

²⁸ ICC-01/05-01/08-2299-Red, para. 9.

attitude towards MONUC in late 2003 and in 2004 and the fact that MONUC considered him a threat to the security of its personnel and the civilian population as well as an obstacle to the restoration of peace in Ituri.

(iii) *There is no unfair prejudicial effect*

16. The admission of the material is not unfairly prejudicial to the Convicted Person. The Convicted Person 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.

17. 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 issues relevant to the sentence; (ii) each of the proposed items tends to prove one or more discrete issues relevant to the sentence; (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 Convicted Person had sufficient notice of both the content of the items and the Prosecution's intention to offer them into evidence, and they were disclosed years ago; and (v) the proposed items provide significant value related to contested issues at sentencing.

Conclusion

18. Based on the foregoing, the Prosecution requests that all items listed in the Annex to this filing be admitted into evidence.



Fatou Bensouda
Prosecutor

Dated this 30th day of August 2019
At The Hague, The Netherlands