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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

Decision on second Defence request for admission of evidence from the bar table

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

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Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 69(4) of the Rome Statute, Rule 63(2) of the Rules of Procedure and Evidence and Regulation 24(5) of the Regulations of the Court, renders the following 'Decision on second Defence request for admission of evidence from the bar table'.

I. Background

1. On 5 February 2018, the defence team for Mr Ntaganda ('Defence') filed a request for the admission into evidence of 20 items from the bar table ('Request').¹ It submits that the documents, which largely address events that are contextual, are *prima facie* reliable and probative of relevant facts.² The Request, as well as one of its annexes, also reflect the position of the Office of the Prosecutor ('Prosecution') regarding the admissibility of the tendered items.³ The Prosecution opposes the admission into evidence of six of the items and indicates that two transcripts of audio-visual material should be marked for identification pending resolution of the parties' disagreement on their accuracy.⁴
2. On 12 February 2018, in line with the time limit set by the Chamber,⁵ the Prosecution responded to the Request, providing further submissions on the admissibility of some of the items tendered ('Response').⁶
3. On 16 February 2018, the Defence sought leave to reply in relation to six issues arising from the Response ('Request for Leave to Reply').⁷

¹ Second Defence Request for the admission of evidence from the bar table, ICC-01/04-02/06-2208-Conf, with Confidential Annexes A and B (ICC-01/04-02/06-2208-Conf-AnxA; and ICC-01/04-02/06-2208-Conf-AnxB).

² Request, ICC-01/04-02/06-2208-Conf, para. 1; and ICC-01/04-02/06-2208-Conf-AnxA.

³ The Prosecution's initial submissions are contained in the final column of ICC-01/04-02/06-2208-Conf-AnxA.

⁴ ICC-01/04-02/06-2208-Conf-AnxA, pages 4-20.

⁵ Email from the Chamber to the parties and participants on 6 February 2018, at 11:22.

⁶ Prosecution response to the "Second Defence request for the admission of evidence from the bar table", ICC-01/04-02/06-2208-Conf", ICC-01/04-02/06-2223-Conf.

4. On 20 February 2018, the Prosecution filed its response to the Request for Leave to Reply.⁸

II. Analysis

5. The Chamber incorporates by reference the applicable law as set out in its previous decisions on the admission of documentary evidence from the ‘bar table’.⁹
6. At the outset, and with regard to the Request for Leave to Reply, the Chamber finds that it would not be assisted by additional submissions on any of the six issues identified by the Defence. Accordingly, it rejects the Request for Leave to Reply in its entirety.

1. Uncontested items

7. Four excerpts of **Document 1, DRC-D18-0001-6587**,¹⁰ are tendered by the Defence together with their transcript, **Document 2, DRC-D18-0001-6589**. The Defence submits that this audio recording was broadcast on Radio Candip in August 2002 and appears to contain, *inter alia*, speeches addressed to the population of Ituri in the aftermath of Governor Lomondo’s departure from Bunia.¹¹ **Document 3, DRC-D18-0001-6588**, is another audio recording, submitted to be from Radio Candip from the second half of May 2003, which includes a public address by Jean de Dieu Tinanzabo and Thomas Lubanga.¹²

⁷ Request on behalf of Mr Ntaganda seeking leave to reply to “Prosecution response to the ‘Second Defence request for the admission of evidence from the bar table’, ICC-01/04-02/06-2208-Conf, 16 February 2018, ICC-01/04-02/06-2233-Conf.

⁸ Prosecution response to “Request on behalf of Mr Ntaganda seeking leave to reply to ‘Prosecution response to the Second Defence request for the admission of evidence from the bar table’, ICC-01/04-02/06-2208-Conf”, ICC-01/04-02/06-2233-Conf, 19 February 2018, ICC-01/04-02/06-2237-Conf, notified on 20 February 2018.

⁹ Decision on Prosecution’s first request for the admission of documentary evidence, 19 February 2016, ICC-01/04-02/06-1181 (‘Decision on First Request’), paras 6-7; Decision on Prosecution’s request for admission of documentary evidence, 28 March 2017, ICC-01/04-02/06-1838 (‘Decision on Second Request’), para. 6; and Decision on Defence request for admission of evidence from the bar table, 31 January 2018, ICC-01/04-02/06-2201-Conf, para. 4.

¹⁰ From time stamps 00:35:15 to 00:35:29; 00:47:22 to 00:50:02; 01:01:28 to 01:01:42; and 01:05:59 to 01:06:38.

¹¹ Request, ICC-01/04-02/06-2208-Conf, paras 8-9; and ICC-01/04-02/06-2208-Conf-AnxA, pages 2-3.

¹² Request, ICC-01/04-02/06-2208-Conf, paras 10-12; and ICC-01/04-02/06-2208-Conf-AnxA, page 4.

The Defence tenders three excerpts from this recording,¹³ together with the corresponding transcript, **Document 4, DRC-D18-0001-6592**. In light of their content, the Chamber finds that the relevant excerpts are *prima facie* relevant, and considers that their probative value has been sufficiently established. With regard to Documents 1 and 2, while noting that the Defence refers to a witness statement meant to confirm the identity of a person speaking in the radio excerpt,¹⁴ the Chamber indicates that it did not need to rely on this document in the present admissibility assessment. Finally, noting that their admission is uncontested, the Chamber is satisfied that no undue prejudice arises from the admission of the aforementioned excerpts. Accordingly, it admits Documents 1 and 3 into evidence. The Chamber further notes the Prosecution's submissions with regard to their transcripts, Documents 2 and 4,¹⁵ and finds it appropriate to follow the procedure adopted so far to resolve any outstanding disagreement between the parties on the accuracy of transcripts or translations.¹⁶ Accordingly, in order to have on the record an accurate transcription of the audio recordings admitted, the Chamber sets the timeline below for the parties and the Registry to review Documents 2 and 4 and produce final versions thereof. Once these final versions have been released by the Defence, the Registry shall reflect their admitted status in the eCourt metadata.

8. **Document 11, DRC-OTP-2078-0229; Document 12, DRC-OTP-2078-0328; Document 13, DRC-OTP-2078-0367; Document 14, DRC-OTP-1034-0057; Document 15, DRC-OTP-2078-0274; Document 16, DRC-OTP-2078-0290;**

¹³ From time stamps 00:17:50 to 00:25:48; 00:30:16 to 00:47:47; and 00:53:25 to 01:06:46.

¹⁴ Request, ICC-01/04-02/06-2208-Conf, para. 9; and ICC-01/04-02/06-2208-Conf-AnxB.

¹⁵ Response, ICC-01/04-02/06-2223-Conf, footnote 4; and ICC-01/04-02/06-2208-Conf-AnxA, pages 4-5.

¹⁶ Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution, ICC-01/04-02/06-1588, para. 15. A corrigendum was filed on 12 December 2016 (ICC-01/04-02/06-1588-Corr). Order referring certain translation matters to the Registry, ICC-01/04-02/06-1705, with one confidential Annex. Order concerning certain translation matters referred to the Registry, 3 April 2017, ICC-01/04-02/06-1846. Second order referring certain transcription and translation matters to the Registry, 9 May 2017, ICC-01/04-02/06-1897.

Document 17, DRC-OTP-0052-0186; Document 18, DRC-OTP-0052-0199; Document 19, DRC-OTP-2067-2003; and Document 20, DRC-OTP-2067-1989; are MONUC reports on the situation in Bunia between March and June 2003.¹⁷ The Chamber observes that these documents concern events relevant to the charges in the present case, and contain information on the activities of the MONUC and the UPC, and on the security situation in Bunia between March and June 2003, in particular. These reports are all dated, indicate both the sending and receiving offices, bear relevant stamps and transmission numbers, and are consistent in terms of layout and other features. The transmission date is also reflected on each document. Additionally, the Chamber notes that Mr Ntaganda testified as to the accuracy of the information contained in Document 20 with regard to tensions between the UPC and the UPDF on 6 March 2003, and that the excerpt used during his testimony was subsequently admitted into evidence.¹⁸ In light of the foregoing, the Chamber finds that these reports are *prima facie* relevant and have probative value. Furthermore, the Chamber is satisfied that no undue prejudice arises from their admission and therefore admits them into evidence.¹⁹

2. Contested items

9. An excerpt of **Document 5, DRC-OTP-0127-0064**,²⁰ is submitted together with the corresponding excerpt of its transcript, **Document 6, DRC-OTP-0165-0276**,²¹ and translation, **Document 7, DRC-OTP-0165-0349**.²² This recording was authenticated by Witness P-0030, who confirmed that it depicts a ceremony he attended in Katoto in 2004 during which Mr Ntaganda

¹⁷ Request, ICC-01/04-02/06-2208-Conf, para. 30; and ICC-01/04-02/06-2208-Conf-AnxA, pages 20-26.

¹⁸ **D-0300**: T-221, page 34, line 1 to page 37, line 22.

¹⁹ Partial admission for Document 14 ('Summary' and paras 1, 2, and 5 to 7 only), Document 17 ('Summary' and paras 6 to 10 only), Document 18 ('Highlights' and paras 5 and 13 only), Document 19 ('Highlights' and paras 1, 2, and 10 only), and Document 20 ('Highlights' and paras 2 and 3 only).

²⁰ From time stamps 44:32 to 57:28.

²¹ Page 0300, line 536 to page 0304, line 660.

²² Page 0374, line 559 to page 0379, line 704.

delivered a speech.²³ The Chamber notes that the Prosecution previously sought to have this extract of the recording admitted through Witness P-0030.²⁴ At the time, the Chamber sustained a Defence objection and denied admission, mainly invoking the low relevance of the excerpts played.²⁵ The Defence now seeks to tender this video excerpt noting that it shows ‘the message delivered by Mr Ntaganda to his subordinates in relation to protection of the population’ and argues that the Chamber should follow its jurisprudence according to which the structure of the UPC/FPLC in the period shortly after the temporal scope of the charges is of relevance to the case.²⁶ In light of the foregoing, and particularly noting its potential relevance to the Defence’s case, the Chamber considers that the *prima facie* relevance and probative value of the abovementioned video excerpt have been established. Furthermore, the Chamber does not consider, as submitted by the Prosecution,²⁷ that it was necessary for the accused to explain the meaning of his speech, and finds that no undue prejudice arises from the admission of the three aforementioned items. These items are therefore admitted into evidence.

10. Seven excerpts of **Document 8, DRC-OTP-1002-0014**,²⁸ are submitted together with their corresponding transcript and translation, **Document 9, DRC-D18-0001-6623**. The Defence avers that these excerpts are footage partly broadcast in June 2003 which provide context to the security situation in and around Bunia following the arrival of the Artémis forces.²⁹ The Prosecution argues that the excerpts tendered by the Defence are too selective and that it

²³ **P-0030**: T-144, page 47, line 3 to page 61, line 15.

²⁴ Prosecution application under rule 68(3) to admit Witness P-0030’s prior recorded testimony and associated material, 2 September 2016, ICC-01/04-02/06-1488-Conf; and T-144, page 59, line 22 to page 61, line 15.

²⁵ T-144, page 61, lines 18-25.

²⁶ Request, ICC-01/04-02/06-2208-Conf, paras 14-15; and ICC-01/04-02/06-2208-Conf-AnxA, pages 5-6. See also, Decision on First Request, ICC-01/04-02/06-1181, para. 22.

²⁷ ICC-01/04-02/06-2208-Conf-AnxA, pages 6-7.

²⁸ From time stamps 22:57 to 23:38; 24:02 to 24:29; 25:55 to 27:42; 29:54 to 30:18; 32:40 to 33:05; 36:58 to 39:01; and 47:35 to 48:46.

²⁹ Request, ICC-01/04-02/06-2208-Conf, paras 16-17; and ICC-01/04-02/06-2208-Conf-AnxA, pages 7-8.

would be more appropriate for the entire video to be admitted,³⁰ a proposal not opposed by the Defence.³¹ In light of the foregoing, and having particularly considered the other excerpts identified by the Prosecution, the Chamber considers that it would be more appropriate to admit the video in its entirety, notably to assist in contextualizing those portions initially identified by the Defence as being most relevant. The Chamber further finds this video to be *prima facie* relevant, considers that it has probative value, and is satisfied that no undue prejudice arises from its admission in full. Accordingly, it admits Document 8 into evidence. Under these circumstances, the Chamber finds it appropriate to be provided with a full transcription of the video and, in light of the current stage of the proceedings, instructs the Registry to prepare a transcript thereof, and/or a translation, as appropriate, which shall be admitted into evidence instead of Document 9. The Chamber therefore admits the full transcript of Document 8, as well as the final versions of the transcripts contained in Documents 2 and 4, as noted above, and, in this regard, clarifies that the remaining procedural steps identified in the disposition below shall have no bearing on the upcoming closure of the presentation of evidence.

11. **Document 10, DRC-D18-0001-0463**, is a video depicting, *inter alia*, Mr Ntaganda's visit to the Rwampara and Ndromo training camps.³² The Chamber notes the Defence's submission that admission of this video, in full, 'is necessary in order to understand [Witness D-0080's] testimony and the images he refers to therein'.³³ In light of this, and having considered the Prosecution's submissions in this regard, notably that 'D-0080's witness statement fails to adequately explain crucial details related to his viewing of DRC-D18-0001-0463 that affect the reliability and probative value of his

³⁰ Response, ICC-01/04-02/06-2223-Conf, paras 18-19; and ICC-01/04-02/06-2208-Conf-AnxA, pages 7-15.

³¹ Request, ICC-01/04-02/06-2208-Conf, para. 18.

³² See, *inter alia*, **D-0300**: T-220, page 33, line 11 to page 44, line 10.

³³ ICC-01/04-02/06-2208-Conf-AnxA, page 15.

statement’,³⁴ the Chamber finds it more appropriate to consider the requested admission of this item in its decision on the Defence’s Rule 68(2)(c) request in relation to Witness D-0080.

3. Classification of items admitted into evidence

12. The Chamber notes that, in its Request, the Defence does not make any specific submissions on the appropriate level of confidentiality for each of the items tendered into evidence. In the interest of the proceedings being accessible to the public, the parties are directed to coordinate with each other and the Registry, as appropriate, and indicate, by 29 March 2018, whether any of the items admitted pursuant to the present decision can be reclassified as ‘public’, with or without redactions, as well as to provide reasons for any items to remain confidential.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply;

ADMITS the following items into evidence:

- Document 1, DRC-D18-0001-6587 (from time stamps 00:35:15 to 00:35:29; 00:47:22 to 00:50:02; 01:01:28 to 01:01:42; and 01:05:59 to 01:06:38 only);
- Document 3, DRC-D18-0001-6588 (from time stamps 00:17:50 to 00:25:48; 00:30:16 to 00:47:47; and 00:53:25 to 01:06:46 only);
- Document 5, DRC-OTP-0127-0064 (from time stamps 44:32 to 57:28 only);
- Document 6, DRC-OTP-0165-0276 (page 300, line 536 to page 304, line 660 only);
- Document 7, DRC-OTP-0165-0349 (page 374, line 559 to page 379, line 704 only);
- Document 8, DRC-OTP-1002-0014;
- Document 11, DRC-OTP-2078-0229;

³⁴ Response, ICC-01/04-02/06-2223-Conf, paras 20-30.

- Document 12, DRC-OTP-2078-0328;
- Document 13, DRC-OTP-2078-0367;
- Document 14, DRC-OTP-1034-0057 ('Summary' and paras 1, 2, and 5 to 7 only);
- Document 15, DRC-OTP-2078-0274;
- Document 16, DRC-OTP-2078-0290;
- Document 17, DRC-OTP-0052-0186 ('Summary' and paras 6 to 10 only);
- Document 18, DRC-OTP-0052-0199 ('Highlights' and paras 5 and 13 only);
- Document 19, DRC-OTP-2067-2003 ('Highlights' and paras 1, 2, and 10 only); and
- Document 20, DRC-OTP-2067-1989 ('Highlights' and paras 2 and 3 only);

DIRECTS the Registry to update the eCourt metadata of the aforementioned items so as to reflect their admission status and the fact that they were admitted pursuant to the present decision;

DIRECTS the Registry to prepare a transcript and/or a translation, as appropriate, of Document 8, DRC-OTP-1002-0014, to be uploaded onto eCourt, and marked as an admitted item by 5 April 2018;

INSTRUCTS the parties to complete their review and file joint submissions setting out the areas of agreement and any remaining disagreement with regard to the accuracy of the following transcripts, by 9 March 2018:

- Document 2, DRC-D18-0001-6589; and
- Document 4, DRC-D18-0001-6592;

DIRECTS the Registry to submit observations providing concrete proposals for any outstanding disagreement between the parties as to the accuracy of the abovementioned transcripts, by 15 March 2018;

ORDERS the Defence to upload and release on eCourt amended versions of the abovementioned transcripts by 20 March 2018, having implemented any Registry's conclusions on the contested portions, as well as any other agreement reached between the parties as reflected in their joint submissions;

DIRECTS the Registry to update the eCourt metadata of the aforementioned transcripts so as to reflect their admission status and the fact that they were admitted pursuant to the present decision, forthwith, once their final versions have been release by the Defence;

DEFERS its ruling with regard to:

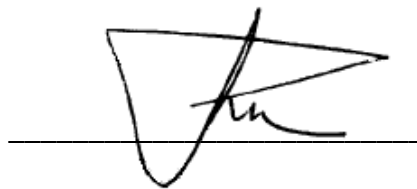
- Document 10, DRC-D18-0001-0463;

REJECTS the remainder of the Request and therefore denies the admission of:

- Document 9, DRC-D18-0001-6623; and

DIRECTS the parties and participants to file, by 29 March 2018, submissions on the appropriate confidentiality level for each of the items admitted by way of the present decision.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 21 February 2018

At The Hague, The Netherlands