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No.: **ICC-01/04-02/06**
Date: **14 May 2018**

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

Request on behalf of Mr Ntaganda seeking admission in evidence of three items used during the testimony of Witness D-0300

Source: **Defence Team of Mr Bosco Ntaganda**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Further to Trial Chamber VI ("Chamber")'s 16 March 2018 "Decision closing the presentation of evidence and providing further directions" ("Chamber's Decision"),[1] Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Request on behalf of Mr Ntaganda seeking admission in evidence of three items used during the testimony of Witness D-0300

"Defence Request"

INTRODUCTION

1. During the testimony of the accused, Bosco Ntaganda ("Witness D-0300"), the Defence used items DRC-D18-0001-5683, DRC-D18-0001-5748 and DRC-D18-0001-5778 ("Three Items"), hard copy of which was distributed in a binder along with other documents to the Chamber, Prosecution, Registry and Participants.

2. The Three Items were used and referred to by the Defence and the Prosecution on multiple occasions during the testimony of Witness D-0300. However, due to an oversight, they were not admitted into evidence.

3. It is in the interests of justice, bearing in mind the Chamber's truth-seeking function, that the testimony of Witness D-0300 be assessed taking into account the Three Items in his possession during his testimony and from which he made observations.

PROCEDURAL BACKGROUND

4. On 11 July 2013, the Prosecution disclosed the UPC Communications Logbook, item DRC-OTP-0017-0033 ("UPC Logbook") along with its *original*

[1] Decision closing the presentation of evidence and providing further directions, 16 March 2018, ICC-01/04-02/06-2259.

French translation, DRC-OTP-0171-0926 ("Original Translation – UPC Logbook")[2].

5. On 31 August 2013, the Prosecution disclosed the short UPC Communications Logbook, item DRC-OTP-0017-0003 ("Short UPC Logbook") along with its *original* French translation, DRC-OTP-2055-0050 ("Original Translation – Short UPC Logbook").[3]

6. The UPC Logbook (DRC-OTP-0017-0033) was adduced by the Prosecution and admitted in evidence on 10 February 2016 during the testimony of Witness P-0290.[4] Pages 0991 and 0992 of the Original Translation – UPC Logbook (DRC-OTP-0171-0926) had previously been adduced by the Defence and admitted in evidence for the purpose of impeachment, on 22 October 2015 during the testimony of Witness P-0768.[5]

7. The admission of the entire Original Translation – UPC Logbook (DRC-OTP-0171-0926) was requested by the Prosecution in its "Request for the admission of exhibits from the bar table" ("Bar Table Motion") on 3 February 2017.[6]

8. Pursuant to the Chamber's "Decision on the Prosecution's request for admission of documentary evidence" ("Bar Table Decision") on 28 March 2017, the entire Original Translation – UPC Logbook (DRC-OTP-0171-0926) was marked for identification, pending verification of the accuracy of the

[2] The amended version of the original translation, DRC-OTP-2102-3854, was admitted in evidence on 30 June 2017. *See* infra para. 16.
[3] The amended version of the original translation, DRC-OTP-2102-3828, was admitted in evidence on 30 June 2017. *See* infra para. 17.
[4] ICC-01/04-02/06-T-65-ENG ET, 104:1-7.
[5] ICC-01/04-02/06-T-36-ENG ET, 33:1-5 (page 0991) ; 36:6-8 (page 0992).
[6] Prosecution's request for the admission of exhibits from the bar table, 3 February 2017, ICC-01/04-02/06-1770.

translation based on *inter partes* submissions.[7] The Chamber further directed the Registry to "submit its observations on all Contested Materials with a view to ensuring their accuracy", including on the Original Translation – UPC Logbook.[8]

9. As a result of the Registry's observations and verification of the accuracy of the Original Translation – UPC Logbook, an amended version of this document (DRC-OTP-2102-3854, Amended Translation – UPC Logbook) was produced.

10. The Short UPC Logbook (DRC-OTP-0017-0003) was adduced by the Prosecution and admitted in evidence on 10 February 2016 during the testimony of Witness P-0290.[9] Page 0008 had previously been adduced by the Defence and admitted in evidence for the purpose of impeachment on 22 October 2015 during the testimony of P-0768.[10]

11. The admission of the Original Translation – Short UPC Logbook (DRC-OTP-2055-0050) was requested by the Prosecution in its 3 February 2017 Bar Table Motion.[11]

12. In its 28 March 2017 Bar Table Decision, the Chamber directed that the Original Translation - Short UPC Logbook be marked for identification pending the verification of its accuracy based on *inter partes* submissions. On 9 May 2017, the Chamber further directed the Registry to "submit its observations on all Contested Materials with a view to ensuring their

[7] Decision on Prosecution's request for admission of documentary evidence, 28 March 2017, ICC-01/04-02/06-1838.
[8] Second order referring certain transcription and translation matters to the Registry, 9 May 2017, ICC-01/04-02/06-1897.
[9] ICC-01/04-02/06-T-65-ENG ET, 82:21-83:11.
[10] ICC-01/04-02/06-T-36-ENG ET, 55:5-11.
[11] Prosecution's request for the admission of exhibits from the bar table, 3 February 2017, ICC-01/04-02/06-1770.

accuracy" including on the Original Translation - Short UPC Logbook (DRC-OTP-2055-0050).

13. As a result of the Registry's observations and verification of the accuracy of the Original Translation – Short UPC Logbook, an amended version of this document (DRC-OTP-2102-3828 Amended Translation – Short UPC Logbook) was produced. The Defence produced its own version of this document to reflect exactly the original document kept in the Registry's vault with *recto-verso* and blank pages (DRC-D18-0001-5718).

14. On 29 June 2017, courtesy copies of the Three Items, namely DRC-D18-0001-5683 ("Defence Version – Short UPC Logbook"), DRC-D18-0001-5748 ("Re-Organised Defence Version - Short UPC Logbook") and DRC-D18-0001-5778 ("Re-Organised Amended Translation – Short UPC Logbook") were provided to the Prosecution and Participants.[12]

15. On 30 June 2017, at the beginning of D-300's testimony, the Defence distributed to the Chamber, Registry, Prosecution and Participants, hard copies the Three Items along with other material as follows:

- DRC-D18-0001-5683 - Defence Version – Short UPC Logbook;
- DRC-D18-0001-5718 – Defence Version Amended Translation – Short UPC Logbook (DRC-OTP-2102-3828);
- DRC-D18-0001-5748 - Re-Organised Defence Version - Short UPC Logbook;
- DRC-D18-0001-5778 - Re-Organised Amended Translation – Short UPC Logbook;
- DRC-OTP-0017-0033 - UPC Logbook; and

[12] Correspondence from Stéphane Bourgon to the Chamber, Prosecution and Participants sent on 29 June 2017 at 10h14.

- DRC-OTP-2102-3854 - Amended Translation – UPC Logbook

16. Also on 30 June 2017, the Amended Translation – UPC Logbook (DRC-OTP-2102-3854) was adduced by the Defence and admitted in evidence.[13]

17. On the same day, 30 June 2017, the Amended Translation – Short UPC Logbook (DRC-OTP-2102-3828) was adduced by the Defence and admitted in evidence.[14]

18. The Three Items were formally disclosed by the Defence on 3 July 2017.

19. Witness D-0300 testified from 14 June to 13 September 2017, during which the Three Items were used on multiple occasions by the Defence and the Prosecution.

20. Due to an oversight, these documents were not admitted in evidence.

SUBMISSIONS

I. It is in the interests of justice that Witness D-0300's testimony be assessed on the basis of the documents in his possession at the time

21. Items DRC-D18-0001-5683, DRC-D18-0001-5748 and DRC-D18-0001-5778 (the "Three Items") were used by the Defence and Prosecution on multiple occasions during the testimony of Witness D-0300 but were not formally admitted in evidence.

[13] ICC-01/04-02/06-T-216-ENG ET, 2:17-4:23.
[14] ICC-01/04-02/06-T-216-ENG ET, 4:2-17.

22. For the reasons set out below, the Defence requests that the Three Items be admitted in evidence at this stage.

23. The first item, **DRC-D18-0001-5683** (Defence Version – Short UPC Logbook) is an identical reproduction/copy, in colour, containing blank pages, of the Short UPC Logbook (DRC-OTP-0017-0003) identical to that stored in the Registry's vault.

24. The difference between DRC-D18-0001-5683 (Defence Version – Short UPC Logbook) and DRC-OTP-0017-0003 (Short UPC Logbook / Prosecution version) is that the latter is reproduced in black and white, *recto* side only and does not include blank pages. When the Prosecution version (DRC-OTP-0017-0003) of this item was disclosed, the Defence did not know that some of the pages were copies of *verso* pages.

25. Indeed, pages 0004, 0007, 0015, 0019 and 0022 were later identified as being *verso* pages of *recto* pages 0003, 0006, 0014, 0018 and 0021.

26. It is necessary as well as in the interests of justice that item DRC-D18-0001-5683, Defence version - Short UPC Logbook be admitted into evidence as it is the <u>only version</u> that is identical (in colour, including *recto verso* and blank pages, with the pages in the original order in which they were obtained by the Prosecution) to the version kept in the vault.

27. The second item, **DRC-D18-0001-5748** (Re-Organised Defence Version - Short UPC Logbook) is a replica of the first item mentioned above (Defence Version – Short UPC Logbook) in which the pages were reorganized by Witness D-0300 and referred to by him when responding to questions from the Defence and the Prosecution during his testimony.

28. This document has been used on multiple occasions by both Defence and Prosecution during the testimony of Witness D-0300.[15] Although this item has not been admitted into evidence, it is referred to by the Prosecution in its Final Closing Brief.[16] The Prosecution argues that Mr Ntaganda's re-organisation of the pages in the Short UPC Logbook (DRC-OTP-0017-0003) was "self-serving" and that "interpretation of the loose pages radio communications log is not supported by the facts". The Chamber's assessment and findings to be made in relation to the Prosecution's arguments requires access to the short UPC Logbook as reorganized by Witness D-0300. What is more, since questions were posed to Mr Ntaganda on the basis of this item (DRC-D18-0001-5748) which was in his possession during his testimony, it is in the interests of justice that Mr Ntaganda's responses be assessed on the basis of that specific document.

29. The Defence recalls in this regard that with the exception of one page, the Prosecution agreed with Mr Ntaganda's reorganization of the pages in this item.[17]

30. What is more, item DRC-D18-0001-5748 faithfully reproduces the original version of the Short UPC Logbook (DRC-OTP-0017-0003) kept in the vault. Indeed, this version of the short UPC Logbook contains the exact same blank pages as the original kept in the vault, respectively at pages 5749, 5751, 5755, 5757, 5759, 5761, 5763, 5765, 5767, 5771, 5775 and 5777.

[15] By the Defence : T-216-ENG CT WT, 60:22-67:17; T-241-CONF-ENG CT, 43:16-23; 69:2-70:3; 76:16-77:7; By the Prosecution: T-234-CONF-ENG CT, 66:14-67:7; T-235-CONF-ENG CT, 9:16-28.
[16] *See* Prosecution's Final Closing Brief, 20 April 2018, ICC-01/04-02/06-2277-Conf-Anx1-Corr, p. 111.
[17] ICC-01/04-02/06-T-235-CONF-ENG CT2, 53:10-54:4.

31. Moreover, contrary to DRC-OTP-0017-0003, this version of the short UPC Logbook contains *recto* and *verso* pages. DRC-OTP-0017-0003 is not in colour and does not represent faithfully the original kept in the vault.

32. The third item, **DRC-D18-0001-5778** is a copy of the Amended Translation – Short UPC Logbook (DRC-OTP-2102-3828) in which the pages were reorganized by Witness D-0300 and referred to by him when responding to questions from the Defence and the Prosecution during his testimony.

33. This item – as was the case for DRC-D18-0001-5748 – was used and referred both by the Defence and Prosecution on multiple occasions during the testimony of Mr Ntaganda.[18] It is both practical as well as in the interests of justice for the Chamber to have the ability to assess Mr Ntaganda's testimony on the basis not only of the Re-Organised Defence Version - Short UPC Logbook that was in his possession at the time but also on the basis of the Re-Organised Amended Translation – Short UPC Logbook used simultaneously by the Parties.

II. The admission of the Three Items at this stage is not prejudicial to the Prosecution or Participants and would assist the Chamber in assessing the testimony of Bosco Ntaganda

34. Despite the Chamber's order declaring the end of the evidentiary phase of the proceedings, the admission of the Three Items at this stage is necessary, practical as well as in the interests of justice. Moreover, the admission of the Three Items at this stage is not prejudicial to the Prosecution or Participants.

[18] By the Defence: T-216-ENG CT WT, 60:17-67:17; T-241-CONF-ENG CT, 43:21-46:15; By the Prosecution: T-234-CONF-ENG CT, 67:5-71:14; T-235-CONF-ENG CT, 29:1-36:21.

35. The Three Items are not new. A courtesy copy of the Three Items sought for admission was provided to the Prosecution and Participants on 29 June 2017 at 10h14[19], hard copies were distributed to the Chamber, Registry, Prosecution and Participants during the hearing on 30 June 2017 and the Three Items were formally disclosed on 3 July 2017.

36. The second (DRC-D18-0001-5748) and third (DRC-D18-0001-5778) of the three items were extensively used by the Defence and the Prosecution during the testimony of Witness D-0300. Mr Ntaganda responded to numerous questions on the basis of the Three Items, which were in his possession at the time.[20]

37. Although the Prosecution did not refer to specific pages of the Three Items sought for admission in the Prosecution Final Closing Brief, the Prosecution did refer to the second (DRC-D18-0001-5748) and third (DRC-D18-0001-5778) of the three items when putting questions to Mr Ntaganda in cross-examination.

38. The Defence, on the other hand, did not refer to item DRC-OTP-0017-0003 (Short UPC Logbook) or to item DRC-OTP-2102-3828 (Amended Translation – Short UPC Logbook) when asking questions to Mr Ntaganda in relation to the Short UPC Logbook. When putting questions to Bosco Ntaganda in relation to the logbooks, the Defence referred to the Three Items sought for admission and thus intends to refer to these items in the Defence Final Closing Brief. Should the Prosecution or the Participants

[19] Formal disclosure on 3 July 2017.

[20] **DRC-D18-0001-5683** (by the Defence: T-216-ENG CT WT, 57:12-60:22); **DRC-D18-0001-5748** (By the Defence : T-216-ENG CT WT, 60:22-67:17; T-241-CONF-ENG CT, 43:16-23; 69:2-70:3; 76:16-77:7 ; By the Prosecution: T-234-CONF-ENG CT, 66:14-67:7; T-235-CONF-ENG CT, 9:16-28); **DRC-D18-0001-5778** (By the Defence: T-216-ENG CT WT, 60:17-67:17; T-241-CONF-ENG CT, 43:21-46:15. By the Prosecution: T-234-CONF-ENG CT, 67:5-71:14; T-235-CONF-ENG CT, 29:1-36:21).

deem necessary to address the references to the Three Items in the Defence Final Closing Brief, they will have ample opportunity to do so in their responses.

39. What is most important, as well as in the interests of justice, is for the Chamber to have the ability to assess Mr Ntaganda's testimony on the basis of the documents that were in his possession when he testified. Working in the spirit of cooperation, the Prosecution agreed to the use of these items during the testimony of Mr Ntaganda.[21] The Prosecution actually referred to these items when putting questions to him.[22] The Chamber was also in agreement with this procedure, stating that « on behalf of the Chamber I think we appreciate this working style, which obviously facilitate even role of the Chamber».[23]

40. Had the Defence requested admission of the Three Items during Mr Ntaganda's testimony, all requirements for their admission had been met.

41. Admission of the Three Items would assist the Chamber in its assessment of the testimony of the Accused.

[21] ICC-01/04-02/06-T-216-ENG CT WT, 60:24-61:4.
[22] **DRC-D18-0001-5748** (T-234-CONF-ENG CT, 66:14-67:7; T-235-CONF-ENG CT, 9:16-28); **DRC-D18-0001-5778** (T-234-CONF-ENG CT, 67:5-71:14; T-235-CONF-ENG CT, 29:1-36:21).
[23] ICC-01/04-02/06-T-216-ENG CT WT, 61:5-7.

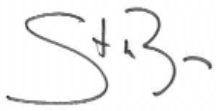
RELIEF SOUGHT

42. For the reasons set out above, the Defence respectfully requests the Chamber to:

GRANT the Defence Request; and

ADMIT items DRC-D18-0001-5683, DRC-D18-0001-5748 and DRC-D18-0001-5778 in evidence.

RESPECTFULLY SUBMITTED ON THIS 14TH DAY OF MAY 2018



Me Stéphane Bourgon, Counsel for Bosco Ntaganda