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**International
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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

Public redacted version of "Corrected version of "Prosecution's response to the
"Defence request for admission of sentencing evidence", ICC-01/04-02/06-2369-
Conf-Red, 29 July 2019", 5 August 2019, ICC-01/04-02/06-2375-Conf

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Introduction

1. The Prosecution requests the Chamber to partially reject the Defence's request, for the reasons set out below.
2. Specifically, the Prosecution requests the Chamber to: (1) decline to admit Witness D-0304's statement; (2) limit the scope of Witnesses D-0303, D-0305 and D-0047's evidence; (3) reject the Defence's request to admit 10 documents; (4) admit five additional documents and limited excerpts of a further six documents, which are important for the Chamber's complete evaluation of matters raised by the Defence; and (5) reject the Defence's requests to use rule 68(3) with Witnesses D-0047 and D-0305 and for in-court protective measures during D-0306's testimony.

Confidentiality

3. This filing is classified as "Confidential" pursuant to regulation 23bis(1) and(2) of the Regulations of the Court since it refers to information not yet available to the public and responds to filings bearing the same classification.

Procedural Background

4. On 8 July 2019, Trial Chamber VI (the "Chamber") convicted Bosco Ntaganda of 18 counts of war crimes and crimes against humanity.¹
5. On the same day, the Chamber issued an order on the sentencing procedure (Sentencing Order).² The Parties and Legal Representatives of Victims ("LRVs") 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

¹ ICC-01/04-02/06-2359.

² ICC-01/04-02/06-2360.

evidence intended to 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.³
7. The Prosecution requested permission to call one *viva voce* expert witness and to admit the statements of four additional witnesses under rule 68(2)(b) of the Rules of Procedure and Evidence (the “Rules”).⁴ The Prosecution requested protective measures for three of its proposed witnesses.⁵
8. The Defence requested authorisation to call three *viva voce* witnesses,⁶ submit five statements pursuant to rule 68(2) of the Rules,⁷ and to admit 21 documents.⁸ The Defence withheld the identity of witness D-0308 by redacting his or her identity, witness summary,⁹ and significant portions of its submissions,¹⁰ as well as by withholding from the Prosecution a document related to the witness’s evidence.¹¹

³ ICC-01/04-02/06-2368-Conf and ICC-01/04-02/06-2369-Conf-Red.

⁴ ICC-01/04-02/06-2368-Conf, paras. 7-39.

⁵ ICC-01/04-02/06-2368-Conf, paras. 40-61.

⁶ D-0305, D-0306 and D-0047. *See* ICC-01/04-02/06-2369-Conf-Red, paras. 18-20 and ICC-01/04-02/06-2369-Conf-AnxA-Red, pp. 1-5. The Defence proposed to present their evidence pursuant to rule 68(3) of the rules or entirely *viva voce*. In the former case, direct examination would take 30 minutes; in the latter, it would take one hour (*see* ICC-01/04-02/06-2369-Conf-Red, paras. 34-35 and ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 1). The Defence also requested in-court protective measures for Witness D-0306 (ICC-01/04-02/06-2369-Conf-Red, para. 19) and authorisation for witnesses D-0306 and D-0047 to testify by way of audio-video link (ICC-01/04-02/06-2369-Conf-Red, para. 34).

⁷ D-0020, D-0302, D-0303, D-0304 and D-0308 (*see* ICC-01/04-02/06-2369-Conf-Red, paras. 21-24 and 26-30; ICC-01/04-02/06-2369-Conf-AnxA-Red, pp. 1 and 6-10).

⁸ *See* ICC-01/04-02/06-2369-Conf-Red, para. 25 and ICC-01/04-02/06-2369-Conf-AnxB-Red. Four documents (DRC-OTP-0086-0036, DRC-OTP-0004-0047, DRC-D18-0001-6753 and a document related to D-0308, which was not provided to the Prosecution) and 18 excerpts from six videos, namely DRC-OTP-0159-0477 (transcript DRC-OTP-2061-0651; translation DRC-OTP-2085-0468); DRC-OTP-0120-0294 (transcript DRC-OTP-2102-3468; translation DRC-OTP-2102-3557); DRC-D18-0001-0425 (translation DRC-D18-0001-5540); DRC-D18-0001-0436 (transcript DRC-D18-0001-5632; translation DRC-D18-0001-5632); DRC-OTP-0118-0002 (transcript DRC-OTP-2084-0092; translation DRC-OTP-2084-0041); and DRC-OTP-0127-0064 (transcript DRC-OTP-0165-0276; translation DRC-OTP-0165-0349).

⁹ ICC-01/04-02/06-2369-Conf-AnxA, p. 10.

¹⁰ ICC-01/04-02/06-2369-Conf-Red, paras. 5, 26-30, and 36.

¹¹ ICC-01/04-02/06-2369-Conf-Red, para. 36.

On 30 July 2019, the Prosecution requested access to D-0308's identity and associated materials¹² and, on 31 July 2019, the LRVs joined the Prosecution's request.¹³

Prosecution Submissions

Applicable law

9. The Chamber has discretion in deciding what evidence and submissions may be of assistance in determining the appropriate sentence pursuant to articles 76 and 78 of the Rome Statute ("Statute"), and rule 145 of the Rules. In the exercise of such discretion, other Chambers of this Court have placed limits on requests to adduce additional evidence for sentencing, where such evidence was found to (1) lack relevance, (2) address matters already dealt with in the Judgment pursuant to article 74 of the Statute, or (3) be cumulative of other admitted evidence.
10. The Prosecution submits that the Chamber should likewise exercise its discretion to limit the evidence which the Defence seeks to submit, as follows:
11. *First*, the Chamber should reject evidence where the Defence has not demonstrated its relevance to the purpose for which it was submitted or to the factors set out in article 78 of the Statute and rule 145 of the Rules.¹⁴ Accordingly, the Chamber should decline to hear certain witnesses or to limit the scope of their evidence to what is strictly relevant at this stage.
12. The Defence has failed to specify the time periods to which most of the proposed evidence pertains, simply referring, for instance, to "Mr. Ntaganda's peace and

¹² ICC-01/04-02/06-2370-Conf.

¹³ ICC-01/04-02/06-2371-Conf.

¹⁴ See TCIII, *Bemba*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, ICC-01/05-01/08-3384, para. 46, where TCIII excluded documentary evidence on the basis that the Defence "ha[d] not demonstrated how these documents [were] relevant to the purpose for which it submit[ed] them, let alone to the factors set out in Article 78 of the Statute and Rule 145 of the Rules".

reconciliation message to the population during a *cérémonie des grades* in Mabanga”¹⁵ or “Mr Ntaganda’s rapid and robust reaction to an attempted rape of a civilian girl by FPLC soldiers, and his reaction to theft”.¹⁶ As the submitting party, it is for the Defence to provide the Chamber with sufficient information to assess the relevance of the evidence which it seeks to introduce. Absent such information, the Chamber cannot determine whether the evidence could assist in assessing Bosco Ntaganda’s “conduct after the act” within the meaning of rule 145(2)(a)(ii), and should decline to hear it.

13. *Second*, the Chamber should dismiss any aspects of the Defence’s proposed evidence that would impermissibly re-open the factual findings contained in the Judgment.

14. As noted by the Defence, some of the evidence it seeks to introduce “overlaps with the period of the charges”.¹⁷ Although other Chambers have accepted such evidence in previous sentencing proceedings,¹⁸ Trial Chamber III held in *Bemba* that “the sentencing hearing is not an opportunity for the parties to re-litigate such matters”.¹⁹ Accordingly, the Defence should not be allowed, at the sentencing stage, to attack or undermine factual findings made by the Chamber to convict Bosco Ntaganda.

15. Moreover, whilst other Chambers have accepted the presentation of evidence of conduct falling within the temporal scope of the charges, they found such evidence of limited significance for the determination of the sentence. For instance, although Trial Chamber I in *Lubanga* accepted, on the basis of evidence

¹⁵ ICC-01/04-02/06-2369-Conf-AnxA-Red, Witness Summary for D-0305, no. 4.

¹⁶ ICC-01/04-02/06-2369-Conf-AnxA-Red, Witness Summary for D-0303, no. 3.

¹⁷ ICC-01/04-02/06-2369-Conf-Red, para. 16.

¹⁸ ICC-01/04-02/06-2369-Conf-Red, para. 16.

¹⁹ TCIII, *Bemba*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, ICC-01/05-01/08-3384, paras. 21 and 45. *See also* TC II, *Katanga*, Order on the Prosecution and Defence requests for admission of documentary evidence into the record of the sentencing proceedings and on the Legal Representative’s request for reclassification of a Registry report, ICC-01/04-01/07-3463-Conf-tENG, paras. 4 and 8.

from 2002 and 2003, that “Mr Lubanga hoped that peace would return to Ituri once he had secured his objectives”, it also held that “this is only of limited relevance given the persistent recruitment of child soldiers during the period covered by the charges”.²⁰ Likewise, Trial Chamber III in *Bemba* allowed, but deemed “irrelevant to the sentence in this case,”²¹ evidence of Jean-Pierre Bemba’s contribution to peace during the time of the charges, in a geographic area outside the scope of the charges, namely in the Democratic Republic of Congo (“DRC”). Taking into account the low probative value and eventual weight of such evidence, the Chamber could decline to admit it at the present stage.

16. *Third*, the principle of judicial economy requires that, where ample other evidence is already available on the record, the Chamber reject additional evidence of the same facts on the basis that it is cumulative.²²

17. Based on a careful review of the Defence’s proposed evidence against the above criteria, detailed below, the Prosecution requests the Chamber to (1) decline to admit Witness D-0304’s statement, (2) to limit the scope of Witnesses D-0303, D-0305 and D-0047’s evidence,²³ and (3) reject the Defence’s request to admit 10 documents.²⁴

²⁰ TCI, *Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, para. 87: “The Chamber accepts that Mr Lubanga hoped that peace would return to Ituri once he had secured his objectives, but this is only of limited relevance given the persistent recruitment of child soldiers during the period covered by the charges. The critical factor is that, in order to achieve his goals, he used children as part of the armed forces over which he had control, and the Chamber has set out in the Judgment its conclusions as to their continued presence in the UPC/FPLC, notwithstanding public statements to the contrary and the demobilisation orders he issued. Whether or not Mr Lubanga genuinely feared attacks by others, his response should not have included using children as part of the armed wing of the UPC”.

²¹ ICC-01/05-01/08-3399, paras. 75-76.

²² See e.g. TCVII, *Bemba et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, ICC-01/05-01/13-2025, para. 9; TCIII, *Bemba*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, ICC-01/05-01/08-3384, paras. 18 and 33.

²³ The Prosecution does not oppose or request to limit the scope of the evidence of Witnesses D-0020 and D-0302.

²⁴ DRC-OTP-0086-0036, DRC-OTP-0004-0047, DRC-OTP-0120-0294, DRC-OTP-2102-3468, DRC-OTP-2102-3557, DRC-D18-0001-0425, DRC-D18-0001-5540, DRC-OTP-0127-0064, DRC-OTP-0165-0276, DRC-OTP-0165-0349.

Analysis

(i) *Witness D-0304 and associated documentary evidence*

18. The Chamber should decline to admit Witness D-0304's evidence, because it is irrelevant, cumulative of evidence admitted at trial, and addresses issues upon which the Chamber has already made factual findings. *First*, The Defence has failed to articulate, let alone demonstrate, how D-0304's evidence regarding a meeting with UPDF officers in January 2003²⁵ and a joint UPC and RCD-Goma press conference in February 2003²⁶ is of any relevance to mitigating circumstances within the meaning of rule 145(2) of the Rules. Moreover, these events have already been extensively covered by the Defence at trial, including in Bosco Ntaganda's testimony, and D-0304's evidence on them would, accordingly, appear to be cumulative in nature. For the same reasons, the Chamber should decline to admit the excerpts of video recordings of these events, namely DRC-OTP-0120-0294 and DRC-D18-0001-5540.²⁷ *Second*, the Defence has not articulated how D-0304's role as the UPC's *Secrétaire National aux Communications et aux relations avec les medias*,²⁸ his knowledge of Ntaganda's role in creating discipline within the FPLC,²⁹ and the UPC's policy with respect to ethnic reconciliation and peace,³⁰ would be relevant to the factors set out in article 78 of the Statute and rule 145 of the Rules. The Defence has already presented extensive evidence³¹ – and the Chamber made factual findings³² – on these issues at trial. The Chamber

²⁵ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0304's summary of evidence, no. 2.

²⁶ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0304's summary of evidence, no. 3.

²⁷ DRC-OTP-0120-0294, (1) 00.00.00 to 00.17.45 and (2) 01.42.48 to 01.50.31 (transcript DRC-OTP-2102-3468; translation DRC-OTP-2102-3557); DRC-D18-0001-0425, (1) 00.10.10 to 00:14.52 and (2) 01.09.22 to 01.11.30 (translation DRC-D18-0001-5540).

²⁸ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0304's summary of evidence, no. 1.

²⁹ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0304's summary of evidence, no. 4.

³⁰ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0304's summary of evidence, no. 5.

³¹ See Defence's Closing Brief, ICC-01/04-02/06-2298-Conf, paras. 2, 53, 157-162, 172-175, 226, 235-236, 570, 685, 703, 763, 781, 796, 810-811, 814, 1062-1063 (for discipline); and paras. 2, 44, 60-61, 65, 68, 71, 80-94, 152, 225, 227, 229, 237-238 (for the UPC's policies).

³² See Judgment, ICC-01/04-02/06-2359, paras. 260-261, 331-332, 371, 376-377, 639, 846 and 855 (for discipline); and para. 686 (for the UPC's policies): "The Defence submits that the UPC, as a political movement, had the objective to 'restore good governance; promote reconciliation; establish peace; [and] protect all civilians

should reject the Defence's impermissible attempt to re-litigate factual findings contained in the Judgement.

19. Alternatively, should the Chamber deem relevant one or more of the issues that Witness D-0304 is expected to testify about, the Prosecution asks the Chamber to issue an order limiting his evidence to any such issue or issues.

(ii) Witnesses D-0047, D-0303, and D-0305

20. Whilst the Prosecution does not oppose the request to hear or admit evidence from Witnesses D-0047, D-0303 and D-0305 as such, certain aspects of their proposed evidence are irrelevant to the determination of Bosco Ntaganda's sentence, cumulative of other already admitted evidence, or improperly attempt to re-litigate, matters already decided by the Chamber. Accordingly, the Chamber should limit the scope of these witnesses' evidence and instruct the Defence to exclude irrelevant or impermissible issues from any of their statements which are yet to be taken. For any statements already taken, the Chamber should admit only the appropriate portions thereof.

21. D-0047's evidence regarding Bosco Ntaganda's promotion to FPLC *Chef d'état-major general*³³ is both irrelevant for sentencing and duplicative of evidence already admitted in this case.³⁴ As for D-0047's proposed evidence on Ntaganda's involvement in two ongoing demobilisation programs adhered to by the UPC,³⁵ the Defence failed to indicate the timing of such alleged involvement, making it impossible for the Chamber to assess its relevance as "conduct after the act" or

without discrimination' and that the mutineers organised and set up a training camp 'to defend themselves'. While recognising that some of the documents produced by the UPC/FPLC indeed promoted peace, or denounced the crimes committed against the local population of Ituri, the Chamber finds that the internal communications and documents as well as military actions undertaken by the UPC/FPLC show that in parallel its goal was to actively chase away the RCD-K/ML, and those who were perceived as non-Iturians".

³³ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0047's witness summary, no. 1.

³⁴ See Defence's Closing Brief, ICC-01/04-02/06-2298-Conf, part XI. "Split of UPC-RP", para. 153 and fn. 340, referring to D-0300:T-222,23:19-24; DRC-OTP-0016-0131; DRC-OTP-0132-0237.

³⁵ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0047's witness summary, nos. 3-4.

otherwise as a mitigating circumstance. Moreover, the Chamber should not allow the Defence to re-open a matter – demobilisation efforts – upon which it has already made extensive factual findings.³⁶ Absent such information, the Chamber should decline to hear D-0047 on these points.

22. D-0303's evidence about "meeting with Mr Ntaganda on several occasions in her bar in Largu"³⁷ should be dismissed as irrelevant, because of the lack of details as to the nature and context of these meetings. The Chamber should also reject D-0303's evidence regarding Bosco Ntaganda's reaction in a case of an attempted rape,³⁸ because the Defence has not indicated when this incident allegedly took place. Without this information, the Chamber cannot determine whether such information may be relevant to Bosco Ntaganda's "conduct after the act" or is merely an attempt to impermissibly re-litigate issues dealt with at trial.

23. D-0305's evidence regarding "Mr. Ntaganda's peace and reconciliation message to the population during a *cérémonie des grades in Mabanga*"³⁹ should also be rejected in the absence of any details as to the timing of this event. The Defence already presented abundant evidence of Bosco Ntaganda's alleged "peace and reconciliation messages" at trial.⁴⁰ The Chamber should reject any attempt at re-litigating matters already decided at trial. For the same reasons, the Chamber should decline to hear D-0305's evidence regarding the kidnapping of her daughter in Marabo.⁴¹ With respect to this incident, the Prosecution additionally notes that, whilst the Defence presents her as a community leader and "President of the *Association des Mamans de l'Ituri*", it omits to mention that she is also a long-time UPC member. She was appointed as a member of the "*Comité des Mamans de*

³⁶ See Judgment, ICC-01/04-02/06-2359, paras. 417-432.

³⁷ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0303's witness summary, no. 1.

³⁸ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0303's witness summary, no. 3: "Mr Ntaganda's rapid and robust reaction to an attempted rape of a civilian girl by FPLC soldiers, and his reaction to theft".

³⁹ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0305's witness summary, no. 3.

⁴⁰ See e.g. Defence's Closing Brief, ICC-01/04-02/06-2298-Conf, para. 161 and fn. 371.

⁴¹ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0305's witness summary, no. 3.

l'UPC/RP in charge of security as early as February 2003⁴² and ran as a UPC candidate in the DRC provincial elections as recently as 2015.⁴³ That Bosco Ntaganda occasionally assisted UPC members is both irrelevant to any mitigating circumstances and not disputed by the Prosecution. Accordingly, the Chamber should decline to hear this evidence.

(iii) Documentary evidence

24. As argued above,⁴⁴ the Chamber should decline to admit the excerpts of video DRC-OTP-0120-0294 and DRC-D18-0001-5540,⁴⁵ which are related to D-0304's evidence and irrelevant.

25. The Prosecution further opposes the admission of document DRC-OTP-0086-0036, which indicates that the DRC President appointed Bosco Ntaganda as a General in the FARDC, because the Defence has not demonstrated its relevance for sentencing. For the same reason, the Chamber should reject the excerpts of video DRC-OTP-0127-0064.⁴⁶ It is for the submitting party to explain the relevance of its evidence and the Chamber should not be required to guess. Accordingly, the Chamber should dismiss these two items. Should the Chamber nevertheless be minded to admit document DRC-OTP-0086-0036, the Prosecution requests the admission of excerpts of six additional documents and a seventh document in full, for a complete evaluation of the evidence on this point.⁴⁷

26. Lastly, the Chamber should reject document DRC-OTP-0004-0047. The Chamber has previously refused to admit this document from the bar table, because it lacks

⁴² See DRC-OTP-0089-0461 (Décision politique no 004/UPC/RP/CAB/SG/2003 portant nomination des membres du comité des mamans de l'UPC/RP, dated 1 February 2003).

⁴³ See DRC-OTP-2087-1512, p. 1554.

⁴⁴ See above, para. 18.

⁴⁵ DRC-OTP-0120-0294, (1) 00:00:00 to 00:17:45 and (2) 01:42:48 to 01:50:31 (transcript DRC-OTP-2102-3468; translation DRC-OTP-2102-3557); DRC-D18-0001-0425, (1) 00:10:10 to 00:14:52 and (2) 01:09:22 to 01:11:30 (translation DRC-D18-0001-5540).

⁴⁶ DRC-OTP-0127-0064, 00:57:47 to 01:07:01 to 02:17:41 to 02:19:33 (transcript: DRC-OTP-0165-0276; translation: DRC-OTP-0165-0349).

⁴⁷ See below, paras. 32-33.

indicia of reliability.⁴⁸ At the time, the Chamber also noted that “[a]s the tendering party, it is for the Defence to provide the Chamber with sufficient information to assess the reliability of the items it requests admission of”. Since the Defence has not provided any new information, this document should not be admitted into evidence.

(iv) Witness D-0308 and associated material

27. As previously noted,⁴⁹ the Prosecution reserves its right to respond to the Defence seven days after it has been provided with the identity of Witness D-0308 and all related submissions and material, consistent with the Sentencing Order. If the Defence is requesting that the identity of Witness D-0308 be permanently withheld from the Prosecution, which is unclear at this time, the Chamber should reject this request.⁵⁰

(v) Request to admit additional evidence

28. Should the Chamber admit the Defence’s evidence for sentencing, the Prosecution requests the admission of a discrete number of additional documentary items for the sake of completeness, so the Chamber can evaluate the totality of the evidence, in the proper context.

29. The Chamber has on previous occasions granted requests to admit additional evidence, such as additional excerpts of a statement, an additional witness statement, and additional video excerpts, in order to “better” or “more

⁴⁸ ICC-01/04-02/06-2201-Red, para. 12: “while these four documents appear to be prima facie relevant, they all lack indicia of reliability, such as information on their sources, context, or purpose of their creation, as well as, for [DRC-OTP-0004-0047], the relevant date. Furthermore, the Chamber considers that the fact that these documents were disclosed by the Prosecution as originating from the UN is not, in itself, sufficient to establish their source. As the tendering party, it is for the Defence to provide the Chamber with sufficient information to assess the reliability of the items it requests admission of. In the absence of any further information, or authentication, these documents are not sufficiently reliable and probative, and the Chamber therefore denies their admission into evidence.”

⁴⁹ ICC-01/04-02/06-2370-Conf, para. 15.

⁵⁰ See ICC-01/04-02/06-2371-Conf, paras. 9-10, referring to ICC-01/05-01/13-2040, para. 5.

comprehensively”⁵¹ assess the evidence on a particular issue, to evaluate a witness’s evidence,⁵² or to “assist it in contextualizing”⁵³ specific evidence submitted by a party.

30. In this regard, the Prosecution notes, in particular, that the Defence intends to present evidence from Witnesses D-0020 and D-0047 regarding Bosco Ntaganda’s “good cooperation” with MONUC in 2004, including with Dominique McAdams, the former head of MONUC in Bunia.⁵⁴ The Chamber would not have an accurate and complete picture on this matter if it were to rely solely on these two Defence witnesses. The Prosecution therefore requests the admission of four additional documents to assist the Chamber in its evaluation of the evidence, namely: (1) DRC-OTP-2057-0099 at pp. 0101-0103, a letter from William Swing, Special Representative of the Secretary General to MONUC, to DRC President Joseph Kabila, on 24 January 2004, complaining about Bosco Ntaganda ordering his troops to fire on MONUC forces as well as human rights violations committed by his troops, and demanding his arrest; (2) DRC-OTP-0151-0306, a letter sent by Dominique McAdams to Thomas Lubanga on 21 June 2004, wherein she complains about the attitude of D-0047, in particular his lack of cooperation with MONUC and the humanitarian actors present in Ituri at the time in the context of a DDR program; (3) DRC-OTP-0142-0038, a second letter by the same author to a DRC Government Minister, dated 16 November 2004, wherein she lists a number of incidents reported by humanitarian NGOs in areas controlled by the UPC and complains about Bosco Ntaganda’s conduct; and (4) DRC-OTP-0142-0042, a third letter sent by Dominique McAdams to Bosco Ntaganda on 17 November 2004, wherein she complains about the UPC’s threats and violent actions, demands that

⁵¹ See ICC-01/04-02/06-2141-Conf, para. 52 and ICC-01/04-02/06-2184-Conf, paras. 26 and 27.

⁵² See ICC-01/04-02/06-2238, para. 11.

⁵³ See ICC-01/04-02/06-2240, para. 10.

⁵⁴ ICC-01/04-02/06-2369-Conf-AnxA-Red, D-0020’s witness summary, no. 5 and D-0047’s witness summary, nos. 4-6.

he immediately put an end to these actions, and expresses her regret that he decided not to continue with their dialogue.

31. All four documents are relevant to Bosco Ntaganda's or D-0047's own cooperation with MONUC and bear sufficient indicia of reliability, namely a MONUC letterhead, date, reference number, and a signature. Accordingly, the Chamber should admit all four documents to assist it in contextualising and evaluating the Defence's proposed evidence.

32. Should the Chamber admit document DRC-OTP-0086-0036, the Prosecution further requests the Chamber to admit limited excerpts of six additional documents, namely a series of reports from the United Nations Group of Experts on the Democratic Republic of the Congo (DRC-OTP-2102-1032, DRC-OTP-2102-1093, DRC-OTP-2102-1220, DRC-OTP-2102-1247, DRC-OTP-2102-1535, and DRC-OTP-2102-1560), and one Reuters news article (DRC-OTP-2102-1004), for a complete evaluation of the evidence regarding Bosco Ntaganda's appointment as a General in the FARDC, namely:

(1) DRC-OTP-2102-1032, Excerpt 1, p. 1044, para. 54: Final report of the Group of Experts on the Democratic Republic of the Congo, 13 February 2008 (S/2008/43), indicating that "Bosco Ntaganda [...] is [...] the CNDP military wing operations commander";

(2) DRC-OTP-2102-1093, Excerpts 2 and 3, Final report of the Group of Experts on the Democratic Republic of the Congo, 12 December 2008 (S/2008/773),

a. p. 1097, para. 19: indicating that the CNDP's military wing "is led by General Bosco Ntaganda";

- b. p. 1139, para. 191: indicating that the CNDP carried out summary executions in Kiwanja, Rutshuru territory, and detailing the Group of Expert's findings on said crimes;
- (3) DRC-OTP-2102-1220, Excerpts 4 and 5-, Interim report of the Group of Experts on the Democratic Republic of the Congo, 18 May 2009 (S/2009/253),
 - a. p. 1228, para. 35: indicating that Bosco Ntaganda "is acting as a de facto FARDC deputy commander for military operations in the Kivus";
 - b. p. 1239, paras. 98-99: indicating that the Group of Experts confirmed the CNDP's Chief of Staff Bosco Ntaganda's presence in Kiwanja;
- (4) DRC-OTP-2102-1247, Excerpt 6, p. 1292, para. 183 and p. 1432, annex 62: Final report of the Group of Experts on the Democratic Republic of the Congo, 23 November 2009 (S/2009/603), indicating that Bosco Ntaganda "has been given the post of deputy operational commander for Kimia II although FARDC has repeatedly denied his position in official circles", as well as a document signed by Bosco Ntaganda as "Coord Adjt OPS KIMIA II";
- (5) DRC-OTP-2102-1535, Excerpt 7, p. 1542, para. 34: Interim report of the Group of Experts on the Democratic Republic of the Congo, 25 May 2010 (S/2010/252), indicating that "integrated CNDP units continue to respond to the parallel chain of command of General Bosco Ntaganda";
- (6) DRC-OTP-2102-1560, Excerpt 8, p. 1601, para. 153: Final report of the Group of Experts on the Democratic Republic of the Congo, 29 November 2010 (S/2010/596), indicating that "General Bosco Ntaganda remained deputy commander of Amani Leo operations", although "his role has never been officially acknowledged by FARDC"; and

(7) DRC-OTP-2102-1004: a Reuters news article dated 6 October 2010, including an interview with Bosco Ntaganda where he acknowledges his role as “number two” of the Amani Leo operations.

33. These documents show that Bosco Ntaganda only took up his position within the FARDC years after his alleged appointment (if at all) and that, meanwhile, he was part of the leadership of a rebel military group in eastern DRC, which has been accused of committing serious human rights abuses and international crimes.

Procedural issues

(i) Admission of statements pursuant to rule 68(2)

34. The Prosecution accepts, in principle, the admission of witness statements pursuant to rule 68(2). However, at this stage, the Defence has not yet filed any statements. Should the Chamber approve any part of the Defence Request, and once it has received disclosure of the statements, the Prosecution reserves its right to make submissions on their form and substance, and to request the admission of discrete additional evidence for a complete evaluation of the evidence.

(ii) Testimony pursuant to rule 68(3) of the Rules

35. The Prosecution opposes the use of rule 68(3) in the proposed testimony of Defence Witnesses D-0047 and D-0305 and requests the Chamber to hear instead the entirety of their testimony, including direct-examination, *viva voce*.

36. As noted above, D-0305 is a long-time UPC member who was in charge of security within the “*Comité des Mamans de l’UPC/RP*” since at least February 2003⁵⁵

⁵⁵ See DRC-OTP-0089-0461 (Décision politique no 004/UPC/RP/CAB/SG/2003 portant nomination des membres du comité des mamans de l’UPC/RP, dated 1 February 2003).

and ran as a political candidate for the UPC in regional elections in the DRC in 2015.⁵⁶ As a result of her long-term partisanship, the Chamber needs to be able to thoroughly assess her credibility, which will be assisted by requiring her evidence in chief to be presented *viva voce*.

37. Witness D-0047 is a founding member of the UPC⁵⁷ who was detained for several years on charges of crimes against humanity in the DRC.⁵⁸ While detained, he was temporarily transferred to the custody of the ICC to appear as a Defence witness in *Lubanga*.⁵⁹ He was held in the ICC Detention Centre at the same time as Thomas Lubanga for an extensive period of time, between his transfer to The Hague in March 2011 and October 2012.⁶⁰ He was released from prison in 2014.

38. Trial Chamber I found D-0047 “to be an evasive and contradictory witness on the issues that particularly concerned Thomas Lubanga, and in some instances during his testimony he demonstrated partiality towards the accused”.⁶¹ As a result, the Chamber exercised particular caution with certain aspects of his testimony. Moreover, as previously reported to the Chamber,⁶² D-0047 has, on numerous occasions, sought to interfere with witnesses in this case in an attempt to pervert the course of justice. Amongst others, D-0047 interfered with a Prosecution interview in 2014,⁶³ and threatened Prosecution Witnesses [REDACTED] and [REDACTED], both directly and through their family, and

⁵⁶ See DRC-OTP-2087-1512, p. 1554.

⁵⁷ See DRC-OTP-0094-0177.

⁵⁸ See DRC-OTP-0155-0250 and DRC-OTP-1010-0052.

⁵⁹ See ICC-01/04-01/06-T-340-ENG.

⁶⁰ [REDACTED].

⁶¹ ICC-01/04-01/06-2842, paras. 728-730: “The Chamber found D-0019 to be an evasive and contradictory witness on the issues that particularly concerned Thomas Lubanga, and in some instances during his testimony he demonstrated partiality towards the accused. Bearing these factors in mind, as well as his position within the UPC, the Chamber has exercised caution as regards certain aspects of his testimony. However, on issues that were not directly related to the accused, such as the structure of the UPC, his account tended to be more consistent, credible and reliable. In all the circumstances, the Chamber has accepted his testimony in these latter areas, particularly when corroborated by other credible evidence or if they were uncontroversial”.

⁶² See e.g. ICC-01/04-02/06-603-Conf-Exp, paras. 34-41; ICC-01/04-02/06-630-Conf-Exp, para. 48; ICC-01/04-02/06-1212-Conf-Exp, paras. 32-48; ICC-01/04-02/06-1397-Conf-Exp, paras. 10-19; and ICC-01/04-02/06-1916-Conf-Exp, paras. 23-29.

⁶³ See [REDACTED].

repeatedly pressured them not to testify against Bosco Ntaganda, up until the moment they testified.⁶⁴ The Chamber has, as a result, ordered the Registry to restrict all telephone calls by any individual at the Detention Centre with D-0047.⁶⁵ Accordingly, the Prosecution submits that his evidence is to be approached with circumspection and the Chamber should not dispense with any opportunity to assess his testimony, including by requiring his evidence in chief to be presented *viva voce*.

39. Given the profile of these two witnesses, it is essential for the Chamber to hear the entirety of their testimony, including their direct examination by the Defence, *viva voce*, in order to be able to appropriately evaluate their credibility. The Prosecution notes that the use of rule 68(3) for these two witnesses would only save one hour in total.⁶⁶ Accordingly, the Chamber should not allow the use of rule 68(3) in respect of these two witnesses.

(iii) In-court protective measures for Witness D-0306

40. The Defence requests the “implementation of the utmost in-court security measures” without further explanation as to the nature of such measures, except a reference to “[c]losed session”, or any justification other than a reference to “the existing volatile and precarious situation, the sensitive nature of his evidence and [REDACTED]”.⁶⁷ The Chamber should reject this request as the Defence has not demonstrated the existence of an objectively justifiable risk for this witness based on an assessment of his individual circumstances.

⁶⁴ [REDACTED].

⁶⁵ ICC-01/04-02/06-683-Conf-Exp, para. 11.

⁶⁶ ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 1.

⁶⁷ ICC-01/04-02/06-2369-Conf-Red, para. 19 and ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 1.

Relief Requested

41. Based on the foregoing, the Prosecution requests the Chamber to: (1) decline to admit Witness D-0304's statement, (2) to limit the scope of Witnesses D-0303, D-0305 and D-0047's evidence, as indicated in paragraphs 20-23 above, (3) reject the Defence's request to admit 10 documents, (4) admit five additional documents and excerpts of a further six documents, listed in paragraphs 30 and 32 above, in the interest of completeness, and (5) reject the Defence's request to use rule 68(3) with Witnesses D-0047 and D-0305 and for in-court protective measures during D-0306's testimony.



Fatou Bensouda
Prosecutor

Dated this 17th day of September 2019
At The Hague, The Netherlands