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**International
Criminal
Court**

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Date: **28 March 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

Decision on Prosecution's request for admission of documentary evidence

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

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Mr Stéphane Bourgon
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Legal Representatives of Victims

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**Unrepresented Applicants for
Participation/Reparation**

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REGISTRY

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Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 69(4) of the Rome Statute, and Rule 63(2) of the Rules of Procedure and Evidence ('Rules'), renders the following 'Decision on Prosecution's request for admission of documentary evidence'.

I. Background

1. On 3 February 2017, the Office of the Prosecutor ('Prosecution') submitted the 'Prosecution's request for the admission of exhibits from the bar table' ('Prosecution Request'),¹ seeking admission into evidence of 192 items, as detailed in confidential Annex A to the Prosecution Request.²
2. The Prosecution Request and its annex also reflect the position of the defence team for Mr Ntaganda ('Defence') regarding the admissibility of the documents, opposing the admission into evidence of a number of them.³
3. On 27 February 2017, upon an extension of time having been granted by the Chamber,⁴ the Defence further elaborated its initial observations ('Defence Response').⁵

II. Submissions

4. The Prosecution submits that the documents are relevant,⁶ have *prima facie* probative value,⁷ and their admission is not unfairly prejudicial to the accused.⁸

¹ Prosecution's request for the admission of exhibits from the bar table, ICC-01/04-02/06-1770, with confidential annex A, ICC-01/04-02/06-1770-Conf-AnxA.

² Prosecution Request, ICC-01/04-02/06-1770, paras 1-3; and ICC-01/04-02/06-1770-Conf-AnxA.

³ The Defence's initial responses are contained in the final column of ICC-01/04-02/06-1770-Conf-AnxA.

⁴ E-mail from Trial Chamber to the parties and participants, 9 February 2017, at 17:48.

⁵ Response on behalf of Mr Ntaganda to "Prosecution's request for the admission of exhibits from the bar table", ICC-01/04-02/06-1805-Conf, with confidential annex ICC-01/04-02/06-1805-Conf-Anx.

⁶ Prosecution Request, ICC-01/04-02/06-1770, para. 8.

⁷ Prosecution Request, ICC-01/04-02/06-1770, paras 9-11.

⁸ Prosecution Request, ICC-01/04-02/06-1770, paras 12-13.

5. The Defence objects to the admission from the bar table of 129 documents.⁹ Specific submissions in relation to the documents are captured in the analysis below.

III. Applicable Law

6. The Chamber incorporates by reference the applicable law as set out in its previous decision on the admission of documentary evidence.¹⁰ In particular, the Chamber recalls that: (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.¹¹

IV. Analysis

7. As a preliminary matter, the Chamber observes that seven documents sought to be admitted have already been admitted into evidence.¹² With regard to **Document 132, DRC-OTP-0009-0146**, the Chamber notes that it was admitted on 9 June 2016 as a Defence exhibit.¹³ The Prosecution is seeking now its admission into evidence, in particular of certain portions.¹⁴ Having found that

⁹ Defence Response, ICC-01/04-02/06-1805-Conf, para. 7; see also ICC-01/04-02/06-1805-Conf-Anx.

¹⁰ 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.

¹¹ Decision on First Request, ICC-01/04-02/06-1181, para. 7.

¹² Document 2, DRC-OTP-0014-0183; Document 29, DRC-OTP-0089-0093; Document 55, DRC-OTP-0113-0070; Document 56, DRC-OTP-0113-0133; Document 79, DRC-OTP-0016-0133; Document 132, DRC-OTP-0009-0146; and Document 147, DRC-OTP-0185-0879. The Chamber observes that the admission status of Document 147, DRC-OTP-0185-0879 is not correctly recorded in E-Court.

¹³ Transcript of hearing on 9 June 2016, ICC-01/04-02/06-T-99-CONF-ENG ET, page 93, lines 11-17. The Chamber observes that the document admitted is referred to in the transcript as DRC-OTP-2009-0146, but that it appears this should have been DRC-OTP-0009-0146; see page 30, line 25 to page 31, line 3.

¹⁴ See p.0152, para. 1, and pp 0154-0155, para. 10(b).

these portions are *prima facie* relevant and have probative value, and that their probative value is not outweighed by any potential prejudice, the Chamber admits those parts of the document into evidence for the truth of their content. The Chamber further observes that the Prosecution seeks admission of **Document 81, DRC-OTP-0129-0329**, a French translation of an original English document which was admitted on 6 February 2017.¹⁵ Since the original English version of the document in question is already admitted, the Chamber does not consider it necessary to admit its translation. Accordingly, these eight items will not be considered further in the present decision, leaving 184 items for consideration.

8. Before proceeding to the assessment of the individual items tendered from the bar table, the Chamber will first address a number of general issues, also raised by the Defence in its objections with regard to the majority of the items under consideration.
9. A general Defence observation is that a given document should not be admitted 'without information related to the purpose for which its admission via the Bar Table is sought', and that the Prosecution should 'specify where the document fits in its case and why it was not possible to adduce the same via a witness', or that the Prosecution should have tendered those documents through specific witnesses. In this regard, the Chamber first notes that when tendering documents through the 'bar table', the moving party must demonstrate, with clarity and specificity, the relevance of each item and where and how it fits into its case. If at the time of tendering an item, the party is unable to demonstrate its relevance and probative value, including with regard to its authenticity, the

¹⁵ DRC-OTP-0074-0422, admitted into evidence on 13 June 2016 (part V, D only) (see transcript of hearing on 13 June 2016, ICC-01/04-02/06-T-100-Red-ENG WT, page 97, lines 7-8) and 6 February 2017 (in full) (see transcript of hearing on 6 February 2017, ICC-01/04-02/06-T-192-CONF-ENG ET, page 33, line 19 to page 34, line 2).

document cannot be admitted.¹⁶ It does not suffice to argue that its content may be corroborated by other evidence, or that the ‘document’s appearance, contents, substance and consistency with other documents, and other distinctive features satisfy the indicia of reliability for admission’. With regard to relevance, if the submissions are not sufficiently clear or precise, or if the Chamber cannot ascertain the relevance of an item with reasonable precision, it may decide to reject it on those grounds. In assessing whether an item is relevant, the Chamber will consider the purpose for which the evidence is adduced.¹⁷

10. The Chamber observes that, for some documents, the Prosecution has identified the most relevant portions sought to be admitted. The Chamber, while not bound by this in its assessment, has taken it into account and, noting also that the Prosecution’s submissions on relevance and probative value relate only to those portions identified as being the most relevant, in certain cases, it has limited admission to those parts only, together with any other portions of the document that assist in contextualising the document and assessing its reliability.
11. Further, the Chamber recalls that when an item contains information falling outside the scope of the charges, this does not, in itself, preclude its admission into evidence.¹⁸ However, if this is the case, the Chamber has evaluated whether such information is sufficiently linked to the charges or may assist the Chamber in the determination of material issues.

¹⁶ See also, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, Trial Chamber II, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635 (‘*Katanga* Bar Table Decision’), para. 13.

¹⁷ See *Katanga* Bar Table Decision, para. 16.

¹⁸ Decision on First Request, ICC-01/04-02/06-1181, para. 14. See also, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on the Prosecution’s Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, para. 28.

12. The Chamber also notes the Defence's submission that it does not agree with the 'conclusions' drawn by the Prosecution on relevance and probative value. In this regard, the Chamber considers that any disagreement between the parties on the interpretation of the content of the items under consideration does not affect their potential relevance, but rather goes to the weight, which, as mentioned above, will be assessed at a later stage in light of the totality of the evidence on the record.
13. As to the reasons for tendering the items 'without witness',¹⁹ the Chamber notes that the Prosecution provided an actual reason for only a very small number of items, while the vast majority of the explanations merely focus on the (alleged) indicia of reliability.²⁰ Moreover, even though the Chamber notes that failure by a party to tender a document through a witness does not in and of itself prevent it from being tendered from the bar table, it is clear from the Chamber's instruction at the start of the trial that a party wishing to tender evidence without it being introduced through a witness would have to indicate 'the reason for not tendering the item through a witness'.²¹ Accordingly, the Chamber considers that any documentary evidence should, where possible, be admitted through a witness, and the absence of authentication by a witness may impact on the Chamber's admissibility assessment.²² In this regard, the Chamber notes that for most of the items sought to be admitted, the Prosecution failed to provide sufficiently specific reasons why they have not been tendered through a witness.
14. Further, as mentioned above, once the probative value of a particular item has been determined, the Chamber must weigh this against the potential prejudice,

¹⁹ See the column 'Reason for tendering without witness' (ICC-01/04-02/06-1770-Conf-AnxA).

²⁰ Only for ten items, the Prosecution indicates why the item concerned could not be tendered through a witness. In all other instances, it states that '[t]he appearance, contents, substance and consistency with other documents, and other distinctive features of the document [...] satisfy the indicia of reliability for admission' (see ICC-01/04-02/06-1770-Conf-AnxA).

²¹ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 52.

²² *Katanga* Bar Table Decision, para. 12.

if any, caused by its admission. In making this assessment the Chamber may take into account the right of the accused to examine or have examined adverse witnesses, and the right to be tried without undue delay.²³

15. Finally, with regard to the Defence's submissions on redactions applied to documents tendered, the Chamber has considered, where relevant, whether or not the prejudice arising from the amount of redactions, alone or in combination with other factors or objections raised by the Defence, outweighs their *prima facie* relevance and probative value, rendering the documents inadmissible.
16. For the purpose of its assessment, the Chamber has considered first the documents to which the Defence does not object, and then the documents to which the Defence objects. The Chamber has further considered the items by the following categories: documents relating to armed and political groups; documents allegedly originating from the United Nations ('UN'); newspaper articles; audio/video recordings; photographs; and others.

1. Items to which the Defence does not object

17. The Defence does not object to the admission of 56 of the 184 items,²⁴ which fall within the categories of: documents relating to armed and political groups, audio/video recordings and others.
18. The Chamber encouraged the parties to have *inter partes* consultations on these matters and, while noting that it is not bound by their agreement on matters of evidence or law,²⁵ the Chamber has taken into consideration the parties' position in its assessment of the admissibility of each of these uncontested items.

²³ See also, *Katanga* Bar Table Decision, in particular paras 37-51.

²⁴ Defence Response, ICC-01/04-02/06-1805-Conf, para. 6; see also ICC-01/04-02/06-1805-Conf-Anx.

²⁵ Decision on First Request, ICC-01/04-02/06-1181, para. 9.

Armed and political group documents

19. The Prosecution seeks admission of 50 documents related to the structure and organisation of the UPC/FPLC.²⁶ The Chamber considers that each of these documents has *prima facie* relevance and probative value. In this regard, the Chamber observes that they relate to or bear dates falling within the time period of the charges, in most cases appear to contain letterhead and/or stamps and/or signatures of members of the UPC/FLPC, and use language and layout similar to other documents on the case record. Moreover, they appear to relate to operational and structural matters within the UPC/FPLC, including the link between the UPC and FPLC, roles and powers of certain individuals within the UPC/FPLC, and the role of the UPC/FPLC as an armed group as well as its objectives. The Chamber is satisfied that no undue prejudice arises from the admission of the abovementioned items, and accordingly admits them into evidence.

Audio/video recordings

20. The Prosecution seeks admission of two audio/video recordings. **Document 103, DRC-OTP-0164-0910** is a 7 minute 14 second long video, which was, according

²⁶ Document 3, DRC-OTP-0014-0187; Document 4, DRC-OTP-0014-0269; Document 5, DRC-OTP-0014-0270; Document 6, DRC-OTP-0014-0282; Document 9, DRC-OTP-0016-0041; Document 12, DRC-OTP-0017-0026; Document 13, DRC-OTP-0017-0288; Document 14, DRC-OTP-0018-0113; Document 15, DRC-OTP-0018-0158; Document 16, DRC-OTP-0018-0159; Document 18, DRC-OTP-0029-0294; Document 20, DRC-OTP-0037-0264; Document 21, DRC-OTP-0037-0266; Document 22, DRC-OTP-0041-0098; Document 27, DRC-OTP-0089-0039; Document 28, DRC-OTP-0089-0040; Document 31, DRC-OTP-0089-0483; Document 32, DRC-OTP-0091-0039; Document 33, DRC-OTP-0091-0709; Document 34, DRC-OTP-0091-0728; Document 35, DRC-OTP-0091-0737; Document 36, DRC-OTP-0091-0769; Document 37, DRC-OTP-0091-0778; Document 38, DRC-OTP-0092-0436; Document 39, DRC-OTP-0092-0541; Document 41, DRC-OTP-0093-0121; Document 42, DRC-OTP-0093-0136; Document 43, DRC-OTP-0093-0202; Document 44, DRC-OTP-0093-0248; Document 45, DRC-OTP-0093-0359; Document 47, DRC-OTP-0094-0160; Document 49, DRC-OTP-0106-0187; Document 50, DRC-OTP-0109-0100; Document 51, DRC-OTP-0109-0101; Document 53, DRC-OTP-0113-0014; Document 54, DRC-OTP-0113-0052; Document 58, DRC-OTP-0136-0173; Document 60, DRC-OTP-0148-0377; Document 61, DRC-OTP-0164-0452; Document 62, DRC-OTP-0165-0255; Document 80, DRC-OTP-0016-0137; Document 96, DRC-OTP-0089-0057; Document 98, DRC-OTP-0089-0059; Document 99, DRC-OTP-0089-0069; Document 101, DRC-OTP-0159-0436; Document 177, DRC-OTP-0089-0075; Document 189, DRC-OTP-0113-0135; Document 190, DRC-OTP-0113-0141; Document 191, DRC-OTP-0113-0156; and Document 192, DRC-OTP-0113-0186. The Chamber notes, as pointed out by the Defence, that Documents 31 and 43, and Documents 32 and 45 are almost identical. Documents 43 and 45 appear to be more complete versions, although less readable in some parts. For these reasons, the Chamber admits both versions of the documents.

to the Prosecution, filmed by MONUC and depicts events in Bunia in May 2003. The Chamber notes that the video contains images of the MONUC headquarters in Bunia, and the voice-over provides information on the filming crew. In these circumstances, and noting that the Defence does not dispute that the video shows the situation in Bunia in May 2003, the Chamber considers it to be sufficiently established that the video shows what it purports to show. Further, the Chamber is satisfied that its *prima facie* relevance and probative value outweighs any potential prejudice arising from its admission.

21. **Document 94, DRC-OTP-0035-0076** is a 34 minute long MONUC video on the situation in Ituri during the period of the charges. It appears that the Prosecution only intends to submit for admission a 24 second excerpt at time stamp 00:19:40 to 00:20:04 which shows a paper entitled 'Communiqué conjoint' and dated 18 May 2003, being signed at the names stated as 'Kisembo Floribert' and 'Ngudjolo Mathieu'. That extract contains sound of individuals speaking about signing the document and of a female French speaking voice-over explaining attempts to reach agreement between the leaders of the Hema and Lendu militia. The Chamber notes that the Defence does not object to the admission of this 24 second video excerpt, provided that no sound or transcript is admitted concurrently.²⁷ The Chamber considers that the excerpt shows what it purports to show, and finds that its *prima facie* probative value outweighs any potential prejudice arising from its admission.

22. The Chamber accordingly admits Document 103 into evidence in full and the 00:19:40 to 00:20:04 excerpt of Document 94. With regard to Document 94, the Chamber does not consider that admission with sound is prejudicial and admits the relevant excerpt with sound.

²⁷ ICC-01/04-02/06-1805-Conf-AnxA, p. 66.

Others

23. The Prosecution seeks admission of four other documents. **Document 1, DRC-OTP-0003-0028** is a hand-drawn map of the Ituri region. **Document 104, DRC-OTP-0171-0926** and **Document 105, DRC-OTP-2055-0050**²⁸ are French translations of the UPC Communication Logbooks already admitted into evidence.²⁹ The Defence has no objection to the admission of these two documents, provided that they are marked for identification pending verification of the accuracy of the translation.³⁰ In addition, **Document 109, DRC-OTP-2078-0202**, a UPDF account of UPC Bunia attack of 6 March 2003, is also not objected to. The Chamber considers that the documents are *prima facie* relevant, have probative value and that no undue prejudice arises from their admission. Accordingly, it admits Documents 1 and 109 into evidence, and orders that Documents 104 and 105 be marked for identification pending verification of the accuracy of the translations.

2. Items to which the Defence objects

24. The Defence objects to the admission of 128 of the 184 items.

Armed and political group documents

25. The Prosecution seeks admission of a number of documents relating to armed and political groups. These comprise UPC/FPLC documents, being (i) letters; (ii) orders/decisions/declarations/decrees; (iii) reports/memoranda; and (iv) others. It also comprises (v) documents from other groups.

26. The Defence consistently objects to the admission of these documents on various grounds, including that: the documents do not meet the minimum indicia of reliability for admission via the bar table; no probative value can be attributed to

²⁸ The Chamber observes that p. 0056 of Document 105 has already been admitted by the Chamber for the purposes of impeachment: see transcript of hearing on 22 October 2015, ICC-01/04-02/06-T-36-CONF-ENG ET, page 55, lines 5 to 9.

²⁹ DRC-OTP-0017-0033 and DRC-OTP-0017-0003.

³⁰ ICC-01/04-02/06-1805-Conf-Anx, pp 72 -73.

them in the absence of evidence related to the creation of the documents, their purpose and use; any probative value which can be attributed to them is far exceeded by the potential prejudice to the accused, if only because the Defence is deprived of the opportunity to investigate and challenge the content of the documents; and/or they contain information which should be adduced through witnesses.³¹

(i) UPC/FPLC letters

27. The Chamber notes that **Document 17, DRC-OTP-0024-0788, Document 19, DRC-OTP-0029-0306, and Document 30, DRC-OTP-0089-0146** each bear dates falling within the time period of the charges and appear to relate to operational and structural matters within the UPC/FPLC, including the link between the UPC and FPLC, lines of communication and the respective roles and powers of certain individuals. Moreover, they appear to contain UPC letterhead and stamps, and are signed. Two other letters which fall outside the temporal scope of the charges, **Document 40, DRC-OTP-0093-0060 and Document 46, DRC-OTP-0094-0155**, are both dated within the year 2004, and appear relevant to the structure of the UPC. In this regard, the Chamber recalls that it has considered the composition and structure of the UPC/FPLC in the period shortly after the temporal scope of the charges to be *prima facie* relevant.³² In addition, both documents contain UPC letterhead and appear to be signed by Thomas Lubanga. For these reasons, the Chamber is of the view that the five above-mentioned documents are relevant and have probative value, and considers that the probative value of these documents outweighs the potential prejudice of their admission. It accordingly admits the above documents into evidence. Document 19 is not, as noted by the Defence, included on the Prosecution's latest list of evidence. As a result, the Defence was only informed of the

³¹ Defence Response, ICC-01/04-02/06-1805-Conf, paras 23-24; see also ICC-01/04-02/06-1805-Conf-Anx.

³² Decision on First Request, ICC-01/04-02/06-1181, para. 22.

Prosecution's intention of admitting this document when receiving the relevant batch of items to be tendered. Noting that in this case, the Defence had sufficient time to assess the item and provide observations, the Chamber does not consider that undue prejudice arises as a result of the omission of the item from the list of evidence.

28. **Document 7, DRC-OTP-0014-0471** is a letter that appears to be from Commander Kisembo to a number of recipients (including persons within the Kinshasa government) dated October 2003, which appears to relate to the presence of child soldiers within the UPC/FPLC, and the relevant knowledge by UPC leadership. The Chamber notes that it contains no official letterhead or stamp, and that it is not signed. **Document 52, DRC-OTP-0109-0122** appears to be a letter from the FPLC G2 addressed to the 'President of the UPC' requesting the reopening of a centre for military training. While containing FPLC letterhead, the document is not stamped, signed or dated. Notwithstanding the apparent relevance of the content of these two letters, the Chamber finds that their reliability is not sufficiently established and that their limited probative value is outweighed by the potential prejudice of their admission. It therefore declines to admit them into evidence.

(ii) UPC/FPLC orders/decisions/declarations/decrees

29. **Document 8, DRC-OTP-0015-0051** is a handwritten document which appears to contain an order resulting from an instruction given over the telephone by the 'President of the UPC', and thus relates to the UPC/FPLC's chain of command. The document bears a UPC letterhead, is stamped, and signed. Although it is not dated, the Chamber is satisfied that the document has *prima facie* relevance and probative value and it therefore admits it into evidence.

30. **Document 135, DRC-OTP-0016-0135**, is a handwritten declaration dated 6 December 2003, stating that Commander Kisembo's '*déclarations*' were to be nullified or rescinded. The document is neither signed nor stamped. Further, it

appears to be a draft document, and its author is not known. In the circumstances, the Chamber finds that the authenticity of this document has been inadequately supported. Having regard to its content, it finds that the potential prejudice of its admission outweighs its *prima facie* probative value, and declines to admit it into evidence.

(iii) UPC/FPLC reports and memoranda

31. **Document 48, DRC-OTP-0102-0071**, purports to be a UPC report by Thomas Lubanga responding to a report published in June 2003 accusing the UPC/RP of serious human rights violations in Ituri since June 1998.³³ While the document is not dated, the Chamber notes that its content relates to events falling within the temporal scope of the charges, and therefore it is *prima facie* relevant. However, the Chamber notes that although the document bears a UPC letterhead, it is not signed, and noting the lack of further indicia of reliability as well as the limited context provided by the Prosecution in its submissions, the Chamber considers that the probative value is outweighed by the potential prejudice. **Document 57, DRC-OTP-0113-0161** is a memorandum addressed to MONUC, purportedly from Thomas Lubanga dated 8 January 2003, stating that the UPC is a political-military movement created to fight the values implemented by the RCD/ML. While containing UPC letterhead, the document is not stamped or signed. In these circumstances, and noting that the Prosecution did not seek to authenticate the document with the individual identified as the source of this document when the latter was called to testify,³⁴ the Chamber finds that the probative value has not been sufficiently established and it is therefore outweighed by the potential prejudice that would arise from its admission. It therefore declines to admit these two documents into evidence.

³³ The Chamber notes that admission of this document has been previously rejected during the examination of Witness P-0043, who was questioned about part of the report and noted that what was stated therein did not correspond to what was said to him during his arrest. See transcript of hearing on 30 January 2017, ICC-01/04-02/06-T-190-Red-ENG WT, page 28, line 25 to page 30, line 2.

³⁴ Witness P-0005 is recorded as the provider of this document in E-Court.

32. **Document 10, DRC-OTP-0017-0023** appears to be a handwritten FPLC security services report dated 18 February 2003 which relates to the general military, security and socio-economic situation in Bunia. It is dated and signed and contains a handwritten letterhead, though is not stamped. **Document 11, DRC-OTP-0017-0025** is a handwritten situation report purportedly sent from the FPLC 'G2 2end' to its Chief of Staff on 10 October 2002. It is dated and signed and also contains a handwritten letterhead, though no stamp. **Document 107, DRC-OTP-2066-0253** is a modified version of Document 11 which contains two additional signatures at the bottom, one dated March 2014. In light of the above, the Chamber is satisfied that the documents are relevant and have probative value, and it finds that the potential prejudice caused by their admission is outweighed by their probative value. It therefore admits them into evidence.

(iv) Other UPC/FPLC documents

33. **Document 63, DRC-OTP-0091-0162** is a list of names, ranks and positions of 44 FPLC officers dated 12 March 2004. The document appears to originate from the FPLC, 'Etat Major General, G1' and appears to have been created in Bunia. The Defence states that on its face, the document does not meet the minimum criteria for admission via the bar table because there is no signature and no stamp. The Chamber finds that, although the document appears relevant, it is not signed and stamped, and in this respect lacks sufficient indicia of reliability.³⁵ For these reasons, the Chamber considers that the document does not have sufficient probative value for admission into evidence and declines to admit it.

34. **Document 100, DRC-OTP-0091-0065** is a typed document containing information on the history and the functioning of the UPC. While it appears to have been prepared by the UPC Secretary General, the document is not signed

³⁵ See for example, Decision on First Request, ICC-01/04-02/06-1181, para. 22.

and lacks other indicia of reliability. The Chamber further notes that the document also includes a number of handwritten annotations from an unknown author. In the circumstances, the Chamber considers that this document does not have sufficient probative value and therefore declines to admit it.

(v) Documents from other groups

35. **Document 23, DRC-OTP-0055-0472** is a letter dated 6 June 2002, addressed to the president of RCD-KIS/ML, indicating that Thomas Lubanga is creating a 'Gegere militia' in Mandro. **Document 24, DRC-OTP-0055-0474** is a letter dated 14 May 2002, addressed to P. Kamaragi regarding the ethnical conflicts and attacks in Irumu and Djugu. **Document 25, DRC-OTP-0055-0476** is a letter dated 22 May 2002, addressed to a UPDF commander in Bunia and discusses the return of soldiers to Thomas Lubanga's residence. The Chamber notes that these documents precede the temporal scope of the charges. It further notes that the Defence submits that no probative value can be attributed to the documents. Nevertheless, the Chamber finds them relevant to the case background and context. It also considers that they have probative value, noting that the documents appear to bear a government cabinet stamp and signature of Jean-Pierre Molondo Lompondo, the then Governor of Ituri. The Chamber does not find that there would be undue prejudice caused by the admission of these documents and accordingly admits them into evidence.

36. **Document 26, DRC-OTP-0055-0484** is a report dated June 2002, regarding the increase of hostilities and the upsurge of violence in Bunia since 7 May 2002. The Chamber finds that the document contains sufficient indicia of reliability. However, the Chamber notes the document also contains allegations of Thomas Lubanga and the accused planning the killing of, amongst others, Jean-Claude Kiza on 18 April 2002. The Chamber recalls its previous rulings in relation to admission of evidence relating to alleged murders by the accused which are not directly charged, including that such evidence is not, in principle,

inadmissible, and that the Prosecution may lead such evidence but with limited focus.³⁶ Although the conduct of the accused preceding the charges may be of relevance in certain circumstances, the Chamber finds that in this case the relevance and probative value of this particular part of the item is outweighed by the potential prejudice arising from its admission. It accordingly decides to admit this document into evidence, while excluding its fourth paragraph which attributes the specific event mentioned above to the accused.

37. **Document 130, DRC-OTP-0126-0002** is an APC report dated 22 April 2002 regarding events of 18 April 2002. The document bears a letterhead, a stamp and a signature. According to the Prosecution, the document's *prima facie* relevance and probative value rest on it further establishing the APC as an organised armed group. While noting the Prosecution's submission as to the relevance of this document, the Chamber observes that it also relates to the accused ordering his men to kill five persons, including Jean-Claude Kiza. Noting as above for Document 26 that the conduct of the accused preceding the charges may be of relevance in certain circumstances, the Chamber however finds that, in this case, the document's relevance and probative value is outweighed by the potential prejudice arising from its admission. It accordingly declines to admit this document into evidence.

38. **Document 59, DRC-OTP-0136-0181** is a document dated 3 October 2002 and addressed to the President of the UPC regarding pillaging and destruction of houses. It refers to locations, events and times that are relevant to the charges and has been signed by several individuals. The Chamber is of the view that this document is relevant and has probative value, and considers that its probative value outweighs the potential prejudice of its admission. It accordingly admits this document into evidence.

³⁶ Transcript of hearing on 6 June 2016, ICC-01/04-02/06-T-96-Red-ENG ET, page 61, line 18 to page 62, line 17.

39. **Document 179, DRC-OTP-0104-0146** is a document containing information on a meeting purportedly held by MONUC, in August 2003, in the presence of different armed groups, including the UPC. While the information contained therein appears relevant, the Chamber notes that the document does not contain any information on the context or purpose of its creation, and that it is not dated or signed. In these circumstances, the Chamber considers that, in the absence of any authentication, it is not sufficiently reliable and declines to admit it.

Documents originating from the UN

40. The Prosecution seeks admission of a number of UN documents, which comprise: (i) MONUC daily/weekly/monthly/situation reports; (ii) other reports; and (iii) other documents such as tables, timelines of events, records of interview and lists of individuals.

(i) MONUC daily/weekly/monthly/ situation reports

41. The Defence systematically objects to the admission of these reports, mainly on grounds including that these documents are not reliable, are prejudicial to the accused in so far as the authors are unknown, contain prejudicial information which should be adduced through witnesses and, ultimately, no probative value can be attributed to them.³⁷

42. In relation to **Document 69, DRC-OTP-0005-0027, Document 70, DRC-OTP-0005-0041, Document 71, DRC-OTP-0005-0085, Document 72, DRC-OTP-0005-0276, Document 73, DRC-OTP-0005-0283, Document 74, DRC-OTP-0006-0221, Document 75, DRC-OTP-0006-0459, Document 76, DRC-OTP-0009-0021, Document 78, DRC-OTP-0010-0003, Document 133, DRC-OTP-0011-0476, and Document 184, DRC-OTP-0005-0030**, the Chamber notes that they are reports referring to locations, times and events that are relevant to the charges. The Chamber further notes that these are relatively short documents and, concerning

³⁷ Defence Response, ICC-01/04-02/06-1805-Conf, paras 25-33; see also ICC-01/04-02/06-1805-Conf-Anx.

Document 163, DRC-OTP-0109-0305 and **Document 165, DRC-OTP-0109-0288**, the relevant parts contained therein can easily be distinguished from parts that do not appear relevant. They all have, according to the Prosecution, been obtained from the UN, bear the UN logo, present consistent layout and other features. The Chamber further notes that they all are contemporaneous documents, originating from the UN local offices and reporting on ongoing events, including on activities of the MONUC. For these documents, the Chamber considers that their relevance and probative value outweighs any prejudicial effect and therefore admits them into evidence.

43. With regard to **Document 68, DRC-OTP-0004-0446, Document 89, DRC-OTP-2066-0352, Document 95, DRC-OTP-0003-0038, Document 108, DRC-OTP-2066-0344, Document 131, DRC-OTP-0060-0250, Document 137, DRC-OTP-0057-0405, Document 141, DRC-OTP-0208-0215, Document 172, DRC-OTP-0111-0008, Document 176, DRC-OTP-0195-1336, Document 181, DRC-OTP-0152-1487, Document 182, DRC-OTP-0111-0827, Document 183, DRC-OTP-0199-0130** and **Document 185, DRC-OTP-0111-0654** the Chamber considers that these documents lack important indicia of reliability, such as information on their sources, context or purpose of their creation, for some of them relevant dates. In addition, the layout and format of the documents does not clearly correspond to other documents that are supposed to derive from the same source. In this regard, the Chamber considers that the Prosecution's submission that those documents were obtained from the UN, and that some of them have been marked as Article 54(3)(e) documents, is not in itself sufficient to establish their source. In light of the above, and in the absence of any authentication, the Chamber finds that, they are not sufficiently reliable and declines to admit them.

44. The Prosecution submits that **Document 171, DRC-OTP-2082-2011** is a MONUC Human Rights Section report regarding alleged threats by UPC militia occurring

on 30 June 2007 against an individual supported by a local organisation and involved in proceedings against Thomas Lubanga before the Court. The Prosecution states that the document is generally consistent with testimony of Prosecution witnesses regarding threats from UPC supporters in relation to the Court's proceedings, including those supported by this organisation, and that it is relevant to the testimonies of individuals who provided statements to that organisation. The Defence objects to the document's admission *inter alia* on the basis that the identity of the person providing the information is redacted. Having regard to the content of the document, including the date of the incident reported therein, the Chamber is not satisfied that the document's relevance has been established. It therefore declines to admit this document into evidence.

45. The Chamber further observes that **Document 161, DRC-OTP-0109-0293, Document 162, DRC-OTP-0109-0299, Document 166, DRC-OTP-0109-0281, Document 167, DRC-OTP-0109-0261, Document 168, DRC-OTP-0109-0268, Document 169, DRC-OTP-0109-0276** are reports from the end of 2003 and beginning of 2004, and appear to contain only limited information, with limited relevance, and mostly falling outside the scope of the charges. Concerning the limited information of relevance, the Chamber considers that their relevance has not sufficiently been established and therefore declines to admit these documents into evidence.

46. **Document 151, DRC-OTP-2082-2170** and **Document 152, DRC-OTP-2082-2679** are two purported MONUC incident reports, investigated by Witness P-0317 and concerning respectively a Hema militia attack on non-Iturians in Mabanga and alleged threats by the UPC against a journalist and member of a peace organisation for her denunciation of human rights violations. While *prima facie* relevant, the Chamber notes that the sources of the information and identities of the alleged victims are either not provided or redacted, thereby reducing the probative value of these documents. Considering further that due to their late

submission, the Defence was deprived of the opportunity of questioning the witness on the findings contained in the reports, and absent any justification why the documents were not introduced through Witness P-0317, the Chamber finds that the prejudice caused to the accused through their admission would outweigh their probative value, and declines to admit them.

47. **Document 88, DRC-OTP-2063-5648, Document 90, DRC-OTP-2066-0406, Document 91, DRC-OTP-2067-1914, Document 92, DRC-OTP-2067-1945, Document 93, DRC-OTP-2067-1994, Document 139, DRC-OTP-0061-0228, and Document 149, DRC-OTP-0061-0219,** are daily and weekly reports relating to events covered by the charges. **Document 150, DRC-OTP-2078-0458** is a report concerning abductions in the relevant period of time and locations. They are all therefore *prima facie* relevant. In this regard, the Chamber also notes that for some of them the Prosecution identified the most relevant portions. While they do not bear any official UN logo or information about their authors,³⁸ the Chamber notes that they are, according to the Prosecution, all obtained from the MONUC,³⁹ and were allegedly transmitted via code cable from a UN agency or body to the UN headquarters. They all present consistent layout and other features, they contain stamps from the relevant agency or body and the UN communication centre, transmission numbers, and the sender is identified in the headers of the documents. The transmission date is also reflected on the documents. Noting further that the documents contain no or very limited redactions, the Chamber finds that their *prima facie* relevance and probative value outweighs any prejudice. The documents are therefore admitted into evidence.⁴⁰

³⁸ With the exception of Document 150, for whom the drafter is identified.

³⁹ Certain items under this group of reports are marked as Article 54(3)(e) documents, thus covered by confidentiality agreement. See for example Document 90, DRC-OTP-2066-0406; Document 139 DRC-OTP-0061-0228; and Document 149, DRC-OTP-0061-0219.

⁴⁰ Partial admission for the following documents: Document 90, DRC-OTP-2066-0406 (admission limited to 0406 and 0408); Document 91, DRC-OTP-2067-1914 (admission limited to 1914 and 1916, para. 10); Document

48. **Document 159, DRC-OTP-0109-0232, Document 160, DRC-OTP-0109-0215, and Document 164, DRC-OTP-0109-0199** are monthly reports from September, October and December 2003 respectively on the human rights situation in the DRC. The Chamber notes that the relevant parts contained therein can easily be distinguished from parts that do not appear relevant. **Document 186, DRC-OTP-2082-1982** is a report dated November 2003 containing information on elements for a security council briefing. All these documents appear to be documents meant to be transmitted through code cable from the MONUC Kinshasa Office to the UN headquarters. Although they lack the features attesting to their actual transmission mentioned above, the sender identified in the headers of the documents, their layout and other features are consistent with each other and with other similar reports that have been admitted. Noting, as mentioned above, that any weight to be attached to the documents will only be considered in the light of the evidentiary record as a whole, the Chamber does not find that there would be any prejudice caused by the admission of these documents.⁴¹

49. The Chamber notes that the Prosecution has tendered a number of UN reports (mainly monthly reports, some including executive summaries thereof), without specifically identifying the most relevant portions, namely **Document 148, DRC-OTP-2078-0590,**⁴² **Document 153, DRC-OTP-2078-0435, Document 154, DRC-OTP-2082-2126, Document 155, DRC-OTP-2078-0646, Document 156, DRC-OTP-2078-0335, Document 157, DRC-OTP-2082-2618, and Document 158, DRC-OTP-2078-0467.** The Chamber notes that these reports contain in part information that is *prima facie* relevant to the case. The Chamber further notes

92, DRC-OTP-2067-1945 (admission limited to 1945-1946, para. 2); Document 93, DRC-OTP-2067-1994 (admission limited to 1994, para. 1); Document 139, DRC-OTP-0061-0228 (admission limited to 0228 and 0232, para. 17).

⁴¹ Document 186, DRC-OTP-2082-1982 (admission limited to 1982-1983).

⁴² With regard to this document, the Chamber notes that it consists of a code cable transmitting a report from the Child Protection Section but also includes other documents, which do not clearly relate to the main document.

that they all have, according to the Prosecution, been obtained from the UN, bear the UN Logo and/or use consistent language, layout and other features. While the Chamber has assessed their probative value to be sufficiently established, it finds that at this stage, in light of the amount of information contained in the documents, and without specification by the Prosecution of the most relevant portions, admission in full would be prejudicial. In these circumstances, it therefore declines to admit them.

(ii) Other reports

50. The Chamber notes the Defence objections based mainly on the absence of reliability of other reports allegedly originating from the UN on account of: the unknown identity of the authors; the lack of relevance because they deal with facts outside the parameters of the charges; the prejudicial information contained therein; and/or the fact that the Prosecution should have tendered such documents through a witness.⁴³

51. **Document 84, DRC-OTP-0236-0015** and **Document 85, DRC-OTP-0236-0040** are two reports, which reach a combined total of over 400 pages, although the Prosecution has identified what it considers to be the most relevant paragraphs from the documents.⁴⁴ Both are, according to the Prosecution, open source documents obtained from the UN website. The two documents contain information regarding events in North Kivu and other parts of the DRC in 2008-2009 and beyond. While the accused is mentioned in these documents, the Chamber, noting the remoteness of such information from the charges,

⁴³ Defence Response, ICC-01/04-02/06-1805-Conf, paras 25-33; see also ICC-01/04-02/06-1805-Conf-AnxA, pp 56-60.

⁴⁴ Document 84, DRC-OTP-0236-0015, p. 0022, para. 24, pp 0026-0029, paras 35-56, p. 0033, paras 66-69; and Document 85, DRC-OTP-0236-0040 pp 0109-0110, paras 238-242, p. 0117, para. 279, pp 0121-0125, paras 297-313, pp 0153-0154, paras 443-445, pp 0157-0159, paras 460-465, pp 0162-0163, paras 485-487, pp 0165-0166, paras 498-504, pp 0171-0172, para. 530, p.0175, para. 542, p.0176, para. 547, p. 0182, paras 569, 571, and pp 0188-0195, paras 597-631.

considers that the potential prejudicial effect outweighs their probative value. It therefore declines to admit these documents into evidence.

52. **Document 86, DRC-OTP-1061-0212** is a 581-page long UN report on violations of human rights and humanitarian law between March 1993 and June 2003 in the DRC. The Chamber notes that the report is an open source document, which can be downloaded from the UN website. It further notes the identifying logos of the UN, the layout and sources used. The Prosecution identifies the most relevant portions of the document,⁴⁵ making submissions on their relevance and probative value. The Chamber considers those specific portions of the document to be of *prima facie* relevance and probative value and decides to admit these into evidence, together with relevant pages needed to understand the context and assess the reliability of the admitted excerpts.⁴⁶

(iii) Other documents such as tables, timelines of events, records of interview and lists of individuals

53. The Defence objects to the admission of other documents on various grounds including that the documents are not reliable, contain information that is prejudicial to the accused, refer to events outside the parameters of the charges and no probative value can be attributed to them.⁴⁷

54. **Document 65, DRC-OTP-0003-0068** and **Document 67, DRC-OTP-0004-0058** are tables purporting to contain information about UPC/FPLC military camps. **Document 66, DRC-OTP-0004-0001** is a ten page chronology of MONUC involvement in DRC from 1997 to 31 March 2004. **Document 77, DRC-OTP-0009-0096** is a monthly assessment of the months of September and October 2003, allegedly prepared and provided by MONUC. **Document 87,**

⁴⁵ Document 86, DRC-OTP-1061-0212, paras 420 (at p. 0456), 423-424 (at pp 0458-0459), 639 (at p. 0549), and 756 (at p. 0588).

⁴⁶ The following portions from Document 86, DRC-OTP-1061-0212 are admitted into evidence: p. 0212; pp 0252-0267, paras 87-126 (Introduction); pp 0455-0457, para. 420; pp 0458-0459, paras 423-424; p. 0549, para. 639; p. 0588, para. 756; and pp 0742-0743 (Annex I).

⁴⁷ Defence Response, ICC-01/04-02/06-1805-Conf, paras 34-36; see also ICC-01/04-02/06-1805-Conf-AnxA.

DRC-OTP-2047-0263, is a list of individuals and entities subject to the measures imposed by the Security Council, which was 'last updated on 28 November 2011', and includes information on the accused (information at pages 0276-0277 which the Prosecution identifies as the most relevant portion of the tendered document). **Document 138, DRC-OTP-0172-0266** is a table purporting to contain information about military training camps in the DRC, including in Ituri. **Document 140, DRC-OTP-0001-0251** is a chronology of events in Ituri from 1998 to 2003 from an unidentified source. While the information contained in these documents appears *prima facie* relevant, the Chamber considers that these documents lack important indicia of reliability, such as information on their sources, context or purpose of their creation, and for some of them, relevant dates. In this regard, the Chamber considers that the Prosecution's mere submission that those documents were provided by the UN, or UN personnel, or downloaded from the UN website, without any further information, is in the circumstances not sufficient to establish their source or authenticity. The Chamber therefore considers that, in the absence of any authentication, they are not sufficiently reliable and probative, and it declines to admit them into evidence.

55. **Document 83, DRC-OTP-0152-0249** appears to be a MONUC document containing notes on the presence of child soldiers in military camps in Ituri at various times, including during the period of the charges, and including information on the conduct of the accused. Although the document bears a date and appears to originate from the Child Protection Section of MONUC, the Chamber observes that the names of the victims mentioned in the report are redacted. In light of the content of the document, the Chamber considers that the prejudice arising from its admission would outweigh its *prima facie* probative value and declines to admit it into evidence.

56. **Document 170, DRC-OTP-2082-1861** is an 11-page report containing information on alleged serious human rights violations committed by members of Ituri armed groups nominated for FARDC, and it purports to be based on information gathered by the Human Rights Section, with contributions from the 'Child Protection Section' and 'CivPol Bunia', and states that more detailed information can be found in 'MONUC Special Ituri report dated of 16 July 2004'. It also contains a reference to 'SIU January 2005'. The Chamber further notes that the document contains only a very general description of the sources, and no header, logo, or stamp identifying it as an official UN document. This, taken together with the extent of information contained in the document, including details about the accused and his role during the relevant period, renders its admission prejudicial. The Chamber accordingly declines to admit this item into evidence.

57. **Document 120, DRC-OTP-2082-2072** is a '*fiche d'entretien*' from the 'DRC Justice Mapping Project' which contains information on an interview with an alleged child soldier, conducted in 2009. **Document 143, DRC-OTP-2082-1881, Document 144, DRC-OTP-2082-1886** and **Document 145, DRC-OTP-2082-2152** are '*fiches d'entretien*' of interviews which appear to have been conducted at the UNHRO in Bunia in 2009, and which refer to UPC attacks in the period relevant to the charges. Regarding Document 143, the Chamber recalls that this document was admitted into evidence on 3 February 2017 during the questioning of P-0317, for the limited purpose of its format.⁴⁸ Document 120 contains a UN OHCHR logo. While none of the three latter documents bear the UN logo or contain information on the author, the Chamber notes that, according to the Prosecution, they were obtained directly from UN OHCHR, and that this type of document was recognised in court by UN personnel. The

⁴⁸ Transcript of hearing on 3 February 2017, ICC-01/04-02/06-T-191-CONF-ENG ET, page 95, line 10 to page 96, line 11.

Chamber further notes that the accounts contained in the above-mentioned documents relate to events which allegedly took place in locations and at times relevant to the charges. However, in the absence of any information about the context of the creation of these documents, and noting that the identities of the interviewees have been redacted, the Chamber finds that despite the *prima facie* relevance and probative value of these documents, their probative value is outweighed by the potential prejudice of their admission. It therefore declines to admit them into evidence.

58. **Document 136, DRC-OTP-0018-0129** is a document containing information on an interview with an alleged UPC member in 2004. The document lacks important indicia of reliability and in the absence of any information on the context and purpose of its creation, the Chamber declines to admit it into evidence.

59. **Document 146, DRC-OTP-2082-1832** is a report drafted by Witness P-0046, discussing prior contacts and meetings related to child soldier issues, including the witness's notes of meetings and interviews with 34 individuals. The Chamber notes that the document was authenticated by this witness during her cross-examination.⁴⁹ The Defence objects to its admission, stating that it should have been tendered for admission through that witness. It also states that the document's probative value (if any) is far exceeded by the potential prejudice of its admission, if only because the Defence is deprived of the opportunity to investigate and challenge the content of the report. The Chamber first observes that the notes of the witness concerning her interviews already appear on the record.⁵⁰ In this regard, the document now sought to be admitted contains fewer redactions, which, in the view of the Chamber, may clarify and assist in

⁴⁹ Transcript of hearing on 15 June 2016, ICC-01/04-02/06-T-102-Red-ENG WT, page 19, lines 4-8; see also transcript of hearing on 15 June 2016, ICC-01/04-02/06-T-102-Red-ENG WT, pages 18-30, 39-45, 50-67, 77-81, 84-96, 100-101; transcript of hearing on 16 June 2016, ICC-01/04-02/06-T-103-Red-ENG WT, pages 2-4, 40-49.

⁵⁰ DRC-OTP-0152-0274; see also DRC-OTP-0208-0284.

assessing evidence already on the record.⁵¹ Notwithstanding the Prosecution's failure to provide reasons for failing to tender this document through Witness P-0046, the Chamber, noting the particular content of the document, finds no undue prejudice and finds it appropriate to admit it into evidence.

Newspaper articles

60. The Prosecution seeks admission of six newspaper articles.⁵² The Defence objects to them on various grounds, including that: these documents, by their very nature, do not meet the minimum indicia of reliability; their authors are unknown; the information contained therein causes prejudice to the accused; (iv) the Prosecution should have tendered these documents through witnesses; and/or no probative value can be attributed to them.⁵³

61. The Chamber considers that the lack of information on: the news outlets the articles are supposed to have appeared in; the background and qualifications of their authors; and the sources relied upon, results in the documents of having a limited probative value. In these circumstances, the Chamber considers that these documents do not meet the reliability and probative value requirements without a witness to testify to the accuracy of the information contained therein. When also weighted against the potential prejudice, the Chamber considers that these articles should not be admitted at this stage and through a bar table motion.

⁵¹ DRC-OTP-0208-0284.

⁵² Document 97, DRC-OTP-0077-0500 (pp 0500 and 0514, '*L'Ituri: Une Poudrière entretenue*'); Document 173, DRC-OTP-0077-0345 (p. 0360, '*Bras de fer a Bunia entre l'UPC et l'Administration spéciale de l'Ituri*'); Document 174, DRC-OTP-0134-0146 (pp 0148, 0149 and 0152, '*Un fragile mécanisme intérimaire*'); Document 175, DRC-OTP-0107-0874 (p. 0881, '*La sécurité sans autorité de l'État est vain mot*'); Document 178, DRC-OTP-0021-0160 (pp 0218-0219, '*Au Congo, Bunia reste livrée à l'arbitraire des hommes en armes*'); and Document 180, DRC-OTP-0134-0298 (pp 0298, and 0301-0304, '*Les Congolaises s'élèvent contre les atrocités de la guerre, le viol principalement!*' and '*Elles ont dit à Bunia 'Tire-moi une balle dans la tête plutôt que de me violer!'*').

⁵³ Defence Response, ICC-01/04-02/06-1805-Conf, paras 45-47; see also ICC-01/04-02/06-1805-Conf-Anx, pp 68, and 123-129.

Audio/video recordings

62. The Prosecution seeks admission of three audio/visual recordings. The Defence objects to these items on grounds including that they contain factual information prejudicial to the accused which outweighs any probative value.⁵⁴
63. **Document 102, DRC-OTP-0159-0441** is a video reportage on the presence of alleged child soldiers in Ituri. The Chamber considers that the choice of the Prosecution not to use this item during the testimony of Witness P-0014 does not, as argued by the Defence, impact on its relevance to material issues in the case. However, as the Prosecution has failed to provide any substantiation of the time when the video is supposed to have been shot (except for noting that the video was broadcast on 13 June 2003) and armed groups concerned, the Chamber considers the probative value of the video to be very low. The limited probative value is outweighed by the prejudice that admission of the video would cause. Accordingly, the Chamber declines to admit this video.
64. The remaining audio and video have previously been partially admitted into evidence. **Document 129, DRC-OTP-0082-0016** is a 1 hour 41 minute long video of, at time stamps 00:02:58 to 00:47:20, Mandro training camp purporting to show Chief Kahwa, Commander Kisémbó and the accused. The Chamber admitted excerpts from this video during the testimonies of Witnesses P-0888 and P-0002, absent any objection by the Defence.⁵⁵ Admission of the video at time stamps 00:02:58 to 00:47:20, pursuant to Rule 68(3) for Witness P-0002, has been previously rejected by the Chamber, on the basis that while the witness was able to provide certain information in relation to the circumstances of its recording, it appears that he was not present when it was recorded.⁵⁶ This is the

⁵⁴ Defence Response, ICC-01/04-02/06-1805-Conf, paras 48-50; see also ICC-01/04-02/06-1805-Conf-Anx, pp 71, 87-88, and 96-97.

⁵⁵ Respectively transcript of hearing on 21 June 2016, ICC-01/04-02/06-T-106-Red-ENG WT, page 15, lines 20-21 and transcript of hearing on 2 December 2016, ICC-01/04-02/06-T-170-CONF-ENG ET, page 76, lines 8-9.

⁵⁶ Transcript of hearing on 29 November 2016, ICC-01/04-02/06-T-167-CONF-ENG ET, page 5, lines 1-8 (see also Prosecution application under rule 68(3) and regulation 35 to admit Witness P-0002's prior recorded

portion the Prosecution identifies in its Request as being most relevant. The Prosecution states that it seeks admission of the full video to ensure completeness and integrity of the whole video.

65. **Document 142, DRC-OTP-0162-0115** is an intercepted radio communication which allegedly relates to FPLC operations in the Walendu Djatsi area at times relevant to the charges. The Prosecution also seeks admission, as part of Document 142, of two transcripts (DRC-OTP-0203-0236 and DRC-OTP-0203-0270), and two French translations (DRC-OTP-0204-0036 and DRC-OTP-0204-0056). The Chamber notes that portions of this item have previously been used during the testimony of witnesses and subsequently admitted into evidence.⁵⁷ The Chamber also recalls that admission of the audio recording in full has been previously sought by the Prosecution and rejected, the Chamber instead admitting the portions of the audio which were played in the courtroom, noting, *inter alia*, that while the witness was able to recognise some of the persons who could be heard on the recording, and was able to comment on the places and events that were mentioned on it, he was not in a position to explain the circumstances in which the recording was made or to attest to its chain of custody.⁵⁸ The Prosecution states that it now offers the entire item for completeness and context.

66. The Chamber has assessed the admissibility requirements of Documents 129 and 142 in light of the Prosecution's submissions related to their relevance and probative value. It further notes the Prosecution's submission that the items in question are submitted in their entirety, for 'completeness and integrity of the

testimony and associated material, 14 November 2016, ICC-01/04-02/06-1631-Red and confidential annex A ICC-01/04-02/06-1631-Conf-AnxA, p. 2).

⁵⁷ Transcript of hearing on 25 September 2015, ICC-01/04-02/06-T-32-Red-ENG WT, page 64, line 10 to page 66, line 11; transcript of hearing on 1 February 2016, ICC-01/04-02/06-T-60-Red-ENG WT, page 46, line 16 to page 48, line 8; transcript of hearing on 13 April 2016, ICC-01/04-02/06-T-80-CONF-ENG ET, page 3, line 15 to page 4, line 4; transcript of hearing on 7 October 2016, ICC-01/04-02/06-T-149-Red-ENG WT, page 50, line 10 to page 51, line 20.

⁵⁸ Transcript of hearing on 25 September 2015, ICC-01/04-02/06-T-32-Red-ENG WT, page 64, line 10 to page 66, line 11, in particular page 65, lines 2-110.

video', and for 'completeness and context', respectively. The Prosecution has not provided – and the Chamber does not find – any supplementary information on the relevance and probative value of the remaining parts of the items and, therefore, any reasons that would now further justify admission of these items in full. The Chamber therefore declines to admit the remaining parts of the audio and video, and the other documents forming part of Document 142.

Photographs

67. The Prosecution seeks admission of ten photographs.⁵⁹ According to the Prosecution, these photographs depict members of the UPC/FPLC in civilian and military clothes, including Thomas Lubanga, Commander Kisémbó, John Tinanzabo, Rafiki Saba and the accused, and serve to establish the 'presence of co-perpetrators of the common plan', and provide context and further establish the availability of communications devices and the UPC/FPLC leadership's ability to communicate over electronic devices.⁶⁰ In relation to these documents, the Defence contends that they are inadmissible mainly on the basis that the Prosecution should have tendered them through witnesses capable of identifying the subjects pictured, they refer to events outside the temporal scope of the charges, and/or that the probative value that can be attributed to them is exceeded by the prejudice against the accused.⁶¹

68. These ten photographs purportedly depict members of the UPC/FPLC in civilian and military clothes, including the accused. With respect to the six photographs that are not dated, the Chamber considers that their relevance to issues of the case and probative value cannot be determined. With respect to the four

⁵⁹ Document 110, DRC-OTP-0094-0032; Document 111, DRC-OTP-0094-0040; Document 112, DRC-OTP-0094-0056; Document 113, DRC-OTP-0094-0057; Document 114, DRC-OTP-0094-0089; Document 115, DRC-OTP-0113-0214; Document 116, DRC-OTP-0128-0011; Document 117, DRC-OTP-0128-0013; Document 118, DRC-OTP-0128-0026; and Document 119, DRC-OTP-0137-0680.

⁶⁰ See ICC-01/04-02/06-1770-Conf-AnxA.

⁶¹ Defence Response, ICC-01/04-02/06-1805-Conf, paras 51-53; see also ICC-01/04-02/06-1805-Conf-AnxA, pp 75-81.

photographs that appear to be dated, the Chamber considers that, apart from one photo,⁶² the Prosecution has not provided any information on the basis of which the Chamber can conclude that the dates are correct. Moreover, one photo (**Document 116, DRC-OTP-0128-0011**) refers to a date in 2000, and therefore falls outside the temporal scope of the charges. The other three photographs (**Document 115, DRC-OTP-0113-0214, Document 117, DRC-OTP-0128-0013, and Document 119, DRC-OTP-0137-0680**) appear to be dated from '08/07 2003', 22 November 2002 and 'January-February 2003', respectively. The Chamber considers that while these photos could have some relevance, in the absence of any substantiation or reliable information as to the date and location and events depicted, the probative value of these items is so low that they cannot be admitted into evidence. The Chamber therefore declines to admit these ten items into evidence.

Others

69. The Prosecution seeks admission of 14 other documents.

70. **Document 64, DRC-D03-0001-0004** is a handwritten document which was, according to the Prosecution, provided by a deceased witness in another case, and it contains information on names of victims, locations and events relevant to this case. The Chamber notes that the document lacks important indicia of reliability, notably that it contains no signature or date. In light of its content, and in the absence of further information concerning the creation of this document, the Chamber finds that its probative value has not been sufficiently established and declines to admit it as evidence.

71. **Document 82, DRC-OTP-0138-0027** is a list of individuals who appear to be integrated in the national army, including some identified as former members of UPC. It is dated November 2005, signed and seems to bear the FARDC stamp

⁶² For Document 119, DRC-OTP-0137-0680, the Prosecution refers to investigators' note DRC-OTP-0160-0362, where it is stated that the photograph is supposed to have been taken in January-February 2003.

and logo. In light of its content and the indicia of reliability, the Chamber finds the document sufficiently relevant and probative and it does not consider that the potential prejudice caused by its admission outweighs its probative value. It accordingly admits this document into evidence.

72. **Document 106, DRC-OTP-0176-0063** is a translation of the video DRC-OTP-0127-0059, of which only specific excerpts⁶³ have been admitted into evidence by the Chamber. The Prosecution submits that the translation is necessary to understand the contents of admitted evidence. The Chamber observes that part of Document 106 covers two of the admitted excerpts of DRC-OTP-0127-0059.⁶⁴ While the Defence objects to the admission into evidence, the Chamber notes that it subsequently indicated that it does not challenge the transcripts and translation of these two excerpts provided by the Prosecution.⁶⁵ Accordingly, the Chamber finds it appropriate to admit those parts of this document which cover the admitted extracts of DRC-OTP-0127-0059, together with the document's covering pages.⁶⁶

73. **Document 121, DRC-OTP-2095-0395** is a letter of 12 August 2016 which appears to be signed by the chief of the payroll department from the DRC Ministry of Education. This document provides information about the staff composition of a specific institution within the Mahagi school system and further indicates that

⁶³ DRC-OTP-0127-0059, (1) from timestamp 00:00:00 to 00:01:00 (images only); (2) from 00:03:08 to 00:06:54; (3) from 00:08:02 to 00:10:25; (4) from 01:12:55 to 01:14:00; (5) from 01:25:12 to 01:27:38 (as tendered by the Prosecution) (see List of items that may be used during the testimony of P-0030, 16 September 2016 (items 21 and 22) and transcript of hearing on 30 September 2016, ICC-01/04-02/06-T-144-Red-ENG WT, page 17, lines 12-19 and page 24, lines 15-18) and (6) from timestamp 00:43.25 to 00:50.12 (as tendered by the Defence) (see transcript of hearing on 3 October 2016, ICC-01/04-02/06-T-145-CONF-ENG ET, page 49, line 25 to page 50, line 1).

⁶⁴ From timestamp 00:03:08 to 00:06:54 and from 00:08:02 to 00:10:25.

⁶⁵ See email from the Defence to the Prosecution and the Chamber, 2 March 2017, at 15.10. In this email, the Defence indicates that it challenges the transcript for the fifth admitted excerpt of DRC-OTP-0127-0059 (from timestamp 01:25:12 to 01:27:38).

⁶⁶ Admission limited to pp 0063-0065, 0067, lines 37-57, and 0068-0069, lines 74-102. The Chamber notes the Defence' submissions concerning another portion of the video tendered by the Defence, namely that it would have prepared a transcription of this video and a translation of it, which it would have sought to have admitted them into evidence 'at a later time' (transcript of hearing on 3 October 2016, ICC-01/04-02/06-T-145-CONF-ENG ET, page 49, lines 15-19).

official documents are being transmitted as annexes, including records of the named institution's staff during the period from 1995 to 2003. **Document 122, DRC-OTP-2095-0402, Document 123, DRC-OTP-2095-0414, Document 124, DRC-OTP-2095-0420, Document 125, DRC-OTP-2095-0422, Document 126, DRC-OTP-2098-0605, Document 127, DRC-OTP-2098-0702, and Document 128, DRC-OTP-2098-0738** are purportedly the documents mentioned in Document 121 and directly sourced from the DRC Government, that is a number of school records, including documents attesting of the identity of teachers who were discussed during the testimony of Witness P-0883. The Chamber observes that all these documents have recognisable indicia of reliability, notably that the information provided sufficiently establishes how they were created and obtained, and finds them relevant and probative. The Chamber is of the view that their probative value is not outweighed by any potential prejudice arising from their admission and accordingly admits these documents into evidence.⁶⁷

74. **Document 134, DRC-OTP-0113-0012** appears to be a short report of Father Deneckere, also referred to as 'the white father', on the events of his expulsion from the DRC. The Chamber notes that the Prosecution previously sought admission of this document pursuant to Rule 68(2)(b) of the Rules and Regulation 35 of the Regulations of the Court as a document associated with the prior record testimony of P-0045⁶⁸ and that the Chamber declined to allow the late addition of P-0045 to the Prosecution's list of witnesses, thus not considering the individual associated documents.⁶⁹ The Chamber finds the document *prima facie* relevant with regard to issues at stake in the case and to the credibility of

⁶⁷ Partial admission for the following documents: Document 126, DRC-OTP-2098-0605 (admission limited to 0605-0610); Document 127, DRC-OTP-2098-0702 (admission limited to 0702); and Document 128, DRC-OTP-2098-0738 (admission limited to 0738).

⁶⁸ Prosecution's application under rule 68(2)(b) and regulation 35 to admit the prior recorded testimony of Witness P-0045, 9 January 2017, ICC-01/04-02/06-1709-Conf with confidential annexes 1-5 and public annex A. See also ICC-01/04-02/06-1709-Conf-Anx2. A public redacted version of the application was filed on 15 February 2017, ICC-01/04-02/06-1709-Red.

⁶⁹ Decision on Prosecution's request for admission of prior recorded testimony of P-0045, 13 February 2017, ICC-01/04-02/06-1785-Red, para. 17.

another witness who was questioned by the Defence about his account of Father Deneckere's expulsion from Ituri. However, in light of its above-mentioned decision, resulting in the exclusion of P-0045's evidence, it does not consider appropriate to admit through the bar table unsigned accounts from the same person. Also, in light of the allegations contained therein, the Chamber finds that its probative value is outweighed by the potential prejudice of its admission. Accordingly, it declines to admit this document into evidence.

75. **Document 187, DRC-OTP-0072-0124** appears to be the minutes of a meeting of the '*sous-commission plaidoyer et juridique*' on 2 June 2004. The Prosecution submits that this document supports witnesses' evidence already on the record concerning the phenomenon of sexual violence and the work of different groups supporting victims. The Chamber considers that the combination of the lack of known author, temporal relation to the charges, and the content's general nature render the document of limited relevance or probative value and that the prejudice arising from its admission would outweigh its probative value. It accordingly declines to admit this document into evidence.

76. **Document 188, DRC-OTP-0107-0568** appears to be a report of the '*Centre Resolution Conflits Nyankunde-Bunia/RDC*' general assembly on 27 June 2001 at Nyankunde. Although it predates the charges, the Chamber observes that it refers to activities and meetings of the civil society concerning peace talks in relevant locations, and it contains information that is *prima facie* relevant to case background and context. The Chamber notes that the document is dated and lists the contributing organisations and individuals, including the name of the assembly's 'president' and 'rapporteur'. In the circumstances, the Chamber considers that the potential prejudice deriving from the admission of this document is outweighed by its probative value. It accordingly admits this document into evidence.

3. Confidentiality

77. The Chamber notes that no specific submissions were received on the appropriate level of confidentiality for each of the items of evidence. The Chamber has therefore relied upon the confidentiality status as indicated in E-Court for the purposes of the disposition below.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADMITS the following documents into evidence:

- Document 1, DRC-OTP-0003-0028;
- Document 3, DRC-OTP-0014-0187;
- Document 4, DRC-OTP-0014-0269;
- Document 5, DRC-OTP-0014-0270;
- Document 6, DRC-OTP-0014-0282;
- Document 8, DRC-OTP-0015-0051;
- Document 9, DRC-OTP-0016-0041;
- Document 10, DRC-OTP-0017-0023;
- Document 11, DRC-OTP-0017-0025;
- Document 12, DRC-OTP-0017-0026;
- Document 13, DRC-OTP-0017-0288;
- Document 14, DRC-OTP-0018-0113;
- Document 15, DRC-OTP-0018-0158;
- Document 16, DRC-OTP-0018-0159;
- Document 17, DRC-OTP-0024-0788;
- Document 18, DRC-OTP-0029-0294;
- Document 19, DRC-OTP-0029-0306;
- Document 20, DRC-OTP-0037-0264;
- Document 21, DRC-OTP-0037-0266;
- Document 22, DRC-OTP-0041-0098;
- Document 23, DRC-OTP-0055-0472;
- Document 24, DRC-OTP-0055-0474;
- Document 25, DRC-OTP-0055-0476;
- Document 26, DRC-OTP-0055-0484 (excluding its fourth paragraph);
- Document 27, DRC-OTP-0089-0039;
- Document 28, DRC-OTP-0089-0040;
- Document 30, DRC-OTP-0089-0146;
- Document 31, DRC-OTP-0089-0483;
- Document 32, DRC-OTP-0091-0039;
- Document 33, DRC-OTP-0091-0709;

- Document 34, DRC-OTP-0091-0728;
- Document 35, DRC-OTP-0091-0737;
- Document 36, DRC-OTP-0091-0769;
- Document 37, DRC-OTP-0091-0778;
- Document 38, DRC-OTP-0092-0436;
- Document 39, DRC-OTP-0092-0541;
- Document 40, DRC-OTP-0093-0060;
- Document 41, DRC-OTP-0093-0121;
- Document 42, DRC-OTP-0093-0136;
- Document 43, DRC-OTP-0093-0202;
- Document 44, DRC-OTP-0093-0248;
- Document 45, DRC-OTP-0093-0359;
- Document 46, DRC-OTP-0094-0155;
- Document 47, DRC-OTP-0094-0160;
- Document 49, DRC-OTP-0106-0187;
- Document 50, DRC-OTP-0109-0100;
- Document 51, DRC-OTP-0109-0101;
- Document 53, DRC-OTP-0113-0014;
- Document 54, DRC-OTP-0113-0052;
- Document 58, DRC-OTP-0136-0173;
- Document 59, DRC-OTP-0136-0181;
- Document 60, DRC-OTP-0148-0377;
- Document 61, DRC-OTP-0164-0452;
- Document 62, DRC-OTP-0165-0255;
- Document 69, DRC-OTP-0005-0027;
- Document 70, DRC-OTP-0005-0041;
- Document 71, DRC-OTP-0005-0085;
- Document 72, DRC-OTP-0005-0276;
- Document 73, DRC-OTP-0005-0283;
- Document 74, DRC-OTP-0006-0221;
- Document 75, DRC-OTP-0006-0459;
- Document 76, DRC-OTP-0009-0021;
- Document 78, DRC-OTP-0010-0003;
- Document 80, DRC-OTP-0016-0137;
- Document 82, DRC-OTP-0138-0027;
- Document 86, DRC-OTP-1061-0212 (page 0212; pages 0252-0267, paras 87-126 (Introduction); pages 0455-0457, para. 420; pages 0458-0459, paras 423-424; page 0549, para. 639; page 0588, para. 756; and pages 0742-0743 (Annex I) only);
- Document 88, DRC-OTP-2063-5648;
- Document 90, DRC-OTP-2066-0406 (pages 0406 and 0408 only);
- Document 91, DRC-OTP-2067-1914, (pages 1914 and 1916, para. 10 only);

- Document 92, DRC-OTP-2067-1945 (pages 1945-1946, para. 2 only);
- Document 93, DRC-OTP-2067-1994 (page 1994, para. 1 only);
- Document 94, DRC-OTP-0035-0076 (excerpt 00:19:40 to 00:20:04 only);
- Document 96, DRC-OTP-0089-0057;
- Document 98, DRC-OTP-0089-0059;
- Document 99, DRC-OTP-0089-0069;
- Document 101, DRC-OTP-0159-0436;
- Document 103, DRC-OTP-0164-0910;
- Document 106, DRC-OTP-0176-0063 (pages 0063-0065, 0067, lines 37-57, and 0068-0069, lines 74-102 only);
- Document 107, DRC-OTP-2066-0253;
- Document 109, DRC-OTP-2078-0202;
- Document 121, DRC-OTP-2095-0395;
- Document 122, DRC-OTP-2095-0402;
- Document 123, DRC-OTP-2095-0414;
- Document 124, DRC-OTP-2095-0420;
- Document 125, DRC-OTP-2095-0422;
- Document 126, DRC-OTP-2098-0605 (pages 0605-0610 only);
- Document 127, DRC-OTP-2098-0702 (page 0702 only);
- Document 128, DRC-OTP-2098-0738 (page 0738 only);
- Document 132, DRC-OTP-0009-0146 (page 0152, para. 1, and pages 0154-0155, para. 10(b) only);
- Document 133, DRC-OTP-0011-0476;
- Document 139, DRC-OTP-0061-0228 (pages 0228 and 0232, para. 17 only);
- Document 146, DRC-OTP-2082-1832;
- Document 149, DRC-OTP-0061-0219;
- Document 150, DRC-OTP-2078-0458;
- Document 159, DRC-OTP-0109-0232;
- Document 160, DRC-OTP-0109-0215;
- Document 163, DRC-OTP-0109-0305;
- Document 164, DRC-OTP-0109-0199;
- Document 165, DRC-OTP-0109-0288;
- Document 177, DRC-OTP-0089-0075;
- Document 184, DRC-OTP-0005-0030;
- Document 186, DRC-OTP-2082-1982 (pages 1982-1983 only);
- Document 188, DRC-OTP-0107-0568;
- Document 189, DRC-OTP-0113-0135;
- Document 190, DRC-OTP-0113-0141;
- Document 191, DRC-OTP-0113-0156; and
- Document 192, DRC-OTP-0113-0186;

ORDERS the following documents to be marked for identification pending the accuracy of the translations:

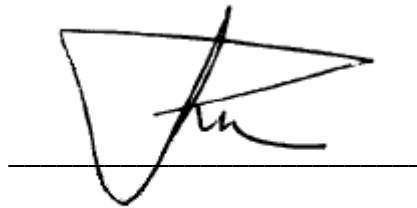
- Document 104, DRC-OTP-0171-0926; and
- Document 105, DRC-OTP-2055-0050;

DIRECTS the Registry to update the E-Court metadata of the abovementioned documents accordingly to reflect their status;

REJECTS all other requests; and

CONSIDERS the phase for the presentation of evidence by the Prosecution closed and directs the Prosecution to file a formal notice forthwith.

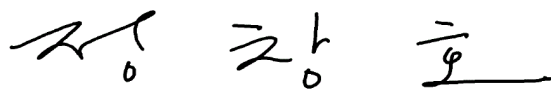
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 28 March 2017

At The Hague, The Netherlands