

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 June 2016

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 Defence request for admission of documents used during the
testimony of Witness P-0963**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

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(9) and 69(4) of the Rome Statute, Rules 63 and 64 of the Rules of Procedure and Evidence, and the Chamber's 'Decision on the conduct of proceedings',¹ issues this 'Decision on Defence request for admission of documents used during the testimony of Witness P-0963'.

I. Procedural history and submissions

1. Witness P-0963 ('Witness') testified in the present case from 11 to 15 April 2016.²
2. Following the conclusion of the testimony on 15 April 2016, the defence team for Mr Ntaganda ('Defence') orally requested the admission into evidence of five documents used during the cross-examination for impeachment purposes ('Request').³ The Office of the Prosecutor ('Prosecution') opposed the Request, arguing that the Defence should be required to identify the precise portions of the documents which it seeks to have admitted into evidence and the inconsistencies between those portions and the Witness's testimony. It further sought the Chamber's guidance as to what 'process' should be followed to ensure that the Chamber is aware of the corrections brought by the Witness during his preparation session to screening notes DRC-OTP-0147-0566 and DRC-OTP-0233-0032.⁴

¹ 2 June 2015, ICC-01/04-02/06-619.

² Transcript of hearing on 11 April 2016, ICC-01/04-02/06-T-78-CONF-ENG ET; Transcript of hearing on 12 April 2016, ICC-01/04-02/06-T-79-CONF-ENG ET; Transcript of hearing on 13 April 2016, ICC-01/04-02/06-T-80-CONF-ENG ET; Transcript of hearing on 14 April 2016, ICC-01/04-02/06-T-81-CONF-ENG ET; Transcript of hearing on 15 April 2016, ICC-01/04-02/06-T-82-CONF-ENG ET.

³ ICC-01/04-02/06-T-82-CONF-ENG ET, pp. 90, line 20 to p. 93, line 25. The documents listed are: DRC-OTP-0147-0566; DRC-OTP-0233-0032; DRC-OTP-0147-0333; DRC-OTP-0149-0049; DRC-OTP-0215-0019.

⁴ ICC-01/04-02/06-T-82-CONF-ENG ET, p. 94, line 3 to p. 95, line 12.

3. The Chamber instructed the Defence to explore the possibility of reaching an agreement with the Prosecution concerning the admission of the documents and, if necessary, to file a motion by 22 April 2016.⁵
4. After having been granted an extension of time,⁶ on 28 April 2016, the Defence filed written submissions ('Additional Submissions')⁷ supplementing the Request and seeking the admission of an additional item, also used during cross-examination (together 'Documents').⁸ The Defence submits that the purpose of using the Documents with the Witness during cross-examination was to raise 'a general matter of credibility', based in particular on the Witness's contacts with [REDACTED] ('Intermediary'), rather than to highlight discrete material inconsistencies.⁹ According to the Defence, given the possibility that information provided by the Witness to the Prosecution may have been influenced by the Intermediary, and noting that the Witness had ample opportunity to respond and explain his contacts with the Intermediary, the Defence submits that it is in the interests of justice to admit the Documents into evidence in their entirety: (i) to ensure that all relevant material is available to the parties to provide 'focused and contextualised observations on the issue of [the] Witness [...]s dealings with [the Intermediary] and, more generally, on his credibility'; and (ii) to provide the Chamber with all relevant material to properly assess the influence of this Intermediary on the interview process conducted by the Prosecution with the Witness.¹⁰ The Defence also requests that the Prosecution clarify when handwritten note DRC-OTP-0149-0049 was provided to its investigator.¹¹

⁵ ICC-01/04-02/06-T-82-CONF-ENG ET, p. 95, line 13 to p. 96, line 22.

⁶ Email from a Legal Officer of the Chamber to the parties and participants on 21 April 2016 at 13.47. *See also*, Email from the Defence to the Chamber on 21 April 2016 at 11.05.

⁷ Additional submissions on behalf of Mr Ntaganda supplementing the Defence oral request for the admission into evidence of certain documents following the testimony of Witness P-0963, ICC-01/04-02/06-1299-Conf.

⁸ The additional item is DRC-OTP-0232-0002, the French version of DRC-OTP-0215-0019.

⁹ Additional Submissions, ICC-01/04-02/06-1299-Conf, para. 9.

¹⁰ Additional Submissions, ICC-01/04-02/06-1299-Conf, paras 8 and 33.

¹¹ Additional Submissions, ICC-01/04-02/06-1299-Conf, para. 25 and p. 15.

5. On 19 May 2016, the Prosecution filed a response to the Additional Submissions.¹² The Prosecution argues that the admission of the Documents in full should not be allowed, that the Defence was required to confront the Witness with any relevant excerpts from his material that purportedly impeach him, and that admission is not necessary, as the excerpts put to the Witness either reveal no contradiction, or are duplicative of the existing record.¹³ Should the Chamber admit some of the Documents, the Prosecution requests that the corresponding portions of the 'Witness preparation session log and disclosure note' ('Witness Preparation Note')¹⁴ containing the corrections made by the Witness during the preparation session also be admitted ('Prosecution Request').¹⁵ Finally, the Prosecution submits that the Defence's request for an order to clarify when document DRC-OTP-0149-0049 was provided is unnecessary as the chain of custody metadata provided to the Defence at the time of disclosure indicates that the document was obtained on [REDACTED].¹⁶

II. Analysis

6. As a preliminary matter, the Chamber recalls its previous guidance on the manner in which items should be tendered during cross-examination.¹⁷
7. Turning to the Request, the Chamber recalls that in previous decisions it held that '[t]he cross-examining party is required to put to the witness any facts or evidence, available at the time and upon which it intends to rely to impeach his or her credibility',¹⁸ and that 'the parties ought to be conducting their examinations in a manner designed, to the extent possible, to create a clear and

¹² Prosecution's Response to the "Additional submissions on behalf of Mr Ntaganda supplementing the Defence oral request for the admission into evidence of certain documents following the testimony of Witness P-0963", ICC-01/04-02/06-1299-Conf, ICC-01/04-02/06-1327-Conf ('Response').

¹³ Response, ICC-01/04-02/06-1327-Conf, paras 11-30.

¹⁴ DRC-OTP-2092-0055.

¹⁵ Response, ICC-01/04-02/06-1327-Conf, paras 27 and 31.

¹⁶ Response, ICC-01/04-02/06-1327-Conf, para. 6.

¹⁷ Decision on Defence request for admission of documents used during the testimony of Witness P-0933, 27 May 2016, ICC-01/04-02/06-1340, para. 5.

¹⁸ ICC-01/04-02/06-619, para. 28.

self-contained transcript record, without unnecessary recourse to seeking admission of supplementary documents for the purposes of impeachment on points of inconsistency with prior statements'.¹⁹

8. DRC-OTP-0147-0566 and DRC-OTP-0233-0032 are 'screening notes' summarising (in three pages) the initial meetings between the Witness and a Prosecution investigator, [REDACTED], respectively. The Chamber notes that significant parts of DRC-OTP-0147-0566 were read out in court,²⁰ that inconsistencies [REDACTED] were raised, and the Witness had the opportunity to respond and/or refer to the corrections previously made during the preparation sessions.²¹ The Chamber considers that in light of the discrepancies identified, admission into evidence of DRC-OTP-0147-0566 is appropriate to enable the Chamber to assess the testimony of the Witness, including the explanations provided. The Chamber does not consider it necessary to admit DRC-OTP-0233-0032 into evidence since its content is reproduced almost entirely in DRC-OTP-0147-0566,²² and the information included in the additional portions, to the extent relevant, has been read out in court and is therefore adequately reflected in the record.²³ With regard to the Prosecution Request, which the Defence does not oppose,²⁴ the Chamber grants it and admits into evidence, for the same purpose of assessing the credibility of the Witness's testimony, the relevant portions of the Witness Preparation Note in which corrections to DRC-OTP-0147-0566 were made.²⁵

¹⁹ Decision on Defence request seeking the admission of certain documents following the testimony of Witness P-0010, 23 December 2015, ICC-01/04-02/06-1070-Conf, para. 13.

²⁰ ICC-01/04-02/06-T-82-CONF-ENG ET, p. 42, lines 7-18; p. 69, line 23 to p. 74, line 22 (paragraphs 4, 5, 6 and 14 were read out in full, relevant portions of paragraphs 10, 11 and 12 were also read out).

²¹ See for example, ICC-01/04-02/06-T-82-CONF-ENG ET, p. 70, lines 6-15; p. 71, lines 14-22; p. 72, lines 2-3; p. 73, lines 3-5 and 21 to p. 74, line 19.

²² With the exception of the last five paragraphs (paragraphs 15 to 19) the content of DRC-OTP-0233-0032 is duplicative of that of DRC-OTP-0147-0566.

²³ ICC-01/04-02/06-T-82-CONF-ENG ET, p. 77, lines 6-25 (paragraphs 17 and 18 were read out in full).

²⁴ Additional Submissions, ICC-01/04-02/06-1299-Conf, para. 19.

²⁵ Witness Preparation Note, DRC-OTP-2092-0055, at 0061 and 0063 (corrections made in relation to paragraphs 4 and 5 of document DRC-OTP-0146-0566), and at 0065 (with regard to paragraph 10 of document

9. Concerning documents DRC-OTP-0147-0333 and DRC-OTP-0149-0049, the Chamber notes that the Witness recognised them [REDACTED] (being two and five pages, respectively) [REDACTED].²⁶ Although the Defence questioned the Witness mainly about the circumstances related to the preparation of these notes, and asked the Witness whether he [REDACTED] only a few particular passages thereof, the Chamber will admit the notes, given that [REDACTED] and in light of their potential relevance to, amongst other things, assessing the circumstances in which the Witness first provided information to the Prosecution. The extent to which the content of the notes was put to the Witness in Court may, however, be considered by the Chamber in assessing the weight to be attributed to them.
10. In respect of DRC-OTP-0215-0019, a statement given by the Witness to the Prosecution [REDACTED], and its translation DRC-OTP-0232-0002, the Chamber considers that the Defence inadequately laid the basis for admission of these documents. Only a few passages of this 10-page statement were specifically put to the Witness and the Chamber is satisfied that the relevant information is adequately reflected in the record.²⁷ With regard to the rest of the statement, the Chamber notes that the Defence had the opportunity to fully explore the Witness's contacts and relationship with the Intermediary, including using this statement [REDACTED], to the extent it considered necessary. The Defence has failed to identify material inconsistencies, or any other basis, to justify the requested admission. The Chamber will therefore not admit the statement and its translation into evidence.

DRC-OTP-0146-0566, corrections were made in relation to similar information in another document, DRC-OTP-0161-2563, at 2569-2570, lines 160, 185 and 225).

²⁶ ICC-01/04-02/06-T-82-CONF-ENG ET, p. 78, line 4 to p. 81, line 7.

²⁷ ICC-01/04-02/06-T-82-CONF-ENG ET, p. 52, line 23 to p. 54 line 10; p. 62, line 12 to p. 69, line 18 (significant parts of paragraphs 10 to 15 were read out in court and the Witness had the opportunity to respond or clarify).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

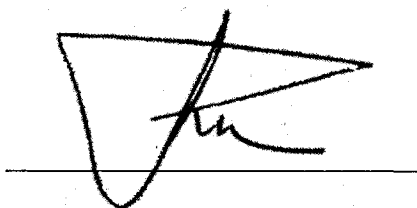
ADMITS INTO EVIDENCE, for impeachment purposes, the following documents, or portions thereof as specified:

- DRC-OTP-0147-0566;
- DRC-OTP-0147-0333;
- DRC-OTP-0149-0049; and
- DRC-OTP-2092-0055, pages 0061, 0063 and 0065, as specified above;

DIRECTS the Registry to update the E-Court metadata accordingly to reflect their admission; and

REJECTS all other requests.

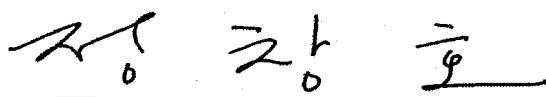
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 16 June 2016

At The Hague, The Netherlands