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

Public redacted version of “Request on behalf of Mr Ntaganda seeking admission of documents DRC-OTP-2077-0140 and DRC-OTP-2081-0589”, 7 July 2016, ICC-01/04-02/06-1441-Conf

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to: (i) the objection raised orally by the Defence on 23, 24 and 27 June 2016 to the admission of only three pages of Witness P-0877's Notebook for the truth of their content ("Defence Objection"); (ii) the request to admit Witness P-0877's Notebook for the purpose of impeachment submitted as well orally by the Defence on 27 June 2016 ("Oral Defence Request");¹ (iii) the request and objection raised orally by the Office of the Prosecutor ("Prosecution") on 27 June 2016 ("Prosecution Request" and "Prosecution Objection");² and (iv) Trial Chamber VI ("Chamber")'s oral decision of 27 June 2016 overruling the Defence Objection,³ Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Request on behalf of Mr Ntaganda seeking admission of documents DRC-OTP-2077-0140 and DRC-OTP-2081-0589

"Defence Request"

INTRODUCTION

1. The Defence respectfully requests the Chamber to admit into evidence documents DRC-OTP-2077-0140 and DRC-OTP-2081-0589 – respectively, Witness P-0877's purported notebook and its translation – for the purpose of impeachment.⁴
2. Given the nature of the interests at stake – namely, the fundamental right of the Accused to a fair trial and the fair evaluation of the testimony of a witness – the Defence submits that admitting into evidence Witness P-0877's purported notebook in its entirety for the purpose of impeachment is necessary in the interests of justice, to provide the Chamber with all necessary evidentiary material to understand the testimony and assess the credibility of Witness P-0877.

¹ ICC-01/04-02/06-T-108-CONF-ENG, p.107, l.4 to p.108, l.8; ICC-01/04-02/06-T-109-CONF-ENG, p.41, l.19 to p.42, l.4; ICC-01/04-02/06-T-110-CONF-ENG, p.22, l.13 to p.24, l.22.

² ICC-01/04-02/06-T-110-CONF-ENG, p.25, l.1 to p.26, l.2.

³ ICC-01/04-02/06-T-110-CONF-ENG, p.26, ll.9-14.

⁴ The Defence notes that while it overruled the Defence Objection, the Chamber did not rule on the Defence Request.

3. Lastly, the Defence takes this opportunity to underscore that this Defence Request is submitted at this time following the reception of the edited version of the transcript of 24 June 2016 which was necessary to conduct an accurate assessment of the Defence cross-examination of that day.

BACKGROUND

4. On 26 May 2016, the Prosecution requested, pursuant to Rule 68(3) (“Prosecution Application”), the admission into evidence of Witness P-0877’s prior recorded testimony as well as of certain associated documents, including five sketches and seven entries of a notebook purportedly kept by Witness P-0877.⁵
5. On 10 June 2016, the Defence responded to the Prosecution Application, indicating that it does not object to the admission into evidence of Witness P-0877’s prior recorded testimony and the sketches attached thereto, but requested that the Chamber defer its decision on the admission of the seven entries of the notebook until completion of cross-examination.⁶
6. On 23 June 2016, after having introduced the prior recorded testimony of Witness P-0877, the Prosecution requested the admission into evidence of *inter alia* the seven entries of Witness P-0877’s notebook.⁷ The Defence reiterated its request that the Chamber defer its decision on the admissibility of the seven entries of the notebook until the end of cross-examination,⁸ which the Chamber granted.⁹
7. On 24 June 2016, the Defence began cross-examination of Witness P-0877. During the course of cross-examination, the Defence showed Witness P-0877

⁵ ICC-01/04-02/06-1335-Conf.

⁶ ICC-01/04-02/06-1387-Conf.

⁷ ICC-01/04-02/06-T-108-CONF-ENG, p.107, l.1 to p.108, l.4.

⁸ ICC-01/04-02/06-T-108-CONF-ENG, p.107, l.4 to p.108, l.8.

⁹ ICC-01/04-02/06-T-110-CONF-ENG, p.26, ll.9-14.

several pages of his purported notebook,¹⁰ and questioned him extensively about his knowledge of this document and the entries therein.

8. On 27 June 2016, upon completion of Witness P-0877's testimony, the Defence objected to Witness P-0877's seven entries of its purported notebook being admitted into evidence for the truth of their content. Nonetheless, the Defence requested the Chamber to have Witness P-0877's purported notebook admitted into evidence in its entirety for the purpose of impeachment.
9. In response, the Prosecution reiterated its request for the admission of the seven entries,¹¹ clarifying that the admission of these seven entries is sought for the truth of their content.¹² The Prosecution further objected to the admission of Witness P-0877's purported notebook in its entirety on the basis that: (i) "the witness has not been shown the entirety of the notebook"; (ii) "we only have the counsel's opinion that there seems to be a difference in handwriting in the notebook"; and (iii) the Defence would be free to produce additional evidence later at trial to challenge the authenticity of the seven entries the Prosecution seeks to have admitted.¹³
10. The Chamber overruled the Defence's objection to the admission into evidence of the seven entries of Witness, finding that criteria set out by the Chamber in relation to the admission of documents under Rule 68(3) were met for the seven entries identified by the Prosecution, but did not rule on the Defence's request to have the entirety of Witness P-0877's purported notebook admitted for the purpose of impeachment.¹⁴

¹⁰ ICC-01/04-02/06-T-109-CONF-ENG, p.79, l.9 to p.98, l.8: DRC-OTP-2077-0140 (translation of the Notebook), pages 0141, 0142, 0143, 0187, 0186, 0210, 0211, 0213, 0205, 0209, 0188 and 0206,

¹¹ ICC-01/04-02/06-T-110-CONF-ENG, p.25, l.1 to p.26, l.2.

¹² ICC-01/04-02/06-T-110-CONF-ENG, p.26, ll. 1-2.

¹³ ICC-01/04-02/06-T-110-CONF-ENG, p.25, l.10-22.

¹⁴ ICC-01/04-02/06-T-110-CONF-ENG, p.26, l.9-14.

SUBMISSIONS

I. Applicable law

11. In its *“Decision on the conduct of proceedings”*,¹⁵ the Chamber indicated that it “shall determine 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”.¹⁶
12. In its [REDACTED]¹⁷, the Chamber set out the applicable framework for the admission of documents for the purpose of impeachment.
13. The Chamber held that *inter alia*: (i) the parties ought to be conducting their examinations in a manner designed, to the extent possible, to create a clear and self-contained transcript record, without unnecessary recourse to seeking admission of supplementary documents for the purpose of impeachment on points of inconsistency with prior statements; (ii) the parties must raise material inconsistencies, or other matters of credibility during cross-examination; and (iii) the parties must not seek to subsequently burden the Chamber with voluminous supplementary material.
14. In its *“Decision on Defence request for admission of documents used during the testimony of Witness P-0963”*,¹⁸ a similar issue was addressed by the Chamber, namely a request for admission of a screening note for the sole purpose of impeachment.¹⁹ The Chamber admitted the document for the purpose of impeachment on the basis that: (i) significant parts of the document were read out in court; (ii) that inconsistencies were raised; and (iii) the Witness had the opportunity to respond and/or refer to the corrections previously made during

¹⁵ ICC-01/04-02/06-619.

¹⁶ ICC-01/04-02/06-619, para. 36.

¹⁷ [REDACTED]

¹⁸ ICC-01/04-02/06-1400-Red.

¹⁹ ICC-01/04-02/06-1400-Red, para.8, concerning admission for the purpose of impeachment of screening note DRC-OTP-0147-0566 summarizing the initial meeting between Witness P-0963 and the Prosecution.

his preparation session. The Chamber considered that in light of the discrepancies identified, admission into evidence of the document was appropriate to enable the Chamber to assess the testimony of the Witness.

II. Admission of Witness P-0877's purported notebook in its entirety (DRC-OTP-2077-0140/DRC-OTP-2081-0589)

15. The Defence respectfully submits that admission of Witness P-0877's purported notebook in its entirety is essential to assist the Chamber in properly assessing Witness P-0877's answers regarding the numerous inconsistencies revealed during cross-examination with regard to both the form and contents of that document. Without the admission of the notebook in its entirety, the parties will be deprived of the possibility to argue on the credibility of the answers given by the Witness in this regard.
16. Firstly, with respect to the chronological order of the notebook, the Defence established with Witness P-0877 that while the entire notebook was run in a chronological order starting on [REDACTED] and ending on [REDACTED], the seven entries sought for admission by the Prosecution are scattered throughout the notebook.²⁰ Without the admission of the entirety of the notebook, neither the Chamber nor the parties will be in a position to conduct a fair evaluation of Witness P-0877's testimony in this regard.

²⁰ While the Prosecution only requested the admission of seven entries, the Defence notes that an eighth entry concerns the period of 2002/2003 at page 0638 of DRC-OTP-2081-0589 (translation of the notebook). To be absolutely complete, the Defence also notes that there is an additional entry which does not appear chronologically, on the first page of the notebook at page 0592 of the translation. Regarding the seven entries admitted into evidence, the Defence notes the following: (i) on page 0657 of the translation, mention is made of events that occurred on [REDACTED]. However, these entries appear in the notebook after an entry mentioning events that occurred on [REDACTED] (see page 0638 of the translation); (ii) on page 0661 of the translation, mention is made of events that occurred on [REDACTED], [REDACTED] (the year is not specified), [REDACTED] and [REDACTED]. However, the last entry dated [REDACTED] and [REDACTED] appear in the notebook before an entry mentioning events that occurred on [REDACTED] (see page 0662 of the translation); and (iii) on page 0664 of the translation, mention is made of events that occurred on [REDACTED]. However, these entries appear after an entry mentioning events that occurred on [REDACTED].

17. Secondly, as regards to the handwriting of the notebook, the Defence further highlighted in cross-examination that there exist significant discrepancies between the calligraphy of certain entries of the notebook (acknowledged by Witness P-0877 to be his) and that of the seven entries admitted into evidence.²¹ In such circumstances, it is essential that both the Chamber and the parties be able to refer to the notebook in its entirety. Limiting the admission into evidence of the seven entries would render such exercise impossible.
18. Finally, Witness P-0877 was questioned²² about a signature appearing on the first page of the notebook,²³ which was compared to the signatures appearing on his statement²⁴ and victim participation form.²⁵ Witness P-0877 acknowledged that the signature of the first page of the notebook was not his and was unable to explain how that signature happened to be in his notebook. Admission into evidence of the notebook in its entirety is necessary to assess Witness P-0877's answers in this regard.
19. While the Defence conducted its cross-examination of Witness P-0877 in a manner designed to create, to the extent possible, a clear and self-contained transcript record, the Defence respectfully submits that in order to fully assess the credibility of Witness P-0877, the Chamber will be required to refer to the notebook itself in its entirety. Moreover, bearing in mind the incriminatory nature of the evidence provided by Witness P-0877, and the correlative need to properly assess the witness's credibility, the Defence posits that the admission of Witness P-0877's purported notebook (DRC-OTP-2077-0140) and its translation (DRC-OTP-2081-0589) will not unduly overburden the Chamber with voluminous supplementary material; quite to the contrary, without the entire notebook on the record, the Chamber will not be in a position to properly

²¹ ICC-01/04-02/06-T-109-CONF-ENG, p.93, l.5 to p.96, l.21.

²² ICC-01/04-02/06-T-109-CONF-ENG, p.96, l.2 to p.98, l.8.

²³ DRC-OTP-2077-0140, page 0141.

²⁴ DRC-OTP-2069-2086.

²⁵ DRC-OTP-2092-0288.

evaluate the testimony of Witness P-0877 as referred to in its *“Decision on the conduct of proceedings”*.

20. Consequently, in light of the above, the Defence posits that having Witness P-0877's purported notebook and its translation admitted into evidence in full for the purpose of impeachment will provide the Chamber with all necessary evidentiary material to understand the witness's testimony and assess his credibility, as the notebook's content and the explanations given by Witness P-0877 in this regard reveal serious inconsistencies.
21. In any event, the fact that Witness P-0877 has not been shown the entirety of the notebook is not a relevant consideration for its admission in full. Indeed, given the limited time available to cross-examine Witness P-0877, the Defence could simply not go through the entire document with the witness. The Defence had thus to select, among the 80 pages, the ones that would be pertinent to demonstrate the inconsistencies of the notebook. In this regard, the Defence notes that even though inconsistencies were emphasised during cross-examination, Witness P-0877 maintained that the notebook was his.²⁶

CONFIDENTIALITY

22. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Request is classified as confidential, as it refers to filings bearing the same classification and information elicited in private session. The Defence will submit a public redacted version of its Application.

²⁶ ICC-01/04-02/06-T-109-CONF-ENG, p.79, l.25 to p.98, l.8.

RELIEF SOUGHT

23. In light of the above submissions, the Defence respectfully requests the Chamber to **ADMIT** Witness P-0877's purported notebook in its entirety, as well as its translation, for the sole purpose of impeachment

RESPECTFULLY SUBMITTED ON THIS 14TH DAY OF SEPTEMBER 2016

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands