

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **21 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 “Prosecution response to the “Request on behalf of Mr Ntaganda for disclosure of the video-recording of the preparation session of Witness P-0019 under Article 13 of the Witness preparation protocol””,
19 August 2016, ICC-01/04-02/06-1476-Conf**

Source: Office of the Prosecutor

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

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Introduction

1. Trial Chamber VI (“Chamber”) should reject the Defence request for disclosure of excerpts of the video-recording of Witness P-0019’s witness preparation session (“Defence Request”).¹
2. The Defence Request fails to demonstrate that access to the video-recording is warranted. The Prosecution disclosed a near *verbatim* record of the relevant portions of the witness preparation session. The witness confirmed the accuracy of this record during cross-examination. There is, as such, no new information to be gleaned from the video-recording warranting disclosure. The Chamber has rejected similar requests in the past, where they were also brought with the aim of finding out “precisely what was said”.²
3. Moreover, an actual *verbatim* record of what Witness P-0019 said during her preparation session would not assist in the fair evaluation of her evidence, because the witness has completed her testimony and is, accordingly, no longer available to answer questions about the precise words she used in preparation.

Confidentiality

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this filing is classified as “Confidential” because it is in response to a filing marked as such.

¹ ICC-01/04-02/06-1468-Conf, para. 1.

² See decision in relation to Witness P-0018, ICC-01/04-02/06-T-111-CONF-ENG ET, p. 82, l. 22 to p. 83, l. 12.

Procedural History

5. On [REDACTED] and [REDACTED] 2016, the Prosecution conducted a preparation session with Witness P-0019. It disclosed the relevant witness preparation disclosure log and note to the Defence on [REDACTED] 2016.³
6. Witness P-0019 testified on 6, 7, and 8 July 2016. She answered Defence questions about her witness preparation session on 8 July 2016.⁴
7. On 10 July 2016, the Defence requested the Prosecution to disclose three portions of the video-recording of Witness P-0019's witness preparation session ("Disclosure Request").⁵
8. On 11 July 2016, the Prosecution rejected the Defence disclosure request, stating that "the witness preparation note adequately informs the Defence of the nature of Witness P-0019's statements during her witness preparation session", and that "the three portions of interest to the Defence were included on an almost verbatim basis".⁶
9. On 29 July 2016, the Defence sought an order for disclosure of specified excerpts of the video-recording of Witness P-0019's preparation session.⁷

Prosecution's Submissions

10. The Defence Request should be rejected.

³ Prosecution email to Defence, [REDACTED] 2016 18:10. The registered version of the note, DRC-OTP-2094-0323, was provided by email on [REDACTED] 2016 at 14:44.

⁴ ICC-01/04-02/06-T-117-CONF-ENG ET, p. 27, l. 23 to p. 30, l. 7.

⁵ Defence email to Prosecution, 10 July 2016 11:51.

⁶ Prosecution email to Defence, 11 July 2016 18:23.

⁷ Defence Request, para. 1.

11. Interviews and other contacts with crime-base witnesses such as Witness P-0019 are generally not audio or video-recorded.⁸ In its Decision on witness preparation, the Chamber ordered that witness preparation sessions be video-recorded as a safeguard against improper conduct by the party conducting the session.⁹
12. In contrast, the Chamber did not direct the video-recording of witness preparation sessions as a means to satisfy the general obligation to disclose relevant information obtained from the witness during preparation session. According to the Decision on witness preparation, the “regular” disclosure regime applies to witness preparation.¹⁰ Specifically, the Witness preparation protocol (“Protocol”) requires the party conducting the session to disclose a log of the session¹¹ and a note containing information subject to disclosure.¹²
13. In the Decision on witness preparation, the Chamber stated that “[s]o long as the Defence is informed of any deviation from the witness statements or additional information provided by the witness, the video-recordings themselves would thus not be subject to disclosure.”¹³
14. The Prosecution took these guidelines into account in drafting the disclosure log and note for Witness P-0019’s witness preparation session. In providing a near *verbatim* account of what Witness P-0019 said during her witness preparation session, the Prosecution was also guided by the Chamber’s

⁸ Cf rule 112(4) of the Rules of Procedure and Evidence.

⁹ ICC-01/04-02/06-652, paras. 24 and 26.

¹⁰ ICC-01/04-02/06-652, paras. 32, 37.

¹¹ ICC-01/04-02/06-652-Anx, paras. 14-15.

¹² ICC-01/04-02/06-652-Anx, para. 31.

¹³ ICC-01/04-02/06-652, para. 32, footnote omitted. This direction from the Chamber is reinforced by its practice. See decision in relation to Witness P-0800, ICC-01/04-02/06-T-68-Red-ENG, p. 5, l. 25 to p. 6, l. 6: “As the log contains detailed information, the Chamber considers the disclosure was not required for this reason”.

direction that “any disclosable material to be communicated to the non-calling party [be transmitted] in a clear and accessible manner”.¹⁴

15. In preparation of the present response, the Prosecution has moreover re-visited the video-recording and interpretation of the relevant portions of Witness P-0019’s witness preparation session. The Prosecution has identified two aspects in which the relevant portions of witness preparation note are not *verbatim*. First, [REDACTED].¹⁵ Second, [REDACTED]¹⁶ and [REDACTED].

16. The Prosecution submits that these words, although not contained *verbatim* in the witness preparation note disclosed prior to Witness P-0019’s testimony, do not constitute “additional information”¹⁷ above and beyond what *was* contained in the disclosed witness preparation note. Specifically, the witness preparation note already informed the Defence that [REDACTED];¹⁸ and that [REDACTED].¹⁹

17. Accordingly, the Prosecution submits that it has discharged its disclosure obligations and that no further disclosure is required. The Prosecution is ready to provide the Chamber with a copy of the video-recording of Witness P-0019’s witness preparation session, should the Chamber consider it necessary to review it prior to rendering a decision on the Defence Request.

¹⁴ ICC-01/04-02/06-652, para. 37.

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ ICC-01/04-02/06-652, para. 32, footnote omitted. This direction from the Chamber is reinforced by its practice. *See* decision in relation to Witness P-0800, ICC-01/04-02/06-T-68-Red-ENG, p. 5, l. 25 to p. 6, l. 6: “As the log contains detailed information, the Chamber considers the disclosure was not required for this reason”.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

18. The Prosecution also notes that during her cross-examination, Witness P-0019 confirmed the accuracy of the witness preparation note. The witness agreed that during the witness preparation session she had:

- a. [REDACTED];²⁰
- b. [REDACTED];²¹ and
- c. [REDACTED].²²

19. The Chamber previously rejected a request for disclosure of the recording of the witness preparation session with Witness P-0018, where the aim of the request, like here, was “to find out precisely what was said”.²³ The circumstances in which the Chamber rejected that request were similar to the present ones: the Defence had put to the witness what she had purportedly said during the witness preparation session, and the witness confirmed the accuracy of the witness preparation note.²⁴ In its ruling in relation to Witness P-0018, the Chamber found that there was “nothing new” requiring further disclosure.²⁵

20. The Prosecution notes, finally, that the Defence request is untimely. Witness P-0019 completed her testimony on 8 July 2016. Access to the actual *verbatim* record of what she said during her preparation session would therefore not assist in a fair assessment of her evidence because she is no longer available to answer any supplementary questions from the Defence.

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ See decision in relation to Witness P-0018, ICC-01/04-02/06-T-111-CONF-ENG ET, p. 82, l. 22 to p. 83, l. 12.

²⁴ ICC-01/04-02/06-T-111-CONF-ENG ET, p. 81, l. 17 to p. 82, l. 4.

²⁵ ICC-01/04-02/06-T-111-CONF-ENG ET, p. 83, ll. 9-12.

Conclusion

21. The Decision on witness preparation does not require the calling party to provide an actual *verbatim* record of what a witness says during the witness preparation session. It follows that the non-calling party is not, in principle, entitled to access “the precise language used by the witness”.²⁶ Rather, the calling party must satisfy the obligation to disclose any deviation from prior statements of additional information provided during the preparation session.²⁷ The Prosecution disclosed the relevant information obtained during Witness P-0019’s preparation in good faith.

22. The Chamber’s previous rulings indicate that there must be “alarming reasons”²⁸ that require the disclosure of the video-recording of the preparation session. This is not the case.

23. The Defence Request should accordingly be rejected.



Fatou Bensouda
Prosecutor

Dated this 21st day of September 2016

At The Hague, The Netherlands

²⁶ Defence Request, para. 1.

²⁷ ICC-01/04-02/06-652, para. 32.

²⁸ See decision in relation to Witness P-0018, ICC-01/04-02/06-T-111-CONF-ENG ET, p. 93, ll. 9-12.