

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/04-02/06
Date: 20 February 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
With confidential Annex**

**Public redacted version of Decision on admission of certain documents used
during the testimony of Witness P-0005**

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, 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 admission of certain documents used during the testimony of Witness P-0005'.

I. Procedural history and submissions

1. Witness P-0005 ('Witness') testified in the present case from 19 to 27 January 2017.²
2. On 24 January 2017, during examination-in-chief, the Office of the Prosecutor ('Prosecution') requested the admission into evidence of a total of seven notebooks or diaries belonging to the Witness and containing his notes on the events between 2002 and 2003³ ('Notebooks'), together with the corresponding transcriptions prepared by the Prosecution⁴ ('Transcripts').⁵ The defence team for Mr Ntaganda ('Defence') opposed the admission of the Notebooks and Transcripts at the time admission was sought, notably on the basis that, in its view, their probative value is outweighed by the potential prejudice to the accused.⁶
3. On the same day, after having deliberated upon the parties' submissions, the Chamber: (i) directed the Prosecution to focus its examination on the methodology followed by the Witness in preparing his notes; (ii) indicated that it

¹ 2 June 2015, ICC-01/04-02/06-619.

² Transcript of hearing on 19 January 2017, ICC-01/04-02/06-T-183-Red-ENG WT; Transcript of hearing on 20 January 2017, ICC-01/04-02/06-T-184-Red-ENG WT; Transcript of hearing on 23 January 2017, ICC-01/04-02/06-T-185-Red-ENG WT; Transcript of hearing on 24 January 2017, ICC-01/04-02/06-T-186-Red-ENG WT; Transcript of hearing on 25 January 2017, ICC-01/04-02/06-T-187-Red-ENG WT; Transcript of hearing on 26 January 2017, ICC-01/04-02/06-T-188-Red-ENG WT; Transcript of hearing on 27 January 2017, ICC-01/04-02/06-T-189-Red-ENG WT.

³ The seven Notebooks are registered under the ERN DRC-OTP-0110-0002, DRC-OTP-0110-0398, DRC-OTP-0115-0002, DRC-OTP-0115-0133, DRC-OTP-0115-0197, DRC-OTP-0115-0287, and DRC-OTP-0115-0400.

⁴ The corresponding Transcripts bear the ERN DRC-OTP-0174-0135, DRC-OTP-0174-0223, DRC-OTP-0174-0324, DRC-OTP-0174-0395, DRC-OTP-0174-0433, DRC-OTP-0174-0469 and DRC-OTP-0174-0582.

⁵ ICC-01/04-02/06-T-186-CONF-ENG ET, pp. 8, 12-17.

⁶ ICC-01/04-02/06-T-186-CONF-ENG ET, pp. 9-12, 16-17.

would only admit, if any, those entries that have been covered by *viva voce* testimony of the Witness; (iii) directed the Prosecution to provide the Chamber and the Defence with the specific entries of the Notebooks that have been covered by *viva voce* testimony; and (iv) deferred its admissibility decision until receipt of the relevant entries. With reference to the Defence's submissions on the admissibility of the Transcripts, the Chamber held that they would merely assist the Chamber in its reading of the Notebooks and that the Defence may draw the Chamber's attention to any discrepancies that would then be dealt with accordingly.⁷

4. On 25 January 2017,⁸ as directed by the Chamber, the Prosecution provided a table listing the specific entries it seeks to be admitted, together with the corresponding portions of the Transcripts, submitting that it addressed these entries during examination-in-chief.
5. On 27 January 2017,⁹ in line with the Chamber's directions,¹⁰ the Defence: (i) responded to the Prosecution's request; and (ii) provided a table containing the entries the Defence seeks to be admitted into evidence. The Prosecution responded on 30 January 2017 that it does not oppose admission of the entries tendered by the Defence.¹¹
6. With the Chamber's permission,¹² the above submissions were received via e-mail and are placed on the record in the annex to the present decision.¹³

⁷ ICC-01/04-02/06-T-186-CONF-ENG ET, pp. 18-19 and 36.

⁸ E-mail from the Prosecution to the Chamber, Defence and Legal Representatives of victims at 20:49.

⁹ E-mail from the Defence to the Chamber, Prosecution and Legal Representatives of victims at 17:43.

¹⁰ E-mail from the Chamber to the parties and participants on 26 January 2017 at 09:49.

¹¹ E-mail from the Prosecution to the Chamber, Defence and Legal Representatives of victims at 13:58.

¹² E-mails from the Chamber to the parties and participants on 26 January 2017 at 09:49 and on 30 January 2017 at 10:12.

¹³ See confidential Annex to the present decision.

II. Analysis

7. As set out in the 'Decision on the conduct of the proceedings', '[i]n accordance with Articles 64(9)(a) and 69(4) of the Statute, the Chamber 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.'¹⁴
8. The Chamber notes in this respect that the Notebooks were recognised by the Witness in court, who confirmed that they contain his notes in relation to the events described in 2002 and 2003 and that the Defence does not contest their authenticity and reliability.¹⁵ Accordingly, the Chamber considers that the Notebooks are of sufficient relevance and probative value for the purposes of admission through this Witness. It will therefore confine its assessment to the third prong of the admissibility test, which relates to the issue of the extent to which the relevant entries were covered by *viva voce* testimony of the Witness, and the assessment of any attendant prejudice that may thereby arise to the accused.
9. For the entries sought to be admitted by the Defence, the Chamber notes that they were shown and read to the Witness during cross-examination and the Prosecution does not oppose their admission. Accordingly, these entries are admitted into evidence, together with the corresponding excerpts of the Transcripts.
10. Turning to the entries tendered by the Prosecution, the Chamber notes that the entries listed as pertaining to the issues identified as issues 1, 5, 6, 7, 8, 10, and 11 in the Prosecution's table and the first four entries relating to issue 12 were shown to the Witness and discussed during his testimony and the Defence does

¹⁴ 2 June 2015, ICC-01/04-02/06-619, para. 36.

¹⁵ ICC-01/04-02/06-T-186-CONF-ENG ET, pages 10 and 16.

not object to their admission. Accordingly, the relevant entries are admitted into evidence, together with the corresponding excerpts of the Transcripts.

11. Noting the Defence's objection to the admission of the remaining entries tendered by the Prosecution, on the basis that they do not meet the Chamber's condition that 'they have been covered by *viva voce* testimony' of the Witness, the Chamber considers that a case-by-case assessment is appropriate.

(i) DRC-OTP-0110-0002, pages 0242, 0244 and 0245

12. The Prosecution requests the admission into evidence of these entries as relating to the 'UPC's takeover of [REDACTED]' (Issue #2). The Defence opposes the admission of these entries on the basis that have not been covered by the *viva voce* testimony of the Witness and that no questions were put by the Prosecution on the specific events mentioned therein.
13. The Chamber notes that the relevant transcript references cited by the Prosecution in support of its request address events related to the UPC's takeover of [REDACTED], but the Witness was not questioned with reference to the relevant entries. Accordingly, the entries were not covered by the Witness's *viva voce* testimony and the request for their admission is therefore rejected.

(ii) DRC-OTP-0110-0398, pages 0540, 0541, 0542, 0543

14. The Prosecution requests the admission into evidence of these entries as relating to the '[REDACTED] meeting' (Issue #3). The Defence opposes admission on the basis that they were not covered by the Witness's *viva voce* testimony, and, although the Witness confirmed having been present at the meeting referred to in this entry, no questions were asked as to the content of this meeting.
15. The Chamber notes that in the transcript references cited by the Prosecution, the Witness confirmed having attended the meeting referred to in the entries, but he indicated that he did not remember the topics that were discussed and he was not questioned on this issue on the basis of the relevant entries. Accordingly, the

entries were not covered by the Witness's *viva voce* testimony and the request for admission is therefore rejected.

(iii) DRC-OTP-0110-0002, page 0208

16. The Prosecution requests the admission into evidence of this entry as relating to the issue of '[a]buses committed in [REDACTED] between April and August 2002' (Issue #4). The Defence objects on the basis that the entry has not been covered by the *viva voce* testimony of the Witness and no information was elicited from the Witness regarding the events that took place on [REDACTED].
17. The Chamber notes that the entry refers to firing occurred on [REDACTED] resulting in the death of certain UPDF soldiers which was not discussed with the Witness in the transcript references cited by the Prosecution. Accordingly, the entry was not covered by the Witness's *viva voce* testimony and the request for admission of these excerpts is therefore rejected.

(iv) DRC-OTP-0115-0002, page 0031

18. The Prosecution requests admission of this entry relating to the issue of [REDACTED] (Issue #9). The Defence opposes on the basis that the events mentioned in this specific entry were not covered by the *viva voce* testimony of the Witness.
19. The Chamber notes that the entry relates to the [REDACTED] and that the Witness was questioned and provided information in relation to this event. However, the Witness was not shown or questioned on the basis of this specific entry and therefore, it cannot be considered as being covered by the Witness's *viva voce* testimony. The request for admission of this entry is therefore rejected.

(v) DRC-OTP-0015-0197, page 0268

20. Together with four other entries, the Prosecution seeks admission of this entry as relating to the issue of '[m]eeting [REDACTED]' (Issue #12). While the Defence does not oppose admission of the other four entries, it opposes admission of this specific page, noting that its content was not covered by the Witness's *viva voce* testimony and that it was neither shown nor read to the Witness.
21. The Chamber notes that contrary to the other entries listed under this issue, the entry at page 0268 was not shown to the Witness. Accordingly, this entry was not covered by the Witness's *viva voce* testimony and the request for admission is therefore rejected.

(vi) DRC-OTP-0110-0398, page 0527

22. The Prosecution seeks admission of this entry as relating to the issue of 'MONUC accuses the UPC of using Radio Candip to incite hatred' (Issue #13). The Defence does not oppose admission of the last two paragraphs of this entry but opposes admission of the first two paragraphs, arguing that the events mentioned therein were not covered by the *viva voce* testimony of the Witness.
23. The Chamber notes that only the last paragraphs of this entry were shown or read out to the Witness and the top of the page was shown to the Witness to confirm the date of the entry. In these circumstances, the Chamber considers it appropriate to admit the entire entry, but will not rely on the first two paragraphs.

(vii) Entries submitted as referring to 'Notes of [REDACTED] meetings'

24. The Prosecution seeks admission of a total of 76 entries relating to the issue of 'Notes of [REDACTED] meetings' (Issue #14). In support of this request, it notes that the Witness did not specifically refer to each of these entries, but stated that he took notes of [REDACTED] meetings at the time they took place and that the issue of [REDACTED] was not discussed at these meetings. The Defence

opposes the admission of these entries on the basis that they were not covered by the Witness's *viva voce* testimony.

25. The Chamber notes that the Witness confirmed during his testimony that he took notes of meetings [REDACTED], that he took these notes at the time the meetings took place, that he wrote everything down, and that, to his knowledge, he was the only person who wrote in his Notebooks. However, the Chamber also observes that the entries the Prosecution seeks to admit refer to a large number of specific meetings, covering an extended time frame and were not individually shown to or discussed during the Witness's testimony. Accordingly, the entries were not covered by the Witness's *viva voce* testimony and the request for admission of these entries is therefore rejected.

(viii) Excerpts of Transcripts

26. The Chamber recalls its previous finding that the Transcripts serve to assist the Chamber in its reading of the Notebooks and that the Defence may draw the Chamber's attention to any discrepancies it identifies,¹⁶ which will be considered by the Chamber in its final assessment of the relevant evidence. In these circumstances, the Chamber will admit those excerpts of the Transcripts that correspond to the entries of the Notebooks which are admitted pursuant to the present decision, as set out below.

¹⁶ The Chamber notes the Defence's submissions as to the accuracy of the transcription at DRC-OTP-0174-0324, p. 0338 relating to entry DRC-OTP-0115-0002, p. 0050.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

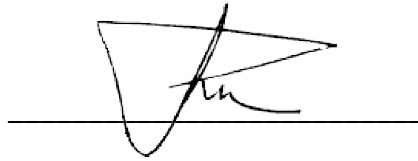
ADMITS INTO EVIDENCE the following portions of documents:

- DRC-OTP-0110-0002, at pages 0125, 0247, 0249, 0300, 0304, 0307 and the corresponding excerpts in Transcript DRC-OTP-0174-0135, at pages 0173, 0204, 0218, 0219, 0220;
- DRC-OTP-0115-0002, at pages 0050, 0103, 0105 and the corresponding excerpts in Transcript DRC-OTP-0174-0324, at pages 0338, 0350, 0351;
- DRC-OTP-0110-0398, at pages 0439, 0441, 0448, 0456, 0527 (with the limitation set out in paragraph 23 above) and the corresponding excerpts in Transcript DRC-OTP-0174-0223, at pages 0237, 0238, 0240, 0241, 0243, 0264;
- DRC-OTP-0115-0287, at pages 0288, 0289, 0290, 0347, 0348, 0349 and the corresponding excerpts in Transcript DRC-OTP-0174-0469, at pages 0470, 0471, 0472, 0529, 0530, 0531;
- DRC-OTP-0115-0197, at pages 0259, 0264, 0265, 0266 and the corresponding excerpts in Transcript DRC-OTP-0174-0433, at pages 0457, 0459, 0460;

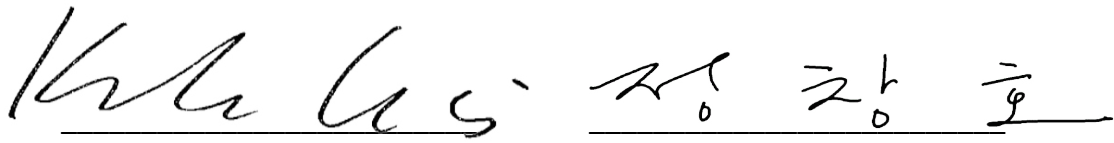
DIRECTS the Registry to update the E-Court metadata accordingly to reflect their admission; and

REJECTS all other requests.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a smaller, cursive 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, written over horizontal lines. The first signature is 'Kuniko Ozaki' and the second is 'Chang-ho Chung'.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 20 February 2017

At The Hague, The Netherlands