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

Date: **18 July 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

**Reasons for the Chamber's oral ruling on use of certain material during
cross-examination by the Prosecution**

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

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Legal Representatives of Victims

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**Unrepresented Applicants for
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**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

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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, 67, and 69 of the Rome Statute ('Statute'), Rule 140 of the Rules of Procedure and Evidence and Regulation 43 of the Regulations of the Court, issues the following 'Reasons for the Chamber's oral ruling on use of certain material during cross-examination by the Prosecution'.

I. Procedural history and submissions

1. On 13 July 2017, the Office of the Prosecutor ('Prosecution') started its cross-examination of Mr Ntaganda.¹ In this context, the defence team for Mr Ntaganda ('Defence') objected to the use of a video² ('Video') and accompanying transcript³ that had not previously been admitted into evidence during the Prosecution's presentation of its case-in-chief. The Defence indicated that this objection concerns 'an issue of principle' which extends beyond the testimony of the accused, namely 'whether the Prosecution can use material that is not in evidence' ('New Material') during its cross-examination of Defence witnesses.⁴
2. In support of its submission, the Defence noted that: (i) the Prosecution bears the burden of proof and is in a different position than the Defence insofar as when it closes its case, the material on the record at that point constitutes the basis upon which the Defence will subsequently present its evidence; (ii) use of material that is not in evidence is a violation of the fair trial rights of the accused, because it deprives the Defence of the opportunity to challenge whether the relevant material ought to have been admitted 'in the first place'; (iii) if the Prosecution believes that it was 'taken by surprise' by the testimony

¹ Transcript of hearing on 13 July 2017, ICC-01/04-02/06-T-224-CONF-ENG ET.

² DRC-OTP-1008-0008.

³ DRC-OTP-2102-0476.

⁴ ICC-01/04-02/06-T-224-CONF-ENG ET, page 30, line 23 to page 31, line 2.

of a witness, it may be able to adduce such evidence as part of a rebuttal case; (iv) if the Prosecution failed to submit evidence through witnesses or the Rule 68(3) procedure, it loses the opportunity to do so at a later stage; and (iv) the risk of the violation of fair trial rights is particularly enhanced in case of the accused because when he waived his right to remain silent, he did so on the basis of the contents of the Prosecution's case at the time it was closed.⁵

3. The Prosecution opposes the Defence's request, arguing that: (i) it would be 'a drastic departure' from the 'Decision on the conduct of proceedings' ('Conduct of Proceedings Decision'),⁶ which allows both parties to include items which have not previously been admitted into evidence on their lists of documents to be used with a witness in cross-examination; (ii) the Chamber has a duty to establish the truth and to assess the credibility of witnesses who appear on behalf of both parties, and it would not be correct to deny the Prosecution an opportunity to authenticate documents if they come from a particular Defence witness in support of its case 'if such authentication wasn't possible prior to the Defence witness coming'; (iii) the Defence can challenge such evidence in re-examination and some of the witnesses to come can 'undoubtedly' provide evidence that may support the Defence and the accused in relation to the documents the Prosecution seeks to use at this stage of the case; (iv) the Chamber has already approved the use of items that have not been admitted into evidence, notably when ruling on the use of recordings and/or transcripts of phone communications by the accused ('Detention Centre Calls'); (v) it is not fair to assume that the Prosecution will be able to put evidence in rebuttal on concrete issues when a witness is able to give evidence about it when they are before the Chamber or when it could impact on the credibility of that witness,

⁵ ICC-01/04-02/06-T-224-CONF-ENG ET, page 31, line 2 to page 35, line 5.

⁶ 2 June 2015, ICC-01/04-02/06-619 and Annex.

noting that challenges to the credibility of a witness have much broader latitude in cross-examination.⁷

4. In reply, the Defence submitted that: (i) re-examination does not allow the Defence to challenge the exhibit itself where admission is not or has not been sought; (ii) the Detention Centre Calls are a completely different matter, noting that the Chamber had put in place a 'very specific regime' for their use; and (iii) the Conduct of Proceedings Decision does not apply to documents used in cross-examination by the Prosecution since a witness, and in particular the accused, cannot be contradicted by evidence that is not part of the case record.⁸ The Prosecution replied to the latter argument by asserting that the language of the Conduct of Proceedings Decision makes it clear that it is applicable to both parties, stressing further that the Defence did not seek leave to appeal on this point, nor did it raise the issue in advance of the Defence case.⁹
5. Noting the Prosecution's request to use the Video during the same hearing, the Chamber adjourned for deliberations, and issued an oral ruling ('Ruling') on the request immediately thereafter, with reasons to follow. Specifically, the Chamber ruled that:

The Chamber has deliberated on the Defence request and indicates that the use of documents that hadn't previously been admitted into evidence by the opposing party is provided for in the Conduct of Proceedings decision, provided that the requirements for use are met. Use of such items will therefore be allowed. Any requests for admission of such items will be adjudicated on a case-by-case basis in accordance with the Conduct of Proceedings [D]ecision. The reasons of the Chamber will follow in a written decision.¹⁰

6. In accordance with this Ruling, the Chamber allowed the use of the Video during the same hearing, and the Prosecution subsequently sought admission

⁷ ICC-01/04-02/06-T-224-CONF-ENG ET, page 36, line 10 to page 39, line 9.

⁸ ICC-01/04-02/06-T-224-CONF-ENG ET, page 39, line 12 to page 41, line 10.

⁹ ICC-01/04-02/06-T-224-CONF-ENG ET, page 41, lines 12-20.

¹⁰ ICC-01/04-02/06-T-224-CONF-ENG ET, page 44, lines 5-14.

of the Video, which was opposed by the Defence.¹¹ The Chamber rejected the request for admission on the basis that, having applied the ‘classical criteria used for evidence tendered through other witnesses’, it considered that the lack of information or certainty on the Video’s author, time, or location, rendered its probative value very low. The Chamber indicated that a further criterion was also applicable at this stage of proceedings, namely that, when requesting the admission of items during cross-examination, the Prosecution must justify its failure to do so during its case-in-chief. Absent any persuasive submission by the Prosecution on this matter, the Chamber, taking into account Article 69(3) of the Statute, did not consider it in the interests of justice to admit the Video.¹²

7. As indicated, the Chamber hereby provides the reasons for its Ruling.

II. Analysis

8. For its determination of the Defence’s request, the Chamber has considered the Conduct of Proceedings Decision, and in particular paragraph 33 thereof, which provides:

As regards the use of documents that have not previously been admitted into evidence the party intending to make use of the documents during cross-examination shall provide a list, by e-mail, no later than 24 hours before the commencement of the cross-examination. If the documents are not already part of the case record, (digital) copies shall be provided to the Chamber, the other party and the LRVs at the same time. The list shall also indicate whether the cross-examining party wishes to tender any of the documents into evidence. Objection to the use of any of the documents during cross-examination shall be raised orally, prior to the start of the cross-examination.

9. The Chamber has further noted its previous finding that ‘unless otherwise provided [...] all previous directions and time limits set out in the Conduct of Proceedings Decision [...] continue to apply to the presentation of evidence by

¹¹ ICC-01/04-02/06-T-224-CONF-ENG ET, page 59, line 12 to page 61, line 3.

¹² ICC-01/04-02/06-T-224-CONF-ENG ET, page 62, lines 5-21.

the Defence’,¹³ as well as its consideration that ‘Mr Ntaganda shall, in principle, be subject to the same rules that are applicable to other witnesses’.¹⁴

10. In view of these findings, and noting that the Conduct of Proceedings Decision clearly refers to ‘the party intending to make use of the documents’, ‘other party’ and ‘cross-examining party’, rather than to a specific party, the Chamber considers the regime set out therein to continue to apply in the context of the Defence case, including the testimony of Mr Ntaganda.
11. With regard to the Defence’s claim that this regime ought not to apply to the cross-examination of Defence witnesses, the Chamber has noted that the Rome Statute framework does not contain any general rule allowing or prohibiting during the cross-examination of Defence witnesses the use or admission of material not previously admitted. The Chamber has also noted that, in previous trials before this Court, the Prosecution has been permitted, during the Defence case, to use and submit material which had not previously been admitted into evidence.¹⁵
12. Concerning the jurisprudence referred to by the Defence in support of its submission that a different regime is warranted for the Defence case, the Chamber has noted that the *ad hoc* tribunals’ jurisprudence does not appear to bar the *use* by the prosecution of material that was not already in evidence.

¹³ Decision on further matters related to the presentation of evidence by the Defence, 11 May 2017, ICC-01/04-02/06-1900, para. 50.

¹⁴ Decision on Defence request to modify the schedule for the first two evidentiary blocks, 19 May 2017, ICC-01/04-02/06-1914, para. 18.

¹⁵ See for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of hearing on 4 March 2010, ICC-01/04-01/06-T-252-CONF-ENG CT, page 30, line 16 to page 32, line 14; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of hearing on 7 September 2011, ICC-01/04-01/07-T-305-Red-ENG, pages 54-60; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Third Order on the submission into evidence of material used during the questioning of witnesses, 27 March 2013, ICC-01/05-01/08-2565, para. 6.

13. Indeed, the decisions of the trial chambers in *The Prosecutor v. Casimir Bizimungu*,¹⁶ *The Prosecutor v. Édouard Karamera*¹⁷ and *The Prosecutor v. Slobodan Milošević*,¹⁸ referred to by the Defence, appear to relate to the *admission* of material that had not previously been admitted, rather than also to its use. Moreover, the Chamber notes that the relevant trial chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY') in *The Prosecutor v. Enver Hadzihasanović and Amir Kubura*, while recalling the 'fundamental principle' that the prosecution 'must present all its evidence in the course of its case', also considered that the prosecution may present in the course of its cross-examination of a witness documents that have not been admitted 'only if it wants to reinforce evidence that it has presented already or if it wants to introduce new elements that concern the criminal responsibility of the accused', as well as to 'test the credibility of a witness or to refresh such a witness's memory'.¹⁹ With regard to the admission of material not previously admitted, the relevant ICTY trial chamber found that the prosecution may present and request that certain documents be tendered into evidence, in the course of cross-examination, but highlighted that the conditions for their admission will be much more restricted.²⁰
14. In view of the above, the Chamber has considered that a general rule barring requests to use New Material by the Prosecution during the Defence case in the present proceedings is not warranted and that such requests shall be assessed on a case-by-case basis, in accordance with the regime set out in the Conduct of

¹⁶ ICTR, *The Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-T, Trial Chamber, Transcript of hearing on 24 November 2005, page 47, line 36 to page 48, line 4.

¹⁷ ICTR, *The Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-T, Trial Chamber, Decision on Admission of UNAMIR documents: Rule 89 of the Rules of Procedure and Evidence, 21 November 2006, para 6.

¹⁸ ICTY, *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, Trial Chamber, Decision on prosecution motion for reconsideration regarding evidence of Defence witnesses Mitar Balevic, Vladislav Jovanović, Vukasin Andric, and Dobre Aleksovski, 17 May 2005, paras 9-18.

¹⁹ ICTY, *The Prosecutor v. Enver Hadzihasanović and Amir Kubura*, IT-01-47-T, Transcript of hearing on 29 November 2004, page 12525, line 14 to page 12526, line 2.

²⁰ ICTY, *The Prosecutor v. Enver Hadzihasanović and Amir Kubura*, IT-01-47-T, Transcript of hearing on 29 November 2004, page 12527, line 22 to page 12528, line 1.

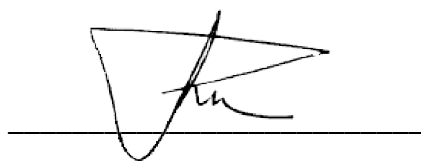
Proceedings Decision. Accordingly, the Chamber has considered it appropriate to determine, in line with paragraph 31 of said decision, whether the witness's testimony was sufficiently connected to the item sought to be used.

15. Concerning requests for *admission*, as indicated in its oral ruling on 13 July 2017 on the request for admission of the Video, the Chamber will continue to assess any such requests with regard to the usual criteria of relevance, probative value, and prejudicial effect. This said, with respect to the third prong of this test, the Chamber deems it appropriate to emphasise that the potential prejudice at this stage of the proceedings will likely be considered higher than during the Prosecution case. Accordingly, when applying this test, the conditions for admission will be stricter and the Chamber will take into account, *inter alia*, the reasons why such evidence was not tendered at an earlier stage.²¹
16. In conducting this assessment, the Chamber notes that further guidance can be found in the approach taken by Trial Chamber VII in *The Prosecutor v. Jean-Pierre Bemba et al.* which held that items tendered by the Prosecution in cross-examination after closure of its case-in-chief 'must, in principle, have a genuine and not pretextual connection to its examination'.²²

²¹ See also ICC-01/04-02/06-T-224-CONF-ENG ET, page 62, lines 5–22.

²² ICC-01/05-01/13-1786-Anx4-Red, page 6.

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

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to read 'K. Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of stylized Korean characters, positioned above a horizontal line.

Judge Chang-ho Chung

Dated 18 July 2017

At The Hague, The Netherlands