

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 24 August 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 requests for admission of documents used during the
testimony of Witnesses P-0877, P-0018 and P-0938**

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, Regulation 35 of the Regulations of the Court ('Regulations'), and the Chamber's 'Decision on the conduct of proceedings',¹ issues this 'Decision on Defence requests for admission of documents used during the testimony of Witnesses P-0877, P-0018 and P-0938'.

I. Procedural history and submissions

1. Witnesses P-0877, P-0018 and P-0938 testified in the present case during the fifth evidentiary block.²
 - a) *Concerning documents related to Witness P-0877*
2. During the testimony of Witness P-0877, the parties each showed a number of pages of a notebook ('Notebook') to the witness. On 27 June 2016, following the conclusion of his testimony, the Chamber, having deferred its decision until after the completion of the cross-examination,³ invited further oral submissions on the admissibility of excerpts of the Notebook, sought to be admitted by the Office of the Prosecutor ('Prosecution').⁴
3. The defence team for Mr Ntaganda ('Defence') opposed the admission of the excerpts for the truth of their contents and requested that the Notebook be admitted into evidence in its entirety for the purpose of impeachment.⁵ The Prosecution opposed this request, noting that Witness P-0877 had not been

¹ 2 June 2015, ICC-01/04-02/06-619.

² Transcripts of hearings on 23, 24, 27, 28, 29, 30 June and 1 July 2016, ICC-01/04-02/06-T-108-CONF-ENG ET; ICC-01/04-02/06-T-109-CONF-ENG ET; ICC-01/04-02/06-T-110-CONF-ENG ET; ICC-01/04-02/06-T-111-CONF-ENG ET; ICC-01/04-02/06-T-112-CONF-ENG ET; ICC-01/04-02/06-T-113-CONF-ENG ET; ICC-01/04-02/06-T-114-CONF-ENG ET.

³ ICC-01/04-02/06-T-108-CONF-ENG ET, p. 107, l. 23 to p. 108, l. 2.

⁴ ICC-01/04-02/06-T-110-CONF-ENG ET, pp 22 to 26.

⁵ ICC-01/04-02/06-T-110-CONF-ENG ET, p. 24, l. 20-22.

shown the entirety of the Notebook, and maintained its request that the excerpts be admitted for the truth of their contents.⁶

4. Having considered the oral and written submissions before it,⁷ the Chamber admitted into evidence excerpts of the Notebook (DRC-OTP-2077-0140), together with the corresponding excerpts of its transcription (DRC-OTP-2081-0507), but did not address the Defence's request for full admission of the Notebook in rendering this oral ruling.⁸
5. On 7 July 2016, noting that the Chamber had not ruled on its initial request, the Defence filed a request seeking the admission of the entire Notebook, as well as the translation thereof, for the purpose of impeachment ('First Request').⁹ The Defence submits that the admission of the 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'.¹⁰ It also argues that the fact that the Notebook was not shown in its entirety to Witness P-0877 is not a relevant consideration as '[he] maintained that the Notebook was his' and, given the limited time available to cross-examine the witness, the Defence selected the excerpts most pertinent to demonstrating the alleged inconsistencies.¹¹
6. On 14 July 2016, the Legal Representative of former child soldiers filed a response submitting, *inter alia*, that the First Request should be dismissed *in limine* given

⁶ ICC-01/04-02/06-T-110-CONF-ENG ET, p. 25, l. 10-12.

⁷ *See also*, Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0877, 26 May 2016, ICC-01/04-02/06-1335-Conf; and Response on behalf of Mr Ntaganda to "Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0877", 10 June 2016, ICC-01/04-02/06-1387-Conf.

⁸ ICC-01/04-02/06-T-110-CONF-ENG ET, p. 26, l. 9 to 14.

⁹ Request on behalf of Mr Ntaganda seeking admission of documents DRC-OTP-2077-0140 and DRC-OTP-2081-0589, ICC-01/04-02/06-1441-Conf.

¹⁰ First Request, ICC-01/04-02/06-1441-Conf, para. 15. *See also*, para. 19

¹¹ First Request, ICC-01/04-02/06-1441-Conf, para. 21.

that the Chamber ‘clearly declined said request in its ruling when granting the Prosecution request for admission of the seven pages’.¹²

7. On 28 July 2016, the Prosecution filed a response¹³ in which it submits that the Chamber already considered and dismissed the initial request for full admission and, accordingly, that it should dismiss the First Request *in limine*. In the alternative, the Prosecution argues that the First Request has no merit as ‘all [the] problems allegedly arising from the [N]otebook were thoroughly explored during cross-examination’ and are already contained in the transcripts of her testimony.¹⁴ In this regard, the Prosecution also notes that the Defence should not be permitted ‘to use material to impeach the witness to which he has not had the opportunity to respond’.¹⁵

b) Concerning documents related to Witness P-0018

8. On 29 June 2016, the Defence made oral submissions indicating that it would seek to admit two of Witness P-0018’s statements (DRC-OTP-0096-0016 and DRC-OTP-2052-0176) into evidence for the purpose of impeachment.¹⁶ The Prosecution objected to their admission, on the basis that: (i) only the portions of the statements put to Witness P-0018 should be tendered for admission; and (ii) Witness P-0018 agreed with the portions put to her during cross-examination and thus there is no impeachment value in admitting them. The Chamber directed the parties to submit written observations thereon¹⁷ and subsequently shortened the deadline for any such observations to 26 July 2016.¹⁸

¹² Former child soldiers’ response to the “Request on behalf of Mr Ntaganda seeking admission of documents DRC-OTP-2077-0140 and DRC-OTP-2081-0589”, ICC-01/04-02/06-1456-Conf, para. 10.

¹³ Prosecution response to the ‘Request on behalf of Mr Ntaganda seeking admission of documents DRC-OTP-2077-0140 and DRC-OTP-2081-0589’, ICC-01/04-02/06-1467-Conf (‘Response to First Request’).

¹⁴ Response to First Request, ICC-01/04-02/06-1467-Conf, paras 5 and 22.

¹⁵ Response to First Request, ICC-01/04-02/06-1467-Conf, paras 5 and 21-24.

¹⁶ Transcript of hearing on 29 June 2016, ICC-01/04-02/06-T-112-CONF-ENG ET, p. 33, l. 20 to p. 35, l. 5.

¹⁷ ICC-01/04-02/06-T-112-CONF-ENG ET, p. 34, l. 19 to p. 35, l. 5.

¹⁸ Email communication from the Chamber to the parties and participants on 19 July 2016 at 15:01.

9. Accordingly, on 15 July 2016, the Defence sent an email,¹⁹ requesting the admission into evidence of certain portions of Witness P-0018's prior statements for the sole purpose of impeachment ('Second Request').
10. On 27 July 2016, the Prosecution responded,²⁰ noting that it had failed to respond in a timely manner due to an 'administrative oversight', and seeking the Chamber to nonetheless consider its observations. Therein, the Prosecution requests the Chamber to dismiss the Second Request to the extent that, with respect to the identified portions: (i) there is no impeachment value in admitting them; and/or (ii) the relevant information is already contained in the transcripts of Witness P-0018's testimony.
11. On 29 July 2016, by way of email, the Defence sought to make further submissions²¹ addressing the Prosecution's objections. The Defence argues with respect to certain portions of the statements that, *inter alia*, the contents thereof: (i) provide appropriate and necessary context surrounding the precise words put to Witness P-0018; or (ii) 'enhance the probative value of [Witness P-0018's] affirmations'.

c) Concerning documents related to Witness P-0938

12. On 1 July 2016, during its cross-examination of Witness P-0938, the Defence questioned the witness on the basis of and tendered into evidence a document entitled 'The PTSD Checklist for DSM-5'.²² The Prosecution objected to the admission of the document, on the basis that it was not the actual document used by Witness P-0938 in her assessment of the witnesses she examined. The Chamber sustained the objection and Witness P-0938 proposed to provide the Prosecution, upon her return to her country of residence, with the document she

¹⁹ Email communication from the Defence to the Chamber on 15 July 2016 at 14:57.

²⁰ Email communication from the Prosecution to the Chamber on 27 July 2016 at 17:08.

²¹ Email communication from the Defence to the Chamber on 29 July 2016 at 17:32.

²² DRC-D18-0001-1735. The terms respectively refer to 'Post-traumatic Stress Disorder' and 'Diagnostic and Statistical Manual of Mental Disorders'.

had used for her assessment. The Chamber and the parties agreed with the proposed procedure.²³

13. On 15 July 2016, the Defence sent an email,²⁴ requesting: (i) the admission into evidence of the portion of the DSM-5 checklist sent by Witness P-0938 to the Prosecution (DRC-OTP-2094-0415)²⁵ 'as constituting the basis of her questions' to the witnesses she examined; and (ii) that the cover letter from Witness P-0938 to the Prosecution (DRC-OTP-2094-0414)²⁶ be attached to the checklist in order to confirm its provenance and use ('Third Request').
14. On 26 July 2016, after the Chamber had shortened the time limit for the submission of responses,²⁷ the Prosecution submitted its response via email, indicating that it does not oppose the Third Request.²⁸

II. Analysis

15. As a preliminary matter, the Chamber notes that the Prosecution failed to meet the Chamber's deadline for written observations in relation to the Second and Third Requests, and did not provide any substantive reasons therefor.²⁹ The Chamber further observes that, with respect to the Second Request, the Defence transmitted further observations to the Chamber without seeking or having been granted leave to do so. Nonetheless, the Chamber notes the relatively concise and supplementary nature of the observations in question. On this occasion, in the circumstances, and exceptionally, the Chamber has considered the submissions. The parties are advised to exercise greater diligence in respecting procedural requirements in the future.

²³ Transcript of hearing on 1 July 2016, ICC-01/04-02/06-T-114-CONF-ENG ET, pp 47-49.

²⁴ Email communication from the Defence to the Chamber at 14:41.

²⁵ The document was formally disclosed and assigned the above-quoted ERN on 28 July 2016. *See* Annex A to Prosecution's Communication of the Disclosure of Evidence, 29 July 2016, ICC-01/04-02/06-1470-Conf-AnxA.

²⁶ The document was formally disclosed and assigned the above-quoted ERN on 28 July 2016. *See* Annex A to Prosecution's Communication of the Disclosure of Evidence, 29 July 2016, ICC-01/04-02/06-1470-Conf-AnxA.

²⁷ Email communication from the Chamber to the parties and participants on 19 July 2016 at 15:01, shortening the response deadline to 26 July 2016 at 16:00.

²⁸ Email communication from the Prosecution to the Chamber at 17:42.

²⁹ In relation to the Second Request, the Prosecution indicated this stemmed from an 'administrative oversight'.

16. Turning to the First Request, the Chamber recalls that the Defence's request to admit the entire Notebook was not addressed when the Chamber ruled orally on the Prosecution request seeking the admission of part of the same document for the truth of its content.³⁰ It will therefore consider this request now. The Chamber notes the focus of the Defence's cross-examination on the handwriting of various entries in the Notebook and further recalls its decision to admit, for the purpose of impeachment, and in order to serve as a writing sample, Witness P-0877's victim application form.³¹ In line with the above decision, and recalling the alleged discrepancies identified by the Defence, the Chamber considers that admission into evidence of the Notebook (DRC-OTP-2077-0140) for the purpose of assessing the credibility of Witness P-0877 is appropriate.
17. Concerning the Defence's request seeking admission of the translation of the Notebook, the Chamber notes that the content of the document was not put to Witness P-0877 in its entirety. Nonetheless, in light of the alleged discrepancies raised by the Defence in relation to the format of the document, notably the ordering of the entries, and noting that the issues have been sufficiently put to Witness P-0877, the Chamber finds it appropriate to also admit the translation of the Notebook (DRC-OTP-2081-0589) for the purpose of impeachment. The Chamber however notes that this document is only admitted into evidence to the extent that it assists the Chamber in assessing the Witness's credibility concerning the issues put to Witness P-0877 during the Defence's cross-examination.
18. Concerning the Second Request, the Chamber recalls its previous holdings 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

³⁰ ICC-01/04-02/06-T-110-CONF-ENG ET, p. 26, l. 9 to 14.

³¹ Transcript of hearing on 6 July 2016, ICC-01/04-02/06-T-115-Conf-ENG ET, p. 59, l. 14 to p. 61, l. 4.

or her credibility'³² and that '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 purposes of impeachment on points of inconsistency with prior statements'.³³

19. Applying the principles outlined above, and having considered the information reflected on the record, the portions of prior statements put to Witness P-0018, the Defence's questions and the witness's answers related to the aforementioned portions, the Chamber considers that the relevant portions highlighted by the Defence are already adequately reflected in the record and that admission of the requested materials is therefore not necessary. The Chamber further notes that during cross-examination, although sometimes providing clarifications or additional explanations, the witness did not disagree with or reject the relevant portions of the paragraphs put to her by the Defence, or the fact of having made and signed such statements.³⁴
20. For these reasons, and in line with the aforementioned principles, the Chamber rejects the Defence's request to have the portions identified in Witness P-0018's prior statements admitted into evidence. The Chamber considers that such material is not necessary in order to obtain a proper understanding of the nature of the propositions put by the Defence to the witness, considering that the relevant information and clarifications provided by the witness are already contained in the transcripts of her testimony.
21. Finally, concerning the Third Request, the Chamber notes that the documents are relevant to Witness P-0938's testimony and that the Prosecution does not oppose

³² Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 28.

³³ 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.

³⁴ See, for example, Transcript of hearing on 28 June 2016, ICC-01/04-02/06-T-111-CONF-ENG ET, p. 69, l. 2-23.

their admission. Admission of documents DRC-OTP-2094-0414 and DRC-OTP-2094-0415 is therefore considered appropriate.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the First Request and Third Request;

REJECTS the Second Request;

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

- DRC-OTP-2077-0140; and
- DRC-OTP-2081-0589;

ADMITS INTO EVIDENCE, for the truth of their contents:

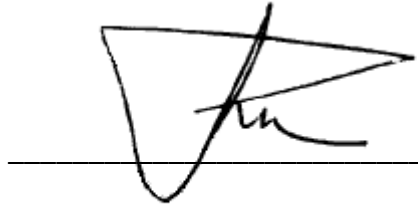
- DRC-OTP-2094-0414; and
- DRC-OTP-2094-0415;

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

REJECTS all other requests; and

ORDERS the Defence, Legal Representative of former child soldiers and Prosecution to file public redacted versions of their respective submissions (ICC-01/04-02/06-1441-Conf, ICC-01/04-02/06-1456-Conf and ICC-01/04-02/06-1467-Conf).

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

A handwritten signature in black ink, consisting of a large, stylized 'F' shape with a horizontal line extending to the right, and a smaller, cursive signature below it. The signature is positioned above a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, one on the left and one on the right, both positioned above a horizontal line. The left signature is in cursive, and the right signature is in a stylized, blocky font.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 24 August 2016

At The Hague, The Netherlands