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

Date: 27 May 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 request for admission of documents used during the
testimony of Witness P-0933

The Office of the Prosecutor

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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 Defence request for admission of documents used during the testimony of Witness P-0933'.

I. Procedural history and submissions

1. Expert Witness P-0933, Professor John Yuille, ('Witness') testified, by way of video-link, before the Chamber on 18, 21 and 22 April 2016.²
2. Following the conclusion of the cross-examination on 22 April 2016, the defence team for Mr Ntaganda ('Defence') provided a list of seven documents 'used with Witness P-0933 during the course of [...] cross-examination for which it seeks admission into evidence' ('Request').³
3. The Office of the Prosecutor ('Prosecution') responded, also by way of e-mail, on 25 April 2016, opposing the Request.⁴ The Prosecution noted that the purpose of the admission had not been specified and argued that the Documents - consisting of transcripts of prior testimony of the Witness in certain national proceedings and three articles co-authored by him - should not be admitted in their entirety. The Prosecution submits that no explanation for the necessity of the admission has been provided, given, in particular, that relevant excerpts had been read into the record. The Prosecution further submits that, if the Documents are being tendered for the truth of their contents, the Witness should

¹ 2 June 2015, ICC-01/04-02/06-619.

² Transcript of hearing on 18 April 2016, ICC-01/04-02/06-T-84-ENG ET; Transcript of hearing on 21 April 2016, ICC-01/04-02/06-T-87-ENG ET; Transcript of hearing on 22 April 2016, ICC-01/04-02/06-T-88-ENG ET.

³ E-mail from Defence to the Chamber on 22 April 2016 at 18:27. The documents listed are: DRC-D18-0001-0590; DRC-D18-0001-0614; DRC-D18-0001-0896; DRC-D18-0001-0920; DRC-D18-0001-1013; DRC-D18-0001-1031; DRC-D18-0001-1082 (together, 'Documents').

⁴ E-mail from the Prosecution to the Chamber on 25 April 2016 at 16:42.

first have been asked whether he confirmed the Documents in terms of whether they reflect his expert opinion.

4. On 27 April 2016, the Defence made further submissions on its Request, also by way of e-mail, submitting that: (i) the Documents were not used for impeachment and that, in any event, the Witness is an expert rather than a 'fact' witness; (ii) having the Witness confirm documents, or the fact they reflect his expert opinion, is a 'hyper-technical prerequisite [...]' which was not required in respect of the articles admitted during examination-in-chief; (iii) the Witness accepted 'directly or indirectly' that he was the author of each of the articles and was 'involved in each of the cases in which his opinions were received and discussed'; (iv) the Prosecution's position is 'contrary to its position in respect of its own documents', where entire reports and articles were admitted; and relatedly, (v) the Prosecution's reliance on the principle of generating a self-contained transcript record is 'inapposite'; and (vi) the 'clarity of the record is served by seeing the materials' to which the Witness's opinion referred.⁵

II. Analysis

5. As a preliminary matter, the Chamber notes that it has, on more than one prior occasion,⁶ reminded the Defence of the applicable provisions of the 'Decision on the conduct of proceedings',⁷ and directed it to comply with them when tendering documents for admission. In this instance, rather than tendering the Documents at the time they were used with the Witness and on an item-by-item basis, the Defence sought to tender them collectively by way of e-mail following the cross-examination, without transcript references and without specifying the purpose of the sought admission. This Chamber rules on the admissibility of

⁵ E-mail from the Defence to the Chamber on 27 April 2016 at 12:06.

⁶ See e.g. 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. 11; Transcript of hearing on 25 September 2015, ICC-01/04-02/06-T-32-CONF-ENG ET, page 64, lines 4-6.

⁷ See Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 35.

items at the point of their submission and emphasises that, in this context, that approach does not facilitate the Chamber's admissibility determinations. Moreover, the Defence potentially deprives both itself and the Chamber of the opportunity to clarify matters relevant to the admissibility status of the material with the Witness. The Chamber therefore reiterates its direction to the Defence to comply with the 'Decision on the conduct of proceedings' when tendering material for admission.

6. Turning to the Documents, in respect of the three articles, the Chamber notes that the Defence used **DRC-D18-0001-0590** with the Witness on four occasions, for various purposes,⁸ and a further portion of the article was highlighted by the Prosecution on re-examination.⁹ **DRC-D18-0001-0896** was similarly discussed with the Witness.¹⁰ The Witness also acknowledged his co-authorship of both of these articles.¹¹ In the circumstances, the Chamber is satisfied as to the relevance and probative value of the documents and does not consider that unfair prejudice arises. The Chamber consequently admits the documents.
7. In respect of **DRC-D18-0001-0614**, the Chamber considers that the Defence inadequately laid the basis for admission of the full document, noting that the Witness was simply asked whether he stands by one particular sentence in it.¹² Nonetheless, having considered the content of the 4-page article, and the fact that the Witness independently mentioned research summarised in this article to illustrate a particular answer,¹³ as well as the Witness's implicit acceptance that this co-authored article reflects his expert opinion,¹⁴ the Chamber will also admit this document.

⁸ Transcript of hearing on 21 April 2016, ICC-01/04-02/06-T-87-ENG ET, page 34; Transcript of hearing on 21 April 2016, ICC-01/04-02/06-T-88-ENG ET, pages 6, 11 and 18.

⁹ ICC-01/04-02/06-T-88-ENG ET, page 28.

¹⁰ ICC-01/04-02/06-T-87-ENG ET, pages 42-44.

¹¹ ICC-01/04-02/06-T-87-ENG ET, page 34; ICC-01/04-02/06-T-87-ENG, page 42.

¹² ICC-01/04-02/06-T-88-ENG ET, pages 10-11.

¹³ See, for example, ICC-01/04-02/06-T-87-ENG ET, page 30.

¹⁴ ICC-01/04-02/06-T-88-ENG ET, pages 10-11.

8. DRC-D18-0001-0920 is a copy of a domestic arbitration award. Approximately four pages of the 93-page award judgment summarise expert evidence which the Witness had provided in that case.¹⁵ The Chamber does not consider that an adequate basis has been provided for the admission of this document in its entirety. Nonetheless, noting that reference to pages 0987 and 0988 is necessary to understand portions of the cross-examination of the Witness,¹⁶ the Chamber will admit those two pages.

9. In respect of DRC-D18-0001-1013, DRC-D18-0001-1031 and DRC-D18-0001-1082, having considered the Witness's testimony in relation to the documents,¹⁷ and the content of the documents themselves, the Chamber considers that information from the documents, to the extent relevant, is already adequately reflected in the record. The Chamber consequently will not admit those documents.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADMITS the following documents, or portions thereof as specified:

DRC-D18-0001-0590;
 DRC-D18-0001-0896;
 DRC-D18-0001-0614; and
 Pages 0987 and 0988 of DRC-D18-0001-0920.

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

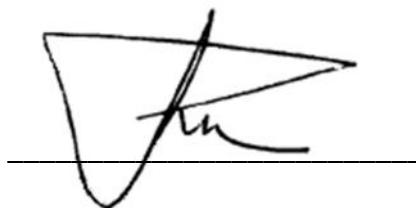
¹⁵ DRC-D18-0001-0920, pages 0988 to 0992.

¹⁶ See especially ICC-01/04-02/06-T-88-ENG ET, page 5, lines 2-14.

¹⁷ ICC-01/04-02/06-T-88-ENG ET, pages 13-18 and 22-24.

REJECTS all other requests.

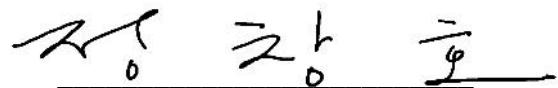
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature consisting of stylized characters 'K' and 'O' followed by 'ZAKI'.

Judge Kuniko Ozaki

A handwritten signature consisting of stylized characters 'C' and 'H' followed by 'CHUNG'.

Judge Chang-ho Chung

Dated 27 May 2016

At The Hague, The Netherlands