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

Date: **3 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 request for reconsideration of oral ruling on admission of a
document for impeachment purposes**

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 the Defence

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 and 67 of the Rome Statute and incorporating by reference the applicable law set out in the 'Decision on the Defence request for reconsideration and clarification',¹ issues this 'Decision on Defence request for reconsideration of oral ruling on admission of a document for impeachment purposes'.

I. Background and Submissions

1. On 9 June 2016, during the cross-examination of Witness P-0190 ('Witness'), the Chamber sustained² an objection by the Office of the Prosecutor ('Prosecution') to the admission into evidence of an investigator's report³ relating to Witness P-0190 ('Report'), tendered by the defence team for Mr Ntaganda ('Defence') for the purpose of impeachment ('Impugned Ruling').
2. On 17 June 2016, the Defence filed a request seeking (i) reconsideration of the Impugned Ruling; and (ii) admission of the Report for the sole purpose of impeachment ('Request').⁴ In support, the Defence submits that: (i) the Impugned Ruling arises from a 'clear error of reasoning'⁵ and 'departs from the Chamber's previous practice without providing compelling reasons';⁶ (ii) the Report 'clearly contradicts' the Witness's testimony and its admission is therefore necessary to assess his credibility;⁷ (iii) failure to admit the Report will 'deprive Mr Ntaganda of an opportunity to undermine the [Witness's] credibility';⁸ (iv) admission 'would not be unnecessarily duplicative or

¹ 27 February 2015, ICC-01/04-02/06-483 ('27 February 2015 Decision'), para. 13.

² Transcript of hearing on 9 June 2016, ICC-01/04-02/06-T-99-CONF-ENG ET, page 95, lines 6-9.

³ DRC-OTP-1062-0395.

⁴ Application on behalf of Mr Ntaganda seeking reconsideration of the Chamber's oral ruling sustaining the Prosecution's objection regarding admission of document DRC-OTP-1062-0395, ICC-01/04-02/06-1407-Conf, notified on 20 June 2016.

⁵ Request, ICC-01/04-02/06-1407-Conf, paras 1 and 21.

⁶ Request, ICC-01/04-02/06-1407-Conf, para. 1.

⁷ Request, ICC-01/04-02/06-1407-Conf, paras 14, 15 and 20.

⁸ Request, ICC-01/04-02/06-1407-Conf, para. 16.

inappropriately expand the evidentiary record of the case and burden the Chamber’;⁹ (v) the format of the Report constitutes strong evidence of its authenticity and reliability;¹⁰ and (vi) the Prosecution did not challenge the authenticity of the Report.¹¹

3. On 7 July 2016, the Prosecution responded to the Request (‘Response’),¹² submitting that it ought to be rejected,¹³ on the basis that the Defence ‘fails to present any new fact and argument warranting reconsideration, to demonstrate a clear error of reasoning’ or to establish that non-admission of the Report for the purpose of impeachment would amount to an injustice.¹⁴ Specifically, the Prosecution argues that (i) the Impugned Ruling is in line with the criteria previously set out by the Chamber regarding the admission of documents for the purpose of impeachment following a case-by-case assessment;¹⁵ (ii) the Impugned Ruling does not adversely affect the rights of the accused since the Report and related testimony are captured in the record by virtue of the Defence’s cross-examination;¹⁶ and (iii) the fact that not all the information contained in the Report was put to the Witness militates against its admission in its entirety.¹⁷

II. Analysis

4. As a preliminary matter, the Chamber recalls its previous finding that, while properly covered by the powers of a chamber, reconsideration of its own decisions is an exceptional measure which will only be taken when a clear error

⁹ Request, ICC-01/04-02/06-1407-Conf, para. 17.

¹⁰ Request, ICC-01/04-02/06-1407-Conf, para. 18.

¹¹ Request, ICC-01/04-02/06-1407-Conf, para. 19.

¹² Prosecution’s response to the “Application on behalf of Mr Ntaganda seeking reconsideration of the Chamber’s oral ruling sustaining the Prosecution’s objection regarding admission of Document DRC-OTP-1062-0395”, ICC-01/04-02/06-1407-Conf, ICC-01/04-02/06-1442-Conf.

¹³ Response, ICC-01/04-02/06-1442-Conf, para. 19.

¹⁴ Response, ICC-01/04-02/06-1442-Conf, paras 10 and 18.

¹⁵ Response, ICC-01/04-02/06-1442-Conf, paras 11-13.

¹⁶ Response, ICC-01/04-02/06-1442-Conf, paras 14-16.

¹⁷ Response, ICC-01/04-02/06-1442-Conf, para. 17.

of reasoning has been demonstrated or if it is necessary to prevent an injustice.¹⁸

The Chamber stresses that this is a high standard which will only be met in limited circumstances and advises the parties to bear this in mind when considering the submission of any future requests for reconsideration.

5. Turning to the present Request, the Chamber considers that the applicable standard has not been met.
6. As to the alleged 'clear error of reasoning', 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 or her credibility';¹⁹ 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';²⁰ and that decisions on the admission of documents for the purpose of impeachment should be taken following a case-by-case assessment.²¹
7. In the Impugned Ruling, having considered, in particular, the extent to which the content of the Report had been put to the Witness and was already reflected on the record,²² the Chamber did not 'see any need' to admit the Report into evidence. The Chamber finds that this ruling is in line with the aforementioned principles. Accordingly, the Defence's argument that the Impugned Ruling

¹⁸ 27 February 2015 Decision, ICC-01/04-02/06-483, para. 13.

¹⁹ ICC-01/04-02/06-619, para. 28.

²⁰ 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 and Decision on Defence request for admission of documents used during the testimony of Witness P-0963, 16 June 2016, ICC-01/04-02/06-1400-Conf.

²¹ ICC-01/04-02/06-1070-Conf, para. 13.

²² See, for example, Transcript of hearing on 8 June 2016, ICC-01/04-02/06-T-98-CONF-ENG ET, page 8, line 21 to page 9, line 11, page 11, lines 1-12, page 20, line 17 to page 25, line 16.

arises from a 'clear error of reasoning' and 'departs from the Chamber's previous practice without providing compelling reasons' is unfounded.

8. For the same reasons, the Chamber does not consider that the Impugned Ruling gave rise to an injustice. Noting that the Defence may rely upon the relevant portions of the transcript, the Defence's submission that non-admission will deprive Mr Ntaganda of an opportunity to undermine the credibility of the Witness is without foundation. Finally, noting that only part of the Report's content has been put to the Witness, the Chamber observes that admission of the Report in its entirety would violate the requirement for the cross-examining party to put to the witness any facts or evidence it intends to rely upon for impeachment purposes.
9. In view of its finding that the standard for reconsideration has not been met with regard to the Impugned Ruling, the Chamber will not further consider the Defence's request for admission of the Report into evidence.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the parties to either request reclassification or file public redacted versions of the Request (ICC-01/04-02/06-1407-Conf) and the Response (ICC-01/04-02/06-1442-Conf) within two weeks of this decision.

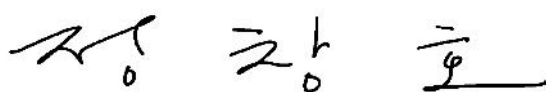
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 3 August 2016

At The Hague, The Netherlands