

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **22 February 2018**

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 seeking partial reconsideration of the ‘Decision on
Defence request for admission of evidence from the bar table’**

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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

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 69(4) of the Rome Statute, Rule 63(2) of the Rules of Procedure and Evidence, and Regulation 35 of the Regulations of the Court, renders the following 'Decision on Defence request seeking partial reconsideration of the "Decision on Defence request for admission of evidence from the bar table"'.

I. Background

1. On 31 January 2018, the Chamber issued a decision on the 'Defence Request for the admission of evidence from the bar table' ('Bar Table Request'),¹ denying the admission into evidence of 35 of the items tendered by the Defence ('Decision').²
2. On 14 February 2018, the Defence filed a request seeking partial reconsideration of the Decision for four of the items for which the Chamber denied admission: Document 16, DRC-OTP-0195-1543; Document 17, DRC-OTP-0195-1570; Document 27, DRC-OTP-0093-0123; and Document 135, DRC-D18-0001-5887 ('Reconsideration Request').³
3. On 19 February 2018, the Prosecution responded to the Reconsideration Request, opposing it ('Response').⁴

II. Analysis

4. The Chamber recalls that it is within its power to reconsider its own decisions, but that reconsideration is an 'exceptional measure' which should only be granted if a 'clear error of reasoning has been demonstrated or if it is necessary

¹ 23 November 2017, ICC-01/04-02/06-2128, with Confidential Annex A (ICC-01/04-02/06-2128-Conf-AnxA).

² Decision on Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2201-Conf. A public redacted version was filed on the same day as ICC-01/04-02/06-2201-Red.

³ Request on behalf of Mr Ntaganda seeking partial reconsideration of the Chamber's "Decision on Defence request for admission of evidence from the bar table", ICC-01/04-02/06-2226-Conf.

⁴ Prosecution response to the "Request on behalf of Mr Ntaganda seeking partial reconsideration of the Chamber's 'Decision on Defence request for admission of evidence from the bar table'", ICC-01/04-02/06-2226-Conf, ICC-01/04-02/06-2235-Conf.

to do so to prevent an injustice'.⁵ In this regard, the Chamber notes that 'new facts' may be of relevance to this assessment.⁶

5. With regard to the Reconsideration Request, the Chamber considers that, for the reasons following, the standard required has not been met. The Chamber is of the view that the Defence has not demonstrated a departure from the Chamber's previous practice concerning admission of exhibits and has therefore failed to substantiate an error of reasoning or any injustice arising from the Decision.
6. The Chamber observes that the Reconsideration Request challenges confined matters, namely the Chamber's determination that the four exhibits lacked *prima facie* reliability or probative value, and finds that the Defence failed to explain how reconsideration of these issues would prevent an injustice. With regard to the alleged error of reasoning, the Chamber notes that its ruling denying admission of Documents 16, 17, and 27 involved an individualised assessment of each item, entailing consideration of multiple factors⁷ and, accordingly, the fact that other items with similar content or format had been previously admitted into evidence does not point to an error of reasoning. Similarly, with regard to Document 135, the Chamber finds that the Reconsideration Request does not indicate any error in the Chamber's determination that, in the absence of evidence attesting to the effective transmission of this document by the Victims Participation and Reparations Section ('VPRS'), probative value had not been established, which warranted denying admission.
7. With regard to Documents 27 and 135, the Chamber notes that the Defence provides the Chamber with a more complete version and with additional information related to aspects relevant to the probative value of the documents

⁵ Decision on the Defence request for reconsideration and clarification, 27 February 2015, ICC-01/04-02/06-483, para. 13; and Decision on Prosecution request for reconsideration of, or leave to appeal, decision on use of certain material during the testimony of Mr Ntaganda, 23 June 2017, ICC-01/04-02/06-1973, para. 14.

⁶ Decision on the Defence request for reconsideration and clarification, 27 February 2015, ICC-01/04-02/06-483, para. 13.

⁷ Decision, ICC-01/04-02/06-2201-Conf, paras 4, 12, and 16.

tendered in the Bar Table Request. In this regard, the Chamber notes that the Reconsideration Request was filed after the deadline set for the filing of the last Defence request for the admission of documentary evidence, which was 10 January 2018.⁸ The Chamber therefore considers that the Defence ought to have made any such request, including in relation to providing additional information, at an earlier point. However, in light of the fact that the Defence only became aware on 31 January 2018 that the Chamber denied admission of certain items due to a lack of reliability, the Chamber considers it to be in the interests of justice to exceptionally render a fresh assessment of the admissibility of the items for which the Defence provided supplementary information.⁹

8. The Chamber notes that, since the rendering of the Decision, the Defence has identified and provided to the Chamber a 'more complete' version of Document 27, namely DRC-OTP-0037-0312.¹⁰ This document is dated and contains a 'signature block', which was information that did not appear in the version initially tendered, and which formed part of the rationale for the Chamber denying its admission.¹¹ Considering its content, which reflects *inter alia* the UPC/RP's perspective on the conflict in Ituri and the pacification process, the Chamber finds that it is of relevance to the case. Furthermore, in light of the additional indicia of reliability contained therein, the Chamber is satisfied that it is *prima facie* reliable and that no undue prejudice arises from its admission, and therefore admits DRC-OTP-0037-0312 into evidence.

⁸ Order providing directions related to the closure of the presentation of evidence, 22 December 2017, ICC-01/04-02/06-2166, para. 12; and T-261, page 67, line 24 to page 68, line 4.

⁹ During the course of its case, a tendering party can generally provide supplementary information to allow the Chamber to reassess a document's reliability, notably by using the document with a witness who is in a position to testify as to the making or content of the item. In addition, the Chamber has occasionally deferred its ruling on admission, allowing the tendering party to further substantiate its request for admission. See, e.g., Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, ICC-01/04-02/06-1029; and Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, ICC-01/04-02/06-1205, paras 9-11.

¹⁰ Request, ICC-01/04-02/06-2226-Conf, para. 13.

¹¹ Decision, ICC-01/04-02/06-2201-Conf, para. 16.

9. Turning to Document 135, the Chamber recalls that it previously noted that ‘without any indication of authorship or proof of transmission, the document’s probative value has not been sufficiently established’.¹² The Defence now provides proof of transmission of this document, in the form of an email from the VPRS.¹³ As the document provides insight into the activities and methods of the VPRS, which is potentially relevant for the credibility of certain witnesses, the Chamber finds that it is *prima facie* relevant. Following the Defence’s submission of the VPRS email, the Chamber considers that the document’s reliability has been sufficiently established. Contrary to the Prosecution’s submissions, the Chamber does not consider that this evidence ought to have been adduced via live testimony.¹⁴ Having further considered that no undue prejudice would arise from its admission, the Chamber admits it into evidence, together with the relevant email from the VPRS.¹⁵
10. Finally, the Chamber instructs the parties to coordinate with each other and the Registry with a view to providing submissions on the appropriate classification of the two items admitted by way of the present decision. Reasons should be provided for any item that the parties seek to remain confidential.

¹² Decision, ICC-01/04-02/06-2201-Conf, para. 53.

¹³ Request, ICC-01/04-02/06-2226-Conf, para. 18; and ICC-01/04-02/06-2226-Conf-AnxA.

¹⁴ ICC-01/04-02/06-2128-Conf-AnxA, pages 75-76.

¹⁵ ICC-01/04-02/06-2226-Conf-AnxA.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Reconsideration Request;

ADMITS the following items into evidence:

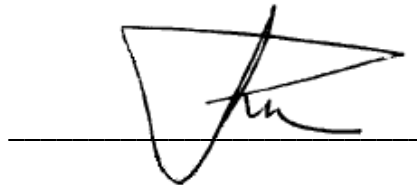
- DRC-OTP-0037-0312;
- DRC-D18-0001-5887; and
- ICC-01/04-02/06-2226-Conf-AnxA;

INSTRUCTS the Defence to upload on eCourt ICC-01/04-02/06-2226-Conf-AnxA;

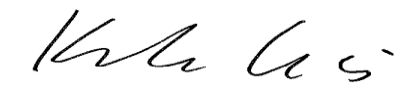
DIRECTS the Registry to update the eCourt metadata of the aforementioned items so as to reflect their admission status and the fact that they were admitted pursuant to the present decision; and

INSTRUCTS the parties to file, by **29 March 2018**, submissions on the appropriate confidentiality level for the two items admitted by way of the present decision.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 22 February 2018

At The Hague, The Netherlands