

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 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 decision on admission of
certain documents used with Witness P-0315**

The Office of the Prosecutor

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Legal Representatives of Victims

Ms Sarah Pellet
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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 ('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 decision on admission of certain documents used with Witness P-0315'.

I. Procedural history and submissions

1. On 20 June 2016, the Chamber issued a preliminary oral ruling on the request by the Office of the Prosecutor ('Prosecution')² for admission, pursuant to Rule 68(3), of certain documents intended to be used with Witness P-0315 ('Witness').³ Subsequently, on 22 June 2016, during the testimony of the Witness, the Chamber admitted into evidence ('Impugned Decision') two Human Rights Watch reports (DRC-OTP-0074-0797 and DRC-OTP-0074-0628), and a small portion of a third Human Rights Watch report (pages 0517 to 0519 of DRC-OTP-2003-0497) (collectively, the 'Reports').⁴
2. On 8 July 2016, the defence team for Mr Ntaganda ('Defence') filed a request for reconsideration of the Impugned Decision ('Request').⁵ The Defence submits that, 'for reasons that are unclear',⁶ the Prosecution failed to seek copies of the Witness's handwritten notes of the interviews which formed the basis of the information in the Reports, with a view to obtaining the 'best evidence'

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

² Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0315, 25 May 2016, ICC-01/04-02/06-1333-Conf. A public redacted version was notified on 30 May 2016, ICC-01/04-02/06-1333-Red.

³ Transcript of hearing on 20 June 2016, ICC-01/04-02/06-T-105-Red-ENG WT, page 91, line 21 – page 95, line 24.

⁴ Transcript of hearing on 22 June 2016, ICC-01/04-02/06-T-107-Red-ENG WT, page 58, lines 6-13, page 59, lines 11-14 and page 87, lines 19-22.

⁵ Application on behalf of Mr Ntaganda seeking reconsideration of the Chamber's oral decisions regarding admission of documents DRC-OTP-0074-0628, DRC-OTP-0074-0797 and DRC-OTP-2003-0497, ICC-01/04-02/06-1448-Conf.

⁶ Request, ICC-01/04-02/06-1448-Conf, para. 17.

available.⁷ The Defence argues that in such circumstances - where, it submits, the Prosecution has failed to extend its investigations to cover all evidence relevant to an assessment of whether there is criminal liability – the ‘only available avenue’ is to exclude the Reports.⁸ It submits that the fact the Prosecution did not request the handwritten notes only became apparent on cross-examination of the Witness.⁹

3. On 29 July 2016, the Prosecution responded opposing the Request (‘Response’).¹⁰ The Prosecution submits that the Defence fails to meet the standard required for reconsideration.¹¹ In particular, the Prosecution argues that the alleged new facts presented by the Defence are not new given that the unavailability of the material to the Prosecution, in light of Human Rights Watch’s policy to protect its confidential sources, has been known to the Defence since December 2013.¹² The Prosecution further submits that the Impugned Decision does not adversely affect the accused’s rights,¹³ and that the Defence’s reliance on the ‘best evidence’ rule is ‘misplaced’.¹⁴

II. Analysis

4. The Chamber considers that the standard required for reconsideration of a decision has not been met. The only aspect which the Defence claims to constitute a ‘new fact’ is whether or not the Prosecution explicitly requested the Witness to provide it with the handwritten notes of interviews which formed the basis for certain of the information in the Reports. The Chamber notes that the absence of these notes, and the principal reason why they had not been

⁷ Request, ICC-01/04-02/06-1448-Conf, paras 15-21.

⁸ Request, ICC-01/04-02/06-1448-Conf, para. 22.

⁹ Request, ICC-01/04-02/06-1448-Conf, para. 21.

¹⁰ Prosecution’s response to the “Application on behalf of Mr Ntaganda seeking reconsideration of the Chamber’s oral decisions regarding admission of documents DRC-OTP-0074-0628, DRC-OTP-0074-0797 and DRC-OTP-2003-0497”, ICC-01/04-02/06-1448-Conf, ICC-01/04-02/06-1472-Conf.

¹¹ Response, ICC-01/04-02/06-1472-Conf, paras 2, 10, 20-21.

¹² Response, ICC-01/04-02/06-1472-Conf, paras 12-14.

¹³ Response, ICC-01/04-02/06-1472-Conf, para. 17.

¹⁴ Response, ICC-01/04-02/06-1472-Conf, paras 18-19.

provided, was apparent from well in advance of the Witness's testimony. The distinction between whether Human Rights Watch pre-emptively indicated that it was not in a position to provide the notes,¹⁵ or whether that information was elicited in response to a Prosecution query, is immaterial in this respect. It also does not impact the Chamber's assessment of the prejudice and probative value of the Reports for admissibility purposes.

5. Further, the Chamber considers the Defence's reliance on the 'best evidence rule' to be misguided. While the Chamber retains control over the conduct of proceedings and has the power to request the submission of any evidence it deems necessary for the determination of the truth,¹⁶ the parties in this case have a general discretion in their choice of material for submission. The Chamber may freely assess all evidence submitted and, as the Chamber already noted in the Impugned Decision, the nature of the Reports will be considered when the Chamber assesses their weight.
6. The Chamber consequently finds that the Defence has failed to establish that exclusion of the Reports is necessary to prevent an injustice. As the Defence did not argue that there had been a clear error of reasoning the Chamber will not address that aspect further.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

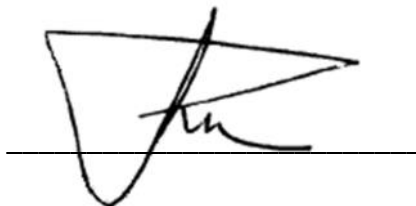
REJECTS the Request; and

DIRECTS the parties to either request reclassification, or file public redacted versions, of the Request (ICC-01/04-02/06-1448-Conf) and Response (ICC-01/04-02/06-1472-Conf) within two weeks of notification of this decision.

¹⁵ See Transcript of hearing on 23 June 2016, ICC-01/04-02/06-T-108-CONF-ENG, page 83, lines 16-18.

¹⁶ Article 69(4) of the Statute.

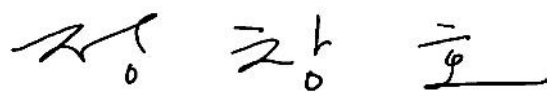
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct characters, written over a horizontal line.

Judge Chang-ho Chung

Dated 8 August 2016

At The Hague, The Netherlands