

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 May 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

Prosecution's response to the "Request on behalf of Mr Ntaganda seeking admission in evidence of three items used during the testimony of Witness D-0300", ICC-01/04-02/06-2284

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. Neither the ICC Statute nor Rules of Procedure and Evidence specifically address whether a party may re-open its case in order to introduce additional evidence.
2. According to the jurisprudence of the ICC and of the *ad hoc* tribunals, a Chamber can consider a request to present “fresh” evidence after the close of the case, which includes evidence which was not available at the close of the case or was previously available but its importance was revealed only in light of new evidence.¹ The test for admission of fresh evidence includes: (i) whether, with reasonable diligence, the evidence could have been identified and presented prior to the closing of evidence; and (ii) the probative value of the evidence and the fairness of admitting it late in the proceedings. It is a stringent test in order to avoid re-opening a case with the consequence of delays to address the late introduction of evidence.²
3. The Defence’s request, however, does not appear to seek admission of “fresh” evidence *per se*. Rather, the Defence seeks the late admission of three items of evidence because it forgot to request admission at the relevant time (“Defence Request”).³ These three items comprise the Defence’s re-scan of a loose-page logbook in its original form, the Accused’s re-organisation of the loose-page logbook and the translation of the loose-page logbook in the order in which the Accused re-organised them.
4. While it would have been preferable for the Defence to have sought admission either at the time it used the three items or, at a minimum, before it closed its case, and certainly before the Prosecution and Legal Representatives of victims

¹ ICC-01/05-01/08-3154-Red2, paras. 25-30; *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Accused’s fourth motion to re-open Defence case, 24 February 2015, paras. 5-8.

² ICC-01/05-01/08-3154-Red2, paras. 25-30; *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Accused’s fourth motion to re-open Defence case, 24 February 2015, paras. 5-8.

³ ICC-01/04-02/06-2284, para. 2.

filed their respective closing briefs, the Prosecution does not object to the late admission of these items, on an exceptional basis. The Prosecution takes a practical position because admission of these three items will facilitate the Chamber's review of the Accused's evidence on these radio communications. The Prosecution's submission is that the Accused's attempt to re-organise the logbook communications is not plausible in light of other evidence, fails to comply with rules about putting a party's case during the testimony of relevant witnesses, and should not be given any weight.

Prosecution's Submissions

5. The Prosecution notes that the Defence Request is a request to re-open the evidentiary phase of the case. This is an exceptional remedy, not provided for in the Court's Statute or Rules of Procedure and Evidence. Jurisprudence at the ICC and other *ad hoc* tribunals establish that Chambers have the authority to consider requests to admit evidence after a party's case has closed but these are generally requests to admit "fresh" evidence not otherwise used during the trial. The Prosecution understands, however, that the Defence Request is not *per se* a request to admit "fresh" evidence, since it is a request to admit three items that were used during the Accused's testimony.
6. While the items are discussed on the record and the original loose-page logbook is already admitted (making admission of the three items not strictly necessary), it may be easier to follow the Accused's evidence if the Chamber can refer to these three items. The Prosecution emphasises that it has provided sound arguments based on the facts in the trial record that the Accused's own "re-organisation" of the loose-page logbook is self-serving and contradicted by other evidence, and should be given no weight because the Accused failed to put these assertions to a relevant witness when he testified. It will be important for the Chamber to be able to evaluate fully the Accused's assertions in this respect.

7. In these circumstances, the Prosecution does not object to the admission of the three items on an exceptional basis.
8. Contrary to the Defence assertion,⁴ the Prosecution does not accept that the Accused's re-organisation of the "loose-page" logbook (DRC-OTP-0017-0003) is accurate but for one page. The Prosecution asserted that one particular page at issue is not in its correct place chronologically, but did not confirm that all other pages have been correctly re-ordered by the Accused.

Conclusion

9. For the foregoing reasons, the Prosecution does not oppose the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 21st day of May 2018
At The Hague, the Netherlands

⁴ Defence Request, para. 29.