

**Cour
Pénale
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**International
Criminal
Court**

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Date: 16 September 2019

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 request for reconsideration of a discrete portion of the Chamber's
"Decision on requests for admission of evidence related to sentencing from the bar
table", ICC-01/04-02/06-2402, 13 September 2019**

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. The Prosecution seeks reconsideration of a discrete portion of the “Decision on requests for admission of evidence related to sentencing from the bar table” (“Decision”),¹ namely the Chamber’s rejection of document DRC-OTP-0151-0305, a 29 June 2004 letter from Dominique McAdams, then-director of MONUC in Ituri, to Thomas Lubanga, on the basis that its relevance to the sentencing proceedings had not been sufficiently established.
2. The Chamber, in reaching its conclusion, noted that this letter does not mention the Convicted Person or the UPC/FPLC. In fact, however, this letter does refer to the UPC/FPLC troops under the Convicted Person’s command. Moreover, it is closely related to a similar, earlier letter from Dominique McAdams, that the Chamber found *prima facie* relevant and admitted as sentencing evidence, that addresses the same conduct by UPC/L soldiers. In light of these two facts, which the Chamber appears to have overlooked, the Prosecution requests that the Chamber reconsider its decision and admit document DRC-OTP-0151-0305 into evidence.

Procedural History

3. On 8 July 2019, Trial Chamber VI (the “Chamber”) convicted Mr Bosco Ntaganda (“Convicted Person”) of 18 counts of war crimes and crimes against humanity² and issued an order on the sentencing procedure.³ On 23 August 2019, the Chamber directed the Parties and the participants to file any requests for admission of documentary evidence other than through witnesses by 30 August 2019.⁴

¹ ICC-01/04-02/06-2402.

² ICC-01/02-02/06-2359.

³ ICC-01/04-02/06-2360.

⁴ ICC-01/04-02/06-2385-Conf, para. 54.

4. On 30 August 2019, the Prosecution requested the admission of 26 items as documentary evidence on sentencing, including document DRC-OTP-0151-0305,⁵ a letter from Dominique McAdams, then-director of MONUC in Ituri, to Thomas Lubanga on 29 June 2004. On 13 September 2019, the Chamber, noting “that the document does not make any mentioned of Mr Ntaganda and/or the UPC/FPLC”, declined to admit document DRC-OTP-0151-0305 into evidence, because “its relevance to the sentencing proceedings [...] ha[d] not been sufficiently established”.⁶

Request for reconsideration

5. Reconsideration is an exceptional remedy, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.⁷ The Chamber may also reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory,⁸ or when new or previously unavailable information requires the Chamber to reconsider its previous ruling.⁹ The Prosecution seeks reconsideration of a discrete portion of the Chamber’s Decision because it appears to have made a factual error in declining to admit document DRC-OTP-0151-0305.
6. Indeed, the Chamber denied the admission of this document on the basis that its relevance had not been sufficiently established, noting “that the document does not make any mentioned [sic] of Mr Ntaganda and/or the UPC/FPLC”.¹⁰

⁵ ICC-01/04-02/06-2389 and ICC-01/04-02/06-2389-Conf-AnxA, pp. 4-5, no. 9.

⁶ ICC-01/04-02/06-2402, para. 36.

⁷ ICC-01/04-02/06-519, pp. 6-7, para. 12; ICC-01/04-02/06-1049-Red, para. 12; ICC-01/04-02/06-1282, pp. 6-7, para. 12. See also ICC-02/04-01/15-468, para. 4; ICC-01/05-01/13-1282, para. 8, ICC-01/05-01/13-1552, para. 6, ICC-01/05-01/13-1854, paras. 75-76.

⁸ Trial Chamber I has accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras. 13-18. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, have concluded that there is no express statutory authority to reconsider rulings (see, e.g., ICC-02/04-01/05-60, para. 18). The Prosecution notes that the Appeals Chamber has affirmed that this Court may exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule expressly provides for it (ICC-01/04-01/06-772 OA4, paras. 36-39).

⁹ ICC-01/05-01/08-1691-Red, para. 17. An analogous application of article 84 also supports this submission.

¹⁰ ICC-01/04-02/06-2402, para. 36.

However, while the Convicted Person is indeed not mentioned in this item, its author refers to “*vos miliciens*” or “*les vôtres*” on five occasions throughout the letter, which is addressed to “*M. Thomas Lubango [sic] Président de l’UPC/TL*”. Consequently, this letter does specifically refer to the conduct of the soldiers of Thomas Lubanga’s UPC/L militia, i.e. the UPC/FPLC troops under then-Chief of Staff Bosco Ntaganda.

7. Moreover, document DRC-OTP-0151-0305 refers to¹¹ and should be read together with an earlier letter from Dominique McAdams to Thomas Lubanga (DRC-OTP-0151-0306) on the very same subject, dated 21 June 2004,¹² which the Chamber found *prima facie* relevant and admitted into evidence.¹³ This document alternatively refers to “*vos milices*” or the “*miliciens de l’UPC*”, a clear reference to the UPC/FPLC troops. The same 21 June 2004 letter also refers to crimes allegedly committed by the UPC/FPLC soldiers of “*camp Bembey*”¹⁴ under commander Tinlengo,¹⁵ which further confirms that document DRC-OTP-0151-0305 refers to the UPC/FPLC troops under the Convicted Person’s command, as it refers to the same UPC/FPLC commander Tinlengo and the same incidents: “*vos miliciens de Tokodo, Bembeyi, quartier de Simbiliabo, notamment les commandants Njaza et Tirelengo (ou Tinlengo comme mentionné dans ma lettre précédente)*”.¹⁶

¹¹ DRC-OTP-0151-0305, p. 0305: “[c]omme suite à ma lettre du 21 courant [...]”.

¹² DRC-OTP-0151-0306.

¹³ ICC-01/04-02/06-2385-Conf, para. 53. The Chamber found that this document was “*prima facie* relevant to [its] assessment of Mr Ntaganda’s conduct after the events forming part of the charges, especially as concerns issues the Defence wishes to bring to the attention of the Chamber, such as his cooperation with MONUC, and may therefore assist the Chamber and thus have probative value”.

¹⁴ The Prosecution notes that MONUC documents consistently indicate that this location was under UPC control. See e.g. DRC-OTP-0006-0160, p. 0161 (a MONUC daily report dated 14 October 2003 referring to the UPC camp at Bembey); DRC-OTP-0052-0097, p. 0102 (a MONUC weekly report for 10-17 August 2003 referring to “a UPC military training camp in Bembey”); DRC-OTP-0109-0215, p. 0220 (a MONUC monthly Human Rights report for October 2003, referring to an unofficial UPC military camp in Bembey; and DRC-OTP-0204-0241, p. 0245 (a weekly report from the MONUC G2 service for 21 to 27 February 2004, referring to the presence of “some armed militias from UPC, BOSCO group” at Bembey).

¹⁵ DRC-OTP-0151-0306, p. 0307: “[p]ar ailleurs il est temps que vous donniez également les ordres nécessaires au Commandant du camp Bembey (miliciens de l’UPC), un dénommé Tinlengo. Nous avons pour votre information recueilli les témoignages de deux très jeunes filles (12 et 14 ans) enlevées, violées, transformées en « épouses forcées » par vos miliciens de ce camp, qui se sont également permis de kidnapper et menacer des chefs d’avenue qui avaient « osé » parler à la MONUC”.

¹⁶ DRC-OTP-0151-0305, p. 0305, first paragraph.

8. In light of these two important pieces of information, which the Chamber appears to have overlooked, the Prosecution submits that the relevance of document DRC-OTP-0151-0305 to the sentencing proceedings – in particular the Convicted Person's alleged cooperation with MONUC – has been sufficiently established and the Chamber should, accordingly, admit this document into evidence.

Conclusion

9. Based on the foregoing, the Prosecution requests that the Chamber reconsider its decision and admit document DRC-OTP-0151-0305 into evidence for the purpose of the sentencing proceedings.



Fatou Bensouda
Prosecutor

Dated this 16th day of September 2019
At The Hague, The Netherlands