

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 October 2017**

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 parties' submissions concerning Agreed Fact 69

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

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 69 of the Rome Statute, Rule 69 of the Rules of Procedure and Evidence ('Rules'), and Regulation 24(5) of the Regulations of the Court, issues the following 'Decision on parties' submissions concerning Agreed Fact 69'.

1. On 22 June 2015, upon receipt of a joint submission by the Office of the Prosecutor ('Prosecution') and the defence team for Mr Ntaganda ('Defence'),¹ the Chamber took note of 82 facts upon which the parties had reached an agreement ('Agreed Facts').² The parties agreed, *inter alia*, on the fact that 'Rwanda provided weapons and ammunition to the UPC/FPLC beginning in July 2002' ('Agreed Fact 69').
2. On 29 March 2017, the Prosecution completed its presentation of evidence.³
3. Between 14 June and 13 September 2017, Mr Ntaganda testified before the Chamber, including on matters related to Agreed Fact 69.
4. On 31 August 2017, after having heard the parties' and participants' submissions on the matter,⁴ the Chamber ordered the Defence to consult with and obtain instructions from Mr Ntaganda after the completion of his testimony, and provide, within two days, further submissions on its position on Agreed Fact 69 and on any other Agreed Facts upon which Mr Ntaganda may have not been consulted. It further indicated that upon receipt of those submissions, the Chamber would evaluate whether it would require further observations, including 'whether it shall authorise the Prosecution to adduce

¹ Joint submission by Prosecution and Defence on agreed facts, 8 June 2015, ICC-01/04-02/06-633, with Annex A, ICC-01/04-02/06-633-AnxA-Red.

² Decision on Prosecution and Defence joint submission on agreed facts, 22 June 2015, ICC-01/04-02/06-662.

³ Prosecution's Notice of the Close of its Case-in-Chief, 29 March 2017, ICC-01/04-02/06-1839.

⁴ Transcript of hearing on 31 August 2017, ICC-01/04-02/06-T-234-CONF-ENG ET, page 17, line 11 to page 27, line 13.

additional evidence on this issue or any other issue flowing from the agreed facts', and whether any issues arising from the Code of Professional Conduct for counsel would need to be addressed.⁵

5. On 22 September 2017, after having been granted an extension of time⁶ and instructed to file its submissions originally provided via email⁷ on the record of the case,⁸ the Defence filed its submissions ('Defence Submissions').⁹ The Defence indicates that Agreed Fact 69 'does not accord with Mr Ntaganda's knowledge, who denies having any knowledge of this fact'.¹⁰ It explains that while Mr Ntaganda was consulted in relation to all proposed Agreed Facts, the Defence misunderstood Mr Ntaganda's observations regarding proposed Agreed Fact 69.¹¹ The Defence further argues that Agreed Fact 69 is of 'little relevance to the matters in issue in this case', as the crimes charged were allegedly committed during a conflict of a non-international character.¹² It further indicates that no other agreed fact requires modification or qualification on the basis of Mr Ntaganda's review.¹³
6. On 28 September 2017, in accordance with the Chamber's instruction,¹⁴ the Prosecution filed its response ('Prosecution Submissions').¹⁵ The Prosecution submits that the Defence provided inconsistent information on the degree of consultation with Mr Ntaganda regarding the proposed Agreed Facts, and unconvincing explanations in general concerning the alleged

⁵ Transcript of hearing on 31 August 2017, ICC-01/04-02/06-T-234-CONF-ENG ET, page 28, lines 5 to 25.

⁶ See Email communication from the Chamber to the parties and participants on 15 September 2017, at 15:35, in which the Chamber granted the Defence's request for an extension of time until 20 September 2017 to provide its position on the agreed facts on the basis of Mr Ntaganda's instructions (email communication from the Defence to the Chamber on 15 September 2017, at 14:23).

⁷ Email communication from the Defence to the Chamber on 20 September 2017, at 14:44.

⁸ Email communication from the Chamber to the parties and participants on 21 September 2017, at 8:49.

⁹ Submission on agreed facts, ICC-01/04-02/06-2043-Conf.

¹⁰ Defence Submissions, ICC-01/04-02/06-2043-Conf, para. 3.

¹¹ Defence Submissions, ICC-01/04-02/06-2043-Conf, paras 4-5.

¹² Defence Submissions, ICC-01/04-02/06-2043-Conf, para. 6.

¹³ Defence Submissions, ICC-01/04-02/06-2043-Conf, para. 7.

¹⁴ Email communication from the Chamber to the parties and participants on 21 September 2017, at 8:49.

¹⁵ Prosecution's response to the Defence submission on agreed fact, ICC-01/04-02/06-2046-Conf.

misunderstanding of the accused's position on this issue.¹⁶ The Prosecution submits that, contrary to the Defence's allegation, the fact in question is not of 'peripheral relevance' and that it is relevant not only to the nature of the armed conflict, but also to the common plan as charged under Article 25(3)(a) of the Statute, as well as Mr Ntaganda's credibility.¹⁷ The Prosecution indicates further that, had it known from the start of the trial that Agreed Fact 69 was disputed, it would have adduced evidence to prove the fact.¹⁸ Therefore, the Prosecution submits that, should the Chamber 'vitiating' Agreed Fact 69, it seeks leave to adduce further evidence of Rwanda's role in the provision of weapons and ammunition to the accused and his group in July 2002.¹⁹

7. On 5 October 2017, the Defence sought leave to reply to the Prosecution Submissions with respect to five issues ('Request for leave to reply').²⁰ In the present case, the Chamber does not consider that it would be assisted by further submissions on any of the identified issues upon which leave to reply is sought, and therefore rejects the Request for leave to reply.
8. The Chamber notes the Defence's explanation concerning the circumstances that led to its change of position concerning Agreed Fact 69. In the present circumstances, the Chamber does not intend to further address any issues related to the conduct of the Defence counsel.
9. The Chamber also notes the Prosecution's request, in light of the current Defence position, 'seek[ing] leave to adduce further evidence' on matters related to Agreed Fact 69, namely, 'documentary evidence or statement(s) taken under [R]ule 68(2)(b)' of the Rules. In the present circumstances, the

¹⁶ Prosecution Submissions, ICC-01/04-02/06-2046-Conf, paras 3-4, 30-33.

¹⁷ Prosecution Submissions, ICC-01/04-02/06-2046-Conf, paras 2, 34.

¹⁸ Prosecution Submissions, ICC-01/04-02/06-2046-Conf, para. 35.

¹⁹ Prosecution Submissions, ICC-01/04-02/06-2046-Conf, paras 2, 36-37.

²⁰ Request for leave to reply to Prosecution's response to the Defence submission on agreed facts, 5 October 2017, ICC-01/04-02/06-2054-Conf.

Chamber directs the Prosecution to file any such request by 10 November 2017. The Chamber will consider any such request, together with the evidence sought to be tendered, after receiving any submissions from the parties and participants, which shall be filed by 17 November 2017.

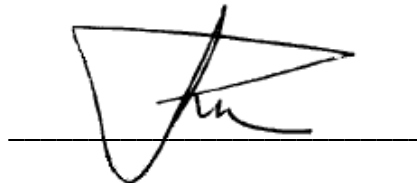
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for leave to reply;

TAKES NOTE of the parties' position concerning Agreed Fact 69; and

DIRECTS the Prosecution to file any request to adduce additional evidence by 10 November 2017, and the Defence and the Legal representatives of victims to file any responses by 17 November 2017.

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

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

Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

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

Judge Chang-ho Chung

Dated this 9 October 2017
At The Hague, The Netherlands