

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 19 February 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 leave to appeal the Chamber's decisions
overruling objections to certain questions put to Witness P-0017**

Decision 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 Luc Boutin

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**

Ms Paolina Massidda

**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 Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on Defence request for leave to appeal the Chamber's decisions overruling objections to certain questions put to Witness P-0017'.

I. Background

1. On 29 January 2016, during the examination of Witness P-0017, the defence team for Mr Ntaganda ('Defence') objected at different times to questions put by the Office of the Prosecutor ('Prosecution') to the witness, on the basis that they were leading.¹ The Chamber overruled two of those objections, considering that the Prosecution's questions were not leading.² The Presiding Judge subsequently also provided a definition of 'leading question' as a 'question that suggests the answer to the person being interrogated that may be answered by a mere yes or no' ('Impugned Decision').³
2. On 8 February 2016, the Defence filed a request for leave to appeal the Impugned Decision ('Request').⁴
3. On 12 February 2016, the Prosecution filed a response, opposing the Request ('Response').⁵

¹ Transcript of hearing on 29 January 2016, ICC-01/04-02/06-T-59-ENG, page 22, line 2; page 25, lines 9-19; page 26, lines 6-12, and lines 22-23; page 27, lines 18-19.

² Transcript of hearing on 29 January 2016, ICC-01/04-02/06-T-59-ENG, page 27, lines 6-8, and 20.

³ Transcript of hearing on 29 January 2016, ICC-01/04-02/06-T-59-ENG, page 29, lines 2-4, 11-17.

⁴ Request on behalf of Mr Ntaganda seeking leave to appeal the Chamber's decisions overruling Defence objections to leading questions, ICC-01/04-02/06-1156-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-1156-Red).

⁵ Prosecution's response to Defence's application for leave to appeal the Chamber's decision overruling Defence objections to leading questions, ICC-01/04-02/06-1169-Conf.

II. Submissions

4. The Defence seeks leave to appeal on the following issue: 'whether, in overruling the Defence objections, the Chamber has misapplied its own definition of what constitutes a leading question' ('Issue').
5. The Defence submits that the Issue constitutes an appealable issue. In particular, it submits that the Issue identifies a 'significant gap' between the definition of 'leading question' given by the Chamber and the application thereof to objections to purportedly leading questions put by the Prosecution to Witness P-0017.⁶ It argues that the Chamber misapplied its own definition of leading questions by allowing the Prosecution to put to Witness P-0017 two questions which 'clearly suggested an answer and that could be answered by "yes" or "no"', and that this further resulted in a 'high number of clearly leading questions' being allowed to be put to the witness after the Impugned Decision being rendered.⁷
6. According to the Defence, the Issue significantly affects the fair conduct of the proceedings, to the extent that it highlights a misapplication of the rule prohibiting leading questions set out by the Chamber. In this respect, the Defence also claims that, in the context of witnesses travelling to Court weeks before the start of their testimony and reviewing in length their statements, leading questions 'act as a prompt for the witness not to recount what he saw, but rather what he reviewed during his/her preparation session with the Prosecution'.⁸ It claims further that the Issue also significantly affects the expeditiousness of the proceedings as it did and may continue to lead to protracted litigation over the permissibility of questions put by the parties, and possibly lengthier cross-examinations.⁹

⁶ Request, ICC-01/04-02/06-1156-Red, para. 15.

⁷ Request, ICC-01/04-02/06-1156-Red, paras 16-17.

⁸ Request, ICC-01/04-02/06-1156-Red, paras 19-21.

⁹ Request, ICC-01/04-02/06-1156-Red, paras 22-25.

7. Further, the Defence submits that the Issue could significantly affect the outcome of the trial as it might allow the Prosecution to elicit from the witness evidence which it could not obtain otherwise.¹⁰ Finally, the Defence submits that an immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings since, having noted the difficulty expressed by the Chamber in deciding on whether a question is leading or not, the Appeals Chamber will set the 'concrete parameters within which the purported leading character of a question must be assessed'.¹¹
8. The Prosecution submits that the Issue is not appealable because it expresses no more than the Defence's disagreement or dissatisfaction with the Chamber's decision to overrule the Defence's objections and therefore with the Chamber's power to control the manner in which the parties question witnesses.¹² In any event, the Prosecution submits that the Issue does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial,¹³ and argues that the immediate intervention of the Appeals Chamber will not materially advance the proceedings, particularly given that, in its view, the Issue is premised on the erroneous assumption that the Impugned Decision will impact the conduct of the proceedings in general.¹⁴

III. Analysis

9. The Chamber incorporates by reference the applicable law as set out in previous decisions.¹⁵
10. The Chamber recalls that in its 'Decision on the conduct of proceedings', it stated that '[d]uring examination-in-chief, the calling party shall use, as a

¹⁰ Request, ICC-01/04-02/06-1156-Red, paras 26-30.

¹¹ Request, ICC-01/04-02/06-1156-Red, paras 31-32.

¹² Response, ICC-01/04-02/06-1169-Conf, paras 2, 4-9.

¹³ Response, ICC-01/04-02/06-1169-Conf, paras 2, 10-14.

¹⁴ Response, ICC-01/04-02/06-1169-Conf, paras 2, 15-16.

¹⁵ See for example, Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, paras 20-21.

matter of principle, non-leading questions'. It also indicated situations in which leading questions may be permitted.¹⁶ The Presiding Judge further provided a definition of 'leading question'.¹⁷

11. The Chamber notes that, in the Impugned Decision, the Chamber overruled two objections to questions put by the Prosecution to Witness P-0017, having considered that, as submitted by the Prosecution at the time,¹⁸ the questions were primarily based on information the witness had already provided,¹⁹ and were therefore not leading.²⁰ The Impugned Decision therefore concerns a very confined matter. It does not affect the general rule that '[d]uring examination-in-chief, the calling party shall use, as a matter of principle, non-leading questions'. The Defence's arguments in support of the requirements of Article 82(1)(d) of the Statute having been met are based on a misinterpretation of the Impugned Decision, are mostly speculative and, with regard to the allegations about the Prosecution's working methods in the context of witness preparation sessions, too general to support the Request.
12. In light of the above, the Defence failed to demonstrate and the Chamber does not consider that the Impugned Decision involves any issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, as required under the first limb of Article 82(1)(d) of the Statute. In light of this, it is unnecessary for the Chamber to consider the remaining requirements of Article 82(1)(d) of the Statute.

¹⁶ The Chamber further added that '[o]n preliminary matters necessary to provide background or context, as well as any other matter which is not contested or when the opposing party agrees to leading questions, or where such questions are otherwise deemed appropriate by the Chamber, the calling party may put information to a witness by way of leading questions'. It further stated that leading questions are permitted '[i]f a witness is not desirous of providing the expected evidence and has been declared hostile by the Chamber'; Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 26.

¹⁷ Transcript of hearing on 29 January 2016, ICC-01/04-02/06-T-59-ENG, page 29, lines 2-4, 11-17.

¹⁸ Transcript of hearing on 29 January 2016, ICC-01/04-02/06-T-59-ENG, page 27, lines 1-5.

¹⁹ See, for example, Transcript of hearing on 29 January 2016, ICC-01/04-02/06-T-59-ENG, page 22, line 8 – page 23, line 8.

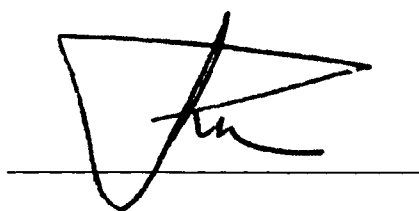
²⁰ Transcript of hearing on 29 January 2016, ICC-01/04-02/06-T-59-ENG, page 27, lines 6-8.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the Prosecution to file a public version of its Response (ICC-01/04-02/06-1169-Conf), with redactions if necessary, by 4 March 2016.

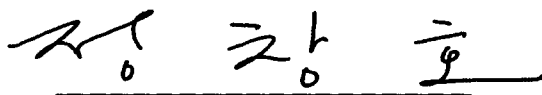
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of Korean characters '정창호' followed by a horizontal line.

Judge Chang-ho Chung

Dated this 19 February 2016

At The Hague, The Netherlands