

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 10 February 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 Defence request seeking leave to appeal one ruling from 'Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)'

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
Appeals Chamber

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 seeking leave to appeal one ruling from "Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)'" .

I. Background

1. On 18 January 2017, the Chamber granted a Prosecution request for admission into evidence of, *inter alia*, the prior recorded testimony of Witness P-0057 ('Decision'), pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules').¹
2. On 24 January 2017, the defence team for Mr Ntaganda ('Defence') requested, pursuant to Article 82(1)(d) of the Statute, leave to appeal the Decision in respect of one issue ('Request').²
3. On 30 January 2017, the Prosecution filed its response ('Prosecution Response').³

II. Submissions

4. The Defence seeks leave to appeal on the issue '[w]hether the prior testimony of Witness P-0057 is admissible under Rule 68(2)(b), without the Defence being provided with an opportunity to cross-examine the witness' ('Issue').⁴ The Defence submits that the Issue constitutes an appealable issue as opposed to a

¹ Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b), ICC-01/04-02/06-1730-Conf. A public redacted version was filed on the same day as ICC-01/04-02/06-1730-Red.

² Request on behalf of Mr Ntaganda seeking leave to appeal one ruling from "Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)", ICC-01/04-02/06-1749-Conf, paras 1 and 15.

³ Prosecution's response to the "Request on behalf of Mr Ntaganda seeking leave to appeal one ruling from 'Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)'" , ICC-01/04-02/06-1759-Conf.

⁴ Request, ICC-01/04-02/06-1749-Conf, para. 1.

mere disagreement, as the prior recorded testimony of Witness P-0057 is 'directly related to events materially disputed, which the Chamber must assess and to which the Chamber must attribute probative value, if any, with a view to adjudicating the charges laid against the Accused'.⁵ In addition, the Defence contends that the Issue affects the fair and expeditious conduct of the proceedings, as it touches upon the accused's right to challenge the evidence brought against him pursuant to Article 67(1)(d) of the Statute and that this 'far outweighs the potential impact of admitting the prior recorded testimony of Witness P-0057'.⁶ The Defence further contends that, absent an immediate resolution by the Appeals Chamber, this evidence will potentially be relied upon by the Chamber in its judgment, without the possibility for the accused to cross-examine Witness P-0057.⁷

5. The Prosecution submits that the Request should be rejected because the Issue amounts to a mere disagreement with the outcome of the Decision, is unspecific, and fails to recognise relevant findings made by the Chamber in its Decision.⁸ The Prosecution further submits that the Defence fails to explain how the Issue significantly affects the fairness of the proceedings and does not address its purported impact on the expeditious conduct thereof.⁹ It further argues that the Issue does not affect the outcome of the trial, as the Defence disregards that Witness P-0057's prior recorded testimony may be challenged in the course of the trial.¹⁰ Lastly, the Prosecution argues that, *inter alia*, as the Chamber only admitted one prior recorded testimony of Witness P-0057 on

⁵ Request, ICC-01/04-02/06-1749-Conf, para. 8.

⁶ Request, ICC-01/04-02/06-1749-Conf, paras 11-12.

⁷ Request, ICC-01/04-02/06-1749-Conf, para. 13.

⁸ Prosecution Response, ICC-01/04-02/06-1759-Conf, paras 5-7.

⁹ Prosecution Response, ICC-01/04-02/06-1759-Conf, para. 9.

¹⁰ Prosecution Response, ICC-01/04-02/06-1759-Conf, para. 11.

relatively confined aspects of the case, the intervention of the Appeals Chamber at this stage will not materially advance the proceedings.¹¹

III. Analysis

6. The Chamber incorporates by reference the applicable law as set out in previous decisions on leave to appeal.¹²
7. As to the merits of the Request, the Chamber will first consider whether the Issue constitutes an appealable issue arising from the Decision, in accordance with Article 82(1)(d) of the Statute. In this regard, the Chamber recalls the Appeals Chamber's finding that only an 'issue' may form the subject of an appealable decision, which is to comprise 'an identifiable subject or topic requiring a decision for its resolution'.¹³ The Chamber observes that the Issue, as stated, is inconsistent with the above requirement, insofar as it demonstrates a disagreement with the Decision as such, rather than identifying a sufficiently defined issue arising therefrom.¹⁴ Indeed, no specific error is clearly identified in the Request, apart from advancing that the prior recorded testimony of Witness P-0057 is 'directly related to events materially disputed', which fails to acknowledge that the Chamber indeed considered this factor in the Decision and thus it expresses mere disagreement therewith.¹⁵ The Chamber notes further that the Defence's general submissions regarding the right of an

¹¹ Prosecution Response, ICC-01/04-02/06-1759-Conf, para. 12.

¹² 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.

¹³ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (OA 3), para. 9.

¹⁴ *See similarly*, Decision on Defence request for leave to appeal the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts', 16 September 2016, ICC-01/04-02/06-1513, para. 15; Decision on the Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 21 May 2015, ICC-01/04-02/06-604, para. 17; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, paras 11-12 and 17-18.

¹⁵ Request, ICC-01/04-02/06-1749-Conf, para. 8; Decision, ICC-01/04-02/06-1730-Conf, paras 17 and 19.

accused to examine witnesses against him appear to attempt to challenge the premise of Rule 68(2)(b) itself, rather than its application by the Chamber in this instance.

8. The Chamber therefore considers that the Defence has failed to identify any legal or factual issue which could constitute an appealable issue for the purposes of Article 82(1)(d) of the Statute.
9. As the first requirement for leave to appeal to be granted is not met, the Chamber need not address the remainder of the criteria. Nonetheless, the Chamber considers that the Defence fails to articulate the way in which the remainder of requirements to grant leave to appeal are satisfied, in particular, how the expeditious conduct of proceedings would be impacted. Further, the only basis upon which the Defence submits that the outcome of the trial would be affected is that the evidence admitted without cross-examination 'will be considered by the Chamber when rendering its Judgment'.¹⁶ A similar argument is presented in relation to the Issue requiring immediate resolution by the Appeals Chamber.¹⁷ The Chamber considers such submissions, which again appear to challenge the general premise of Rule 68(2)(b) itself rather than containing specific arguments on its application, to be inadequate to meet the requirements of Article 82(1)(d) of the Statute.

¹⁶ Request, ICC-01/04-02/06-1749-Conf, para. 2.

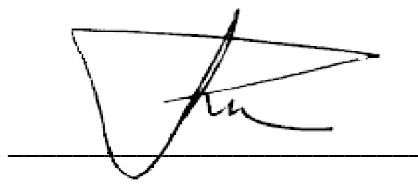
¹⁷ Request, ICC-01/04-02/06-1749-Conf, para. 13.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the Defence and the Prosecution to file public redacted versions of their submissions within two weeks of notification of the present decision.

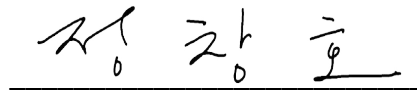
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated this 10 February 2017

At The Hague, The Netherlands