

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 17 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

**Public redacted version of Decision on Defence request for recall of
Witness P-0290**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**Unrepresented Applicants for
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**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

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Mr Nigel Verrill

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**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, 67, 68 and 69 of the Rome Statute ('Statute'), issues this 'Decision on Defence request for recall of Witness P-0290'.

I. Background

1. On 3 February 2016, after having partially granted a request from the defence team for Mr Ntaganda ('Defence') for modification of the witness schedule of the third and fourth evidentiary blocks,¹ the Chamber rejected a Defence request for reconsideration and revision of the schedule for the remaining of the third evidentiary block, including a postponement of the testimony of Witness P-0290 ('Witness') by one day.²
2. On 10 February 2016, prior to the commencement of the Witness's testimony, the Defence informed the Chamber that it was 'not in the position to cross-examine [the Witness] at the end of his examination-in-chief'. The Defence explained this decision by: (i) the lack of time to prepare since the testimony of the preceding witness, due to, *inter alia*, the temporary non-availability of Defence team members for health issues; and (ii) its inability to devote the necessary time for 'some investigation leads' the Defence was pursuing. It further indicated that it would ask to recall the Witness at a later point to conduct cross-examination.³

¹ Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks', 28 January 2016, ICC-01/04-02/06-1115-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-1115-Red). In its decision, the Chamber, *inter alia*, postponed the testimony of one witness to the fourth evidentiary block.

² Decision on Defence request for reconsideration of the decision on the schedule for the third and fourth evidentiary blocks, 3 February 2016, ICC-01/04-02/06-1143-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-1143-Red).

³ Transcript of hearing on 10 February 2016, ICC-01/04-02/06-T-65-Red-ENG WT, pp. 5-7.

3. In an *ex parte* communication addressed to the Chamber by way of e-mail on 10 February 2016,⁴ the Defence provided additional information concerning its inability to cross-examine the Witness at that time. On 12 February 2016, after the Office of the Prosecutor ('Prosecution') completed its examination-in-chief, the Defence confirmed that it was not in a position to cross-examine the Witness and would be seeking for him to be recalled at a later point to complete his testimony, and indicated that it had discussed this decision with the accused.⁵
4. Also on 12 February 2016, the Chamber held that the additional submissions provided by the Defence had not altered its view that the Defence should be in a position to start its cross-examination of the Witness.⁶
5. On 24 January 2017, the Defence requested the Chamber to '[order] the Prosecution to recall Witness P-0290 before the end of the presentation of its case-in-chief; or, in the alternative [implement] the necessary conditions allowing the Defence to call Witness P-0290 as a Defence witness' ('Request').⁷
6. On 6 February 2017, the Prosecution filed its response ('Response'),⁸ opposing the Request.

II. Submissions and Analysis

Request to recall the Witness

7. The Defence submits that recalling Witness P-0290 is justified by 'good cause' and 'compelling circumstances'.⁹ Specifically, the Defence submits that: (i) the Witness

⁴ E-mail from the Defence to the Chamber on 10 February 2016, at 18:07

⁵ Transcript of hearing on 12 February 2016, ICC-01/04-02/06-T-67-Red-ENG WT, p. 23; see also p. 42.

⁶ ICC-01/04-02/06-T-67-Red-ENG WT, p. 40.

⁷ Request on behalf of Mr Ntaganda seeking Trial Chamber VI to recall Witness P-0290, ICC-01/04-02/06-1751-Conf-Exp. The request was notified on 25 January 2017. A confidential redacted version was filed on 25 January 2017, ICC-01/04-02/06-1751-Conf-Red.

⁸ Prosecution's response to the "Confidential redacted version of 'Request on behalf of Mr Ntaganda seeking Trial Chamber VI to recall Witness P-0290'", ICC-01/04-02/06-1775-Conf.

was the only [REDACTED] called by the Prosecution and was thus questioned in relation to ‘several crucial topics for this case’, including [REDACTED];¹⁰ (ii) many essential issues related to these topics, including [REDACTED] involving the accused, were not addressed by the Prosecution;¹¹ (iii) the ‘exceptional health situation’ of Counsel as well as the preparation time in terms of investigations made it ‘unrealistic and unfeasible to be in a position to conduct a thorough and meaningful cross-examination’ of the Witness at the time;¹² (iv) recalling the Witness would be ‘in the interest of justice’ since the additional evidence elicited by the Defence would not be cumulative and it would be the only possibility to have this evidence admitted as part of the record;¹³ (v) absence of cross-examination ‘minimizes’ the probative value which can be attributed to his evidence and violates Mr Ntaganda’s right to a fair trial;¹⁴ and (vi) recalling the Witness would neither cause prejudice to the parties and participants nor impact the expeditious conduct of the proceedings.¹⁵

8. The Prosecution argues that the conditions warranting the recall of the Witness are not met, since the Defence ‘neither demonstrates good cause nor provides cogent and compelling reasons justifying the exceptional remedy of recalling Witness P-0290’.¹⁶ In support of its position, the Prosecution submits that: (i) the arguments put forward in the Request are the same as those advanced when the Defence requested to postpone cross-examination, and the Defence has not advanced any new or compelling facts or arguments to justify recalling the Witness on the basis of its lack of ability to prepare for the Witness’s cross-

⁹ Request, ICC-01/04-02/06-1751-Conf-Red, paras 2, 5, 48 and 65. The Defence refers to decisions from Trial Chamber III in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* and case-law of the *ad hoc* tribunals.

¹⁰ Request, ICC-01/04-02/06-1751-Conf-Red, paras 13-16.

¹¹ Request, ICC-01/04-02/06-1751-Conf-Red, paras 20-26.

¹² Request, ICC-01/04-02/06-1751-Conf-Red, paras 29-47.

¹³ Request, ICC-01/04-02/06-1751-Conf-Red, paras 52 and 54.

¹⁴ Request, ICC-01/04-02/06-1751-Conf-Red, paras 55-56.

¹⁵ Request, ICC-01/04-02/06-1751-Conf-Red, paras 57-58.

¹⁶ Response, ICC-01/04-02/06-1775-Conf, para. 22.

examination;¹⁷ (ii) information related to [REDACTED] that were not addressed by the Prosecution should be ‘squarely within the Accused’s own knowledge and should not require extensive independent investigation’;¹⁸ (iii) the Defence was on notice of the relevance of the [REDACTED] since March 2015 and the scheduling of the Witness ‘nearly 11 weeks’ prior to his testimony, and ‘has not justified its lack of due diligence in conducting any necessary inquiries in a timely fashion’;¹⁹ and (iv) denying the Request does not unduly prejudice the rights of the accused since he fully understood the potential consequences of the Defence not cross-examining the Witness at the time of his testimony and because recalling the Witness is not the only manner to test his evidence.²⁰

9. The Chamber recalls that in its ruling on 12 February 2016, it held that:²¹

Mr Ntaganda does have the right to have witnesses against him examined. However, this is a discretionary right and it can be forfeited. It is very important that Mr Ntaganda understands that if you choose not to examine the present witness as recommended by the Chamber, this can be construed as a waiver of the right to cross-examine him. In other words, Mr Ntaganda risks losing the right to have the witness cross-examined. It is of course open to the Defence to subsequently request in the future that the witness be recalled, but *cogent reasons* should exist to warrant such recalling and there is no guarantee that such a request would be granted by the Chamber.

10. In its determination whether *cogent reasons* have been demonstrated in the case at hand, the Chamber will also be guided by the decisions of Trial Chamber III in the *Bemba* case,²² reflecting the standard adopted by the *ad hoc* tribunals, that ‘in determining whether there are sufficient grounds to recall a witness, the Chamber shall consider whether *good cause* to recall the witness has been demonstrated’ and that ‘judicial economy demands that recall should be granted

¹⁷ Response, ICC-01/04-02/06-1775-Conf, para. 22.

¹⁸ Response, ICC-01/04-02/06-1775-Conf, para. 23.

¹⁹ Response, ICC-01/04-02/06-1775-Conf, para. 24.

²⁰ Response, ICC-01/04-02/06-1775-Conf, para. 27.

²¹ Transcript of hearing on 12 February 2016, ICC-01/04-02/06-T-67-Red-ENG WT, p. 40 (emphasis added).

²² The relevant decisions of Trial Chamber III were rendered in relation to a request to recall a witness further to the discovery of new information after the relevant witness had completed his testimony, including cross-examination.

only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature'.²³

11. In this regard, the Chamber notes that the Request is confined to the purpose of enabling the Defence to cross-examine a witness whom it had decided not to question at the time of his testimony, and will therefore need to be assessed in this context.²⁴ The Chamber observes that the Request essentially reiterates and elaborates upon the issues already mentioned in the Defence's request for reconsideration, its *ex parte* communication of 10 February 2016, and its oral submissions of 10 and 12 February 2016. The Chamber further recalls that, as noted above, in its oral ruling on 12 February 2016, it cautioned the Defence that by deciding not to cross-examine the Witness, it might lose the opportunity to cross-examine the Witness.

12. In addition, the Chamber considers that absence of cross-examination does not *per se* 'minimise' the probative value of the Witness's testimony, as argued by the Defence. The lack of cross-examination of the Witness is a factor to be taken into account in the ultimate determination of the weight to be given to his testimony, but not the only one. The evaluation of the testimony of a witness is evaluated in conjunction with the evidence in the case as a whole. In this regard, while

²³ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of Decision on "Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178 with other witnesses'", 11 December 2014, ICC-01/05-01/08-2924-Red, paragraph 35; Second Redacted version of "Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08-3139-Conf), 11 December 2014'" (ICC-01/05-01/08-3154-Red2). See also ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Trial Chamber I, Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2; ICTY, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber I, Decision on prosecution motion to recall Marko Raj i , 24 April 2009, para. 10; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber II, Decision on the Defence Motion for the Re-examination of Defence Witness DE, 1 August 1998, para. 14. In assessing *good cause*, it has been held that a Chamber should consider the purpose for recalling the witness as well as the applicant's justification for not eliciting the relevant evidence from the witness when he or she originally testified. See for example ICTY, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber I, Decision on prosecution motion to recall Marko Raj i , 24 April 2009, para. 10.

²⁴ While the Chamber agrees with the Defence that the resulting evidence would not be of a cumulative nature, this part of the test as applied by Trial Chamber III, as well as the requirement that the evidence be of significant probative value, related to potential recalling of witnesses who had already testified, including cross-examination, and are not directly relevant to the Chamber's present assessment.

mindful of the Defence's *ex parte* submissions regarding the planning of its case,²⁵ the Chamber further considers that the Defence is still in a position to challenge the Witness's testimony and address issues relating to the [REDACTED] during its presentation of evidence.

13. In light of the above, the Chamber finds that the Defence failed to demonstrate cogent reasons warranting the recall of the Witness.

Alternative request to allow the Defence to call the Witness

14. In the alternative, the Defence requests that the Chamber implement the necessary conditions allowing the Defence to call the Witness, including: (i) enabling the Defence to communicate and meet with the Witness without having to produce and disclose a recording of its exchanges; (ii) allowing the Defence to add the Witness to its list of witnesses; and (iii) if necessary, to summon the Witness to appear before the Court as a Defence witness.²⁶

15. The Prosecution argues that this alternative request should be denied, because granting it would circumvent the Chamber's decision and encourage future delays of investigations and requests for postponement of cross-examination. Further the Prosecution argues that it is in the interests of the Witness not to be recalled without cogent reasons for doing so. Finally, the Prosecution argues that it would be 'inappropriate, and undesirable, to dispense with the Chamber's orders on contact with witnesses of the opposing party by allowing the Defence to communicate and meet with the witness without disclosing a record of such

²⁵ E-mail from the Defence to the Chamber on 10 February 2016, at 18:07; Request, ICC-01/04-02/06-1751-Conf-Exp, para. 53.

²⁶ Request, ICC-01/04-02/06-1751-Conf-Red, paras 60–62.

meetings or exchanges to the Prosecution, in particular because the witness is a Prosecution witness.²⁷

16. The Chamber notes that the alternative request would require the Chamber to make an order to enable the Defence to communicate and meet with the Witness without having to produce and disclose a recording of its exchanges with the Witness to the Prosecution. This would require the Chamber to alter the conditions of the 'Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party Or Participant and Witnesses of the Opposing Party or of a Participant' ('Protocol'),²⁸ and notably the principles set out in Section VI of the Protocol. The Chamber observes that the Defence does not make any additional submissions in support of this part of its alternative request. Accordingly, on the basis of the reasons underlying its finding that the Defence failed to meet the requisite standard warranting the Witness to be recalled as set out above, the Chamber considers that the Defence has not demonstrated any reason warranting a modification of the terms of the Protocol in relation to the Witness.

Conclusion

17. In view of the above, the Chamber finds that the Defence did not sufficiently substantiate its request to recall the Witness, or to modify the terms of the Protocol. However, this finding is without prejudice to any future decision by the Chamber, pursuant to its power to request the submission of any evidence that it considers necessary for the determination of the truth, to itself recall the Witness at a later stage.

²⁷ Response, ICC-01/04-02/06-1775-Conf, paras 29 to 31.

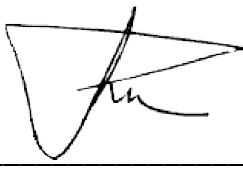
²⁸ 12 December 2014, ICC-01/04-02/06-412-AnxA.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

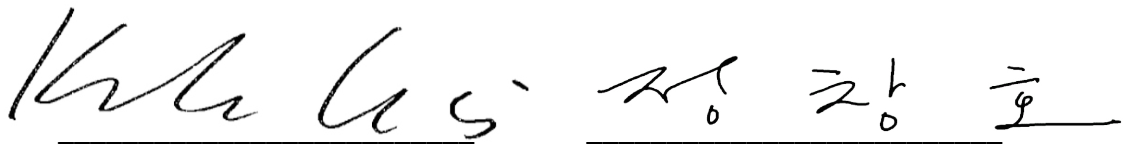
REJECTS the Request; and

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.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated this 17 February 2017

At The Hague, The Netherlands