

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 April 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 for leave to appeal the 'Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016'

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 Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on Defence request for leave to appeal the "Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016"'.¹

I. Background

1. On 24 February 2017, the Chamber granted a request filed by the Office of the Prosecutor ('Prosecution') for admission into evidence of the prior recorded testimony of Witness P-0016 ('Witness') and associated documents, pursuant to Rule 68(2)(c) of the Rules ('Impugned Decision').¹
2. On 6 March 2017, the defence team for Mr Ntaganda ('Defence') requested leave to appeal the Impugned Decision ('Request').²
3. On 10 March 2017, the Prosecution responded, urging the Chamber to dismiss the Request ('Prosecution Response').³

II. Submissions

4. The Defence seeks leave to appeal on the following four issues ('Issues'):
 - (i) Whether the Trial Chamber erred in determining that "the need for Article 56 measures could not have been concretely anticipated prior to the Prosecution's receipt of the Report in December 2016" ('First Issue');
 - (ii) Whether the Trial Chamber erred to the extent that it admitted the paragraphs of the 2005 Statement concerning the events at Kobu without considering whether the supposed *indicia* of reliability cited by the Trial Chamber made those paragraphs any more reliable ('Second Issue');

¹ Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, ICC-01/04-02/06-1802-Red.

² Request for leave to appeal "Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P 0016", ICC-01/04-02/06-1816-Conf.

³ Prosecution's response to the "Request for leave to appeal 'Decision on Prosecution application under rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016', ICC-01/04-02/06-1816-Conf", ICC-01/04-02/06-1819-Conf.

- (iii) Whether the Trial Chamber erred by relying on the existence of a *verbatim* record of the 2005 Statement that did not exist ('Third Issue'); and
 - (iv) Whether the Trial Chamber erred by relying on information concerning the Prosecution's efforts to contact Witness P-0016 that were not disclosed to the Defence ('Fourth Issue').⁴
5. The Defence submits that each of the Issues is appealable as they arise 'directly from the [Impugned] Decision' and were highly relevant or essential to the decision to admit the relevant material.⁵
 6. The Defence further avers that each Issue significantly affects the fair and expeditious conduct of the proceedings. In this regard, it submits that the admission of evidence, particularly a witness statement that was not subject to cross-examination, including allegations of the accused's knowledge about one alleged incident in particular, in and of itself significantly affects the fair conduct – and may also affect the outcome – of the proceedings.⁶
 7. The Defence submits that immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings as, *inter alia*, the admission of this evidence 'may directly impact on the scope of the evidence that the Defence is compelled to adduce during its case', and could 'impact on findings in the final judgment to such an extent that it would not be easily remedied on final appeal'.⁷
 8. The Prosecution submits that the Request should be dismissed on the basis that the Issues are 'mere disagreement[s] with the [Impugned] Decision' and do not constitute appealable issues within the meaning of Article 82(1)(d) of the Statute.⁸ It avers in particular that the Defence fails to articulate any concrete error of law or fact, fails to identify any issues arising from the Impugned Decision, and

⁴ Request, ICC-01/04-02/06-1816-Conf, para. 1 (footnotes omitted).

⁵ Request, ICC-01/04-02/06-1816-Conf, paras 2, 11-16.

⁶ Request, ICC-01/04-02/06-1816-Conf, paras 17-19.

⁷ Request, ICC-01/04-02/06-1816-Conf, para. 20 (footnotes omitted).

⁸ Prosecution Response, ICC-01/04-02/06-1819-Conf, paras 2, 5.

attempts to re-litigate the Defence position in relation to the Impugned Decision.⁹ The Prosecution further argues that the Defence fails to demonstrate that the Issues significantly affect the fair and expeditious conduct of the proceedings, or that immediate resolution of the Issues by the Appeals Chamber will materially advance the proceedings.¹⁰

III. Analysis

9. The Chamber incorporates by reference the applicable law as set out in previous decisions on requests for leave to appeal.¹¹
10. First, the Chamber observes that the Impugned Decision concerns a confined matter, namely the admission into evidence of the prior recorded testimony of one Prosecution witness pursuant to Rule 68(2)(c) of the Rules.
11. With regard to the Second Issue, while the Chamber finds that it arises from the Impugned Decision, given the confined nature of the matter dealt with therein, it is not persuaded that it is an issue that would significantly affect the fair and expeditious conduct of the proceedings. In this regard, the Chamber recalls that, in its determination in the Impugned Decision of whether any prejudicial effect would outweigh the probative value of the prior recorded testimony, the Chamber stated that it will 'approach the Statement with caution [...], particularly noting that cross-examination has not occurred to test such information',¹² and that 'such introduction is without prejudice to the weight, if any, which will be attached to the evidence admitted'.¹³ In light of this, the Defence's arguments in support of the requirements of Article 82(1)(d) of the Statute having been met are unduly speculative as to the Chamber's analysis of

⁹ Prosecution Response, ICC-01/04-02/06-1819-Conf, paras 6-19.

¹⁰ Prosecution Response, ICC-01/04-02/06-1819-Conf, paras 21-27.

¹¹ *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.

¹² Impugned Decision, ICC-01/04-02/06-1802-Red, para. 30.

¹³ Impugned Decision, ICC-01/04-02/06-1802-Red, para. 32.

the Statement in relation to paragraphs concerning the specific event identified by the Defence, the weight the Chamber may attribute to this and to the Statement as a whole, the degree of prejudice to the Defence that has been occasioned, and the concomitant impact on the fair conduct of proceedings. In this regard, the Chamber notes that the Defence failed to explain how these issues would significantly affect the expeditious conduct of the proceedings, as required by Article 82(1)(d) of the Statute.

12. The Defence has therefore failed to establish that the Second Issue constitutes an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In light of this, it is unnecessary for the Chamber to consider the remaining requirement of Article 82(1)(d) of the Statute. Nonetheless, noting that the Second Issue concerns the admission of the evidence of one witness, which the Chamber will assess in light of the evidence as a whole', the Defence has failed to show how, and the Chamber does not find that, an intervention of the Appeals Chamber at this stage may materially advance the proceedings.
13. With regard to the First, Third and Fourth Issues, the Chamber is not persuaded that they constitute 'issues' arising from the Impugned Decision within the meaning of Article 82(1)(d) of the Statute.
14. With regard to the First Issue, the Chamber considers that it constitutes a broad disagreement with the Chamber's determination that Article 56 measures could not have been anticipated, rather than identifying a sufficiently discrete issue arising from the Impugned Decision.¹⁴
15. The Chamber considers that the Third Issue misrepresents the Impugned Decision, which referred to 'any' transcripts and translations of the records of

¹⁴ See *similarly*, Decision on Defence request for leave to appeal the 'Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules', 13 February 2017, ICC-01/04-02/06-1784, para. 12, referring to relevant case law.

interview forming the basis of the Statement, and which had been 'disclosed'. The assertion that 'the issue appears to have been of great importance to the Chamber's decision to admit the 2005 Statement, if not determinative'¹⁵ is therefore unduly speculative and misrepresents the Impugned Decision insofar as it is predicated on the supposition that the existence of a *verbatim* recording of the interview was a factor relied on by the Chamber in reaching its decision to admit the Statement.

16. In respect of the Fourth Issue, the Chamber considers that it is a mere disagreement with the outcome of this part of the Impugned Decision, and thus does not arise therefrom. The Chamber recalls that the Defence was provided with access to the documents in question on 17 February 2017, prior to the rendering of the Impugned Decision, and elected to make no further submissions on the substance of those documents, beyond stating that 'the Prosecution should not be permitted to rely on materials that were neither disclosed nor communicated at the time the [Request] was submitted'.¹⁶ In light of this, the Chamber considers that the Fourth Issue is not an appealable issue for the purposes of Article 82(1)(d).

17. Having so found, it is unnecessary for the Chamber to continue to consider the remaining criteria under Article 82(1)(d) of the Statute with regard to the First, Third and Fourth Issues. Nonetheless, even if these issues were to constitute appealable issues, the Chamber considers that, for reasons similar to those expressed at paragraphs 11 and 12 above, they would not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, nor would their immediate resolution by the Appeals Chamber materially advance the proceedings.

¹⁵ Request, ICC-01/04-02/06-1816-Conf, para. 14.

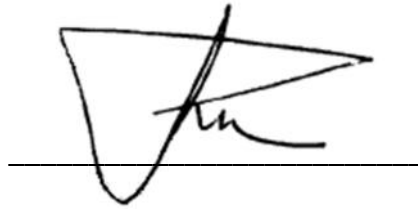
¹⁶ Email from the Defence to the Chamber and Prosecution, 20 February 2017, at 15:19.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the parties to file public redacted versions of their respective filings, within two weeks of notification of the present decision.

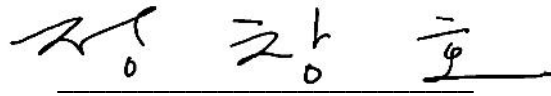
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of stylized Korean characters, positioned above a horizontal line.

Judge Chang-ho Chung

Dated this 7 April 2017

At The Hague, The Netherlands