

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/04-02/06
Date: 2 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 the Defence request for leave to appeal the 'Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 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

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 the Defence request for leave to appeal the "Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b)'"'.¹

I. Background

1. On 12 January 2017, the Chamber provisionally granted a Prosecution request for admission into evidence of the prior recorded testimony of Witness P-0039 ('Decision'), pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules').¹
2. On 18 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 23 January 2017, the Legal Representative of the victims of the attacks ('LRV') filed his response ('LRV Response').³ On the same day, the Office of the Prosecutor ('Prosecution') filed its response ('Prosecution Response').⁴

¹ Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), ICC-01/04-02/06-1715-Conf. A public redacted version was filed on the same day as ICC-01/04-02/06-1715-Red.

² Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's "Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b)", dated 12 January 2017, ICC-01/04-02/06-1732-Conf, paras 1, 16.

³ Response of the Common Legal Representative of the Victims of the Attacks to the "Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's 'Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b)', dated 12 January 2017", ICC-01/04-02/06-1736-Conf.

⁴ Prosecution's response to the Defence application for leave to appeal the Chamber's conditional admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), ICC-01/04-02/06-1740-Conf.

II. Submissions

4. The Defence seeks leave to appeal on the issue 'whether the prior testimony of Witness P-0039 is admissible under Rule 68(2)(b)' ('Issue').⁵ The Defence submits that the Issue constitutes an appealable issue as opposed to a mere disagreement, as the prior recorded testimony of Witness P-0039 is 'directly related to events which the Chamber must assess and attribute probative value [...] with a view to adjudicating the charges laid against the Accused'.⁶ In addition, the Defence contends that the Issue touches upon the accused's right to challenge the evidence brought against him and that this right 'far outweighs the potential prejudice in the admission of prior recorded testimony of Witness P-0039', thus affecting the fair and expeditious conduct of the proceedings.⁷ The Defence further contends that absent an immediate resolution by the Appeals Chamber, this evidence could potentially be relied on by the Chamber in its judgment, without the possibility for the accused to cross-examine Witness P-0039.⁸
5. The Prosecution submits that the Request should be rejected because it does not fulfil the requirements of Article 82(1)(d) of the Statute.⁹ According to the Prosecution, the Issue amounts to a mere disagreement with the outcome of the Decision and the Defence failed to raise 'any concrete error of law or fact at all'.¹⁰ The Prosecution further submits that the Issue does not significantly affect the fair and expeditious conduct of the proceedings, as the Defence's only argument in this regard rests on its 'erroneous view that no evidence may be admitted except through a witness subject to cross-examination'.¹¹ Moreover,

⁵ Request, ICC-01/04-02/06-1732-Conf, para. 1.

⁶ Request, ICC-01/04-02/06-1732-Conf, para. 10.

⁷ Request, ICC-01/04-02/06-1732-Conf, paras 12-13.

⁸ Request, ICC-01/04-02/06-1732-Conf, para. 14.

⁹ Prosecution Response, ICC-01/04-02/06-1740-Conf, paras 1, 13.

¹⁰ Prosecution Response, ICC-01/04-02/06-1740-Conf, para. 5.

¹¹ Prosecution Response, ICC-01/04-02/06-1740-Conf, para. 9.

the Defence ‘does not even attempt to argue that the proposed issue affects the outcome of the trial’.¹² Lastly, it contends that an immediate resolution of the Issue by the Appeals Chamber will not materially advance the proceedings, as the Issue falls within the discretion of the Chamber pursuant to Rule 68(2)(b)(i) of the Rules.¹³ Contrary to the Defence’s position, the Prosecution submits that any error related to the use of prior recorded testimony of Witness P-0039 in the final judgment of the Chamber can be remedied by the exercise of the accused’s right to appeal the final judgment itself.¹⁴

6. In his submissions, the LRV contends that the Defence failed to identify an appealable issue arising from the Decision. In this respect, it is submitted that the Issue constitutes the very subject matter of the Decision and, by requesting leave to appeal the proposed Issue, the Defence is essentially seeking to litigate anew the admissibility of prior recorded testimony of Witness P-0039.¹⁵ Accordingly, the Issue is a mere disagreement with the Chamber’s conclusion and, therefore, does not meet the first criterion of Article 82(1)(d) of the Statute.¹⁶

III. Analysis

7. The Chamber incorporates by reference the applicable law as set out in previous decisions on leave to appeal.¹⁷
8. 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

¹² Prosecution Response, ICC-01/04-02/06-1740-Conf, para. 9.

¹³ Prosecution Response, ICC-01/04-02/06-1740-Conf, para. 11.

¹⁴ Prosecution Response, ICC-01/04-02/06-1740-Conf, para. 11.

¹⁵ LRV Response, ICC-01/04-02/06-1736-Conf, para. 19.

¹⁶ LRV Response, ICC-01/04-02/06-1736-Conf, para. 19.

¹⁷ *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.

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'.¹⁸ The Chamber observes that the Issue, as formulated, is inconsistent with the above requirement, insofar as it constitutes a disagreement with the Decision as such, rather than identifying a sufficiently discrete issue arising therefrom.¹⁹ Indeed, no specific error is clearly identified in the Request. The Chamber notes that the Defence's general submissions regarding the right of an accused to examine witnesses against him appear to attempt to challenge the premise of Article 69(2) and of Rule 68(2)(b) themselves, rather than their application by the Chamber in this instance.

9. 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.
10. 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 notes that the Request fails to explain how the expeditious conduct of proceedings would be impacted, and the only basis upon which the Defence submits that the outcome of the trial would be affected is that the evidence 'may be considered by the Chamber when rendering its Judgment'.²⁰ The Chamber considers such submission inadequate to meet the requirements of Article 82(1)(d).

¹⁸ *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.

¹⁹ *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.

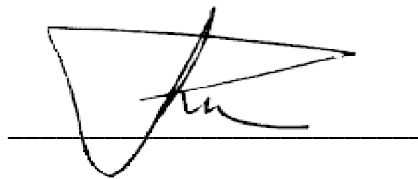
²⁰ Request, ICC-01/04-02/06-1732-Conf, para. 2.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

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

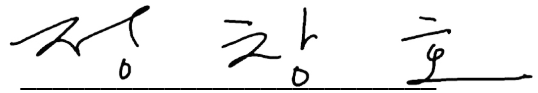
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 2 February 2017

At The Hague, The Netherlands