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No.: **ICC-01/04-02/06**
Date: **18 December 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 “Prosecution’s observations on the modalities of further testimony of Witness P-0290”, 6 December 2017, ICC-01/04-02/06-2144-Conf

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Introduction

1. Trial Chamber VI (“Chamber”) notified the Parties and participants that it is considering recalling Witness P-0290 for a further examination, in particular in light of the evidence presented by the Defence, and has invited observations about the modalities of this testimony.

2. As a preliminary matter, it should be recalled that the Defence chose not to cross-examine Witness P-0290 during his testimony as part of the Prosecution’s case. The Chamber subsequently rejected the Defence’s request to recall him either prior to the close of the Prosecution’s case or as a Defence witness. As such, any examination by the Parties and participants should be strictly limited to issues arising from his examination by the Chamber. In particular, this should not be an opportunity for the Defence to cross-examine this witness on his prior *viva voce* testimony.

Confidentiality

3. In accordance with regulation 23bis(2) of the Regulations of the Court, this Response is classified as ‘Confidential’ [REDACTED].¹ The Prosecution will file a public redacted version.

Procedural History

4. [REDACTED].² Both at the start of his testimony and at the close of the examination-in-chief, the Defence advised the Chamber that it was not in a position to cross-examine the witness, and that it would seek to recall him at a

¹ ICC-01/04-02/06-1133-Conf.

² [Redacted].

later stage for this purpose.³ In response, the Chamber advised that it believed the Defence was able to conduct the cross-examination as scheduled, warned the Defence that failure to do so could be construed as a waiver of the right to cross-examine him and that “cogent reasons” would need to exist to warrant recalling him.⁴

5. On 25 January 2017, the Defence requested that the Chamber recall Witness P-0290 either as a Prosecution witness prior to the end of the presentation of the Prosecution case or, alternatively, as a Defence witness.⁵ The Prosecution opposed this request arguing that the Defence had not shown good cause or compelling circumstances justifying the exceptional remedy of recalling Witness P-0290.⁶
6. On 17 February 2017, the Chamber rejected the Defence request on the basis that the Defence did not demonstrate cogent reasons to do so, but held that this finding was without prejudice to any future decision to itself recall this witness at a later stage, if necessary for the determination of the truth.⁷
7. On 10 November 2017, the Chamber notified the Parties and participants by email that it was considering calling Witness P-0290 to give further evidence.⁸
8. On 17 November 2017, the Defence requested clarification and direction concerning the potential recall of Witness P-0290, and specifically that the Chamber define: (i) the proper scope of any such testimony; (ii) the modalities of

³ [Redacted].

⁴ [Redacted].

⁵ ICC-01/04-02/06-1751-Red2.

⁶ ICC-01/04-02/06-1775-Red.

⁷ ICC-01/04-02/06-1791-Conf, paras. 11-13, 16 and 17.

⁸ Email from Trial Chamber VI Communications to the Parties and participants sent on 10 November 2017 at 15:16, further to ICC-01/04-02/06-1791-Conf, para. 17.

the witness' testimony; and (iii) any safeguards envisaged to protect the rights of the Accused.⁹

9. On 22 November 2017, the Prosecution urged the Chamber to reject the Defence request submitting, *inter alia*, that the Chamber has the inherent authority to recall witnesses and already indicated it would provide further guidance on the modalities of this testimony in due course.¹⁰
10. On 29 November 2017, the Chamber invited the Parties and participants to submit observations on the modalities of Witness P-0290's testimony, such as the order, scope, mode and length of questioning, should the Chamber decide to recall him.¹¹

Prosecution Submissions

11. The Prosecution makes the following submissions relating to the order, scope, mode and length of examination, as well as other considerations, in light of the possibility that the Chamber will call Witness P-0290 to give further evidence [REDACTED].

Order of examination

12. The Chamber is considering calling Witness P-0290 to give further testimony. Accordingly, if recalled, Witness P-0290 should be considered the Chamber's witness and first be examined by the Chamber, then by the Prosecution, then by the Legal Representatives of Victims ("LRV") (if applicable), and finally, by the Defence further to rule 140(2)(d) of the Rules.

⁹ ICC-01/04-02/06-2120, para. 5.

¹⁰ ICC-01/04-02/06-2123. The Chamber set the deadline for this response via email sent 20 November 2017 at 11:23.

¹¹ ICC-01/04-02/06-2134, para. 6.

13. This proposed order follows the procedure established by Trial Chamber III in the *Bemba* proceedings when it heard the testimony of Chamber witness CHM-01.¹² Additionally, Trial Chamber III advised that as per usual practice, it may intervene at any time during the examination by the parties or participants to pose additional questions or seek clarification from the witness.¹³
14. In the *Bemba* proceedings, Trial Chamber III also recalled a Prosecution witness following the close of all evidence in the case (thereby reopening the presentation of evidence¹⁴) for the limited purpose of hearing testimony on “issues arising out of Witness P-0169’s various allegations and issues of witness credibility.”¹⁵ At that time, Trial Chamber III noted that as it elected to recall Witness P-0169 as a Chamber witness, there was to be no further contact by the parties or participants prior to his testimony,¹⁶ [REDACTED].¹⁷
15. The order of questioning during the further testimony of Witness P-0169 was similarly, first the Chamber, followed by the Prosecution, the LRVs (provided a written application was made and granted) and the Defence.¹⁸
16. In the *Lubanga* proceedings, Trial Chamber I called two expert witnesses at the beginning of the Prosecution’s case.¹⁹ During their testimony, each expert was

¹² ICC-01/05-01/08-2863-Red, para. 7.

¹³ This practice and the order of questioning were reiterated by the Presiding Judge at the start of CHM-01’s testimony on 18 November 2013 (*see*: ICC-01/05-01/08-T-353-Red-ENG CT, p. 1, ln. 23 to p. 2, ln. 13).

¹⁴ The parties and participants were permitted to make written submissions in relation to this further testimony and any related evidence (ICC-01/05/01/08-3154-Red2, paras. 33 and 50(xvi)).

¹⁵ ICC-01/05/01/08-3154-Red2, paras. 31 and 50(ii).

¹⁶ ICC-01/05/01/08-3154-Red2, para. 43.

¹⁷ Email from Trial Chamber VI Communications to the Parties and participants sent on 10 November 2017 at 15:16.

¹⁸ ICC-01/05/01/08-3157-Red, para. 3. The order of questioning was reiterated by the Presiding Judge at the start of P-0169’s further testimony on 22 October 2014, as was the instruction that the Chamber may intervene during the examination of the parties and participants to pose additional questions or seek clarification from the witness (ICC-01/05-01/08-T-361-Red-ENG WT, p. 6, ln. 20 to p. 7, ln. 5).

¹⁹ The experts were Elisabeth Schauer, an expert in trauma (DRC-CHM-WWWW-0001) and Roberto Garreton, an expert in the background and context of the conflict (DRC-CHM-WWWW-0002). Trial Chamber I instructed the experts (**DRC-CHM-WWWW-0001**: ICC-01/04-01/06-1671; **DRC-CHM-WWWW-0002**: ICC-01/04-01/06-1558) after having received submissions from the parties and participants about the specific areas to be addressed by the Chamber-appointed experts both in respect to their expert reports and in their *viva voce*

first qualified by the Presiding Judge and their CV and expert report admitted into evidence, then the expert gave a summary of the main parts of their report (unprompted by questions), following this, the Prosecution asked questions, then the LRVs and last the Defence.²⁰ The experts were both also briefly examined by the Chamber.²¹ Given that these were expert (as opposed to fact) witnesses, the modality of their testimony is less applicable to the circumstances in the present case and, respectfully, should not be followed.

Scope of examination

17. The Parties and participants should be strictly limited to only asking Witness P-0290 about matters raised by the Chamber in the course of its examination. [REDACTED]. Accordingly, the Chamber's questions should be limited to topics that were not already covered during Witness P-0290's testimony, [REDACTED].
18. [REDACTED],²² [REDACTED].²³ [REDACTED],²⁴ [REDACTED].²⁵ Witness P-0290 may be in a position to give specific evidence on these points.
19. The Prosecution underscores that this is neither an opportunity for the Defence to conduct a cross-examination, nor for the Prosecution to conduct a re-examination of the witness on his previous testimony. Questions from the Parties and participants, if allowed, must be strictly confined to the precise topics raised by the Chamber.

testimony (**DRC-CHM-WWWW-0001**: ICC-01/04-01/06-1559-Conf, para. 5; **DRC-CHM-WWWW-0002**: ICC-01/04-01/06-T-88-ENG, at pp. 8-9).

²⁰ **DRC-CHM-WWWW-0001**: ICC-01/04-01/06-T-166-ENG CT WT; **DRC-CHM-WWWW-0002**: ICC-01/04-01/06-T-193-ENG ET WT and ICC-01/04-01/06-T-194-ENG ET WT.

²¹ **DRC-CHM-WWWW-0001**: ICC-01/04-01/06-T-166-ENG CT WT, p. 91, ln. 23 to p. 97, ln. 17; **DRC-CHM-WWWW-0002**: ICC-01/04-01/06-T-194-ENG ET WT, p. 41, ln. 23 to p. 47, ln. 25.

²² [Redacted].

²³ [Redacted]. [Redacted].

²⁴ [Redacted]. [Redacted].

²⁵ [Redacted].

20. When Trial Chamber III recalled Witness P-0169 in the *Bemba* proceedings, the scope of questioning – for both the Chamber and the parties and participants – was narrowly confined to the “various allegations and issues related to witness credibility.”²⁶ Trial Chamber III further advised the parties and participants that it would rule on the relevance of questions either on its own motion or at the request of a party or the LRV.²⁷

Mode of examination

21. The Prosecution anticipates conducting any further examination of Witness P-0290 using open-ended, non-leading questions, as it did during its examination-in-chief of this witness. If either of the LRVs apply and are granted leave to examine the witness, they should similarly conduct their examination using neutral, open-ended questions.

22. With respect to the manner of Defence questioning, the Prosecution notes that Trial Chamber III in the *Bemba* proceedings ordered the parties and participants to *all* put only neutral, non-leading questions to the Witnesses CHM-01 and P-0169 unless otherwise authorised by the Chamber.²⁸ The same rules for the manner of questioning by Defence Counsel should apply in this case, as the witness will be recalled as a Chamber witness. The parties and participants should use non-leading questions unless otherwise authorised. If exceptional circumstances so require, the Defence may seek leave from the Chamber to ask leading questions.

²⁶ ICC-01/05/01/08-3157-Red, para. 4.

²⁷ *Ibid.*

²⁸ ICC-01/05-01/08-2863-Red, para. 9 and ICC-01/05/01/08-3157-Red, para. 5.

23. The Prosecution reiterates that any examination by the Defence ought to be strictly confined to only about information elicited by the Chamber (or the Prosecution) in the course of this examination.

Length of questioning

24. The length of the Prosecution's examination will largely depend on the nature and extent of the evidence elicited by the Chamber in the course of its examination of the witness. With this caveat, the Prosecution anticipates it will need approximately one hour to examine Witness P-0290. However, the Prosecution reserves the right to update this estimate once it has further information about the scope of the Chamber's examination and after hearing the additional testimony of the witness.²⁹

Other considerations

25. [REDACTED].³⁰

26. [REDACTED]³¹ [REDACTED]³² [REDACTED]. [REDACTED]. In accordance with the Decision on the conduct of proceedings, the Parties and participants should be required to produce a list of any documents they intend to use in advance of the testimony, and any documents used should have a connection to the witness.³³

²⁹ In the *Bemba* proceedings, Trial Chamber III indicated that it would require approximately four hours to examine Witness P-0169, and granted each of the parties the same amount of time (ICC-01/05/01/08-3157-Red, para. 9).

³⁰ [Redacted].

³¹ [Redacted].

³² [Redacted].

³³ ICC-01/04-02/06-619, paras. 31-33. *See also*: ICC-01/05-01/08-2863-Red, para. 10 and ICC-01/05/01/08-3157-Red, para. 6-8.

Conclusion

27. Further to the request of the Chamber, the Prosecution makes the above submissions relating to the order, scope, mode and length of examination, as well as other considerations, should the Chamber call Witness P-0290 to give further evidence.



Fatou Bensouda
Prosecutor

Dated this 18th day of December 2017
At The Hague, The Netherlands