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Date: **16 February 2016**

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 “Request on behalf of Mr Ntaganda seeking leave to appeal oral decision of 10 February 2016 concerning use of out-of-court statements during direct examination”, 16 February 2016, ICC-01/04-02/06-1173-Conf

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Further to Trial Chamber VI (“Chamber”)’s oral decision of 10 February 2016 (“Impugned Decision”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Request on behalf of Mr Ntaganda seeking leave to appeal oral decision of 10 February 2016 concerning use of out-of-court statements during direct examination

(“Defence Request”)

INTRODUCTION

1. The Defence requests leave to appeal the Chamber’s oral decision permitting the Office of the Prosecutor (“Prosecution”) during its direct examination to “confront” witnesses with out-of-court statements if and when there is a “discrepancy” with their in-court testimony.² This practice, articulated without qualification or condition, has potentially wide-ranging ramifications for the conditions in which testimony will be heard in this case, especially on sensitive issues. Immediate resolution will provide clarity as to whether the approach adopted is correct, and ensure that any evidence improperly received does not infect the Chamber’s deliberations. The need for such clarity is compelling particularly because other Trial Chambers have rejected the approach adopted in the Impugned Decision.

PROCEDURAL BACKGROUND

2. On 2 June 2015, the Chamber issued its *“Decision on the conduct of proceedings”*³ which provides, *inter alia*, that:

During examination-in-chief, the calling party shall use, as a matter of principle, non-leading questions. On preliminary matters necessary to provide background or context, as well as any other matter which is not contested or when the opposing party agrees to leading questions, or where such questions are otherwise deemed appropriate by the

¹ ICC-01/04-02/06-T-65, p.58, ll.2-8, p.58, l.25 to p.59, l.16.

² ICC-01/04-02/06-T-65, p.58.

³ 2 June 2015, ICC-01/04-02/06-619 (“Decision on the Conduct of Proceedings”).

Chamber, the calling party may put information to a witness by way of leading questions. If a witness is not desirous of providing the expected evidence and has been declared hostile by the Chamber, the calling party may ask leading questions. [...] The calling party may request permission to refresh the witness's memory using the witness statement(s). If the Chamber allows the memory of the witness to be refreshed, the witness shall be given an opportunity to read the relevant section of his or her prior statement, or, as appropriate, the calling party may read the relevant section to the witness. During cross-examination, parties may use leading questions.⁴

3. On 10 February 2016, Prosecution Witness P-0290 responded to numerous Prosecution questions designed to ascertain the witness's knowledge about [REDACTED]. The witness's answers varied:

[REDACTED]⁵

[...]

[REDACTED]⁶

[...]

[REDACTED]⁷

4. After one further attempt to have the witness say that [REDACTED], the Chamber instructed the Prosecution to move to a new topic.
5. After the lunch break, the Prosecution returned and started to ask additional questions whose purpose was to elicit testimony that [REDACTED]. During arguments on the permissibility of these questions, the Prosecution represented that the witness "in his statements [...] unequivocally states that [REDACTED]."⁸
6. On the basis of this representation, the following argument by the Prosecution was presented, and ruling of the Chamber issued:

MR IVERSON: Also just to make the Chamber aware, we've noticed the apparent discrepancy between the statement and the testimony. I

⁴ Decision on the Conduct of Proceedings, para.26.

⁵ ICC-01/04-02/06-T-65, p.41, ll.2-9.

⁶ ICC-01/04-02/06-T-65, p.42, ll.2-19.

⁷ ICC-01/04-02/06-T-65, p.44, l.25 to p.45, l.2.

⁸ ICC-01/04-02/06-T-65, p.56, l.5.

would like an opportunity to explore that to see if the witness has an explanation for that. So to the extent that I want to just verify that those types of questions would be allowed by the Chamber.

[....]

PRESIDING JUDGE FREMR: I think it was clear from my previous statement that we are also against the -- prohibit Mr Iverson to ask the same question, even if slightly different manner again. **But just to confront a witness with his previous statement, which is really completely different, I think it's -- it's possible. So now, court officer, please bring witness back.**⁹

7. The Prosecution then, in response to Defence submissions, offered a further explanation of its proposed course of action and the Chamber clarified the basis of its ruling:

MR IVERSON: Your Honour, we're not seeking to have the witness declared hostile. We're also not seeking to refresh his recollection. At no point did he state "I don't remember," which would be the predicate for refreshing the recollection. What we're asking to do is to explore the apparent inconsistency and allow the witness to explain. We're also not asking to ask leading questions. My intent is just to ask if he's able to explain. And if he is, then that is his answer. And that would be my intent, your Honour.

[...]

PRESIDING JUDGE FREMR: So after our silent deliberation, we insist, or the Chamber insists what I have already said that, in our view, it's also -- it's a different situation compared to declaring witness hostile, which would allow even to put leading questions to the party calling the witness, **but still we consider it as, in effect, a way of refreshing his memory because today he testified in different way, while in the written statement he testified and there are no, at least according this statement, no doubt on his part, so I think this discrepancy should be clarified.** [...] And one, my additional comment, you know, as concerns the institute of hostile witness, in fact it's not in the statutory framework of the Court, it's just part of this jurisprudence strongly influenced by common law system. And I don't think that, you know, this hostile witness method should be used in a way that would prevent the Chamber to find the truth which is our main - main - role.¹⁰

APPLICABLE LAW

8. A decision is subject to appeal, pursuant to Article 82(1)(d), where it:

⁹ ICC-01/04-02/06-T-65, p.56, ll.17-20, p.57, ll.16-20 (emphasis added).

¹⁰ ICC-01/04-02/06-T-65, p.58, ll.2-8, p.58, l.25 to p.59, l.16 (emphasis added).

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

9. Even though leave to appeal has been viewed as “exceptional”, it is nonetheless an important procedure that can “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹¹
10. The Prosecution has previously submitted in other proceedings, with which the Defence agrees, that a request for leave to appeal “must not engage on the merits or correctness of a Decision.”¹² The sole issue of concern, unlike in a request for reconsideration, is the consequences – not the correctness – of the decision for the conduct of proceedings, and the potential benefits for the conduct of proceedings that would accordingly arise from immediate appellate intervention.
11. Article 82(1)(d) confers no discretion to deny leave when the conditions are satisfied.

SUBMISSIONS

I. The Impugned Decision involves an appealable issue

12. The Chamber permitted the Prosecution to “confront” a witness with his prior statement during its direct examination thereof in order to “clarify” why there was a discrepancy between the testimony given in court and the prior statement. The issue for appeal and the Impugned Decision itself are co-extensive:

¹¹ *Situation in the Democratic Republic of the Congo*, “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, para. 19 (“DRC, Appeals Chamber LtA Decision”).

¹² *Bemba et al.* case, “Corrected version of ‘Prosecution’s application for leave to appeal the ‘Decision on Witness Preparation and Familiarisation’, 21 September 2015, ICC-01/05-01/13-1276,” ICC-01/05-01/13-1276-Corr, 21 September 2015, para. 24.

Whether it is permissible for a party conducting an examination-in-chief to confront a witness with a prior statement purely on the basis of a purported discrepancy with a prior statement, rather than being subject to the well-established conditions of refreshing recollection, or declaration of hostility

("Issue")

13. The Appeals Chamber has defined an "issue" as "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination" and as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion."¹³ "Essential" in this context is understood as meaning essential to some judicial disposition, and "not merely a question over which there is disagreement or conflicting opinion."¹⁴ Issues that have previously been recognised as appealable range from the correctness of a particular determination to the standard that has been applied as part of a determination. An appealable issue may be "legal or factual or mixed."¹⁵ An example of the former includes the following broadly formulated issue recently approved for interlocutory appeal by another Trial Chamber:

Whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution's cooperation request, such that it ought to have referred the matter to the Assembly of States Parties ('ASP'); or in the alternative, if the Chamber's findings are not considered 'formal' or 'judicial' findings under Article 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP.¹⁶

14. Examples of issues that are more legal in nature include:

¹³ DRC, Appeals Chamber LtA Decision, para.9. See "Decision on 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. 15.

¹⁴ Lubanga case, "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim's Participation of 18 January 2008", 26 February 2008, ICC-01/04-01/06-1191, para. 8.

¹⁵ DRC, Appeals Chamber LtA Decision, para. 9.

¹⁶ Kenyatta case, "Decision on the Prosecution's request for leave to appeal", 9 March 2015, ICC-01/09-02/11-1004 ("Kenyatta, Decision on Prosecution LtA"), para. 9(i), 25.

Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of “interference.”¹⁷

[...]

“Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law.”¹⁸

[...]

The correctness of the standard and procedure established and applied by the Trial Chamber to determine whether the identity of an intermediary must be disclosed under Rule 77.¹⁹

15. A Trial Chamber has the discretion to re-formulate issues posited for appeal as it deems necessary and fit²⁰ and, as illustrated above, such issues may be formulated in the alternative.²¹
16. The Issue as stated above is manifestly an issue that is appealable. The Issue is inextricably connected with a procedure by which the Prosecution adduced evidence, and is an issue that will evidently be the basis for future decisions. The manner in which the Issue is articulated above falls within the range between factual and specific as previously recognized by Trial Chambers in granting leave. However, the Defence has no objection to the Chamber re-formulating the Issue as it deems appropriate.

II. The Impugned Decision involves an issue that will significantly affect the fair and expeditious conduct of proceedings or the outcome of trial

17. The second requirement under Article 82(1)(d) is that the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.

¹⁷ *Ruto et al.* case, “Decision on the Defence’s Applications for Leave to Appeal the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, 10 September 2015, ICC-01/09-01/11-1953-Red-Corr (“*Ruto et al.*, Decision on Defence LtA”), paras. 20(v), 21.

¹⁸ *Ruto et al.*, Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, ICC-01/09-01/11-817, 18 July 2013, para. 2(ii), 18-19.

¹⁹ *Lubanga*, Decision on the prosecution request for leave to appeal the “Decision on Intermediaries”, ICC-01/04-01/06-2463-Conf, 2 June 2010, paras. 2, 8.

²⁰ *Ruto et al.*, Decision on Defence LtA, para. 20.

²¹ *Kenyatta*, Decision on Prosecution LtA, para. 9(i), 25.

18. A principle common to civil and common law systems alike is that the evidence of a witness is what is said in the courtroom, not what has been previously recorded outside of the courtroom. For example, the German Code of Criminal Procedure provides in relevant part:

If proof of a fact is based on the observation of a person, such person shall be examined at the main hearing. The examination shall not be replaced by reading out the record of a previous examination or reading out a written statement.²²

19. This principle is enshrined in Article 69(2) of the ICC Statute:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measure set forth in article 68 or in the Rules of Procedure and Evidence.

20. This principle would, of course, be undermined if the party presenting the evidence of a witness were permitted to suggest answers to a witness, rather than posing neutral questions that permit the witness to describe his or her observations under proper conditions.²³ This would damage, not facilitate, the search for the truth. ICC Trial Chambers are aware of this danger and have, almost without exception, prohibited the examining party from posing questions that suggest a particular answer:

When the calling party is examining a witness, it shall do so with neutral questions.²⁴

[...]

The purpose of the ‘examination-in-chief’ is ‘to adduce by the putting of proper questions [...] relevant and admissible evidence which supports the contentions of the party who calls the witness’. It follows from this purpose that the manner of such questioning is neutral and that leading

²² German Code of Criminal Procedure, s.250.

²³ *Katanga* case, “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 20 November 2009, ICC-01/04-01/07-1665, para. 66, fn. 32 (defining a leading question as a “question framed in such a way as to suggest the answer sought or to assume the existence of facts not yet established.”)

²⁴ *Gbagbo* case, “Directions on the conduct of proceedings”, 3 September 2015, ICC-02/11-01/15-205, para. 34.

questions (i.e. questions framed in a manner suggestive of the answers required) are not appropriate.”²⁵

[...]

The party calling the witness is therefore not allowed to ask leading or closed questions, unless they pertain to an issue that is not in controversy.²⁶

21. As the *Gbagbo* Trial Chamber has explained, exceptions to this rule can arise in “exceptional circumstances.”²⁷ The two exceptions that have been recognized by ICC Trial Chambers to date are: (i) a witness is perceived by the calling party to be lying, which may lead to a declaration by the Trial Chamber that the witness is “hostile”; or (ii) a witness professes an inability to recall a specific relevant fact about which they have commented in an out-of-court statement.

22. As to the former, the *Katanga* Trial Chamber explained:

However, if a party declares that the witness it has called has become adverse and the Chamber allows that party to continue questioning the witness, it may be appropriate for that party to cross-examine the witness. In such case, cross-examination must be limited to issues raised during the initial part of the interrogation or contained in the witness' previous statements.²⁸

23. The justification and scope of the latter has also been explained by the *Katanga* Trial Chamber:

In principle, a witness shall testify to what he or she remembers having observed. Witnesses are not allowed to simply read from earlier statements or documents. However, given the length of time that has passed between the facts relevant to this case and the often traumatic nature of the facts to which the witnesses have to testify, the Chamber may allow witnesses to refer to documents in order to refresh their memory, but only insofar as:

²⁵ *Lubanga* case, “Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims”, 16 September 2009, ICC-01/04-01/06-2127, para. 23.

²⁶ *Katanga* case, “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 20 November 2009, ICC-01/04-01/07-1665, para. 66.

²⁷ *Gbagbo* case, “Directions on the conduct of proceedings”, 3 September 2015, ICC-02/11-01/15-205, para. 34.

²⁸ *Katanga* case, “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 20 November 2009, ICC-01/04-01/07-1665, para. 67.

The documents in question contained the personal recollections of the witness, and

Copies of the document have been made available to the opposing party, who may rely on the parts referred to by the witness during cross-examination.²⁹

24. ICC practice confirms, in accordance with the principle of orality and the rule against leading questioning, that the need for “refreshing recollection” must be specifically established and that any questions based on out-of-court statement must be tailored to the extent of the memory lapse.³⁰ Where it has been permitted, the practice is subject to two express pre-conditions. First, the calling party must demonstrate the precise nature of the memory lapse that cannot be remedied through questioning. This ensures that the witness’s actual state of recollection is established clearly for the record before the refreshment exercise is undertaken, which in turn assists the Chamber to assess the weight to be accorded to that refreshed recollection.³¹ The fact that the previous statement was prepared with the involvement of the calling party may be a factor militating against the use of the document as a means of refreshing recollection.³²
25. Crucially for present purposes, Trial Chambers have rejected recourse to out-of-court statements for “refreshment” where the witness did not seem to be suffering from a lapse of memory, but was merely departing from

²⁹ *Katanga* case, “Directions for the conduct of proceedings and testimony in accordance with rule 140”, 20 November 2009, ICC-01/04-01/07-1665, para. 109. See *Gbagbo* case, “Directions on the Conduct of Proceedings”, 3 September 2015, ICC-02/11-01/15-205, para. 47 (adopting the same approach as the *Katanga* Trial Chamber).

³⁰ See e.g. *Lubanga* case, “Prosecution’s Submissions pursuant to the Trial Chamber’s ‘Decision on prosecution’s requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008’”, 10 June 2008, ICC-01/04-01/06-1390, paras.8, 13, 18 (referring to the practice as “exceptional”).

³¹ ICTY, *Hadžihasanović* case, “Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness”, 2 April 2004, IT-01-47-AR73.2 (“if refreshment is permitted, the Trial Chamber may consider the means by which the memory was refreshed, when assessing the reliability and credibility of the witness’s testimony”).

Available at: http://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/040402.htm.

³² *Katanga* case, ICC-01/04-01/07-T-86, 27 November 2009, p.25, ll.1-2 (“the objection of Counsel O’Shea is favourably received and you can continue with another question”).

what had been previously said. As the *Katanga* Trial Chamber summarized its own approach:

[t]he Chamber decided that, having regard to the precise circumstances of P-250's testimony, it did not consider that it was necessary to refresh P-250's memory by showing him his previous statements. In coming to this conclusion, the Chamber specifically took into consideration the fact that P-250 sometimes provided seemingly inconsistent answers as compared to his prior statements. On the facts, the Chamber considered that the witness did not lack memory and thus paragraph 109 was not applicable.³³

26. The Prosecution agreed with this approach in the *Katanga* case, objecting to the very procedure that it now wishes to use in this case:

he's at this point trying to refresh the witness's memory with the statement, and I understand that at this point that he's trying to make an application to refresh the witness's memory on this issue. Now, to the extent that that application is being made, let me say that the Prosecution is opposed to that application, if it is indeed being made, because the way the witness has been responding to questions so far and clearly being able to remember issues that were broached during his direct examination and cross-examination. So, Mr. President, we are opposed to that application and it is an inappropriate use of the statement of the witness at this stage of the proceedings.³⁴

27. The *Bemba et al.* Trial Chamber, which is composed of a majority of civil law judges, including its presiding judge, after initially allowing the Prosecution to resort to prior statements in cases of mere discrepancy, granted a Defence motion (albeit with one modification) to restrict the practice in line with previous ICC jurisprudence:

From the outset the Defence's proposal for refreshing recollection appears to be reasonable. The Chamber would appreciate it if the examining party would first try to elicit the information sought by asking direct questions before seeking to refresh the witness's recollection. However, the Chamber deems it not necessary to ask the

³³ *Katanga* case, "Decision on the 'Prosecution's Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility'", 11 March 2010, ICC-01/04-01/07-1958, 11 March 2010, para. 15.

³⁴ *Katanga* case, ICC-01/04-01/07-T-308-ENG, 12 September 2011, p.14, ll.1-10.

witness before such try to recollect his memory if he or she believes his or her memory would be refreshed.³⁵

28. The *Bemba et al.* Trial Chamber has subsequently applied this ruling, insisting that the particular memory lapse of a witness be established before the examining party is permitted to resort to the out-of-court statement. A mere discrepancy between testimony and an out-of-court statement is not a permissible basis for using the latter during direct examination.
29. This approach does not reflect an unthinking application of common law, nor to obstruct the search for truth. The rule, rather, is well-suited to ensure that testimony is adduced under conditions most appropriate to ascertaining the truth given the particular circumstances of international criminal investigations and trials. Many out-of-court statements are taken by the Prosecution, regrettably, without any *verbatim* record of questions and answers. The very statement shown to Witness P-0290 contains no indication of questions and answers, let alone a *verbatim* record of the answers. Paragraph 18 of that statement³⁶ contains no record of whether the Prosecution investigators asked leading questions in order to yield the purported statement from the witness that “[REDACTED].” In fact, the witness’s testimony before the Chamber clarifies that the witness’s understanding of [REDACTED] encompasses [REDACTED]. Paragraph 18 of the statement is ambiguous and does not transparently show the Chamber how this information – assuming that it is even correctly recorded – was produced.³⁷
30. The lack of transparency as to the manner of questioning during the interview increases the leading effect of a statement to clarify “discrepancies” with subsequent oral testimony. Witness P-0290 is

³⁵ *Bemba et al.* case, ICC-01/05-01/13-T-18-Red-ENG, 12 December 2015, p. 17.

³⁶ DRC-OTP-0172-0305.

³⁷ In fact, it does not seem unusual for the Prosecution to use leading questions when interviewing its witnesses about [REDACTED]. See e.g. [REDACTED]

evidently a nervous witness. He would be unlikely to tell the Prosecution that its investigators made a mistake in the statement which he signed. The danger of such a mistake is particularly acute where, as here, the Prosecution did not give the statement to the witness in a language he understood. Instead, the statement was read out to him by an interpreter, increasing the likelihood of inattention and error – whether by the witness or the interpreter. The practice of asking a witness to sign a statement in a language that they cannot themselves read after an “oral read-back” is culturally insensitive, increases the danger of errors, and has long been abandoned by the Office of the Prosecutor at the ICTY. uncommon

31. These circumstances illustrate the overwhelming and improper leading effect that can arise from “confronting” a witness with such an out-of-court statement. Not only is the Prosecution presenting an answer that it wishes to elicit, it is doing so with the representation that the witness himself previously made this precise statement. Many witnesses, particularly those who can be intimidated by the prospect of allegations of wrongdoing by the Prosecution, will be reluctant to give any answer that they might think would be interpreted as a lie. The degree of leading effect is inversely proportional to reliability: leading in this manner is not amenable to adducing testimony of any value.
32. Out-of-court statements may, indeed, be referenced during in-court testimony in some civil law systems based on nothing more than a discrepancy with in-court statements. However, those out-of-court statements are almost always taken in a more formal setting, often by a professional judge or other judicial officer who is not only impartial but who is also trained to conduct his or her questioning in an impartial and generally non-suggestive manner. Even Prosecutors in civil law systems understand that they are guided by non-adversarial principles and must remain impartial throughout any such questioning. The Prosecution of the

ICC, however, is not a civil law prosecutor. The Prosecution investigators are not bound by canons of interviewing technique or impartiality that would bind many national prosecutors; on the contrary, the generally adversarial nature of proceedings at the ICC, the lack of any significant judicial supervision of investigations at the ICC, and the generally adversarial conduct of the Prosecutor to date shows that the opposite is true. This observation applies with particular force to the product of an adversarial investigation *par excellence*: an *ex parte* interview with a witness, conducted without any cognizable guidelines and by a party not bound by any rules of impartiality. Grafting a civil law procedural rule onto an adversarial out-of-court statement is a recipe for unfairness, not a harmonious intermingling of diverse legal traditions.

33. Further, resort to such statements in a civil law setting would occur only under the active involvement of a civil law judge, who would actively focus on the issue of the reason for the apparent discrepancy. The Prosecution, as is reflected by its questioning of Witness P-0290, is manifestly uninterested in the reasons for the change, seeking instead only to place on record the evidence that it considers favourable to its position. This is yet another difference between the adversarial and inquisitorial context that justifies a more stringent rule against the use of out-of-court statements as an aid to direct examination.
34. The Impugned Decision, and the Issue upon which it is based, affects directly the fairness of trial proceedings. The likely influence exerted on the witness by resort to this procedure is obvious. Evidence has been – and likely in the future will be – heard based upon this technique. In the case of Witness P-0290, the testimony elicited on the basis of this technique was prejudicial and sensitive. This affects the fairness of proceedings.

35. The issue also affects the expeditiousness of proceedings. A possible response by the Prosecution to the Defence's objections is that the Chamber will sort out these issues in its deliberations. Indeed, the lack of probative value of Witness P-0290's various pronouncements should be relatively self-evident. The technique will nevertheless significantly affect the expeditiousness of proceedings, if only by requiring the Defence to adduce evidence to dispute the flawed testimony. One of the salutary purposes of rules of admissibility is to streamline proceedings by ensuring that only information with a certain minimal reliability is made part of proceedings. Allowing extremely low-value information into evidence causes direct and indirect delays that are neither fair to the defendant, nor in the interests of judicial economy.
36. In summary, the Impugned Decision has a direct and significant impact on the fairness and the expeditiousness of proceedings. Immediate resolution by the Appeals Chamber will streamline proceedings and ensure that proceedings are conducted properly. The absence of such a ruling will permit the introduction of tainted evidence that will not only slow down proceedings in the short- and medium-term, but will also improperly affect the Chamber in the long-term in a way that could not be remedied in a final appeal. Immediate appellate resolution is the most efficient course.

III. Immediate appellate intervention may materially advance proceedings

37. Whether appellate intervention may "materially advance the proceedings" includes an assessment of the degree to which an "authoritative determination" of the "matter posing for decision" may "rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial"³⁸ or "cloud or unravel the judicial process";³⁹ or may remove "doubts about the correctness of a

³⁸ DRC, Appeals Chamber LtA Decision, para. 14.

³⁹ DRC, Appeals Chamber LtA Decision, para. 16.

decision or mapping a course of action along the right lines”;⁴⁰ The applicable threshold is “*may* materially advance” not “*will* materially advance”.

38. Appellate intervention manifestly may materially advance proceedings. Not only will proceedings be streamlined and clarified, but any consequential errors arising from the consideration of tainted evidence will be avoided. The extent of evidence that might be properly heard could be considerable, and could have an impact on the outcome of the trial, certainly in respect of certain charges. Proceedings would be materially advanced by resolving such a crucial issue as early as possible.

CONFIDENTIALITY

39. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Request is submitted on a confidential basis, as it refers to statements during hearings bearing the same level of confidentiality. A public redacted version will be submitted forthwith.

RELIEF SOUGHT

40. In light of the above submissions, the Defence respectfully requests the Chamber to:

GRANT leave to appeal the Impugned Decision on the above outlined Issue.

RESPECTFULLY SUBMITTED ON THIS 16TH DAY OF FEBRUARY 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda
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⁴⁰ DRC, Appeals Chamber LtA Decision, paras. 15.