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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 response to Defence’s application for leave to appeal the Chamber’s decision overruling Defence objections to leading questions”, 12 February 2016, ICC-01/04-02/06-1169-Conf

Source: Office of the Prosecutor

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

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I. Introduction

1. The Defence's Application¹ seeking leave to appeal the Decision overruling Defence objections to leading questions² should be dismissed because it does not meet the threshold requirements for leave to appeal under article 82(1)(d) of the Rome Statute.

2. The proposed issue is not appealable because it expresses no more than the Defence's disagreements with the Chamber's exercise of its power to control the manner in which the parties question the witnesses. In any event, the Defence has failed to demonstrate either that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, or that the immediate intervention of the Appeals Chamber may materially advance the proceedings.

II. Level of Confidentiality

3. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, this filing is submitted as confidential because it responds to a confidential Defence's Application.

III. Submissions

A. The proposed issue is not appealable

4. The Application fails to identify an *appealable* issue arising from the Decision. An "issue" is an identifiable and discrete subject or topic requiring a decision for its resolution and *not merely a matter over which there is disagreement or conflicting*

¹ ICC-01/04-02/06-1156-Conf ("Application").

² ICC-01/04-02/06-T-59-CONF-ENG, p. 26, l. 18 to p. 27, l. 20 ("Decision").

opinion.³ In this case, the Defence merely disagrees with the Chamber's Decision to overrule its objections.

5. During the examination-in-chief of Witness P-0017, the Defence objected to three questions by the Prosecution arguing that they were impermissibly leading the Witness.⁴ The Chamber granted the first two objections—and asked the Prosecution counsel to reformulate her questions—⁵ but twice overruled the Defence's third objection.⁶ The Defence merely challenges and disagrees with the latter ruling⁷ without disputing the Chamber's approach to leading questions in the other two favourable decisions.

6. The proposed issue—whether in overruling the Defence's objection the Chamber misapplied its own definition of what constitutes a leading question⁸—expresses no more than a conflicting opinion with the Chamber's Decision. Contrary to the Defence's submission,⁹ the issue does not identify a “significant gap” between the Chamber's definition of leading question and its application,¹⁰ but expresses a mere disagreement with the Chamber's one unfavourable decision.

7. The Defence does not dispute the Chamber's definition of a leading question¹¹ but argues that the Chamber would benefit from “concrete parameters” for its application.¹² In essence, the Defence is seeking the Appeals Chamber's advisory opinion and guidance for the application of the agreed definition of a

³ See ICC-01/04-168 OA3, para. 9; ICC-02/11-01/15-117 paras. 19-22; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

⁴ ICC-01/04-02/06-T-59-CONF-ENG, p. 22, l. 3; ICC-01/04-02/06-T-59-CONF-ENG, p. 25, ll. 9-10; ICC-01/04-02/06-T-59-CONF-ENG, p. 26, ll. 22-23 and p.27, l. 18.

⁵ ICC-01/04-02/06-T-59-CONF-ENG, p. 22, l. 3; ICC-01/04-02/06-T-59-CONF-ENG, p. 25, ll. 14-15.

⁶ ICC-01/04-02/06-T-59-CONF-ENG, p. 27, ll. 6, 20.

⁷ Application paras. 1, 3-12.

⁸ Application, para. 1.

⁹ Application, para. 15.

¹⁰ *Contra* Application, para. 15.

¹¹ Application, para. 16.

¹² Application, para. 18.

leading question. But the Chamber does not need guidance from the Appeals Chamber to properly apply the definition of a leading question, which squarely falls within the Chamber's management powers.¹³ In addition, the Appeals Chamber has repeatedly held that interlocutory appeals are not a forum to provide advisory opinions but, rather, are a second instance review.¹⁴

8. Finally, the Defence's submission that the issue resulted in a "high number of clearly leading questions"¹⁵ (that the Defence chose not to object to)¹⁶ is inapposite. The impugned Decision only dismissed the Defence's objection to a single question;¹⁷ it did not redefine the meaning of "leading question" nor did it provide *carte blanche* to the Prosecution to formulate leading questions. Further, if counsel considered that the questions listed in Annex A were leading, he should have timely objected.

9. The Defence, far from identifying an appealable issue, merely expresses its dissatisfaction and disagreement with the Chamber's ruling. Further, it seeks an impermissible advisory opinion from the Appeals Chamber. For these reasons alone, the Application should be dismissed.

¹³ *Contra* Application, para. 18.

¹⁴ See ICC-01/04-503 OA4 OA5, para. 30 ("the role of an advisory body" is "beyond and outside the scope of [the Appeals Chamber's] authority"); ICC-01/04-01/07-3132 OA12, para. 7. See also ICC-01/04-01/06-772 OA4, para. 4 ("The Appeals Chamber recalls that it does not provide guidance on the interpretation of the law [...] to the parties").

¹⁵ Application, para. 17. The Prosecution maintains that the questions addressed by the Defence were not leading.

¹⁶ The Defence indicates that it opted not to object because of the Presiding Judge's remark that he did not want to hear "any further submission on that" (see Application, paras. 8, 13). However, the Presiding Judge did not forbid the Defence from objecting the Prosecutor's questions in general. The Presiding Judge asked the Defence to refrain from objecting questions on the discrete topic of Bosco Ntaganda and Commander Salongo returning to the camp, [REDACTED]. (ICC-01/04-02/06-T-59-CONF-ENG, p. 27, ll. 1-8).

¹⁷ ICC-01/04-02/06-T-59-CONF-ENG, p. 26, l. 18 to p. 27, l. 20.

B. The other requirements of article 82(1)(d) are not met

i. The issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

10. Even assuming, *arguendo*, that the proposed issue falls within the scope of an issue under article 82(1)(d), the Defence has failed to demonstrate that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence misrepresents the Decision and advances wholly speculative arguments.

11. The Defence's submission that the proposed issue affects the fair conduct of the proceeding is based on the incorrect premise that the Chamber misapplied the Decision on the conduct of the proceedings¹⁸ allowing the calling party to ask leading questions.¹⁹ As discussed above, the impugned Decision concerns a very confined matter—one single question by Prosecution counsel that the Chamber found to be non-leading—²⁰and not the conduct of proceedings. Contrary to the Defence's suggestion,²¹ the prohibition of leading questions during examination-in-chief remains untouched by the impugned decision—as shown by the other Defence's objections granted by the Chamber.²²

12. The Defence's arguments on expeditiousness²³ are speculative and equally based on the incorrect premise that the Decision concerns the conduct of the proceedings in general.²⁴

13. For the same reasons, the issue does not affect the outcome of the trial.²⁵ The Defence's submission wrongly assumes that the Chamber will allow leading

¹⁸ ICC-01/04-02/06-619, Decision on the conduct of proceedings, para.26.

¹⁹ *Contra* Application, paras. 19-21.

²⁰ ICC-01/04-02/06-T-59-CONF-ENG, p. 26, l. 18 to p. 27, l. 20.

²¹ Application, para. 20.

²² ICC-01/04-02/06-T-59-CONF-ENG, p. 22, l. 3; ICC-01/04-02/06-T-59-CONF-ENG, p. 25, ll. 14-15.

²³ Application, paras. 22-25.

²⁴ Application, para. 24.

questions for the rest of the proceeding as a result of the impugned Decision.²⁶ To the contrary, the Chamber articulated a clear and correct definition of a leading question²⁷ that the Defence did not challenge.²⁸

14. Further, the Defence's submissions on fairness, expeditiousness and the outcome of trial are wholly speculative. The Defence's arguments impermissibly require the Chamber to speculate now on the impact of the Decision to allow the Prosecution's question on the fairness, expeditiousness and outcome of the trial.²⁹

ii. The immediate resolution by the Appeals Chamber will not materially advance the proceedings

15. The immediate resolution by the Appeals Chamber will not advance the proceedings.³⁰ Once again, the Defence's submission is based on the wrong assumption that the Decision will impact the conduct of the proceedings in general.³¹ To the contrary, the Decision refers to a discrete and confined matter—one question put to Witness P-0017 during examination-in-chief—thus an interlocutory appeal will not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.³²

16. Further, since any suggested unfairness at this stage is wholly speculative, an immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings. Rather, it will delay the proceedings.³³

²⁵ *Contra* Application, paras. 26-30

²⁶ *Contra* Application, para. 26.

²⁷ ICC-01/04-02/06-T-59-CONF-ENG, p. 29, ll. 12-17.

²⁸ Application, para. 16.

²⁹ ICC-01/04-01/07-2035, para. 26.

³⁰ *Contra* Application, paras. 31-32.

³¹ Application, para. 31.

³² ICC-01/04-01/06-2404, para. 33.

³³ ICC-01/04-01/06-2109, para. 22; ICC-01/09-01/11-1154, para. 28; ICC-01/04-01/06-1557, para. 25.

C. Relief requested

17. For all the reasons above, the Application should be dismissed.



Fatou Bensouda
Prosecutor

Dated this 3rd day of March 2016

At The Hague, The Netherlands