

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **11 March 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

**Decision on Defence request seeking leave to appeal oral decision concerning use
of prior statements during direct examination**

Decision 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 Luc Boutin

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**

Ms Paolina Massidda

**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 seeking leave to appeal oral decision concerning use of prior statements during direct examination'.

I. Background

1. On 10 February 2016, during the examination of Witness P-0290, the Office of the Prosecutor ('Prosecution') sought permission from the Chamber to explore a discrepancy between the witness's prior statement and his in-court testimony and to elicit any explanations the witness may have therefor.¹ The Chamber permitted the Prosecution to confront the witness with his prior statement on the issue in question ('Impugned Decision').²
2. On 16 February 2016, the defence team for Mr Ntaganda ('Defence') filed a request for leave to appeal the Impugned Decision ('Request').³
3. On 19 February 2016, the Prosecution filed a response, opposing the Request ('Response').⁴

II. Submissions

4. The Defence seeks leave to appeal the following issue:

[w]hether 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').⁵

¹ Transcript of hearing on 10 February 2016, ICC-01/04-02/06-T-65-CONF-ENG ET, page 56, lines 18-20.

² ICC-01/04-02/06-T-65-CONF-ENG ET, page 57, lines 16-19 and page 58, line 25 to page 59, line 6.

³ 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, ICC-01/04-02/06-1173-Conf. A public redacted version was filed on 17 February 2016 (ICC-01/04-02/06-1173-Red).

⁴ Prosecution's response to Defence's application for leave to appeal the Chamber's decision overruling the Defence's objections the use of a statement during direct examination, ICC-01/04-02/06-1182-Conf.

⁵ Request, ICC-01/04-02/06-1173-Red, para. 12.

5. The Defence submits that the Issue is an appealable one as it is 'inextricably connected with a procedure by which the Prosecution adduced evidence' and 'will evidently be the basis for future decisions'.⁶
6. The Defence also submits that the Issue would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.⁷ The Defence avers that the principle of orality, enshrined in Article 69(2) of the Statute, would be undermined if counsel poses leading questions to the witness.⁸ The Defence argues that the two exceptions to this are when a witness is declared hostile or where the calling party is permitted to refresh a witness's memory.⁹ The Defence argues that this procedure ensures 'that testimony is adduced under conditions most appropriate to ascertaining the truth given the particular circumstances of international criminal investigations and trials'.¹⁰
7. Further, the Defence submits that the use of out-court-statements also affects the expeditiousness of proceedings as it allows 'low-value information into evidence [which] causes direct and indirect delays' and requires the Defence to adduce evidence to dispute the 'flawed testimony'.¹¹ The Defence therefore submits that appellate intervention may materially advance proceedings as 'any consequential errors arising from the consideration of tainted evidence will be avoided'.¹²
8. The Prosecution submits that the Issue is not appealable because it expresses no more than a disagreement with the Chamber's discretion to control the mode in which parties question the witnesses.¹³ The Prosecution argues that 'the Chamber did not redefine the procedure by which the Prosecution adduces evidence and properly applied its Decision on the conduct of proceedings: prior

⁶ Request, ICC-01/04-02/06-1173-Red, para. 16. *See also* para. 1.

⁷ Request, ICC-01/04-02/06-1173-Red, paras 17-36.

⁸ Request, ICC-01/04-02/06-1173-Red, paras 18-20 and 31.

⁹ Request, ICC-01/04-02/06-1173-Red, paras 21-28.

¹⁰ Request, ICC-01/04-02/06-1173-Red, paras 29-34.

¹¹ Request, ICC-01/04-02/06-1173-Red, para. 35.

¹² Request, ICC-01/04-02/06-1173-Red, paras 37-38.

¹³ Response, ICC-01/04-02/06-1182-Conf, paras 2, 4, 6 and 8.

statements can be put to the witness by the calling party to refresh their recollection'.¹⁴ The Prosecution further argues that the Issue does not impact the general prohibition on leading questions during examination-in-chief and the conditions for confronting a witness with a prior statement.¹⁵ The Prosecution contends that the Defence submissions are speculative or unsubstantiated.¹⁶

III. Analysis

9. The Chamber incorporates by reference the applicable law as set out in previous decisions.¹⁷
10. The Chamber recalls that the 'Decision on the conduct of proceedings'¹⁸ identifies certain circumstances in which a calling party may use the prior statements of a witness during testimony, stating, in particular, that '[i]f 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'.¹⁹
11. The Chamber notes that the Impugned Decision relates to a confined matter, being the manner in which evidence from P-0290 was elicited on one discrete topic. The Chamber therefore does not consider that the Impugned Decision – in which the Presiding Judge indicated that the Prosecution request was being treated as 'a way of refreshing [the witness's] memory'²⁰ – affects the general rule that '[d]uring examination-in-chief, the calling party shall use, as a matter of principle, non-leading questions' or the circumstances for confronting a witness with prior statements. The Chamber finds that the Defence

¹⁴ Response, ICC-01/04-02/06-1182-Conf, paras 5-6.

¹⁵ Response, ICC-01/04-02/06-1182-Conf, paras 10-11.

¹⁶ Response, ICC-01/04-02/06-1182-Conf, paras 12-14 and 16.

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.

¹⁸ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619.

¹⁹ ICC-01/04-02/06-619, para. 28.

²⁰ Transcript of hearing on 10 February 2016, ICC-01/04-02/06-T-65-CONF-ENG ET, page 59, lines 1-6.

submissions, in support of the requirements of Article 82(1)(d) of the Statute having been met, misunderstand the scope of the Impugned Decision and are speculative in nature.

12. The Defence has therefore failed to establish an appealable issue arising from the Impugned Decision which would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial. In light of this, it is unnecessary for the Chamber to consider the remaining requirements of Article 82(1)(d) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the Prosecution to file a public redacted version of the Response (ICC-01/04-02/06-1182-Conf) by 18 March 2016.

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 11 March 2016

At The Hague, The Netherlands