

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 17 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

**Public redacted version of “Prosecution’s response to Defence’s application for leave to appeal the Chamber’s decision overruling the Defence’s objection to the use of a statement during direct examination”, 19 February 2016,
ICC-01/04-02/06-1182-Conf**

Source: Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the 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

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. The Defence's Application¹ seeking leave to appeal the Decision overruling the Defence's objection to the use of an out-of-court statement during direct examination² 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 disagreement 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, and 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.

¹ ICC-01/04-02/06-1173-Conf ("Application").

² ICC-01/04-02/06-T-65-CONF-ENG, p. 58, l. 25 to p. 59, ll. 1-6 ("Decision").

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 opinion*.³

5. During the examination-in-chief of Witness P-0290, the Prosecution asked the Witness if he recalled the precise age of the soldiers [REDACTED].⁴ Witness P-0290 responded that he could not give a “specific answer” but that [REDACTED]⁵ although in his prior statement he had [REDACTED].⁶ The Chamber allowed the Prosecution to use Witness P-0290’s prior statement to refresh the Witness’ memory and overruled the Defence’s objection.⁷

6. Contrary to the Defence’s implication,⁸ the Chamber did not redefine the procedure by which the Prosecution adduces evidence⁹ and properly applied its Decision on the conduct of proceedings: prior statements can be put to the witness by the calling party to refresh their recollection or to declare them hostile.¹⁰ The proposed issue¹¹ is not “the basis for future decisions,”¹² but expresses no more than a conflicting opinion with the Chamber’s ruling that in this case confronting

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-65-CONF-ENG, p. 42, l. 5.

⁵ [REDACTED], ICC-01/04-02/06-T-65-CONF-ENG, p. 42, ll. 6-7.

⁶ ICC-01/04-02/06-T-65-CONF-ENG, p. 56, l. 5. See for instance DRC-OTP-0172-0305, paras. 12, 18.

⁷ See Decision, ICC-01/04-02/06-T-65-CONF-ENG, p. 59, ll. 1-6. See also ICC-01/04-02/06-T-65-CONF-ENG, p. 57, ll. 18-19.

⁸ Application, paras. 1, 16.

⁹ *Contra* Application, para. 16.

¹⁰ ICC-01/04-02/06-619, Decision on the conduct of proceedings, para. 26, 28, 47.

¹¹ Application, para. 12.

¹² Application, para. 16.

the Witness with his prior statement was a legitimate “way to refresh his memory”.¹³

7. In essence, the Defence is once again seeking the Appeals Chamber’s advisory opinion and guidance for future interpretation and application of the Decision on the conduct of proceedings.¹⁴ The Chamber does not need guidance from the Appeals Chamber to properly apply its own Decision on the conduct of proceedings, which squarely falls within the Chamber’s powers to manage the trial. 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.¹⁵

8. 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.

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

9. 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.

¹³ ICC-01/04-02/06-T-65-CONF-ENG, p. 59, ll. 3, 4.

¹⁴ ICC-01/04-02/06-619, Decision on the conduct of proceedings.

¹⁵ 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”).

10. The Defence extensively discusses the supposed “dangers”¹⁶ of allowing the Prosecution to lead witnesses by using statements “regrettably taken without *verbatim* record”¹⁷ and in a manner that “lacks transparency”.¹⁸ However, contrary to the Defence’s understanding, the Decision does not allow such a practice.

11. The Defence’s submission is based on the incorrect premise that the Chamber departed from its Decision on the conduct of the proceedings¹⁹ giving the Prosecution *carte blanche* to lead witnesses by confronting them with prior out-of-court statements.²⁰ To the contrary, as discussed above, the impugned Decision concerns a very confined matter—the use of Witness P-0290’s statement to refresh his memory on one specific point of his testimony²¹ — and not the future conduct of the proceedings. Contrary to the Defence’s suggestion,²² the prohibition of leading questions during examination-in-chief²³ and the conditions for confronting a witness with a prior statement²⁴ remain untouched by the impugned Decision.

12. Further, the Defence’s submissions are wholly speculative: they impermissibly require the Chamber to speculate now on the impact on the fairness of the proceedings of the Decision.²⁵ Even the Defence, after a lengthy and misplaced discussion of the supposed “dangers”²⁶ inherent in the Decision, cautiously submits that the same “prejudicial” technique is only “likely” to be used in the future.²⁷

¹⁶ Application, paras. 18-33.

¹⁷ Application, para. 29.

¹⁸ Application, paras. 30-31.

¹⁹ ICC-01/04-02/06-619, Decision on the conduct of proceedings, paras. 26, 28, 47.

²⁰ See Application, para. 34.

²¹ ICC-01/04-02/06-T-65-CONF-ENG, p. 58, l. 25 to p. 29, ll. 1-6.

²² See Application, paras. 1, 16, 34, 36.

²³ ICC-01/04-02/06-619, Decision on the conduct of proceedings, para. 26.

²⁴ ICC-01/04-02/06-619, Decision on the conduct of proceedings, paras. 28, 47.

²⁵ ICC-01/04-01/07-2035, para. 26.

²⁶ Application, paras. 18-33.

²⁷ See Application, para.34.

13. The Defence's arguments on expeditiousness²⁸ are equally speculative and based on the incorrect premise that the Decision concerns the conduct of the proceedings in general allowing "extremely low-value information into evidence".²⁹

14. The Defence further submits that the issue would significantly affect the outcome of the trial,³⁰ but does not provide any argument in support. The Defence's claim should therefore be rejected as unsubstantiated.

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.³¹ The Defence's submission is based on the same wrong assumption discussed above that the Decision will impact the conduct of the proceedings in general and result in the admission of "tainted evidence".³² To the contrary, the Decision refers to a discrete and confined matter—one question put to Witness P-0290 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.³³

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 proceedings but rather will delay them.³⁴

²⁸ Application, paras. 35-36.

²⁹ See Application, para. 36.

³⁰ Application, paras. 17, 38.

³¹ *Contra* Application, paras. 37-38.

³² Application, para. 38.

³³ ICC-01/04-01/06-2404, para. 33.

³⁴ 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 17th day of March 2016

At The Hague, The Netherlands