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**International
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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***

Confidential

**Prosecution's response to Defence's application for leave to appeal the
Chamber's decision overruling the Defence's objection to
adducing a piece of evidence from an event in 2004**

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 a decision overruling its objection to eliciting evidence of an event in 2004 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. First, the proposed issue is not appealable because it does not arise from the Decision. The Decision solely relates to whether the Prosecution was permitted in this discrete instance to elicit evidence of an event in 2004 where the Accused was present. The Decision does not address the sequence in which the evidence was adduced or any objection that the Prosecution was improperly using leading questions to elicit evidence. Consequently, the Decision does not address the issue the Defence proposes for certification.

3. Second, the proposed issue is not appealable because it mischaracterises the manner in which evidence was elicited from the witness. The Prosecution did not use leading questions to elicit evidence. And it is not "leading" to ask a witness to describe an event that occurred at one time and then to ask whether such events occurred at other times, including in 2002-2003. Nor did the Defence raise any objection at the time to the manner in which the Prosecution asked its questions, which would have been the appropriate time to make the objection rather than making it for the first time in an application for leave to appeal.

4. Even if, *arguendo*, the issue does arise from the Decision, it is not appealable because it expresses no more than the Defence's disagreement with the Chamber's exercise of its discretionary power to allow a witness to give evidence of an event in 2004. In any event, the Defence has failed to demonstrate either that the issue

¹ ICC-01/04-02/06-1578-Conf ("Application").

² ICC-01/04-02/06-T-147-CONF-ENG ET, p. 56, ll.10-18 ("Decision").

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

5. 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 Application.

III. Submissions

A. The proposed issue is not appealable

a. The proposed issue does not arise from the Decision

6. The proposed issue does not arise from the Decision. During the examination-in-chief of Witness P-0365, the Prosecution asked the Witness if she had ever seen Bosco Ntaganda in 2002-2003 and the witness replied that she saw him from a distance in 2004, but not in 2002 or 2003.³ The Defence objected to any continued questioning by the Prosecution on the event since it occurred in 2004, was outside the temporal scope of the charges, had no bearing on the charges against the Accused for the period of 2002-2003 and the prejudice to the Accused outweighed any probative value.⁴ The Chamber overruled the objection and allowed the Prosecution to continue its questioning on the event.⁵

7. The Defence's proposed issue, however, relates to whether it is permissible for the Prosecution to ask questions about an event that took place in 2004 (outside the temporal scope of the charges) and to then ask the witness whether similar events occurred in 2002-2003:

³ ICC-01/04-02/06-T-147-CONF-ENG ET, p. 55, ll.21-24.

⁴ ICC-01/04-02/06-T-147-CONF-ENG ET, p. 56, ll.2-9.

⁵ See Decision, ICC-01/04-02/06-T-147-CONF-ENG ET, p. 56, ll.10-18.

*Whether evidence adduced by the Prosecution related to events beyond the temporal scope of the charges can be used to lead a witness to provide similar evidence in relation to a period within the temporal scope of the charges.*⁶

The Decision does not address this issue; it is much more limited in scope. The Decision solely considers whether the Prosecution can ask a witness about an event that occurred in 2004 where the Accused was present, given that the temporal scope of the charges is 2002-2003. The Application should be dismissed on this basis alone.

b. The proposed issue mischaracterises the Prosecution's questions

8. The Defence further claims that the Prosecution is leading witnesses improperly by using a "technique" of eliciting evidence outside the temporal scope of the charges for use as a "springboard" for evidence of a similar event that occurred during the period relevant to the charges. This claim is without foundation and misconstrues the Prosecution's proper questioning of the witness on relevant events. The Prosecution did not use leading questions to elicit the evidence and the Defence did not raise any such objection at the relevant time, because it had no basis to do so.

9. The Defence then raises the speculative argument that the Prosecution "may be expected to apply this technique in the future". Speculation as to what may or may not happen in the future does not render an issue appealable.

10. The mischaracterisation of the questions made by the Prosecution constitutes an independent basis to dismiss the application.

c. The proposed issue is a mere disagreement with the Decision

11. Even if the Chamber were to find that the issue does arise from the Decision, the Application fails to identify an appealable issue arising from the Decision. An

⁶ Application, para.1.

“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*.⁷

12. Notwithstanding that the Defence decided to propose an issue that does not arise from the Decision, it seeks to challenge the Decision itself by claiming that “the Impugned Decision reflects a categorical inclusionary rule in respect of evidence related to events going beyond the temporal scope of the UDCC”.⁸ While this is not, in fact, the issue for which it seeks appellate review, the Defence contention is wrong and mischaracterises the Decision.

13. The Decision does not reflect a “categorical inclusionary rule” for evidence outside the temporal scope of the charges. The Chamber previously held that it “considers that the fact that a document may fall outside of the temporal scope of the charges does not, as a matter of principle, automatically result in it lacking relevance or probative value. Rather a case by case assessment is required”.⁹ Each time the Defence raised an objection to the admission of evidence beyond the temporal scope of the charges, the Chamber has considered the objection on a case by case basis. At times, the Chamber has allowed the evidence, at other times it has not admitted the evidence, always after a case by case assessment.¹⁰ This is within the Chamber’s discretionary powers under article 69(4) of the Statute and is in accordance with decisions of other Chambers of this Court¹¹, as well as with the one decision cited by the Defence.¹²

⁷ 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.

⁸ Application, para.8.

⁹ ICC-01/02-04/06-1181, para.14.

¹⁰ See, for example: ICC-01/04-02/06-T-94-CONF-ENG ET, p.3, ll.9-14 (not permitting evidence of a rape committed in 2004 to be elicited); ICC-01/04-02/06-T-144-CONF-ENG ET, p.59, l.22 to p.61, l.25 (not admitting a video of events in 2004); ICC-01/04-02/06-T-144-CONF-ENG ET, p.68, l.20 to p.70, l.1 (admitting a different video of events in 2004).

¹¹ ICC-01/09-01/11-1353, para.28.

¹² Application, para.9.

14. Also contrary to the Defence's assertions,¹³ the Decision does not preclude case-by-case objections or depart from the Chamber's earlier jurisprudence. The Decision simply instructs Defence Counsel to exercise judgment in raising objections that have failed on similar grounds in the past.¹⁴ This is a proper means at the Chamber's disposal to ensure the efficiency of proceedings. The Chamber held in its decision on the conduct of proceedings that it will "actively ensure the efficiency and focus of the examination of witnesses".¹⁵ Nor does the Decision predict the outcome of properly founded objections in the future.

15. The proposed issue expresses no more than a conflicting opinion with the Chamber's ruling that in this instance the Prosecution was permitted to elicit evidence on an event in 2004 during which the Accused was present.¹⁶

16. The Appeals Chamber has repeatedly held that interlocutory appeals are not a forum to provide advisory opinions but rather are a second instance review.¹⁷ The Defence, far from identifying an appealable issue, merely expresses its dissatisfaction and disagreement with the Chamber's ruling. For these reasons, the Application should be dismissed.

d. 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

17. 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

¹³ Application, paras.8 and 12.

¹⁴ ICC-01/04-02/06-T-147-CONF-ENG ET, p. 56, ll.10-12.

¹⁵ ICC-01/04-02/06-619, para.23.

¹⁶ ICC-01/04-02/06-T-147-CONF-ENG ET, p. 56, ll.10-18.

¹⁷ 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").

significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

18. The Defence argues that “potential prejudice and impact on the proceedings” is “substantial” by allowing the Prosecution to elicit information about an event in 2004 then eliciting information about similar events that occurred in 2002-2003.¹⁸ However, contrary to the Defence’s understanding, the Decision does not address this point and cannot be wrongly extended to cover factual scenarios that were not at issue at the time of the adjudication. In sum, the Decision remains relevant to the particular objection it sought to resolve. The Chamber will continue to consider Defence objections to admission of evidence about events outside of 2002-2003 as it has done in the past.

19. The Defence’s submission is also based on the incorrect premise that the Prosecution used leading questions during the examination in chief of Witness P-0365 or that the Chamber departed from its Decision on the conduct of the proceedings¹⁹ on the general use of non-leading questions during examination by the calling party. To the contrary, as discussed above, the impugned Decision concerns a very confined matter—whether the Prosecution could elicit evidence of an event that took place in 2004²⁰ — and not the future conduct of the proceedings.

20. 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.²¹ Even the Defence, after an erroneous conclusion that the Prosecution used an event in 2004 to ask leading questions of the witness,

¹⁸ Application, para.10, 12.

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

²⁰ ICC-01/04-02/06-T-147-CONF-ENG, p.56, ll/10-18.

²¹ ICC-01/04-01/07-2035, para. 26.

cautiously submits that the same “prejudicial” technique “may” be used in the future.²²

21. The Defence’s arguments on expeditiousness²³ are equally speculative. It surmises that the Decision “might very well require refutation by the Defence” and would be a time-consuming exercise.²⁴ Yet, in this particular instance, the Defence did not cross-examine the witness on her evidence of this event. And it chose not to do so despite being aware of the witness’s evidence on this point since the disclosure of her witness statement in March 2015.

22. The Defence further submits that the issue may significantly affect the outcome of the trial,²⁵ 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

23. The immediate resolution by the Appeals Chamber will not advance the proceedings.²⁶ The Defence’s submission is based on the same incorrect and speculative assertions discussed above on: admission of evidence outside the temporal scope of the charges, the amount of time required to challenge the evidence in cross-examination, the improper use of the information to suggest answers to the witness (lead the witness).²⁷ To the contrary, the Decision refers to a discrete and confined matter—one question put to Witness P-0365 during examination-in-chief—

²² See Application, para.10.

²³ Application, para.13.

²⁴ See Application, para.13.

²⁵ Application, para.2.

²⁶ *Contra* Application, para.15.

²⁷ Application, para.14.

thus an interlocutory appeal will not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.²⁸

24. 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.²⁹

IV. Relief requested

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



Fatou Bensouda
Prosecutor

Dated this 14th day of October 2016
At The Hague, The Netherlands

²⁸ ICC-01/04-01/06-2404, para. 33.

²⁹ ICC-01/04-01/06-2109, para. 22; ICC-01/09-01/11-1154, para. 28; ICC-01/04-01/06-1557, para. 25.