

**Cour
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**International
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Court**



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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

Former child soldiers' response to the "Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's decision regarding the admissibility of evidence related to events beyond the temporal scope of the Updated Document containing the charges"

Source: Office of Public Counsel for Victims (CLR1)

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 Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet

Mr Mohamed Abdou

Legal Representatives of the Applicants

Mr Dmytro Suprun

Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**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**

Other

I. INTRODUCTION

1. The Common Legal Representative of the former child soldiers (the "Legal Representative") hereby files her response to the "Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's decision regarding the admissibility of evidence related to events beyond the temporal scope of the Updated Document containing the charges" (the "Request").¹

2. The Request should be dismissed as it does satisfy any of the requirements for leave to appeal set out in article 82(1)(d) of the Rome Statute. The Legal Representative submits that the Request : (1) fails to identify an appealable issue arising from the Impugned Decision; (2) does not contribute in any way to the fair and expeditious conduct of the proceedings and (3) will not materially advance the proceedings.

II. PROCEDURAL BACKGROUND

3. On 5 October 2016, the Defence objected to the Prosecution's line of questioning concerning P-0365 sighting of the accused. The Defence asserted that because the witness *"indicated that she saw Bosco Ntaganda in 2004 [...] whatever the follow-up questions would be, it is an event that took place in 2004 [...] that has no bearing on the charges laid against the accused for the period of 2002-2003"*.²

4. The Defence objection was subsequently overruled by the Chamber, as follows: *"Mr Bourgon, your objection is overruled. And allow me one question from my part. Really, I find wasting of time if you repeat the objection which was made a few days, two days ago, in fact in the same style, same way with the same argumentation. I mean this speech*

¹ See the "Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's decision regarding the admissibility of evidence related to events beyond the temporal scope of the Updated Document containing the charges", No. ICC-01/04-02/06-1578-Conf, 11 October 2016.

² See the transcript of the hearing held on 5 October 2016, No. ICC-01/04-02/06-T-147-CONF-ENG ET, p. 56, lines 2-5.

of Mr Ntaganda also I guess from 2004. And as we said, generally, it doesn't matter if such a behaviour, such an act, such a speech has something to do with 2002-2003 with the charges, if such a behaviour could assist us in our decision about the charges [...] I don't want to hear any more submission on it because this issue I find solved".³ (the "Impugned Decision")

5. On 11 October 2016, the Defence filed the "Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's decision regarding the admissibility of evidence related to events beyond the temporal scope of the Updated Document containing the charges".⁴ The Defence requested leave to appeal the Impugned Decision in respect of the following issue: whether the Chamber "[w]hether 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".⁵

III. SUBMISSIONS

A. The Request fails to identify an appealable issue arising from the Impugned Decision

6. The Legal Representative submits that the Request does not meet the requirements of article 82(1)(d) of the Rome Statute. The Appeals Chamber clarified that "[o]nly an 'issue' may form the subject-matter of an appealable decision".⁶ The term "issue" was defined as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".⁷

7. The way in which the proposed issue is framed does not enable the identification of any appealable issue(s). It is formulated in a vague and confusing

³ *Idem*, p. 57, lines 10-18.

⁴ See the Request, *supra* note 1.

⁵ *Idem.*, para. 1.

⁶ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

⁷ *Ibid.*

manner; thus rendering it difficult to identify what the Defence would seek to challenge if leave is granted. Indeed, the proposed issue is a compound question comprising several elements: (1) the propriety of referring to events beyond the temporal scope of the charges and, (2) the permissibility of leading a witness to provide similar evidence in relation to a period within the temporal scope of the charge. It is unclear whether the Defence seeks to challenge one element or both. This confusion is exacerbated by the title of the Request, which refers to the more general and distinct question of “admissibility of evidence related to events beyond the temporal scope of the Updated Document containing the charges”.

8. In any event, and notwithstanding the ambiguous formulation, none of the elements identified in the proposed issue(s) were the subject-matter of the Impugned Decision. The scope of the Impugned Decision was limited to addressing the Defence’s objection regarding the potential *relevance* of P-0365’s reference to events occurring after the timeframe of the charges.⁸ Indeed, the Defence’s objection was based on the fact that the event at issue “*took place in 2004*” and that the “*description or [the] testimony is by far outweighed by the potential prejudice to the accused*”.⁹ In its argumentation leading to the Impugned Decision, the Defence did not raise any arguments concerning the “leading” consequences of the questions posed.

9. Moreover, the Defence now appears to have changed its position regarding the admissibility of evidence derived from events beyond the temporal scope of the charges. This, as such, is reflective of the Defence mere disagreement with the Impugned Decision. After initially arguing that the fact that an event “*took place in 2004 [...] has no bearing on the charges laid against the accused for the period of 2002-2003*”,¹⁰ it now appears to advocate for a “case-by-case” approach.¹¹ This proposed “case-by-case” approach is precisely the one adopted by the Chamber in the

⁸ See the transcript of the hearing held on 5 October 2016, *supra* note 2, p. 56, lines 10-18.

⁹ *Idem*, p. 56, lines 2-9.

¹⁰ *Ibid.*, p. 56, lines 4-5.

¹¹ See the Request, *supra* note 4, para. 9.

Impugned Decision. This is reflected in the Chamber's remark that evidence would be admissible "*if [it] could assist us in our decision about the charges*".¹²

10. Moreover, the "case-by-case" procedure for admission of evidence at trial is not novel. In this regard, the Impugned Decision does not make any new determination but merely reiterates the Chamber's previous approach set out in the Decision on the conduct of proceedings.¹³ Thus, this aspect does not specifically arise from the Impugned Decision

11. Finally, the Defence assertion that the Chamber precluded "case-by-case objections" is without merit.¹⁴ Nowhere in the Impugned Decision is there a prohibition on making specific objections in the future. In contrast, the Chamber disallowed repeating objections framed exactly "*in fact in the same style, same way with the same argumentation*" when the very issue at stake had already been resolved.¹⁵

B. Granting leave will not contribute to the fair and expeditious conduct of the proceedings

12. The Defence incorrectly assumes that authorising appeals in respect of any issue related to the admissibility of evidence is *per se* likely to contribute to the fair and expeditious conduct of proceedings.¹⁶ During the course of a trial, Chambers are frequently requested to take decisions on admission of evidence. These decisions fall within the discretionary powers of the Chamber, taking into account the relevance and reliability of the evidence tendered. A margin of deference is therefore required,

¹² See the transcript of the hearing held on 5 October 2016, *supra* note 2, p. 56, lines 15-16.

¹³ See the "Decision on the conduct of the proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, para. 35: "*After having introduced a document through a witness, the relevant party may request the documents to be admitted into evidence. The tendering party shall request admission into evidence at the first opportunity during the examination of the witness, and on an individual basis. The Chamber will decide on the admission of each item of evidence, after having heard any objection to its admission by the other party*".

¹⁴ See the Request, *supra* note 1, paras. 8 and 12.

¹⁵ See the transcript of the hearing held on 5 October 2016, *supra* note 2, p. 56, 12-18.

¹⁶ *Idem*, para. 11.

particularly in light of the principle of free assessment of evidence provided for under Rule 63(2) of the Rules of Procedure and Evidence.

13. Likewise, the Request seems to be predicated on the understanding that any evidence tendered for the purpose of establishing the crimes and the individual criminal responsibility would be “*prejudicial to accused*”.¹⁷ This is plainly incorrect. Prejudice only arises when the specific rights recognised to the defendant are violated. The fact that events occurring in 2004 are used to facilitate a witness testimony in relation to a different time period is neither prohibited nor inappropriate. To the contrary, it may help understand and give context to the events, may assist the witness by refreshing his or her memory, and may even prove crucial to the assessment of the witness credibility/reliability.

C. Immediate resolution by the Appeals Chamber is not warranted

14. The Defence argues that it would be “*time-consuming [to challenge] in cross-examination any evidence elicited related to events going beyond the period of the charge*”.¹⁸ Besides being speculative, the Defence’s argument fails to take into account the fact that the Chamber usually gives equal time to both parties for the examination of witnesses. In any event, the Defence may also seek leave for additional questioning and preparation time, as it regularly do, in order to address any unanticipated matters arising from the Prosecution examination-in-chief.

15. Contrary to the Defence submissions, the resolution of this issue will not ensure that the “*case proceeds on a sound basis*”.¹⁹ Disallowing the parties and participants from exploring relevant events occurring beyond the temporal scope of the charges will not materially advance the proceedings. Indeed, proceedings can only proceed forward on a sound basis when all relevant evidence is presented,

¹⁷ *Ibid.*, para. 12.

¹⁸ See the Request, *supra* note 1, para. 14.

¹⁹ *Idem*, para. 15.

debated and tested before the Chamber. Curtailing a party from exploring further relevant issues on the basis of arbitrary criteria can only be prejudicial to the Court's truth-finding function.

CONFIDENTIALITY

16. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present submissions are classified as "confidential" as they constitute a response to a document marked with the same classification.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests the Chamber to dismiss the Request.



Sarah Pellet
Common Legal Representative of the former
Child soldiers

Dated this 17th Day of October 2016

At The Hague, The Netherlands