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No.: ICC-01/04-02/06
Date: **27 October 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 an oral decision regarding
the admissibility of certain evidence outside the temporal scope of the charges**

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 Christopher Gosnell

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**

**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 an oral decision regarding the admissibility of certain evidence outside the temporal scope of the charges'.

I. Background

1. On 5 October 2016, during the examination-in-chief of Witness P-0365 ('Witness') by the Office of the Prosecutor ('Prosecution'), the Chamber overruled an objection by the defence team for Mr Ntaganda ('Defence') to the Prosecution's line of questioning relating to an event which occurred in 2004¹ ('Impugned Decision').²
2. On 11 October 2016, the Defence sought leave to appeal the Impugned Decision ('Request').³
3. On 14 October 2016, the Prosecution filed a response ('Prosecution Response'),⁴ opposing the Request.⁵
4. On 17 October 2016, the Legal representative of former child soldiers ('Legal Representative') filed a response ('Legal Representative Response'),⁶ also opposing the Request.⁷

¹ Transcript of hearing on 5 October 2016, ICC-01/04-02/06-T-147-CONF-ENG ET, page 56, lines 2 to 8.

² Transcript of hearing on 5 October 2016, ICC-01/04-02/06-T-147-CONF-ENG ET, page 56, lines 10 to 18.

³ 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, ICC-01/04-02/06-1578-Conf.

⁴ 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, ICC-01/04-02/06-1583-Conf.

⁵ Prosecution Response, ICC-01/04-02/06-1583-Conf, para. 25.

⁶ 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", ICC-01/04-02/06-1586-Conf.

⁷ Legal Representative Response, ICC-01/04-02/06-1586-Conf, page 8.

II. Submissions

5. The Defence seeks leave to appeal the following issue that it submits arises from the Impugned Decision:⁸

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 ('Issue').

6. According to the Defence, the Issue is an appealable one as it 'identifies a topic requiring clear appellate directions'.⁹ In this regard, the Defence argues that the Impugned Decision 'reflects a categorical inclusionary rule' in respect of evidence related to events going beyond the temporal scope of the Updated Document containing the charges ('UDCC') and signals a departure from the Chamber's approach that the issue of admissibility of evidence regarding events going beyond the temporal scope of the charges is to be considered on a case-by-case basis.¹⁰
7. The Defence further submits that the Issue significantly affects the fair and expeditious conduct of the proceedings, noting that: (i) the Impugned Decision resulted in allowing the Prosecution to adduce evidence regarding similar events during the period of the charges 'by leading the [W]itness using the answers given regarding 2004 as a springboard', using 'leading questions' which are 'highly prejudicial to the Accused';¹¹ and (ii) the admission of evidence related to events outside the scope of the UDCC 'might very well require refutation by the Defence in respect of that same information' which is a 'lengthy and time-consuming exercise concerning matters that should be of peripheral or no relevance to the charges being adjudicated'.¹²

⁸ Request, ICC-01/04-02/06-1578-Conf, para. 1.

⁹ Request, ICC-01/04-02/06-1578-Conf, para. 10.

¹⁰ Request, ICC-01/04-02/06-1578-Conf, para. 8.

¹¹ Request, ICC-01/04-02/06-1578-Conf, para. 12.

¹² Request, ICC-01/04-02/06-1578-Conf, para. 13.

8. Finally, the Defence argues that the immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings, as it would 'ensure that the presentation of the remaining of the Prosecution's case proceeds on a sound basis' and 'avoid, or certainly, minimize, any future litigation regarding the use of evidence elicited in relation to events beyond the period of the charges to lead the witness into giving similar evidence concerning the period of the charges.'¹³
9. The Prosecution and the Legal Representative argue that the Request fails to identify an appealable issue arising from the Impugned Decision,¹⁴ noting that: (i) the Impugned Decision solely considers whether the Prosecution can ask a witness about an event that occurred in 2004 where the accused was present and is therefore much more limited in scope than the Issue as phrased by the Defence;¹⁵ and (ii) the Issue constitutes a mere disagreement with the Impugned Decision, given that the Chamber has considered the objection on a case-by-case basis and did not therefore establish a 'categorical inclusionary rule' for evidence outside the temporal scope of the charges.¹⁶ In addition, the Legal Representative submits that the Issue is 'formulated in a vague and confusing manner', in that it is unclear whether the Defence seeks to challenge the propriety of referring to events beyond the temporal scope of the charges or the permissibility of leading a witness to provide similar evidence in relation to a period within the temporal scope of the charges, or both of these elements.¹⁷

¹³ Request, ICC-01/04-02/06-1578-Conf, paras 14-15.

¹⁴ Prosecution Response, ICC-01/04-02/06-1583-Conf, paras 6-16; Legal Representative Response, ICC-01/04-02/06-1586-Conf, paras 6-11.

¹⁵ Prosecution Response, ICC-01/04-02/06-1583-Conf, paras 6-7; Legal Representative Response, ICC-01/04-02/06-1586-Conf, para. 8.

¹⁶ Prosecution Response, ICC-01/04-02/06-1583-Conf, paras 11-16. *See also* Legal Representative Response, ICC-01/04-02/06-1586-Conf, paras 9-11.

¹⁷ Legal Representative Response, ICC-01/04-02/06-1586-Conf, para. 7.

According to the Prosecution, the Issue mischaracterises the Prosecution's questions and is speculative.¹⁸

10. Additionally, both the Prosecution and the Legal Representative submit that the Defence fails to demonstrate that the other requirements of Article 82(1)(d) have been met.¹⁹

III. Analysis

11. As a preliminary matter, the Chamber notes that the Impugned Decision and related filings are currently classified as confidential. However, in the interest of publicity of the proceedings under Articles 64(7) and 67(1) of the Statute and Regulation 20 of the Regulations of the Court, the present decision is classified as public, and the parties and Legal Representative are directed to file public redacted versions of their filings or to request their reclassification as public if no redactions are required. In this context, while the Chamber does not intend to order the reclassification of the part of the transcript containing the Impugned Decision, which was rendered in private session, at this stage,²⁰ it authorises the parties and participants to refer to its content in public filings, including by quoting portions thereof, as appropriate.
12. The Chamber incorporates by reference the applicable law as set out in previous decisions on requests for leave to appeal.²¹
13. The Chamber further recalls that it has previously held that evidence falling outside the temporal scope of the charges is not in-principle inadmissible and

¹⁸ Prosecution Response, ICC-01/04-02/06-1583-Conf, paras 8-10.

¹⁹ Prosecution Response, ICC-01/04-02/06-1583-Conf, paras 17-24; Legal Representative Response, ICC-01/04-02/06-1586-Conf, paras 12-15.

²⁰ Instead, the Chamber will consider the part concerned, as well as other parts of the transcript that were held in private session, when conducting its regular review of transcripts, done for the purpose of creating lesser redacted public versions.

²¹ 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.

that the admissibility of such evidence is to be considered on a case-by-case basis.²²

14. The Chamber considers that the Issue does not arise from the Impugned Decision. The Defence objection, as overruled in the Impugned Decision, related solely to the eliciting of evidence outside of the temporal scope of the charges, 'whatever the follow-up questions would be'.²³ The Defence did not raise, and the Impugned Decision did not address, any alleged leading impact.
15. Further, the Defence's claim that the Impugned Decision departs from the Chamber's previous approach to assess admissibility on a case-by-case basis and reflects a 'categorical inclusionary rule in respect of evidence related to events going beyond the temporal scope of the UDCC'²⁴ misrepresents the Chamber's ruling. First, the Impugned Decision was rendered in relation to a specific question put by the Prosecution and objected to by the Defence. Second, the Presiding Judge recalled, making reference to a recent prior ruling, that any questioning should be focused on matters that could assist the Chamber in its evaluation of the charges, and indicated that he considered that to be the case in this specific instance.²⁵ Third, the Presiding Judge's indication that he did not wish to hear any further submissions on this issue, which he considered as having been 'solved',²⁶ was related to the specific question being objected to, namely the circumstances in which the Witness saw the accused in 2004. As such, this direction concerned a specific situation and does not preclude any future objections in relation to other information outside the temporal scope of

²²Decision on Prosecution's first request for the admission of documentary evidence, 19 February 2016, ICC-01/04-02/06-1181, para. 14; See also Transcript of hearing on 3 May 2016, ICC-01/04-02/06-T-94-CONF-ENG ET, page 3.

²³ Transcript of hearing on 5 October 2016, ICC-01/04-02/06-T-147-CONF-ENG ET, page 56, lines 2-5.

²⁴ Request, ICC-01/04-02/06-1578-Conf, para. 8.

²⁵ Transcript of hearing on 5 October 2016, ICC-01/04-02/06-T-147-CONF-ENG ET, page 56, lines 16-17 ('the questioning should be focused also on that, which is exactly this case').

²⁶ Transcript of hearing on 5 October 2016, ICC-01/04-02/06-T-147-CONF-ENG ET, page 56, lines 17-18.

the charges, which, in accordance with the Chamber's consistent approach, will continue to be considered on a case-by-case basis.

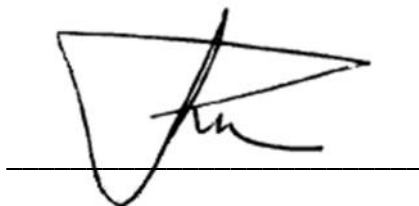
16. Accordingly, the Chamber finds that the Defence's submissions, in support of the requirements of Article 82(1)(d) of the Statute having been met, do not follow from the Impugned Decision and are speculative in nature.
17. The Defence has therefore failed to establish, and the Chamber does not consider, that the Issue constitutes an appealable issue arising from the Impugned Decision which would significantly affect the fair and expeditious conduct of the proceedings or the 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 Defence, the Prosecution, and the Legal Representative to file public redacted versions of the Request (ICC-01/04-02/06-1578-Conf), the Prosecution Response (ICC-01/04-02/06-1583-Conf), and the Legal Representative Response (ICC-01/04-02/06-1586-Conf) within two weeks of notification of the present decision.

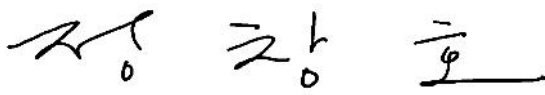
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of stylized Korean characters, written over a horizontal line.

Judge Chang-ho Chung

Dated this 27 October 2016

At The Hague, The Netherlands