

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: **ICC-01/04-02/06**
Date: **23 January 2017**

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 the Defence application for leave to appeal the
Chamber's conditional admission of prior recorded testimony of Witness P-0039
under Rule 68(2)(b)**

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 Trial Chamber VI's² decision conditionally admitting the prior recorded testimony of Witness P-0039³ 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 issue is not appealable because it expresses no more than a disagreement with the Chamber's Decision. In addition, the Defence fails 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 Appeals Chamber's immediate intervention may materially advance the proceedings.

II. Level of Confidentiality

3. Pursuant to regulation 23bis(1) of the Regulations of the Court, this filing is submitted as confidential because it refers to confidential decisions that have not yet been made public. The Prosecution will file a public redacted version of this filing in due course.

III. Submissions

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

4. The Application fails to identify an appealable issue arising from the Decision. The issue "[w]hether the prior testimony of Witness P-0039 is admissible under Rule 68(2)(b)"⁴ merely questions the correctness of the Decision in general terms. This falls short of constituting an issue. As held by the Appeals Chamber, is an "issue" is an

¹ ICC-01/04-02/06-1732-Conf ("Application").

² ("Chamber").

³ ICC-01/04-02/06-1715-Conf ("Decision").

⁴ See Application, para. 1.

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*.⁵ The general question of the correctness of a decision is not in itself an issue. Only a concrete subject underlying that decision can qualify as an issue. In fact, the issue expresses no more than a disagreement with the Chamber's Decision.

5. The Defence fails to allege any concrete error of law or fact at all. The Defence's only proffered argument—the prior recorded testimony of Witness P-0039 is “directly related to events which the Chamber must assess [...] with a view to adjudicating the charges”, and therefore cannot be admitted under rule 68—is illogical on its face and its acceptance would defeat rule 68(2)(b) altogether.⁶ Since only relevant evidence is admissible, rule 68(2)(b) could never be used if it could *not* be applied to relevant evidence.

6. The Defence does not allege that the Chamber erred in determining that the prior recorded testimony of Witness P-0039 “goes to proof of a matter other than the acts and conduct of the accused”, or that the Chamber erred in the exercise of its discretion under rule 68(2)(b)(i). Rather, the Defence selectively quotes the Chamber in asserting that the prior recorded testimony of Witness P-0039 addresses “issues which are potentially materially in dispute”⁷, but omits to recall the Chamber's finding that “the statements are significantly cumulative with the oral testimony of other witnesses who have appeared before the Chamber.”⁸

7. The Application should be dismissed on that basis alone.

⁵ 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. (emphasis added)

⁶ See Application, para. 10.

⁷ Decision, para. 13.

⁸ Decision, para. 14.

b. The issue does not affect the other article 82(1)(d) criteria

8. In any event, the issue does not meet the other article 82(1)(d) criteria. The Defence fails 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 Appeals Chamber's immediate intervention may materially advance the proceedings. The Application should also be dismissed on that basis.⁹

9. The proposed issue does not significantly affect the fair *and* expeditious conduct of the proceedings. The Defence's sole argument that the fairness of the proceedings is significantly affected rests on his erroneous view that no evidence may be admitted except through a witness subject to cross-examination. This is incorrect, and amounts to nothing more than a general disagreement with article 69(2) and rule 68(2)(b) itself. The Defence fails to make any concrete argument of unfairness in this case, especially in light of the cumulative nature of the evidence concerned. Nor in any event does the Defence explain how the Decision significantly affects the expeditious conduct of the proceedings, which is also a cumulative part of the test. The Defence does not even attempt to argue that the proposed issue affects the outcome of the trial.

10. The immediate resolution of the issue by the Appeals Chamber will not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.¹⁰ The Appeals Chamber has repeatedly held that interlocutory appeals are not a forum to provide advisory opinions but rather are a second instance review.¹¹ Indeed, even if the issue were considered to affect the

⁹ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria are cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

¹⁰ ICC-01/04-01/06-2404, para. 33.

¹¹ *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").

fairness of the proceedings (which it does not), the Chamber may properly refuse leave to appeal.¹²

11. Immediate resolution of the proposed issue by the Appeals Chamber also will not materially advance the proceedings because the broad nature of the issue proposed is quintessentially a matter of discretion under rule 68(2)(b)(i), concerning the evidence of one witness, cumulative to the evidence of others. The Defence incorrectly asserts that any error in relying on the prior recorded testimony of Witness P-0039 in the final judgment cannot be remedied. To the contrary, the Accused has the right to appeal the final judgment, including the reliance made by the Chamber on any evidence including that of Witnesses P-0039.

12. 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.

IV. Relief requested

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



Fatou Bensouda
Prosecutor

Dated this 23rd day of January 2017
At The Hague, The Netherlands

¹² ICC-01/05-01/13-1898, para. 17; ICC-01/09-01/11-1154, para. 28.