

**Cour
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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*

Public

Public Redacted Version of the "Response of the Common Legal Representative of the Victims of the Attacks to the 'Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's 'Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b)', dated 12 January 2017"

Source: Office of Public Counsel for Victims (CLR2)

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) hereby submits his response to the “Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI’s ‘Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b)’, dated 12 January 2017”¹ (the “Defence Request” or “Request”), as he represents P-0039 in his capacity of participating victim [REDACTED] in the present proceedings.

2. It is submitted that the Defence Request does not meet the legal criteria under article 82(1)(d) of the Rome Statute. In particular, the issue as identified by the Defence constitutes a mere disagreement with the Impugned Decision. Accordingly, the Defence Request must be rejected.

II. PROCEDURAL BACKGROUND

3. On 28 October 2015, Trial Chamber VI (the “Chamber”) partially granted the Prosecution’s request for protective measures for P-0039 and ordered the use of pseudonym for the duration of the trial.²

4. Prior to the scheduled commencement of Witness P-0039’s testimony on 28 October 2015, the Presiding Judge explained the practical implications of the Chamber’s decision to the witness. Witness P-0039 then refused to testify in the absence of the protective measures of face and voice distortion.³

¹ See the “Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI’s ‘Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b)’, dated 12 January 2017”, No. ICC-01/04-02/06-1732-Conf, 18 January 2017 (the “Defence Request”).

² See the “Decision on Prosecution’s request for in-court protective measures for Witness P-0039” (Trial Chamber VI), No. ICC-01/04-02/06-956-Conf, 28 October 2015.

³ See the transcript of the hearing of 28 October 2015, No. ICC-01/04-02/06-T-40-Red-ENG ET, p. 75, lines 2-3.

5. The Prosecution subsequently moved for reconsideration of the Chamber's Decision,⁴ which was denied orally the same day.⁵ The Chamber, however, indicated that it was open to the Prosecution to "*think about other legal measures how to get this testimony into evidence*".⁶

6. On 3 November 2015, the Prosecution submitted an application for protective and special measures and request for leave to appeal the 28 October decision on protective measures.⁷

7. Leave to appeal was denied on 10 December 2015.⁸

8. On 30 March 2016, the Prosecution requested that Witness P-0039's prior recorded testimony be admitted pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (the "Rules").⁹ This request was rejected on 19 May 2016.¹⁰

9. On 17 October 2016, the Prosecution submitted a request for the admission of Witness P-0039's statement pursuant to rule 68(2)(b) of the Rules.¹¹

10. On 12 January 2017, the Chamber issued the "Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b)"¹² (the "Impugned Decision") wherein it admitted into evidence P-0039's

⁴ *Idem*, p. 77, lines 5-8.

⁵ *Ibid.*, p. 81, lines 7-21.

⁶ *Ibid.*, p. 81, lines 17-18.

⁷ See the "Prosecution applications for protective/special measures under rule 87 or rule 88, and for leave to appeal the "Decision on Prosecution's request for in-court protective measures for Witness P-0039"", No. ICC-01/04-02/06-973-Conf, 3 November 2015.

⁸ See the "Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039" (Trial Chamber VI), No. ICC-01/04-02/06-1049-Conf, 10 December 2015.

⁹ See the "Prosecution's application under rule 68(2)(c) of the Rules to admit the prior recorded testimony of Witness P-0039", No. ICC-01/04-02/06-1238-Conf, 30 March 2016.

¹⁰ See the "Decision on Prosecution application under rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039" (Trial Chamber VI), No. ICC-01/04-02/06-1325, 19 May 2016.

¹¹ See the "Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0039", No. ICC-01/04-02/06-1585-Conf, 17 October 2016.

¹² See the "Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b)" (Trial Chamber VI), No. ICC-01/04-02/06-1715-Conf, 12 January 2017 (the

prior recorded statement together with associated documents, subject to receipt of a satisfactory declaration conforming to the requirements of rule 68(2)(b)(ii) and (iii) of the Rules.¹³

11. On 18 January 2017, the Defence submitted its Request for leave to appeal the Impugned Decision.¹⁴

III. SUBMISSIONS

1. The criteria set forth in article 82(1)(d) of the Rome Statute

12. Article 82(1)(d) of the Rome Statute stipulates that “*a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*” may be appealed.

13. The jurisprudence of the Court clarified the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to establish their cumulative existence for leave to appeal to be granted.¹⁵ In particular, the Appeals Chamber previously held that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.¹⁶ It also stated that “[o]nly

“Impugned Decision”). A public redacted version of the Impugned Decision was filed at the same time. See No. ICC-01/04-02/06-1715-Red.

¹³ *Idem*, pp. 11-12.

¹⁴ See the Defence Request, *supra* note 1.

¹⁵ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 21. See also “Judgment 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 OA 3, 13 July 2006, paras. 8 and 14.

¹⁶ 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”, *supra* note 15, para. 8.

an 'issue' may form the subject-matter of an appealable decision",¹⁷ and defined the term "issue" as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".¹⁸ Accordingly, the mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal.¹⁹

14. The Appeals Chamber further considered that "[n]ot every issue may constitute the subject of an appeal. It must be one apt to 'significantly affect', i.e. in a material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'".²⁰ Indeed, "the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal",²¹ and "[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances".²²

15. A Chamber presented with an application for leave to appeal must not examine or consider "arguments on the merits or the substance of the appeal", since these arguments may be more appropriately considered by the Appeals Chamber when and if leave to appeal is granted.²³

¹⁷ *Idem*, para. 9.

¹⁸ *Ibid.*

¹⁹ See the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'" (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

²⁰ 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", *supra* note 15, para. 10.

²¹ See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'" (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the "Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses'" (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

²² See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", *supra* note 21, para. 4. See also the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

²³ See the "Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58" (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 22.

16. Moreover, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of “fairness” must be understood as referring to situations “*when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*”.²⁴ In turn, “expeditiousness” must be read as “*closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*”.²⁵

17. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²⁶

2. The Defence Request does not meet the criteria of article 82(1)(d) of the Rome Statute

a. The Defence fails to identify an “issue” arising from the Impugned Decision

18. The Defence requests for leave to appeal the Impugned Decision with regard to the following issue: “*Whether the prior testimony of Witness P-0039 is admissible under Rule 68(2)(b)*”.²⁷

²⁴ See *inter alia* the “Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.

²⁵ *Idem*, para. 18.

²⁶ 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”, *supra* note 15, para. 13.

²⁷ See the Defence Request, *supra* note 1, para. 1.

19. The Legal Representative submits that the issue identified by the Defence was the very subject matter of the Impugned Decision. It is apparent from the very way in which the purported issue is phrased that the Defence simply does not agree with the Impugned Decision and aims at re-litigating the issue already settled by the Chamber. Accordingly, the issue identified by the Defence simply reflects a mere disagreement with conclusions of the Chamber and, therefore, does not meet the requisite threshold for leave to appeal to be granted under article 82(1)(d) of the Rome Statute.

20. Insofar the Defence seeks, in essence, reconsideration of the Impugned Decision, the Chamber already established that *“while properly covered by the powers of a chamber, reconsideration of its own decisions is an exceptional measure which will only be taken when a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice”*.²⁸ It is submitted that reconsideration is, therefore, an exceptional remedy that can only be granted in limited circumstances and none of the requirements for granting such a request are met in the present instance.

21. The Legal Representative submits that, as demonstrated *supra*, since the issue identified by the Defence clearly does not constitute an appealable issue under article 82(1)(d) of the Rome Statute, and because of the cumulative nature of the applicable legal criteria, there is no need to further consider whether said issue affects the fair and expeditious conduct of the proceedings, and whether an immediate resolution by the Appeals Chamber on said issue may materially advance the proceedings.²⁹

²⁸ See the “Decision on the Defense request for reconsideration and clarification” (Trial Chamber VI), No. ICC-01/04-02/06-483, 27 February 2015, para. 13. See also, *inter alia*, the “Decision on Defense request for reconsideration of oral ruling on admission of a document for impeachment purposes” (Trial Chamber VI), No. ICC-01/04-02/06-1473, 3 August 2016, para. 7.

²⁹ See the “Decision on request for leave to appeal the Chamber’s decision rejecting the Defence request for a stay of proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-1677, 12 December 2016, para. 17. See also e.g. the “Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing” (Pre-Trial Chamber I), No. ICC-02/11-01/11-530, 8 October 2013, para. 42.

22. Accordingly, the Legal Representative respectfully requests the Chamber to reject the Defence Request.

IV. CONFIDENTIALITY

23. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present submissions are classified as “confidential” as they refer to the documents marked with the same level of classification.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests that the Chamber

REJECT the Defence Request



Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 17th Day of February 2017

At The Hague, The Netherlands