



Original: **English**

No.: ICC-01/04-02/06
Date: 28 February 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***

Public

**Public redacted of "Request on behalf of Mr Ntaganda seeking leave to appeal one ruling from 'Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)'" ,
ICC-01/04-02/06-1749-Conf, 24 January 2017**

Source: Defence Team of Mr Bosco Ntaganda

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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REGISTRY

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**Victims Participation and Reparations
Section**

Further to: (i) Trial Chamber VI (“Chamber”)’s *Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)* of 12 January 2017 (“Impugned Decision”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submits this:

**Request on behalf of Mr Ntaganda seeking leave to appeal one ruling from
“Decision on Prosecution application for admission of prior recorded testimony of
Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)”**

“Defence Request for Leave to Appeal”

1. The Defence respectfully seeks leave to appeal one ruling from the Impugned Decision whereby the Chamber granted the Prosecution’s request to admit the prior recorded testimony of Witness P-0057 pursuant to Rule 68(2)(b) without cross-examination. The Defence posits that the appealable issue is as follows:

Whether the prior testimony of Witness P-0057 is admissible under Rule 68(2)(b), without the Defence being provided with an opportunity to cross-examine the witness.

(“Appealable Issue”)

2. To the extent that the Impugned Decision strikes at the core of principles allowing for evidence to be admitted other than by viva voce testimony, the Appealable Issue significantly affects the fair and expeditious conduct of the proceedings. The Appealable Issue also has the potential to significantly affect the outcome of the trial as the evidence admitted without cross examination will be considered by the Chamber when rendering its Judgment. Furthermore, the Defence posits that immediate resolution of the Appealable Issue by the Appeals Chamber will materially advance the proceedings.

¹ ICC-01/04-02/06-1730-Conf.

BACKGROUND

3. On 2 December 2016, the Prosecution requested admission of Witness P-0057's Prior Recorded Testimony under Rule 68(2)(b).
4. On 27 December 2016, the Defence opposed the Prosecution request to have Witness P-0057's Prior Recorded Testimony admitted under Rule 68(2)(b) considering that the criteria of that latter provision were not met.
5. On 18 January 2017, the Chamber admitted into evidence the prior recorded testimony of Witness P-0057 with one additional document for impeachment.

SUBMISSIONS

I. The Appealable Issue

6. At the outset, the Defence underscores that a request for leave to appeal is not concerned with whether the Decision is legally founded or not,² but should rather be aimed at addressing the specific criteria set out in Article 82(1)(d) of the Statute.³
7. The Appealable Issue is not merely a dispute or disagreement between the Parties or the Chamber but rather, whether (1) the prior recorded testimony of Witness P-0057 meets the threshold to be admitted pursuant to Rule 68(2)(b) and (2) can be admitted without allowing the Defence an opportunity to cross-examine Witness P-0057.
8. The Defence submits that The prior recorded testimony of Witness P-0057 is directly related to events materially disputed, which the Chamber must assess and to which the Chamber must attribute probative value, if any, with a view to adjudicating the charges laid against the Accused. For instance, the details of Witness P-0057's [REDACTED] are central to challenging and evaluating

² See, e.g., ICTY, *Slobodan Milošević* case, IT-02-54-T, "Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding", 20 June 2005, para.4.

³ ICC-01/04-02/06-425-Conf-Exp, para.22.

the credibility of other witnesses, including witnesses who [REDACTED] such as Witness [REDACTED].

9. In addition, evidence related to the participation of Mr Lubanga and the UPC in efforts to demobilise child soldiers undoubtedly goes to the charges against Accused and/or to conclude whether of the modes of individual criminal responsibility put forward by the Prosecution are proved beyond reasonable doubt. The Chamber has recognised that this issue is in dispute.⁴ One additional important factor, namely the Accused's fundamental right to challenge the evidence brought against him militates in favour of granting leave to appeal.
10. The Impugned Decision admitting the prior recorded testimony of Witness P-0057 along with one additional item for impeachment purposes demonstrates in and of itself that his evidence is materially disputed by the parties.

II. The Appealable Issue significantly affects the fair and expeditious conduct of the proceedings

11. The Issue at hand strikes at the core of the Accused fundamental right to examine the witnesses against him in accordance to Article 67(1)(d) and thereby significantly affects the fair conduct of the proceedings.
12. The fundamental right of the Accused to challenge the evidence of the charges brought before him far outweighs the potential impact of admitting the prior recorded testimony of Witness P-0057.

III. Immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings

13. The Appealable Issue necessitates immediate resolution by the Appeals Chamber as it consists of evidence that will otherwise be admitted and potentially relied upon by the Chamber in its Judgement. The Issue cannot be remediated at a later stage in the proceedings because the evidence will have

⁴ Decision, para.17.

been considered without the possibility for the Accused to cross-examine Witness P-0057 on these important matters.

CONFIDENTIALITY

14. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Request is classified as confidential, as it addresses matters raised in confidential filings.

RELIEF SOUGHT

15. In light of the above, the Defence respectfully requests the Chamber to **GRANT** leave to appeal one ruling from the Impugned Decision on the above outlined Appealable Issue.

RESPECTFULLY SUBMITTED ON THIS 28TH DAY OF FEBRUARY 2017

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands