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Date: **14 March 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 version of “Prosecution’s response to the “Request for leave to appeal ‘Decision on Prosecution application under rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016’, ICC-01/04-02/06-1816-Conf”,
10 March 2017, ICC-01/04-02/06-1819-Conf**

Source: Office of the Prosecutor

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 Chris Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the 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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence request¹ for leave to appeal the decision of Trial Chamber VI (“Chamber”) to admit the prior recorded testimony of Witness P-0016² should be dismissed because it fails to meet the cumulative requirements for leave to appeal under article 82(1)(d) of the Statute.
2. Each of the four issues advanced in the Defence Application demonstrate a mere disagreement with the Decision, and do not constitute appealable issues. Further, the Defence fails to demonstrate that any of the four issues would significantly affect 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.

Confidentiality

3. This filing is classified as “Confidential” pursuant to regulation 23*bis*(2) of the Regulations of the Court since it responds to a confidential submission. The Prosecution will file a public redacted version of this filing in due course.

Submissions

I. None of the four issues are appealable

4. An “issue” is “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or

¹ ICC-01/04-02/06-1816-Conf (“Defence Application”).

² ICC-01/04-02/06-1802-Conf (“Decision”).

conflicting opinion.”³ Moreover, an “issue” should be framed in concrete terms, and should not merely be an attempt to re-litigate the impugned decision.⁴

5. None of the four issues set out in the Defence Application constitute an appealable issue arising from the Decision within the meaning of article 82(1)(d) and as defined in this Court’s jurisprudence.⁵

*i. First Issue: Whether the Trial Chamber erred in determining that “the need for Article 56 measures could not have been concretely anticipated prior to the Prosecution’s receipt of the Report in December 2016”*⁶

6. The first issue is merely a disagreement with the Chamber’s conclusion and is not sufficiently articulated in the Defence Application. A generalised challenge to the correctness of the Chamber’s conclusion does not render the issue appealable.⁷
7. The Defence fails to articulate any concrete error of law or fact. Rather, it simply states that the Chamber’s determination on whether article 56 measures could have been anticipated was essential to the Decision and refers to the statutory requirements of article 68(2)(c).
8. In the Decision, the Chamber considered all key facts, summarised the submission of the parties with respect to article 56 (paragraphs 12 to 15) and then provided its analysis and findings on this matter (paragraphs 16-17). The Defence merely disagrees with the Chamber’s conclusion. This is not an appealable issue and should be dismissed.

³ ICC-01/04-02/06-760-Red, para. 21, fn. 37 citing ICC-01/04-168 OA3, para. 9.

⁴ See e.g., ICC-01/05-01/13-1963, paras. 19-21.

⁵ See para. 4, above; See also ICC-01/04-168, 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.

⁶ Defence Application, para. 1(i).

⁷ See, ICC-01/04-02/06-1779, para. 7.

*ii. Second Issue: Whether the Trial Chamber erred to the extent that it admitted the paragraphs of the 2005 Statement concerning the events at Kobu (paragraphs 153-168) without considering whether the supposed indicia of reliability cited by the Trial Chamber made those paragraphs any more reliable*⁸

9. The second issue in the Defence Application is similarly a mere disagreement with the Decision, and the Defence again fails to allege any concrete error of law or fact.
10. Moreover, in its framing of this “issue”, the Defence omits relevant portions of the Chamber’s analysis and reasoning that inform its conclusion that “the probative value of admitting the Statement under Rule 68(2)(c) outweighs its prejudicial effect.”⁹ Namely, directly above this conclusion, the Chamber expressly notes that it has had the benefit [REDACTED] referred to in Witness P-0016’s statement, concerning certain alleged acts and conduct of the Accused, that the ultimate weight to be attributed to his statement would be assessed in light of the evidence as a whole and, importantly, that the Chamber “will approach the [s]tatement with caution in accordance with the considerations noted above [...]”.¹⁰
11. In the Decision, the Chamber acknowledges that certain references to the Accused in the 2005 witness statement appear to be “potentially prejudicial and of limited probative value”.¹¹ The Defence articulated specific concerns about the source of Witness P-0016’s information in its response.¹² Reiterating these same concerns in the Defence Application is an inappropriate attempt to re-litigate this issue.¹³

⁸ Defence Application, para. 1(ii).

⁹ Defence Application, para. 12, citing the Decision, para. 30.

¹⁰ Decision, para. 30.

¹¹ Decision, para. 27.

¹² ICC-01/04-02/06-1788-Conf, paras. 15-16 (“Defence Response”).

¹³ Defence Application, para. 12

12. For the above reasons, this issue is not appealable and should be dismissed.

iii. The Third Issue: Whether the Trial Chamber erred by relying on the existence of a verbatim record of the 2005 Statement that did not exist¹⁴

13. The third issue is a speculative assertion, which finds no basis in the Decision and should be dismissed *in limine*. It is also inaccurate, in that the Chamber did not order *disclosure* of transcripts or translations of interview, but rather the identification of already disclosed items – importantly, only if such transcripts or translations existed.¹⁵ This portion of the Decision does not support the Defence assertion that the Chamber was under the “misapprehension that a *verbatim* recording of the 2005 Statement existed”, or that it was “of great importance to the Chamber’s decision” or “determinative”.¹⁶ The Chamber decided to admit the 2005 witness statement on the basis of the material before it; it ordered the identification of a *verbatim* record of the interview, if one existed, in order to consider the weight to be attributed to the 2005 witness statement but not as a prerequisite to its admission.
14. The Defence fails to identify an issue arising from the Decision or requiring resolution, or any error of fact or law in the Decision. It should be dismissed on this basis alone.

iv. The Fourth Issue: Whether the Trial Chamber erred by relying on information concerning the Prosecution’s efforts to contact Witness P-0016 that were not disclosed to the Defence¹⁷

15. The fourth issue is also a mere disagreement with the Chamber’s conclusion, and an attempt to re-litigate the Defence position.

¹⁴ Defence Application, para. 1(iii).

¹⁵ Decision, para. 30. The Chamber found it appropriate “to admit any disclosed transcripts and translations of the records of the interview forming the basis of the Statement, and orders the Prosecution to identify the ERNs of these to the Registry in order for the Registry to facilitate their admission.”

¹⁶ Defence Application, para. 14.

¹⁷ Defence Application, para. 1(iv).

16. On 17 February 2017, the Prosecution provided the Chamber and Defence with ten documents referred to by ERN in footnotes 7, 10 to 16 of the Prosecution Application (which supported the factual assertions contained in paragraphs 11, 15 to 17 and 19). These ten documents had inadvertently not been annexed or formally disclosed.¹⁸ These documents related to Prosecution efforts to contact Witness P-0016 and ascertain information about his health condition. The Defence did not notify the Prosecution that it could not access the ten documents referred to in support of this point in its filing, yet asserted that there was a lack of documentary foundation to substantiate the Prosecution's submissions about the difficulties it encountered re-contacting Witness P-0016.¹⁹
17. On 20 February 2017, after the Prosecution rectified the issue, the Defence advised the Chamber, *via* email, that it would not amend the Defence Response or provide any supplemental submissions in response to these ten documents, and argued that the Prosecution should not be permitted to rely on the ten documents.²⁰
18. In the Decision, the Chamber referred to the Prosecution's numerous attempts to contact Witness P-0016 as set out in the Prosecution Application and supported by these documents,²¹ and concluded that the requirement under rule 68(2)(c)(i) was met.²²
19. The Defence does not articulate an issue in concrete terms, other than to assert that it did not have disclosure of these ten documents relied upon the Chamber. The Chamber was notified of the position of the Defence prior to issuing the Decision. The Defence is now seeking to re-litigate a matter which is ultimately

¹⁸ Email from Selamawit Yirgou to Trial Chamber VI Communications and the Defence at 12:12.

¹⁹ Defence Response, paras. 1, 10 and 14.

²⁰ Email from Stéphane Bourgon to Trial Chamber VI Communications and the Prosecution at 15:19.

²¹ Decision, para. 16.

²² Decision, para. 17.

a mere disagreement with the Chamber's decision. It should be dismissed on this basis.

II. The remaining article 82(1)(d) criteria are not met

20. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.²³ Since none of the four issues are appealable issues, the Defence Application should be dismissed on this basis alone. Notwithstanding, the issues also fail to meet the remaining article 82(1)(d) criteria.
21. *First*, the Defence fails to substantiate its assertion that the Decision significantly affects the fair conduct of the proceedings. Rule 68(2)(c) expressly permits the admission of prior recorded testimony where the witness is unavailable for examination, and does not preclude that such testimony goes to the acts and conducts of the accused.²⁴ Therefore, admission of such evidence cannot be said to *necessarily* affect the fair conduct of the proceedings.
22. The Chamber held that it will approach Witness P-0016's statement with caution and that ultimate weight to be attributed to the statement shall be assessed in light of the evidence as a whole.²⁵ The Defence fails to appreciate that such an evaluation includes evidence presented by the Defence during the Defence case, where the Defence would be able to raise any alleged

²³ 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."

²⁴ ICC-01/04-02/06-1779, para. 9, where the Chamber held that "merely challenging the general premise of the provision is insufficient".

²⁵ Decision, para. 30.

inconsistencies. As such, it is premature and speculative to request appellate scrutiny at this stage.²⁶

23. The Defence does not address how the Decision significantly affects the expeditious conduct of the proceedings, which is also a cumulative part of the test. The Defence argues that the admission of portions of Witness P-0016's statement "may also affect the outcome of the proceedings" without further substantiation.
24. As the Chamber has neither relied on, nor assigned any weight to Witness P-0016's prior recorded testimony, there is no reason for the Appeals Chamber to intervene at this stage.
25. *Second*, the Defence fails to show that immediate resolution by the Appeals Chamber is warranted.
26. 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.²⁷ The Appeals Chamber has repeatedly held that interlocutory appeals are not a forum to provide advisory opinions but rather are a second instance review.²⁸
27. Immediate resolution of the proposed issue by the Appeals Chamber also will not materially advance the proceedings because the nature of the issues proposed is a matter of discretion under rule 68(2)(c), concerning the evidence of one witness. The Defence incorrectly asserts that admitting the prior

²⁶ See ICC-01/05-01/08-532, para. 12: "[A]s has been stated by other chambers of this court, the remedy of article 82(1)(d) of the Statute reflects a restrictive approach, favouring "as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions"

²⁷ ICC-01/04-01/06-2404, para. 33.

²⁸ 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").

recorded testimony of Witness P-0016 could impact the final judgment, which could not be easily remedied.²⁹ To the contrary, the Accused can advance final closing argument on the weight to be accorded to Witness P-0016's prior recorded testimony, and it has the right to appeal the final judgment, including the reliance made by the Chamber on any evidence, including that of Witnesses P-0016.

Relief requested

28. For all the reasons above, the Defence Application should be dismissed.



Fatou Bensouda
Prosecutor

Dated this 14th day of March 2017
At The Hague, The Netherlands

²⁹ Defence Application, para 20.