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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 “Request for leave to appeal ‘Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016’”, 6 March 2017, ICC-01/04-02/06-1816-Conf

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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Further to the Trial Chamber's ("Chamber") "Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016"¹ issued on 24 February 2017 ("Decision"), Counsel for Mr Ntaganda ("Defence") submits this:

Request for leave to appeal "Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016"

INTRODUCTION

1. The Defence seeks leave to appeal the Decision admitting the entirety of Prosecution Witness P-0016's [REDACTED] Statement² and [REDACTED]³ into evidence without cross-examination. The Defence seeks leave to appeal the following issues:

- i. 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" ("First Issue");⁴
- ii. Whether the Trial Chamber erred to the extent that it admitted the paragraphs of the 2005 Statement concerning the events at Kobu⁵ without considering whether the supposed *indicia* of reliability cited by the Trial Chamber made those paragraphs any more reliable ("Second Issue");⁶

¹ ICC-01/04-02/06-1802-Conf.

² Prosecution's application under rule 68(2)(c) to admit the prior recorded testimony and related documents of Prosecution Witness P-0016, Annex A.1, 22 December 2016, ICC-01/04-02/06-1698-Conf-AnxA1, ("2005 Statement").

³ Prosecution's application under rule 68(2)(c) to admit the prior recorded testimony and related documents of Prosecution Witness P-0016, 22 December 2016, Annex B.1, B.2, B.3, B.4, B.5, B.6, B.7 and B.8, ICC-01/04-02/06-1698-Conf-AnxB ("[REDACTED]").

⁴ Decision, para.17.

⁵ Statement, paras.153-168.

⁶ Decision, paras.28-30.

- iii. Whether the Trial Chamber erred by relying on the existence of a *verbatim* record of the 2005 Statement that did not exist (“Third Issue”);⁷ and
- iv. 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 Defence (“Fourth Issue”).⁸

(Collectively, the “Issues”)

- 2. These Issues are each appealable as they arise directly from the Decision. Further, the Decision relied substantially on the correctness of its resolution of each of these Issues in its ultimate disposition. The admission without cross-examination of testimonial evidence that the Trial Chamber itself recognised could “be potentially prejudicial”⁹ directly and significantly affects the accused’s right under Article 67(1)(e) to “examine [...] the witnesses against him or her.” Immediate resolution of these Issues, especially given the uniquely incriminating nature of some portions of the 2005 Statement, may and will materially advance the proceedings.

APPLICABLE LAW

- 3. A decision is subject to interlocutory appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁷ Decision, para.30, p.16 (“**DIRECTS** the Prosecution to identify any disclosed transcripts of the records of interview forming the basis of the Statement, and orders the Prosecution to forthwith identify the ERNs of these to the Registry in order to facilitate their admission”).

⁸ Email from Prosecution to the Chamber, 17 February 2017 at 12:12 mentioning 10 documents (DRC-OTP-2091-0128, DRC-OTP-2091-0132, DRC-OTP-2099-0372, DRC-OTP-2099-0374, DRC-OTP-2099-0500, DRC-OTP-2099-0501, DRC-OTP-2099-0503, DRC-OTP-2089-1194, DRC-OTP-2089-1196, DRC-OTP-2091-0126).

⁹ Decision, para.27.

4. The Appeals Chamber has defined an “issue” as

an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.¹⁰

5. The issue must further be one for which

immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.¹¹

6. The Chamber may reformulate appealable issues at its discretion.¹²

BACKGROUND

7. On 22 December 2016, the Office of the Prosecutor (“Prosecution”) filed its request seeking the admission of the prior recorded testimony and associated documents of Witness P-0016 under Rule 68(2)(c).¹³

8. On 27 December 2016, the Chamber transmitted to the parties a summary of a psychosocial assessment report of the Witness provided by the Victims and Witnesses Unit (“VWU”).¹⁴

9. On 16 February 2017, the Defence filed its response to the Prosecution Application.¹⁵

¹⁰ *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168 (“Leave to Appeal Judgment”), para.9.

¹¹ Leave to Appeal Judgment, para.14.

¹² Leave to Appeal Judgement, para.20.

¹³ Prosecution’s application under rule 68(2)(c) to admit the prior recorded testimony and related documents of Prosecution Witness P-0016, 22 December 2016, ICC-01/04-02/06-1698-Conf (“Prosecution Application”).

¹⁴ Email from the Chamber to the Defence on 27 December 2016 at 11:20.

10. On 24 February 2017, the Chamber rendered the Decision admitting the 2005 Statement and [REDACTED], with associated documents.¹⁶ The Chamber further ordered the Prosecution to “identify any disclosed transcripts of the records of interview forming the basis of the Statement [referring to the 2005 Statement], and orders the Prosecution to forthwith identify the ERNs of these to the Registry in order to facilitate their admission.”¹⁷

SUBMISSIONS

I. Each issue is appealable

a. The First Issue is appealable

11. The Chamber held that it was “satisfied that, while greater diligence could have been exercised by the Prosecution to secure a diagnosis of the Witness, the need for Article 56 measures could not have been concretely anticipated prior to the Prosecution’s receipt of the Report in December 2016”.¹⁸ A precondition for admitting an uncross-examined out-of-court statement by a witness as evidence is that “the necessity of measures under article 56 could not be anticipated.”¹⁹ The Chamber’s determination of this issue was, accordingly, essential to the Decision to admit the Witness’s prior statement and testimony.

b. The Second Issue is appealable

12. The Chamber rejected the Defence’s arguments concerning the reliability of, in particular, the 2005 Statement²⁰ on the basis that “[t]he Chamber does not consider that the Defence arguments on the Statement go to the *reliability* of the Statement but rather to the *weight* the Chamber may ultimately attach to it,

¹⁵ Response on behalf of Mr Ntaganda to the “Prosecution’s application under rule 68(2)(c) to admit the prior recorded testimony and related documents of Prosecution Witness P-0016”, 16 February 2017, ICC-01/04-02/06-1788-Conf (“Response”).

¹⁶ Decision, p.16.

¹⁷ Decision, p.16.

¹⁸ Decision, para.17.

¹⁹ ICC Statute, Article 68(2)(c)(i).

²⁰ Response, paras.15-17.

if admitted.”²¹ The Chamber proceeded to consider Witness P-0016’s purported “[REDACTED]”, his purported “frequent contact with Mr Ntaganda” and “the fact that the Statement is internally consistent” as the basis for holding that “the *prima facie* probative value of the Statement is sufficiently established.”²² The Chamber then weighed these *indicia* of reliability against the danger of prejudice, which included consideration of such factors as: (i) the directness of the evidence; (iii) whether it is corroborated by any other evidence; and (iii) the extent to which the statement may address non-charged, rather than charged, events.²³ The Chamber then balanced these considerations to reach the conclusion, even in respect of the 2005 Statement, that “the probative value of admitting the Statement under Rule 68(2)(c) outweighs its prejudicial effect.”²⁴ This included the passages of the 2005 Statement concerning Mr Ntaganda’s knowledge of the alleged Kobu massacre conveyed to the witness through someone named “[REDACTED]”²⁵ The Chamber seems to have analysed the appropriateness of the admission of the Statement as a indivisible whole: “the Chamber considers that the *prima facie* probative value of the Materials as a whole outweighs any prejudicial effect to the accused caused by their introduction, noting the analysis above in relation to the Statement.”²⁶

The determination that the *indicia* of reliability outweighed the prejudicial effect of the 2005 Statement, including the specific paragraphs concerning the alleged Kobu massacre, was necessary and essential to the admission of those paragraphs. The issue is, accordingly, appealable

²¹ Decision, para.23.

²² Decision, para.28.

²³ Decision, para.29.

²⁴ Decision, para.30.

²⁵ Statement, para.163.

²⁶ Decision, para.32.

c. The Third Issue is appealable

13. The operative paragraphs of the Decision include an order that the Prosecution was directed “to identify any disclosed transcripts of the records of interview forming the basis of the Statement, and orders the Prosecution to forthwith identify the ERNs of these to the Registry in order to facilitate their admission.”²⁷ The Chamber appears to have been under the misapprehension that a *verbatim* recording of the 2005 Statement existed. This misapprehension was not incidental to the Decision, as is reflected by the Chamber’s order that the recording be identified, disclosed and admitted into evidence.
14. The significance of such an order to the Decision is self-evident. The difference between the *prima facie* reliability of a written *non-verbatim* statement prepared by four Prosecution investigators as opposed to an audio-recording or transcript is enormous. The least that can be said is that the issue appears to have been of great importance to the Chamber’s decision to admit the 2005 Statement, if not determinative.

d. The Fourth Issue is appealable

15. The Chamber placed substantial reliance on the steps taken by Prosecution investigators to ascertain Witness P-0016’s state of health, including apparently accepted the “reported difficulties in contacting the Witness during both 2015 and 2016.”²⁸ The Chamber appeared to entertain some doubts about whether the information concerning the Witness’s condition was obtained as expeditiously as possible, noting that the Prosecution “could indeed have exercised a greater degree of diligence.”²⁹ Nevertheless, the Chamber accepted that, on balance, the steps taken by the Prosecution were sufficiently diligent as to negate any finding of prior foreseeability of the need for Article 56 measures.

²⁷ Decision, p.16.

²⁸ Decision, para.16.

²⁹ Decision, para.16.

16. The Defence did not, however, have disclosure of the documents relied on by the Trial Chamber to reach this determination.³⁰ The reliance on these documents was, at the very least, highly significant for the Chamber's determination concerning the foreseeability of the need for Article 56 measures. The Fourth Issue, accordingly, arises from the Decision and was highly relevant if not essential to the outcome reached in respect of the admission of both the 2005 Statement and [REDACTED]. The issue is appealable.

II. Each issue significantly affects the fair and expeditious conduct of proceedings, for which immediate resolution may materially advance the proceedings

17. Each issue is essential to the determination that the 2005 Statement and [REDACTED] should be admitted. The material admitted includes paragraphs of the 2005 Statement that allege that Mr Ntaganda knew about the alleged Kobu massacre and did nothing about it. This allegation is the basis for charges of murder in the Updated Document Containing the Charges.³¹

18. Admission of an uncross-examined Statement imputing to an accused knowledge of a massacre, in itself, significantly affects the fair conduct of proceedings. More particularly, the factors cited generally by the Trial Chamber in weighing potential unfairness and prejudice do not apply to the allegation concerning Mr Ntaganda's knowledge of the Kobu massacre:

- It is uncorroborated by other evidence;³²

³⁰ Email Response from the Defence to the Chamber, 20 February 2017 at 15:18 indicating that the documents had not previously been disclosed to the Defence and should not be relied upon.

³¹ Updated Document Containing the Charges, 16 February 2015, ICC-01/04-02/06-458-AnxA, paras.2, 82-91, 143 ff.

³² Decision, paras.29-30 ("the evidence contained therein is corroborated by any other evidence admitted into the record"); ("the Chamber has had the benefit of hearing from several other military insider witnesses on the topics referred to in the Statement, concerning certain alleged acts and conduct of the accused.")

- The information is directly incriminating in respect of charged acts, and is not merely of indirect relevance;³³ and
- Neither the claimed frequency of the Witness's contacts with Mr Ntaganda³⁴ nor his "unique role" in the UPC³⁵ are germane to the reliability of his alleged knowledge that Mr Ntaganda was informed of the Kobu massacre, as that knowledge is based exclusively on hearsay.

19. The admission of the Kobu allegations without cross-examination impacts directly on the fairness of trial which may also affect the outcome of the proceedings.

20. Immediate appellate resolution may materially advance proceedings. Interlocutory appellate resolution as to whether the admission of this uncross-examined assertion accords with trial fairness is the only way to ensure that the course of trial proceedings are not irremediably impacted in respect of a substantial material issue. The admission of this uniquely prejudicial information may directly impact on the scope of the evidence that the Defence is compelled to adduce during its case.³⁶ The admission of this evidence could impact on findings in the final judgment³⁷ to such an extent that it would not

³³ Decision, para.29 ("[t]he Chamber further indicates that, in accordance with its previous rulings, while any references to conduct for which the accused is not charged (such as alleged killings referred to in the Statement) may have potential relevance, including in relation to various modes of liability and to *mens rea*, and are thus not in principle inadmissible, the Chamber's focus shall be on matters within the scope of the charges.")

³⁴ Decision, para.28 ("the fact that the Witness states that during certain periods of time that he had frequent contact with Mr Ntaganda").

³⁵ Decision, para.28 ("the high-level and unique role of the Witness").

³⁶ ICC, *The Prosecutor v. Ruto and Sang*, Decision on the Prosecution's Application for Admission of Documentary Evidence Related to the Testimony of Witness 13, 4 February 2015, ICC-01/09-01/11, para.23 ("[t]he Chamber agrees with the Defence that the identified issues relate to incriminatory evidence that has been admitted into the record and which could significantly impact the length of the proceedings.")

³⁷ Leave to Appeal Judgement, para.15 ("ensur[e] that the proceedings follow the right course"; "[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.")

be easily remedied on final appeal, as well as tainting the overall fairness of proceedings.³⁸

CONFIDENTIALITY

21. 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

22. Leave to appeal the Decision is sought pursuant to Article 82(1) of the Statute in respect of the Issues.

RESPECTFULLY SUBMITTED ON THIS 1ST DAY OF MAY 2017



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³⁸ ICTY, *The Prosecutor v. Karadžić*, Decision on Accused's Application for Certification to Appeal Decision on Commencement of Trial, 18 September 2009, IT-95-5/18-PT, para.6 ("[g]iven that both prongs of the test for certification are satisfied, and the Chamber's view that it is in the interests of justice for the Appeals Chamber to rule on this issue, certification to appeal will be granted"; ICTR, *The Prosecution v. Ngirabatware*, Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date, 15 April 2009, ICTR-99-54-T, para.20 ("a resolution of this matter at any later stage could impact [] the Accused's right to a fair trial").