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No.: **ICC-01/04-02/06**
Date: **18 December 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 Defence ‘Request for clarification and directions concerning potential recall of Prosecution Witness P-0290, ICC-01/04-02/06-2120’, 20 November 2017”, 22 November 2017, ICC-01/04-02/06-2123-Conf

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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Introduction

1. Trial Chamber VI ("Chamber") informed the Parties and participants that it is considering calling Witness P-0290 to give further evidence and that it will provide guidance on the modalities of witness testimony in due course.¹ While acknowledging that the Chamber has the authority under the Statute to call a Prosecution witness to give further evidence, the Defence seeks to make submissions on the propriety of the Chamber doing so "in the specific circumstances of this case".² The Defence also requests that the Chamber inform it of the purpose and scope of recalling Prosecution Witness P-0290, submitting that there is potential prejudice to the Accused.³

2. It is undisputed that the Chamber may request the submission of any evidence it considers necessary for the determination of the truth. Articles 64(6)(b) and (d) of the Statute give the Chamber clear authority to "require the attendance and testimony of witnesses and production of documents and other evidence" and to "order the production of evidence in addition to that already [...] presented during the trial by the parties". Article 69(3) empowers the Chamber to "request the submission of all evidence that it considers necessary for the determination of the truth".

3. The Defence Request should be rejected. The Chamber does not have to "define the topics that justify recalling the witness"⁴ and enter into a debate as to whether the Parties agree with the Chamber that it is necessary for the determination of the truth to request the submission of additional evidence. It is up to the Chamber to decide. Should the Defence disagree with the Chamber's final reasoning, it can challenge the decision.

¹ Email from Trial Chamber VI on 10 November 2017 at 15:16.

² ICC-01/04-02/06-2120 ("Defence Request"), para. 4.

³ Defence Request, paras. 5-6.

⁴ Defence Request, para. 4.

4. The Chamber has indicated that it will provide further instruction in due course as to the modalities of this examination, once it reaches a final decision.

Confidentiality

5. In accordance with regulation 23*bis*(2) of the Regulations of the Court, this Response is classified as 'Confidential' as it responds to a confidential Defence request. The Prosecution will file a public redacted version.

Procedural History

6. [REDACTED].⁵ At the start of his testimony, the Defence advised the Chamber that it would not cross-examine him at the end of the examination-in chief, but would seek to recall the witness at a later stage for this purpose.⁶ In response, the Chamber advised that they believed it was possible for the Defence to cross-examine Witness P-0290 as scheduled, and that it may not grant a request to recall the witness.⁷
7. [REDACTED], the Defence reiterated its position that it was unable to cross-examine Witness P-0290 and would apply to recall the witness at a later point.⁸ In response, the Chamber encouraged the Defence to proceed with its cross-examination, advised that failure to do so could be construed as a waiver of the right to cross-examine him and that "cogent reasons" would need to exist to warrant recalling him.⁹

⁵ [Redacted].

⁶ [Redacted].

⁷ [Redacted].

⁸ [Redacted].

⁹ [Redacted].

8. On 25 January 2017, the Defence requested that the Chamber recall Witness P-0290 either as a Prosecution witness prior to the end of the presentation of the Prosecution case or, alternatively, as a Defence witness.¹⁰
9. On 6 February 2017, the Prosecution opposed this request on the basis that the Defence had not shown good cause or compelling circumstances justifying the exceptional remedy of recalling Witness P-0290.¹¹
10. On 17 February 2017, the Chamber rejected the Defence request finding that the Defence “did not sufficiently substantiate its request to recall the Witness, or to modify the terms of the Protocol [on the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant].”¹² The Chamber held that its finding was without prejudice to any future decision to itself recall this witness at a later stage, if necessary for the determination of the truth.¹³
11. On 10 November 2017, the Chamber notified the Parties and participants by email that it was considering calling Witness P-0290 to give further evidence pursuant to articles 64(6)(d), 69(3) of the Rome Statute and its Decision on the Defence Request.¹⁴
12. On 17 November 2017, the Defence requested that the Chamber set out a procedure to allow the Parties and participants to be heard on the “propriety” of recalling Witness P-0290¹⁵ and requested the Chamber to “define the topics that justify recalling the witness.”¹⁶ Specifically, the Defence requested that the Chamber define: “(i) the proper scope of any such testimony; (ii) the modalities of

¹⁰ ICC-01/04-02/06-1751-Red2.

¹¹ ICC-01/04-02/06-1775-Red.

¹² ICC-01/04-02/06-1791-Conf, para. 17 (“Decision on the Defence Request”).

¹³ *Ibid.*

¹⁴ Email from Trial Chamber VI Communications to Parties and participants, dated 10 November 2017 at 15:16.

¹⁵ Defence Request, para. 4.

¹⁶ Defence Request, para. 5.

the witness' testimony; and (iii) any safeguards envisaged to protect the rights of the Accused."¹⁷

13. On 20 November 2017, the Chamber notified the Parties and participants by email to file any responses to the Defence Request by 22 November 2017.¹⁸

Prosecution Submissions

14. The Defence concedes that the Chamber has the authority to recall a witness pursuant to articles 64(6)(d) and 69(3) of the Statute,¹⁹ yet requests that the Chamber "define the topics that justify" recalling Prosecution Witness P-0290 and informs it of the purpose of scope of recalling this witness.²⁰
15. This Defence request is misplaced: the Chamber is acting within its statutory authority to request the submission of any evidence that it considers necessary to determine the truth. The Chamber does not need to provide any further justification.
16. As indicated in its email of 10 November 2017, the Chamber will first decide whether to call this witness, and if so, it will provide guidance on the modalities of testimony in due course. Such guidance will include practical modalities, such as whether the examination will be led by the Chamber or the Prosecution, the order of questioning, the manner of questioning by the Parties and participants, and the strict scope of the topic(s) to be covered.
17. The scope of any examination by the Defence ought to take into account the Defence's decision not to cross-examine Witness P-0290 during his testimony,

¹⁷ Defence Request, para. 5.

¹⁸ Email from Trial Chamber VI Communications to Parties and participants, dated 20 November 2017 at 11:23.

¹⁹ Defence Request, para. 2.

²⁰ Defence Request, paras. 5 and 8.

against the recommendation of the Chamber, and the Chamber's subsequent rejection of the Defence request to recall this witness.

18. Furthermore, the Defence assertion that "this would be the first time that any international court has sought to recall a Prosecution witness after the close of the Defence case"²¹ is incorrect. Both this Court and the *ad hoc* tribunals have recalled Prosecution witnesses, where Chambers considered that this was necessary for the establishment of the truth.
19. In its Decision on the Defence Request, the Chamber referred to various decisions on this very issue.²² In the *Bemba* case, Trial Chamber III re-opened the case in order to recall Prosecution Witness P-0169²³ further to a Defence request to either disregard his testimony or recall the witness.²⁴ Trial Chamber III ordered the recall of this Prosecution witness more than five months after issuing its decision on the closure of evidence, and after both the Prosecution and Defence had filed their closing briefs and the Prosecution had filed its response brief.²⁵
20. In the same Decision on the Defence Request, the Chamber also noted that Trial Chamber III had reflected the standard adopted by the *ad hoc* tribunals with respect to recalling witnesses, citing considerable jurisprudence.²⁶ Unlike the cases from the *ad hoc* tribunals where a party sought to persuade the Chamber that there were sufficient grounds to recall a witness or adduce additional evidence, here the Chamber itself is seeking to recall a Prosecution witness.

²¹ Defence Request, para. 3.

²² Decision on the Defence Request, para. 10.

²³ ICC-01/05-01/08-3154-Red2, paras. 25-29 and 50. Trial Chamber III also called a "Chamber witness" (CAR-CHM-PPPP-0001) who testified from 18-22 November 2013, three days after the last Defence witness testified in the proceedings (*see*: ICC-01/05-01/08-2863-Red, ICC-01/05-01/08-2898 and ICC-01/05-01/08-T-353-Red-ENG CT to ICC-01/05-01/08-T-357-Red-ENG CT).

²⁴ ICC-01/05-01/08-3139-Red, paras. 2, 22, 52 and ICC-01/05-01/08-3146-Red, paras. 9-10.

²⁵ ICC-01/05-01/08-3343, para. 14. The Legal Representative filed its closing brief and response brief on the same dates as the Prosecution.

²⁶ Decision on the Defence Request, para. 10 and footnote 23.

21. Similarly, in the *Lubanga* case, at the request of the Prosecution, [REDACTED] was recalled to provide additional testimony in rebuttal.²⁷ Further to an order issued by Trial Chamber I,²⁸ the Prosecution called Witnesses P-0582 and P-0583 to give evidence after the close of the Prosecution case, also in rebuttal.²⁹
22. Critically, article 64(6)(d) expressly authorises a Chamber to order the production of evidence in addition to that *already presented during the trial by the parties*. This makes plain that the Chamber can make such an order at any time, including after the presentation of the evidence of either or both parties.

Conclusion

23. The Defence Request should be rejected. The Chamber has the inherent authority to recall witnesses. Also, and as it has expressly indicated, the Chamber will provide further guidance on the modalities of this testimony in due course. No further action is required from the Chamber at this stage.



Fatou Bensouda
Prosecutor

Dated this 18th day of December 2017
At The Hague, The Netherlands

²⁷ [Redacted]. [Redacted].

²⁸ ICC-01/04-01/06-2434-Red2, para. 146.

²⁹ Witness P-0582 provided deposition testimony under (former) rule 68 between 16-18 November 2010 (See: ICC-01/04-01/06-T-Rule68Deposition-CONF-ENG ET). Witness P-0583 testified *viva voce* on 22 and 23 November 2010 (See: ICC-01/04-01/06-T-334-CONF-ENG CT, ICC-01/04-01/06-T-335-CONF-ENG ET and ICC-01/04-01/06-T-336-CONF-ENG ET). In the *Lubanga* case the Defence presented bifurcated case, the first part of which concluded in December 2010 and included the testimony of rebuttal witnesses called by the Prosecution (See: ICC-01/04-01/06-2842, paras. 37-40).