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No.: ICC-01/04-02/06
Date: **23 January 2018**

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

**Decision on presentation of evidence pursuant to Articles 64(6)(b) and (d) and
69(3) of the Statute**

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 Bosco Ntaganda

Mr Stéphane Bourgon

Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of 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**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64(6)(b) and (d), 67, 68, and 69(3) of the Rome Statute ('Statute'), issues the following 'Decision on presentation of evidence pursuant to Articles 64(6)(b) and (d) and 69(3) of the Statute'.

I. Procedural history

1. Witness P-0290 ('Witness') testified during the presentation of evidence by the Office of the Prosecutor ('Prosecution') between 10 and 12 February 2016.¹ The defence team for Mr Ntaganda ('Defence') did not cross-examine the Witness at that time,² and its subsequent request to recall the Witness before the end of the presentation of the Prosecution's case-in-chief, or, in the alternative, to implement the necessary conditions allowing the Defence to call him as a Defence witness, was rejected on 17 February 2017 ('Decision 1791').³ In this decision, the Chamber stated that 'this finding is without prejudice to any future decision by the Chamber, pursuant to its power to request the submission of any evidence that it considers necessary for the determination of the truth, to itself recall the Witness at a later stage'.⁴
2. On 6 November 2017, the Chamber directed the Registry to make the necessary arrangements to explore the Witness's availability to testify in January or February 2018.⁵

¹ Transcripts of hearings of 10 February 2016, ICC-01/04-02/06-T-65-CONF-ENG CT; 11 February 2016, ICC-01/04-02/06-T-66-CONF-ENG ET; and 12 February 2016, ICC-01/04-02/06-T-67-CONF-ENG ET.

² For the relevant procedural history in relation to the Witness, the Chamber refers to its 'Decision on Defence request for recall of Witness P-0290', 17 February 2017, ICC-01/04-02/06-1791-Red, paras 1-4.

³ Decision on Defence request for recall of Witness P-0290, 17 February 2017, ICC-01/04-02/06-1791-Red.

⁴ ICC-01/04-02/06-1791-Red, para. 17.

⁵ Email communication from the Chamber to the Registry on 6 November 2017, at 12:50.

3. On 10 November 2017, the Victims and Witnesses Unit notified the Chamber that the Witness indicated that he is available to testify as a Chamber witness in February 2018.⁶
4. On the same day, the Chamber informed the parties and the participants that, pursuant to Articles 64(6)(d) and 69(3) of the Statute, and recalling Decision 1791,⁷ it is considering calling the Witness to give further evidence, and directed the parties to refrain from any further contact with the Witness, unless specifically authorised by the Chamber. The Chamber also indicated that it would decide in due course whether to call the Witness and, if required, provide guidance on the modalities of the Witness's testimony.⁸
5. On 29 November 2017, after receiving further submissions from the parties,⁹ the Chamber indicated that it may call the witness, noting that the Defence did not cross-examine him, and to provide for a further examination of the Witness by the Chamber, the parties, and, if applicable, the participants, in particular in light of the evidence presented by the Defence, and set a deadline for any observations, including on the modalities of the Witness's testimony.¹⁰
6. On 6 December 2017, the Prosecution and the Defence filed their submissions ('Prosecution Submissions' and 'Defence Submissions', respectively).¹¹
7. On 8 December 2017, the Prosecution sought leave to reply to the Defence Submissions ('Request for Leave to Reply').¹²

⁶ Email communication from the VWU to the Chamber on 10 November 2017, at 11:09.

⁷ ICC-01/04-02/06-1791-Red, para. 17.

⁸ Email communication from the Chamber to the parties and the participants on 10 November 2017, at 15:16.

⁹ Request for clarification and directions concerning potential recall of Prosecution Witness P-0290, 17 November 2017, ICC-01/04-02/06-2120-Conf; 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, ICC-01/04-02/06-2123-Conf.

¹⁰ Order setting deadline for submissions related to Witness P-0290, 29 November 2017, ICC-01/04-02/06-2134, para. 6.

¹¹ Prosecution's observations on the modalities of further testimony of Witness P-0290, 6 December 2017, ICC-01/04-02/06-2144-Conf ('Prosecution Submissions'); Submissions concerning potential recall of Prosecution Witness P-0290, 6 December 2017, ICC-01/04-02/06-2143-Conf ('Defence Submissions').

II. Submissions

8. The Defence opposes the calling of the Witness, arguing that doing so would be unfair and infringe the right of the accused to remain silent.¹³ In particular, the Defence submits that recalling a Prosecution witness after the closing of the Defence case appears to be unprecedented, and could only be justified by either the re-opening of the Prosecution case or during rebuttal, with the Defence suggesting that the criteria are not met for either in the present case.¹⁴ The Defence further submits that the lack of cross-examination does not justify recalling the Witness at this stage of the proceedings, as this ‘will not remedy any prejudice that may have arisen from the lack of cross-examination; on the contrary, further prejudice will be caused by allowing the Prosecution to adduce supplemental or clarifying evidence that should have been presented during its case-in-chief’.¹⁵ The Defence submits that, even assuming that the rebuttal standard does not apply directly, the Chamber should decline to exercise its discretion to recall the Witness, as it ‘increases the likelihood of prejudice arising from the modification or addition of testimony in respect of matters that should have already been comprehensively addressed’.¹⁶
9. The Defence further submits that, if the Witness is called, the mode of questioning should follow the one prescribed for Prosecution witnesses and that the scope of his testimony should be narrowly defined by the Chamber and concern issues that are both ‘new and unforeseeable’.¹⁷ In this regard, the Defence submits that allowing a Prosecution witness to ‘contradict Mr

¹² Prosecution request for leave to reply to the “Submissions concerning potential recall of Prosecution Witness P-0290”, ICC-01/04-02/06-2143-Conf, 8 December 2017, ICC-01/04-02/06-2146-Conf.

¹³ Defence Submissions, ICC-01/04-02/06-2143-Conf, paras 1, 49. *See also* Request for clarification and directions concerning potential recall of Prosecution Witness P-0290, 17 November 2017, ICC-01/04-02/06-2120-Conf, paras 2-3, 6.

¹⁴ Defence Submissions, ICC-01/04-02/06-2143-Conf, paras 1, 20-38.

¹⁵ Defence Submissions, ICC-01/04-02/06-2143-Conf, para. 35.

¹⁶ Defence Submissions, ICC-01/04-02/06-2143-Conf, para. 41.

¹⁷ Defence Submissions, ICC-01/04-02/06-2143-Conf, paras 43-45, 48.

Ntaganda [...] at a stage of proceedings when he has provided the entirety of his testimony is fundamentally unfair in an adversarial trial'.¹⁸ Finally, the Defence argues that the Prosecution should be precluded from questioning the Witness, or, in the alternative, to have the following order of questioning: Chamber, Prosecution, Legal Representatives of Victims ('LRVs') if authorised, and Defence.¹⁹

10. The Prosecution submits, *inter alia*, that the Witness should first be examined by the Chamber, then by the Prosecution, then, if applicable, by the LRVs, and finally, by the Defence.²⁰ It further argues that during the Witness's examination, the Chamber's questions should be limited to 'new issues arising concretely as a result of the evidence from Defence witnesses', and the parties and the participants should be strictly limited to asking questions about matters raised by the Chamber.²¹ In this regard, the Prosecution underscores that this examination should neither be an opportunity for the Defence to conduct a cross-examination, nor for the Prosecution to conduct a re-examination of the Witness on his previous testimony.²² The Prosecution also submits that the parties and the participants should conduct their examination using neutral, open-ended questions unless otherwise authorised.²³ As to the length of questioning, while noting that its examination will largely depend on the nature and extent of the evidence elicited by the Chamber, and that its estimate may therefore need to be updated after hearing the Witness's additional testimony, the Prosecution anticipates that it would need approximately one hour to examine the Witness.²⁴

¹⁸ Defence Submissions, ICC-01/04-02/06-2143-Conf, para. 45.

¹⁹ Defence Submissions, ICC-01/04-02/06-2143-Conf, paras. 46-47.

²⁰ Prosecution Submissions, ICC-01/04-02/06-2144-Conf, paras 12-16.

²¹ Prosecution Submissions, ICC-01/04-02/06-2144-Conf, paras 2 and 17-20.

²² Prosecution Submissions, ICC-01/04-02/06-2144-Conf, para. 19.

²³ Prosecution Submissions, ICC-01/04-02/06-2144-Conf, paras 21-23.

²⁴ Prosecution Submissions, ICC-01/04-02/06-2144-Conf, para. 24.

III. Analysis

11. At the outset, with regard to the Request for Leave to Reply, noting the matters upon which leave to reply was sought, the Chamber does not consider that it would be assisted by further submissions on any of the identified issues in ruling upon the Request. The Chamber therefore rejects the Request for Leave to Reply.
12. The Chamber underscores that it has been considering calling the Witness to provide further testimony as a Chamber witness in accordance with the Chamber's authority and discretion, pursuant to Articles 64(6)(b) and (d) and 69(3) of the Statute. It would call the Witness to provide testimony that could assist the Chamber in its assessment of certain aspects of the evidence already presented, and not for the Prosecution to adduce further incriminating evidence that should have been elicited during its case-in-chief. Under these circumstances, the Chamber considers the Defence's arguments regarding re-opening of the Prosecution case and rebuttal to be inapposite. Further, if called, the Witness's questioning by the parties and, if applicable, the participants would be closely monitored by the Chamber in accordance with its duty to ensure that the trial is conducted with full respect of the rights of the accused. Finally, given that the Defence did not cross-examine the Witness, the Chamber also considered providing the Defence with an opportunity to cross-examine him in relation to his testimony provided during the Prosecution's case-in-chief.
13. However, in the present circumstances, having considered: (i) the arguments of the parties, including the Defence's submissions on the aforementioned issue of cross-examination; (ii) the nature and scope of the expected testimony in relation to evidence presented by the Defence; and (iii) the totality of the evidence adduced so far in the case as a whole, the

Chamber is not ultimately persuaded that it would be necessary or appropriate to recall the Witness at this stage of the proceedings. Accordingly, the Chamber decides not to exercise its discretion to call the Witness.

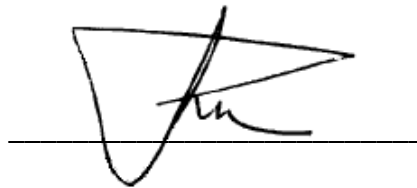
14. Finally, the Chamber hereby informs the parties and participants that it has considered calling other witnesses pursuant to Articles 64(6)(d) and 69(3) of the Statute, and that, after careful consideration, it has decided not to do so. At this stage, the Chamber therefore will not call any witnesses.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply; and

INDICATES that, at this stage, it will not exercise its discretion to call Witness P-0290 or any other witnesses to provide further evidence in the *Ntaganda* case.

Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 23 January 2018
At The Hague, The Netherlands