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No.: ICC-01/04-02/06
Date: 8 February 2016

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
With confidential Annex A**

Public redacted version of "Request on behalf of Mr Ntaganda seeking leave to appeal the Chamber's decisions overruling Defence objections to leading questions"

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 Trial Chamber VI's ("Chamber") decisions overruling objections raised by Counsel representing Mr Ntaganda ("Defence") to the use of leading questions during examination-in-chief of Witness P-0017 by the Office of the Prosecutor ("Prosecution") on 29 January 2016 ("Impugned Decision"),¹ the Defence hereby submits this:

**Request on behalf of Mr Ntaganda seeking leave to appeal the Chamber's
decisions overruling Defence objections to leading questions**

"Defence Request"

INTRODUCTION

1. The Defence respectfully seeks the Chamber leave to appeal the Impugned Decision – whereby the Chamber rejected objections raised by the Defence to leading questions put by the Prosecution to Witness P-0017 – on the following appealable issue:

Whether, in overruling the Defence objections, the Chamber has misapplied its own definition of what constitutes a leading question

("Issue")

2. To the extent that it strikes at the core of the admissibility of evidence, the Defence submits that the Issue significantly affects the fair and expeditious conduct of the proceedings and has also the potential to significantly affect the outcome of the trial. Furthermore, insofar as the Issue highlights a misapplication of the Chamber's "*Decision on the conduct of proceedings*",² the Defence posits that its immediate resolution by the Appeals Chamber will materially advance the proceedings.

¹ T-59-CONF-ENG, p.26, l.18 to p.27, l.20.

² 2 June 2015, ICC-01/04-02/06-619 ("*Decision on the Conduct of Proceedings*").

BACKGROUND

3. On 29 January 2016, the Prosecution continued with its examination-in-chief of Witness P-0017. Delving into the topic of FPLC's presence in Mongbwalu, the Prosecution put the following question to Witness P-0017:

[REDACTED]³

4. The Defence objected to the question based on its leading nature.⁴ The Presiding Judge then directed the Prosecution to rephrase its question.⁵
5. Later on, the Prosecution asked a substantially similar question, namely:

[REDACTED]⁶

6. The Defence objected again to this leading question being put to the witness.⁷ Noting that the question presented some "leading aspects", the Presiding Judge directed, once again, the Prosecution to reformulate its question.⁸
7. The Prosecution then asked Witness P-0017:

[REDACTED]⁹

8. The Defence raised an objection arguing that the question is "highly leading".¹⁰ The Presiding Judge indicated that he agreed with the Prosecution that the question was not leading and further stated that he did not want to hear "any further submission on that".¹¹
9. The Prosecution then put the following question to the witness:

³ T-59-CONF-ENG, p.21, ll.22-25.

⁴ T-59-CONF-ENG, p.22, l.2

⁵ T-59-CONF-ENG, p.22, l.3.

⁶ T-59-CONF-ENG, p.25, ll.4-7.

⁷ T-59-CONF-ENG, p.25, ll.9-19; p.26, ll.6-12. The Defence also objected to the question on the basis that the subject-matter did not fall within the scope of the charges. The Defence does not seek leave to appeal the Impugned Decision on this ground.

⁸ T-59-CONF-ENG, p.26, ll.13-16.

⁹ T-59-CONF-ENG, p.26, ll.18-20.

¹⁰ T-59-CONF-ENG, p.26, ll.22-23.

¹¹ T-59-CONF-ENG, p.27, ll.6-8.

[REDACTED]¹²

10. The Defence objected to the question¹³ and the objection was overruled by the Presiding Judge.¹⁴
11. Before the morning break, the Defence informed the Chamber that it would seek leave to appeal the Impugned Decision “based on the Chamber’s understanding of what a leading question is”.¹⁵
12. Upon returning from break, the Presiding Judge stated the following:

PRESIDING JUDGE FREMR: Before we continue with the testimony I would like to mention three minor issues or just to make some clarification about the issues that have been touched at the end of the previous session.

[...]

As to the issue of what question is leading or is not leading, I can quote both dictionary and I guess our or at least my understanding is in harmony with that that: A leading question is a question that suggests the answer to the person being interrogated that may be answered by a mere yes or no. I have to admit that sometimes questions put this morning was not clearly leading or not leading, because sometimes, and I think I even expressed this opinion, had some leading aspects. So sometimes it's not easy to decide, but we are trying to do our best.¹⁶

13. During the remaining of the session, the Prosecution put to Witness P-0017 a series of what the Defence submits to be leading questions,¹⁷ to which the Defence opted not to object given the Presiding Judge’s earlier remark¹⁸ and which were not forbidden to be asked by the Chamber.

¹² T-59-CONF-ENG, p.27, ll.10-15.

¹³ T-59-CONF-ENG, p.27, ll.18-19.

¹⁴ T-59-CONF-ENG, p.27, l.20.

¹⁵ T-59-CONF-ENG, p.28, ll.17-19.

¹⁶ T-59-CONF-ENG, p.29, ll.2-4, 11-17.

¹⁷ Annex A.

¹⁸ T-59-CONF-ENG, p.27, ll.6-8.

SUBMISSIONS

I. The Issue constitutes an appealable issue

14. At the outset, the Defence underscores that a request for leave to appeal is not concerned with whether the impugned decision was correctly reasoned or not,¹⁹ but should rather be aimed at addressing the specific criteria set out in Article 82(1)(d) of the Statute.²⁰ The Defence respectfully submits that this *ratio* must also apply to decisions on requests for leave to appeal. Hence, in adjudicating this Defence Request, the Chamber must consider solely whether the requirements set out in Article 82(1)(d) of the Statute are met, regardless of its views on the merits of a potential Defence appeal.
15. The Issue identifies a significant gap between the theoretical definition given by the Chamber of what a ‘leading question’ is and its application thereof to objections raised by the Defence to leading questions put by the Prosecution during examination-in-chief of Witness P-0017.
16. Indeed, whereas the Chamber defined a ‘leading question’ as a “question that suggests the answer to the person being interrogated that may be answered by a mere yes or no”,²¹ it allowed the Prosecution to put to Witness P-0017 two questions which *clearly* suggested an answer and that could be answered by ‘yes’ or ‘no’.²² The expected answer to these two questions is even more so apparent when put in perspective with the previous questions the Prosecution attempted to put to Witness P-0017 on the same topic, the permissibility of which was debated in the presence of the witness.

¹⁹ See, e.g., ICTY, *The Prosecutor v. Slobodan Milošević*, 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.

²⁰ ICC-01/04-02/06-425-Conf-Exp, para.22.

²¹ T-59-CONF-ENG, p.29, ll.11-17.

²² “[REDACTED]” (T-59-CONF-ENG, p.26, ll.18-20); “[REDACTED]” (T-59-CONF-ENG, p.27, ll.10-15) (emphasis added).

17. The Chamber's misapplication of its own definition of 'leading questions' further resulted in a high number of clearly leading questions being allowed to be put to Witness P-0017 after the Impugned Decision being rendered.²³
18. As such, the Issue is not merely a question over which there is a disagreement. Rather, the Issue identifies a topic requiring clear appellate directions. The Chamber itself conceded that "[...] *sometimes it's not easy to decide, but we are trying to do our best*".²⁴ Should leave to appeal be granted, the Defence will move the Appeals Chamber to set concrete parameters in light of which the purported leading character of a question must be determined.

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

19. To the extent that it highlights a misapplication of the rule prohibiting leading questions, as set out by the Chamber in its Decision on the Conduct of Proceedings,²⁵ the Issue significantly affects the fair conduct of the proceedings.
20. Indeed, the rationale underlying this rule strikes at the core of the fairness of the proceedings: the prohibition of leading questions during examination-in-chief ensures that it is the witness who is the source of the evidence, not the examining party.²⁶
21. In the instant proceedings, the risk of the examining party obtaining through leading questions evidence supporting its theory of the case which it would not be able to obtain otherwise, is further compounded by the practice adopted by Prosecution to make its witnesses travel to The Hague weeks prior to their testimony in order for them to review in length their previous

²³ Annex A.

²⁴ T-59-CONF-ENG, p.29, l.17.

²⁵ Decision on the Conduct of Proceedings, para.26.

²⁶ G. Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford: Oxford University Press, 2013, p. 586.

- statements and related material.²⁷ In such circumstances, the leading question acts as a prompt for the witness not to recount what he saw, but rather what he reviewed during his/her preparation session with the Prosecution.
22. The Issue also significantly affects the expeditious conduct of the proceedings.
 23. Indeed, as it stems from the above procedural summary, the debate over the permissibility of the questions put by the Prosecution to Witness P-0017 on the topic of [REDACTED] used significant court time. This protracted litigation – which ended by the Chamber’s direction not to make any further submissions,²⁸ including objections²⁹ – is illustrative of the impact on the expeditious conduct of the proceedings of any misunderstanding as to the leading nature of a question put by the examining party.
 24. Bearing in mind the Chamber’s remark that “[...] *sometimes it’s not easy to decide, but we are trying to do our best*”³⁰ and the high number of leading questions which remained undisturbed thereafter,³¹ the Impugned Decision will likely result in objections being increasingly raised as well as in protracted litigation as to whether a given question is leading or not, thereby impacting the expeditious conduct of the proceedings.
 25. Moreover, once adduced by the witness, evidence cannot be ignored by the Defence. Indeed, the Defence has the duty to address all evidence entered on the record, regardless of its own evaluation of the probative value that should be attached to the answers given by the witness. Consequently, should incriminatory evidence be adduced through impermissible leading questions, this will inevitably result in lengthier cross-examinations.

²⁷ For example, Witness P-0017’s preparation session commenced on [REDACTED], almost [REDACTED] weeks before the scheduled start of his testimony. See DRC-OTP-2090-0336.

²⁸ T-59-CONF-ENG, p.27, ll.6-7, 16-17.

²⁹ T-59-CONF-ENG, p.29, ll.20-23.

³⁰ T-59-CONF-ENG, p.29, l.17.

³¹ Annex A.

III. The Issue has the potential to significantly affect the outcome of the trial

26. The potential impact of impermissible leading questions being allowed goes much further than the above.
27. An answer provided by a witness to a leading question – even if such answer appears not to have any probative value – might very well allow the Prosecution to elicit from the witness evidence which it could not obtain otherwise. In such circumstances, the Defence will necessarily have to engage the witness on this evidence.
28. The Defence is aware that the Chamber is composed of professional judges capable of assessing evidence in its context and attaching the proper weight thereto. However, as conceded by the Chamber, “[...] *sometimes it’s not easy to decide, but we are trying to do our best*”.³²
29. In the absence of a proper understanding of what a leading question is, the risk of incriminatory evidence of low-probative value forming part of the evidentiary record – on the basis of which a conviction against the Accused could be secured – cannot be excluded.
30. Consequently, if not resolved by the Appeals Chamber, the Issue has the potential to significantly affect the outcome of the trial.

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

31. Bearing in mind the Chamber’s remark that “[...] *sometimes it’s not easy to decide, but we are trying to do our best*”,³³ the Defence respectfully posits that immediate resolution of the Issue by the Appeals Chamber will set the concrete parameters within which the purported leading character of a question must be assessed. The high number of clearly leading questions put

³² T-59-CONF-ENG, p.29, l.17.

³³ T-59-CONF-ENG, p.29, l.17.

to Witness P-00117 after the Chamber rendered the Impugned Decision³⁴ – and which remain undisturbed – further emphasises the need for an immediate resolution of the Issue by the Appeals Chamber.

32. Immediate appellate resolution of the Issue will thus ensure that examination-in-chief of Prosecution witnesses proceeds on a sound basis and will avoid, or certainly, minimize, any future litigation as to the permissibility of leading questions during examination-in-chief.

CONFIDENTIALITY

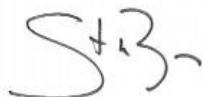
33. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Request is submitted as confidential as it refers to evidence elicited in private session. The Defence will submit a public redacted version of its Request separately.

RELIEF SOUGHT

34. In light of the above submissions, the Defence respectfully requests the Chamber to:

GRANT leave to appeal the Impugned Decision on the Issue as outlined above.

RESPECTFULLY SUBMITTED ON THIS 8TH DAY OF FEBRUARY 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

³⁴ Annex A.