

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 13 February 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

Decision on Defence request for leave to appeal the 'Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules'

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

Detention Section

**Victims Participation and Reparations
Section**

Others
Appeals Chamber

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on Defence request for leave to appeal the "Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules"'.

I. Background

1. On 1 December 2016, the Office of the Prosecutor ('Prosecution') filed a request under Rule 68(2)(b) of the Rules seeking admission of a medical report ('Report') relating to Witness P-0790, which was prepared by an expert instructed by the Chamber ('Expert').¹
2. On 18 January 2017, the Chamber issued a decision granting this request ('Impugned Decision').²
3. On 24 January 2017, the defence team for Mr Ntaganda ('Defence') filed a request seeking leave to appeal the Impugned Decision ('Request').³
4. On 30 January 2017, the Prosecution⁴ and Legal Representative for victims of the attacks ('LRV')⁵ each filed responses, opposing the Request (respectively, 'Prosecution Response' and 'LRV Response').

¹ Prosecution's Request for the Admission of the Expert Medical Report for Witness P-0790 pursuant to Rule 68(2)(b), ICC-01/04-02/06-1666-Conf. A public redacted version was filed on 2 February 2017.

² Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules, ICC-01/04-02/06-1731.

³ Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's "Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules", 18 January 2017, ICC-01/04-02/06-1731, ICC-01/04-02/06-1748-Conf.

⁴ Prosecution's response to the Defence application for leave to appeal the Chamber's decision to admit the medical report related to Witness P-0790 under Rule 68(2)(b), ICC-01/04-02/06-1761-Conf.

⁵ Response of the Common Legal Representative of the Victims of the Attacks to the "Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI's "Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules", 18 January 2017, ICC-01/04-02/06-1731, ICC-01/04-02/06-1758-Conf.

II. Submissions

5. The Defence seeks leave to appeal on the following issue:

Whether a report: (i) prepared by a qualified expert, in relation to testimony of a fact witness and potentially corroborative of the witness's testimony; (ii) commissioned by the Chamber; (iii) contested by the Defence; and (iv) which was prepared contrary to the Chamber's directions, is admissible pursuant to Rule 68(2)(b), without providing the Defence with an opportunity to cross-examine the expert on the impact of his failure to abide with the Chamber's directions ('Issue').⁶

6. The Defence argues that '[w]hether expert evidence that could potentially be corroborative of a fact witness who testified *viva voce* before [the] Chamber and which is materially disputed by the Parties can be admitted without cross-examination constitutes an appealable issue'.⁷ The Defence submits that it ought to be afforded an opportunity to challenge the evidence provided by the Expert through cross-examination, as the Report 'depart[ed] significantly' from the Chamber's instructions, and that, absent being able to address this matter, the evidence and potentially the outcome of proceedings would be tainted.⁸

7. The Defence avers that the Issue significantly affects the fair and expeditious conduct of the proceedings, as the right of Mr Ntaganda to examine the witness under Article 67(1)(d) of the Statute has been impacted by the Impugned Decision.⁹ It submits further that immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings as, *inter alia*, the Defence will otherwise have no further opportunity to challenge this particular evidence before the Prosecution closes its case.¹⁰

⁶ Request, ICC-01/04-02/06-1748-Conf, para. 1.

⁷ Request, ICC-01/04-02/06-1748-Conf, para. 16.

⁸ Request, ICC-01/04-02/06-1748-Conf, paras 15-18.

⁹ Request, ICC-01/04-02/06-1748-Conf, paras 19-20.

¹⁰ Request, ICC-01/04-02/06-1748-Conf, paras 21-23.

8. The Prosecution argues that the Request should be rejected on the basis that the Issue does not qualify as an appealable issue within the meaning of Article 82(1)(d) of the Statute, and does not arise from the Impugned Decision. It avers in particular that, ‘when elaborating on the Issue, the Defence merely repeats its prior arguments, which were rejected by the Chamber’, and that this constitutes mere disagreement with the Impugned Decision.¹¹ The Prosecution submits that, in addition, the Defence fails to demonstrate that the Issue significantly affects the fair *and* expeditious conduct of the proceedings, does not argue the way in which the Issue affects the outcome of the trial, and also fails to show that immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings.¹²
9. The LRV argues that the Request should be rejected on the basis that the Defence fails to identify an ‘issue’ arising from the Impugned Decision but instead repeats the very subject matter of the Impugned Decision itself. The LRV avers that, in formulating the Issue in this way, the Defence is merely attempting to re-litigate issues ‘already settled by the Chamber’.¹³ Noting that the criteria for leave to appeal are cumulative, the LRV submits that there is no need to consider further whether the remaining criteria under Article 82(1)(d) of the Statute are met, and that the Request ought to be dismissed on the basis of the absence of an appealable issue therein.¹⁴

¹¹ Prosecution Response, ICC-01/04-02/06-1761-Conf, paras 2 and 4-8 (footnotes omitted).

¹² Prosecution Response, ICC-01/04-02/06-1761-Conf, paras 2 and 9-13.

¹³ LRV Response, ICC-01/04-02/06-1758-Conf, paras 11-13.

¹⁴ LRV Response, ICC-01/04-02/06-1758-Conf, paras 15-16.

III. Analysis

10. The Chamber incorporates by reference the applicable law as set out in previous decisions on requests for leave to appeal.¹⁵
11. The Chamber will first consider whether the Issue constitutes an appealable issue arising from the Impugned Decision.
12. In this regard, the Chamber recalls the Appeals Chamber's finding that only an 'issue' may form the subject of an appealable decision, which is to comprise 'an identifiable subject or topic requiring a decision for its resolution'.¹⁶ The Chamber considers the Defence's expansive formulation of the Issue to be inconsistent with this requirement, insofar as it constitutes a wholesale disagreement with the Impugned Decision rather than identifying a sufficiently discrete issue stemming therefrom.¹⁷ Moreover, the Chamber notes that, in its Request, the Defence directly disputes certain of the Chamber's findings in the Impugned Decision, such as the holding that the Report adhered to the Chamber's instructions,¹⁸ thus repeating arguments that were previously dismissed by the Chamber without specifying any appealable issue arising therefrom.
13. The Chamber therefore finds that the Defence has not specified the alleged legal or factual issue in a manner which could constitute an appealable issue for the

¹⁵ See for example Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, paras 20-21.

¹⁶ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (OA 3), para. 9.

¹⁷ See similarly, Decision on Defence request for leave to appeal the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts', 16 September 2016, ICC-01/04-02/06-1513, para. 15; Decision on the Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 21 May 2015, ICC-01/04-02/06-604, para. 17; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, paras 11-12 and 17-18; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the request for leave to appeal the 'Decision on witness preparation and familiarisation, 13 January 2016, ICC-02/11-01/15-388, paras 10-12; Decision on request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' and other issues related to the presentation of evidence by the Office of the Prosecutor, 13 May 2016, ICC-02/11-01/15-524, para. 16.

¹⁸ See Impugned Decision, ICC-01/04-02/06-1731, paras 12-13 and Request, ICC-01/04-02/06-1748-Conf, paras 17-18.

purposes of Article 82(1)(d) of the Statute. Having so found, the Chamber need not consider whether the Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of trial, or whether immediate resolution by the Appeals Chamber may materially advance the proceedings.

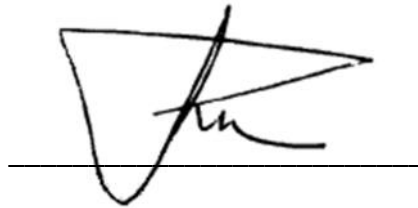
14. Nonetheless, the Chamber is equally unpersuaded by the Defence's submissions in relation to these remaining criteria. In particular, the Chamber considers that the Defence arguments as to the way in which immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings to be premised on speculation as to the *weight* that the Chamber will ultimately accord to the Report, which the Chamber shall determine at a later moment in light of all of the evidence before it. Accordingly, the Chamber does not consider that the criteria under Article 82(1)(d) of the Statute to be met in the present circumstances, and rejects the Request.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS public redacted versions of the Request (ICC-01/04-02/06-1748-Conf), Prosecution Response (ICC-01/04-02/06-1761-Conf) and LRV Response (ICC-01/04-02/06-1758-Conf) to be filed within two weeks of issuance of the present decision.

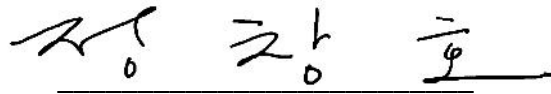
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to read 'Kuniko Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of Korean characters '정창호' followed by a horizontal line.

Judge Chang-ho Chung

Dated this 13 February 2017

At The Hague, The Netherlands