



Original: English

**No. ICC-01/04-02/06 OA 2
Date: 29 October 2015**

THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofma ski
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public document

Decision on the Prosecutor's application to dismiss the appeal *in limine* and directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” of 9 October 2015 (ICC-01/04-02/06-892),

Having before it the “Prosecution’s application to dismiss *in limine* Bosco Ntaganda’s Appeal against Trial Chamber VI’s decision in respect of Counts 6 and 9” of 27 October 2015 (ICC-01/04-02/06-952),

After deliberation,

Renders unanimously the following

DECISION

1. The Prosecutor’s application to dismiss Mr Ntaganda’s appeal *in limine* is rejected.
2. Victims represented by Ms Sarah Pellet and Mr Dmytro Suprun may submit observations on the document in support of the appeal and on the response thereto within five days of the notification of the response.
3. Mr Ntaganda and the Prosecutor may each file a response to the observations of the legal representatives of victims referred to in paragraph 2 within five days of the notification of the observations.
4. The participants are directed to set out any arguments deemed necessary on the admissibility of the present appeal in their submissions on the merits.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial and Trial Chambers

1. On 9 June 2014, Pre-Trial Chamber II confirmed the charges against Mr Bosco Ntaganda (hereinafter: “Mr Ntaganda”), which included, *inter alia*, war crimes of rape and sexual slavery of the *Union des Patriotes Congolais/Forces Patriotiques pour la*

libération du Congo (hereinafter: “UPC/FPLC”) child soldiers by UPC/FPLC members under article 8 (2) (e) (vi) of the Statute¹ (hereinafter: “Counts 6 and 9”).

2. On 1 September 2015, Mr Ntaganda challenged the jurisdiction of the Court with respect to Counts 6 and 9 before Trial Chamber VI (hereinafter: “Trial Chamber”), arguing that article 8 (2) (e) (vi) of the Statute “does not foresee the possibility of child soldiers being victims of the war crimes of rape and sexual slavery”² (hereinafter: “Challenge to Counts 6 and 9”).

3. On 9 September 2015, the legal representative of former child soldier victims submitted observations on the Challenge to Counts 6 and 9 and, on 11 September 2015, the Prosecutor filed a response to the Challenge to Counts 6 and 9.³ On 24 September 2015, having been granted leave by the Trial Chamber, Mr Ntaganda filed a reply to the Prosecutor’s Response on the issue of ‘whether the [Challenge to Counts 6 and 9] is a proper jurisdiction challenge within the meaning of Article 19’.⁴

4. On 9 October 2015, the Trial Chamber rejected the Challenge to Counts 6 and 9⁵ (hereinafter: “Impugned Decision”).

B. Proceedings before the Appeals Chamber

5. On 19 October 2015, Mr Ntaganda filed a notice of appeal of the Impugned Decision,⁶ requesting the Appeals Chamber to quash the Impugned Decision and to find that “the *rationae materiae* jurisdiction of the Court does not include rape and

¹ “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda”, ICC-01/04-02/06-309, paras 76-82.

² “Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges”, ICC-01/04-02/06-804, para. 8.

³ “Former child soldiers’ response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges’”, ICC-01/04-02/06-814; “Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document Containing the Charges’”, ICC-01/04-02/06-804”, ICC-01/04-02/06-818 (hereinafter: “Prosecutor’s Response”).

⁴ “Reply on behalf of Mr Ntaganda to ‘Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the charges’”, ICC-01/04-02/06-804”, ICC-01/04-02/06-863, para. 5.

⁵ “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, ICC-01/04-02/06-892, p. 12.

⁶ “Appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892”, ICC-01/04-02/06-909 (OA 2) (hereinafter: “Notice of Appeal”).

sexual slavery of child soldiers as war crimes” and that “the Trial Chamber is barred from exercising jurisdiction over Counts 6 and 9”.⁷

6. On 27 October 2015, the Prosecutor filed an application for the Appeals Chamber to dismiss Mr Ntaganda’s appeal *in limine* and to “issue directions on the future conduct of the proceedings following the filing of this application – including the suspension of the appeal briefing schedule if deemed necessary”⁸ (hereinafter: “Application for the Appeal to be Dismissed *In Limine*”).

II. MERITS

7. In her Application for the Appeal to be Dismissed *In Limine*, the Prosecutor argues that “[r]ather than ruling on the Court’s jurisdiction, the Chamber found that Mr Ntaganda’s [Challenge to Counts 6 and 9] was not about jurisdiction”.⁹ The Prosecutor submits that since the “substance of the [Impugned] Decision is not of a jurisdictional nature and does not fall under article 82(1)(a)”, Mr Ntaganda’s appeal is improperly filed as he should have sought leave to appeal under article 82 (1) (d) of the Statute.¹⁰

8. The Appeals Chamber notes that the Impugned Decision appears to have limited its assessment of the Challenge to Counts 6 and 9 to the question of whether it was jurisdictional in nature or whether it related ‘to the contours or elements of crimes’.¹¹ Having found that the Challenge to Counts 6 and 9 did not raise an issue with respect to the jurisdiction of the Court,¹² the Trial Chamber concluded that it “need not address at this stage whether [UPC/FPLC child soldiers], or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to [a]rticle 8(2)(e)(vi) when committed by members of the same group”.¹³ The Trial Chamber indicated that “[s]uch questions of substantive law are to be addressed when the

⁷ Notice of Appeal, pp. 4-5.

⁸ “Prosecution’s application to dismiss *in limine* Bosco Ntaganda’s Appeal against Trial Chamber VI’s decision in respect of Counts 6 and 9”, ICC-01/04-02/06-952 (OA 2), paras 12-13.

⁹ Application for the Appeal to be Dismissed *In Limine*, para. 8.

¹⁰ Application for the Appeal to be Dismissed *In Limine*, paras 1, 3.

¹¹ Impugned Decision, para. 24.

¹² Impugned Decision, paras 25-26.

¹³ Impugned Decision, para. 28.

Chamber makes its assessment of whether the Prosecution has proven the crimes charged”.¹⁴

9. Given that the Impugned Decision focused primarily on the issue of whether the Challenge to Counts 6 and 9 was jurisdictional in nature, without resolving the substantive question on article 8 (2) (e) (vi) raised by Mr Ntaganda therein, and having regard to the fact that some of the considerations which underlie the Impugned Decision and which appear to be the subject-matter of the present appeal, may be of relevance to the issue of its admissibility, the Appeals Chamber finds that it would be in the interests of judicial economy to hear submissions on the admissibility of the present appeal in conjunction with the submissions on the merits. This is without prejudice to the question of whether the appeal is admissible.

10. Accordingly, the Application for the Appeal to be Dismissed *In Limine* is rejected and any arguments raised as to the admissibility of the present appeal should be included in the submissions of the parties and participants.

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



Judge Christine Van den Wyngaert
Presiding Judge

Dated this 29th day of October 2015

At The Hague, The Netherlands

¹⁴ Impugned Decision, para. 28.