

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 30 October 2015

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 the Defence's request for clarification of the admissibility of evidence
related to any allegations of rape and sexual slavery committed personally by
Mr Ntaganda**

Decision 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 Luc Boutin

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

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67 of the Rome Statute, issues the following 'Decision on the Defence's request for clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda'.

I. Procedural History

1. On 30 September 2015, the defence team for Mr Ntaganda ('Defence') submitted a request seeking: (i) clarification that evidence related to the commission, by Mr Ntaganda as an individual, of the crimes of rape and sexual slavery is not admissible; and (ii) that certain answers given by P-0901 in response to questions put by the Office of the Prosecutor ('Prosecution') on this issue be struck from the record ('Request').¹
2. On 12 October 2015,² the Prosecution responded, opposing the Request ('Prosecution Response').³
3. On that same day, the Legal Representative of former child soldiers ('Legal Representative') also filed a response requesting the Chamber to dismiss the Request ('LRV Response').⁴

¹ Request on behalf of Mr Ntaganda seeking clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda, ICC-01/04-02/06-878. The filing was notified on 1 October 2015.

² The Chamber shortened the deadline for responses to the Request to 12 October 2015, e-mail from the Chamber to the parties and participants on 2 October 2015 at 11:23.

³ Prosecution response to the Defence request for clarification on the admissibility of evidence related to rape and sexual slavery committed by the Accused, ICC-01/04-02/06-896-Conf.

⁴ Former child soldiers' response to the "Request on behalf of Mr Ntaganda seeking clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda", ICC-01/04-02/06-895.

II. Submissions

Defence

4. The Defence relies upon the Chamber's reasoning in its 'Decision on the updated document containing the charges',⁵ to argue that evidence on the commission of crimes of rape or sexual slavery by Mr Ntaganda as an individual are not admissible.⁶ Moreover, the Defence submits that such evidence is 'clearly not relevant' to any of the crimes charged, and, even if it is relevant its probative value would be 'plainly exceeded' by its prejudicial effect.⁷
5. The Defence further submits that admitting such evidence would be contrary to the accused's right to a fair trial as he 'cannot be considered to be on notice of the need to counter such allegations' and would impact his right to be tried without undue delay due to the significant length of time that will be required for the parties to 'elicit and counter such evidence'.⁸

Prosecution

6. The Prosecution requests the Chamber to dismiss the Request *in limine*, submitting that: (i) the sought clarification is unnecessary as the Chamber's prior rulings have been clear;⁹ and (ii) the Request is procedurally impermissible as a 'belated challenge' to the Chamber's rulings in the 'guise' of a request for clarification.¹⁰

⁵ 6 February 2015, ICC-01/04-02/06-450 ('UDCC Decision'), para. 45.

⁶ Request, ICC-01/04-02/06-878, paras 6-8.

⁷ Request, ICC-01/04-02/06-878, para. 8.

⁸ Request, ICC-01/04-02/06-878, paras 9-10.

⁹ Prosecution Response, ICC-01/04-02/06-896, paras 2 and 17-25, referring, in particular, to Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, ICC-01/04-02/06-519 and ICC-01/04-02/06-T-29-CONF-ENG, pages 57-59.

¹⁰ Prosecution Response, ICC-01/04-02/06-896, paras 2, 17 and 26-27.

7. In the alternative, the Prosecution submits that the Request should be rejected on the merits because such evidence is admissible and 'directly relevant' to the existing charges, notwithstanding the fact that the accused has not been charged with rape or sexual slavery as a direct perpetrator.¹¹ The Prosecution contends that disallowing such evidence would: (i) prevent the Prosecution from fully presenting its case; (ii) impact the fairness of the proceedings by depriving victim witnesses of the opportunity of presenting their 'entire stories' in a manner detrimental to a fair evaluation of their testimony; and (iii) lead to inconsistency in the manner in which the accused's contribution to different crimes could be proven, in particular regarding the accused's own conduct.¹²
8. Finally, the Prosecution submits that the probative value of such evidence outweighs any prejudicial effect to the accused, arguing, in particular, the relevance of the evidence to the charges and that the accused has had notice that allegations of the accused's personal commission of rape and sexual slavery form part of the Prosecution's case since prior to the confirmation hearing.¹³ The Prosecution, while noting that such evidence is relevant to charged conduct and is within the temporal and geographic scope of the charges, identifies jurisprudence holding that even evidence from outside the temporal or geographic scope of the charges or relating to uncharged conduct may be relevant and admissible.¹⁴

Legal Representative

9. The Legal Representative submits that the Chamber is not an 'advisory body' addressing 'hypothetical issues of fact or law', and that the request for clarification does not relate to a 'live' issue.¹⁵ The Legal Representative further

¹¹ Prosecution Response, ICC-01/04-02/06-896, paras 3-4 and 28-36.

¹² Prosecution Response, ICC-01/04-02/06-896, paras 5, 29 and 37-40.

¹³ Prosecution Response, ICC-01/04-02/06-896, paras 5 and 41-46.

¹⁴ Prosecution Response, ICC-01/04-02/06-896, paras 43-45.

¹⁵ LRV Response, ICC-01/04-02/06-895, para. 3.

submits that it would be 'speculative and premature' for the Chamber to decide on the admissibility of prospective items of evidence.¹⁶

10. In relation to the request to strike portions of P-0901's evidence, the Legal Representative submits that the Request is 'procedurally improper' as an attempt to gain reconsideration of the oral ruling on the Defence's objection.¹⁷
11. The Legal Representative additionally submits that the evidence in question is relevant to the charges.¹⁸ On the question of notice, the Legal Representative argues that the Defence misapprehends the distinction between 'facts and circumstances' underlying the charges, and their legal characterisation.¹⁹

III. Analysis

12. Without prejudice to the Chamber's view on the procedural appropriateness of the Request, and notwithstanding the absence of adequate justification having been provided for reconsideration, the Chamber nonetheless considers that addressing the merits may provide the parties with useful guidance in order to forestall further extensive litigation on such issues in the future.
13. It is undisputed that Mr Ntaganda has not been charged as a direct perpetrator with the crimes of rape and sexual slavery. However, the Chamber finds unpersuasive the submission that evidence of the type challenged by the Defence does not have relevance to the confirmed charges. As indicated by the Presiding Judge in his oral ruling, there is a connection between this type of evidence and the charges. Indeed, the conduct of an accused, in particular during the temporal period of the charges, has sufficient potential relevance, including in relation to various modes of liability and to *mens rea*.

¹⁶ LRV Response, ICC-01/04-02/06-895, para. 4.

¹⁷ LRV Response, ICC-01/04-02/06-895, para. 6.

¹⁸ LRV Response, ICC-01/04-02/06-895, para. 7.

¹⁹ LRV Response, ICC-01/04-02/06-895, para. 8.

14. It is recalled that in the UDCC Decision the Chamber made no ruling on the admissibility or otherwise of such evidence.²⁰ In the Chamber's view, the key determination is whether the relevance and probative value of such evidence is outweighed by considerations such as unfair prejudice or undue delay. Maintaining an appropriate balance between probative value and any potential prejudicial effect is a matter that lies within the broad discretionary powers of the Chamber to fairly manage the proceedings. In that regard, the Chamber notes that the risk of prejudice or confusion is significantly reduced by the fact that the accused is not charged with personal commission of rape and sexual slavery, and that the trial is being heard before a panel of professional Judges who are fully capable of only considering such evidence within its proper context or, as the case may be, ultimately declining to consider such evidence.
15. On the question of notice, the Chamber observes that the Defence has had full notice that such allegations were contained within the evidence upon which the Prosecution intended to rely, including through their inclusion in the Prosecution's pre-trial brief, filed over seven months ago.²¹
16. Finally, on the potential impact of such evidence on the accused's right to a trial without undue delay, the Chamber considers that lengthy examination on specific incidents or allegations not directly charged may warrant intervention by the Chamber in order to focus and expedite proceedings. The Chamber's view on the necessity or otherwise of such evidence to the Prosecution's case may be a relevant consideration in that regard. The Chamber is not, however, persuaded that declining to exclude such evidence as a matter of principle will infringe Mr Ntaganda's right to be tried without undue delay. In the present

²⁰ ICC-01/04-02/06-450, para. 45; Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, ICC-01/04-02/06-519, para. 15.

²¹ See, for example, ICC-01/04-02/06-503-Conf-Exp-AnxA, para. 224.

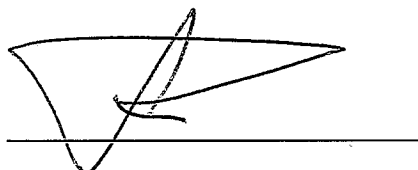
case, the Chamber observes that the specific portion of transcript objected to by the Defence comprises less than one page.²²

17. The Chamber finds that such evidence is not, in principle, inadmissible. Rather, a careful balancing is required on a case-by-case basis taking into account, in particular, the factors mentioned above. In this particular instance, the Chamber considers that neither unfair prejudice nor undue delay arose, nor does the Chamber consider there to have been any other reason warranting exclusion of the evidence.

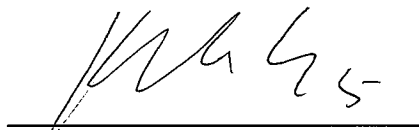
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

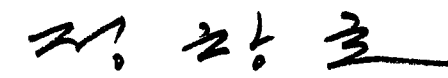
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 30 October 2015

At The Hague, The Netherlands

²² Request, ICC-01/04-02/06-878, footnote 7 (identifying four lines of testimony to be struck from the record).