

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **9 December 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 Defence request for leave to appeal the '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**

Ms Paolina Massidda

**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 Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on Defence request for leave to appeal the "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"'.¹

I. Background

1. On 30 October 2015, the Chamber issued a decision ('Impugned Decision')¹ rejecting the request of the defence team for Mr Ntaganda ('Defence') 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 a particular witness in response to questions put by the Office of the Prosecutor ('Prosecution') on this issue be struck from the record.²
2. On 9 November 2015, the Defence filed a request for leave to appeal the Impugned Decision on two issues ('Request').³
3. On 13 November 2015, the Prosecution responded opposing the Request ('Prosecution Response').⁴
4. Also on 13 November 2015, the Legal Representative of former child soldiers ('Legal Representative') responded, opposing the Request ('LRV Response').⁵

¹ Decision on Defence's request for clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda, ICC-01/04-02/06-968.

² 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, 30 September 2015, ICC-01/04-02/06-878. The filing was notified on 1 October 2015.

³ Request on behalf of Mr Ntaganda seeking leave to appeal the "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", ICC-01/04-02/06-993.

⁴ Prosecution's response to Defence's application for leave to appeal the "Decision on Defence's request for clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda", ICC-01/04-02/06-1007.

⁵ Former Child Soldiers' Response to the "Request on behalf of Mr Ntaganda seeking leave to appeal the "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", ICC-01/04-02/06-1009.

II. Submissions

5. The Defence seeks leave to appeal the following two issues:⁶
- i. 'Whether evidence related to a crime allegedly committed personally by Mr Ntaganda, but which is not charged in the Updated Document containing the charges ("UDCC"), is admissible' ('First Issue');
 - ii. 'Whether allegations of a crime allegedly committed personally by Mr Ntaganda, which are not found in the UDCC but are included in the Prosecution's pre-trial brief, provide notice to the Accused of the need to counter such allegations' ('Second Issue' and together with the First Issue, the 'Issues').

First Issue

6. In respect of the First Issue, the Defence submits that the 'default position' arising from the Impugned Decision is that evidence of crimes allegedly personally committed by Mr Ntaganda but not charged in the UDCC is admissible.⁷ The Defence submits that the Chamber's holding affects the fair conduct of proceedings because it 'imposes on the Defence the burden to oppose any attempt by the Prosecution to adduce such evidence.'⁸ The Defence argues that the burden imposed also affects the expeditious conduct of proceedings, as it 'will entail extensive cross-examination and inevitable related pleadings'.⁹ It submits that immediate appellate resolution will set the correct admissibility standard, ensuring 'that the trial proceeds on a sound basis and will avoid any future litigation as to the admissibility of such evidence.'¹⁰

⁶ Request, ICC-01/04-02/06-993, para. 1.

⁷ Request, ICC-01/04-02/06-993, para. 13.

⁸ Request, ICC-01/04-02/06-993, paras 13 and 18.

⁹ Request, ICC-01/04-02/06-993, para. 19.

¹⁰ Request, ICC-01/04-02/06-993, para. 21.

7. The Prosecution submits that the First Issue ‘misstates’ the Impugned Decision and hence does not arise from it.¹¹ In the Prosecution’s view, the Chamber ‘recognised the ordinary admissibility standard’, and no burden is imposed on the Defence.¹² The Prosecution also argues that, even accepting the proposed issue *arguendo*, the Defence failed to demonstrate that the First Issue significantly affects the fair and expeditious conduct of proceedings.¹³ Finally, the Prosecution argues that immediate appellate resolution ‘in the abstract’ would be ‘premature’ and likely to unnecessarily delay the proceedings, rather than moving it forward.¹⁴
8. The Legal Representative similarly submits that the First Issue does not arise from the Impugned Decision.¹⁵ The Legal Representative argues that, in any event, ‘assessing on a case-by-case basis the admissibility of each item does not affect the fairness and the expeditiousness of the proceedings.’¹⁶

Second Issue

9. In relation to the Second Issue, the Defence submits that, pursuant to the Impugned Decision, the Defence is on ‘notice’ and must respond to any allegation which is not charged in the UDCC but included in the pre-trial brief.¹⁷ The Defence argues that this ruling ‘defeats the purpose of an updated document containing the charges’ and is appealable.¹⁸ The Defence contends that the Chamber’s holding affects the fairness and expeditiousness of the proceedings as it ‘imposes on the Defence the need to investigate and prepare a defence to conduct which is not charged’.¹⁹ Finally, the Defence argues that immediate appellate resolution of the Second Issue is required in order to

¹¹ Prosecution Response, ICC-01/04-02/06-1007, paras 7-8.

¹² Prosecution Response, ICC-01/04-02/06-1007, paras 9-10.

¹³ Prosecution Response, ICC-01/04-02/06-1007, paras 20-22.

¹⁴ Prosecution Response, ICC-01/04-02/06-1007, para. 28.

¹⁵ LRV Response, ICC-01/04-02/06-1009, paras 11-12.

¹⁶ LRV Response, ICC-01/04-02/06-1009, para. 16.

¹⁷ Request, ICC-01/04-02/06-993, para. 15.

¹⁸ Request, ICC-01/04-02/06-993, para. 16.

¹⁹ Request, ICC-01/04-02/06-993, para. 20.

clarify if and when Mr Ntaganda is on notice of crimes allegedly personally committed by him that are included in the pre-trial brief but not the UDCC, and must prepare a defence thereto.²⁰

10. The Prosecution submits that the Second Issue 'is premised on an erroneous representation'²¹ of the Impugned Decision and hence does not arise from it.²² The Prosecution additionally argues that the Defence failed to demonstrate that it significantly affects the fair and expeditious conduct of proceedings because the Defence should '*prepare a defence* to the charged crimes in light of the factual circumstances in the Pre-Trial Brief.'²³
11. The Legal Representative submits that the Second Issue does not arise from the Impugned Decision as the Chamber was not making a general ruling on admissibility but one specific to the facts, and that 'an item of evidence will only need to be addressed or "countered" by the Defence once it has been admitted into evidence.'²⁴

III. Analysis

12. The Chamber incorporates by reference the applicable law as set out in previous decisions.²⁵
13. The Chamber does not consider that either of the Issues meet the requirements of Article 82(1)(d) of the Statute. In the Impugned Decision, the Chamber found that evidence on the alleged commission of rape or sexual slavery by the accused 'is not, in principle, inadmissible' and that, rather, 'a careful balancing is required on a case-by-case basis', taking into account a range of factors.²⁶

²⁰ Request, ICC-01/04-02/06-993, para. 22.

²¹ Prosecution Response, ICC-01/04-02/06-1007, para. 13.

²² Prosecution Response, ICC-01/04-02/06-1007, paras 14-16.

²³ Prosecution Response, ICC-01/04-02/06-1007, para. 23.

²⁴ LRV Response, ICC-01/04-02/06-1009, para. 13.

²⁵ 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, para. 21.

²⁶ Impugned Decision, ICC-01/04-02/06-968, para. 17 (referring to factors discussed earlier in the Impugned Decision).

14. Therefore, in respect of the First Issue, contrary to the Defence submission, the default position is not that such evidence is admissible, but that its admissibility falls to be considered on a case-by-case basis. The Chamber is also not persuaded by the Defence's submission that the Impugned Decision has shifted a burden to the Defence in a manner which significantly affects the fairness or expeditiousness of the proceedings. The Chamber notes that the burden remains with the Prosecution to establish the relevance and probative value of any concrete pieces of potential evidence it intends to submit.
15. Similarly, the Chamber considers that the Second Issue misrepresents the Impugned Decision and consequently does not arise from it. Contrary to the suggestion that the Chamber made a general ruling that the Defence is on 'notice' and must respond to any allegation which is not charged in the UDCC but included in the pre-trial brief,²⁷ the Chamber in the Impugned Decision only made a ruling specific to the facts. It observed that in the circumstances the Defence had full notice that certain allegations of rape and sexual slavery committed personally by Mr Ntaganda were contained within the evidence upon which the Prosecution intended to rely, including through their inclusion in the Prosecution's pre-trial brief.²⁸
16. Finally, the Chamber observes that the Defence failed to adequately substantiate its submission that the Issues would significantly affect the outcome of the trial.²⁹

²⁷ Request, ICC-01/04-02/06-993, para. 15.

²⁸ Impugned Decision, ICC-01/04-02/06-968, para. 15.

²⁹ See Request, ICC-01/04-02/06-993, para. 5 (submitting that issues relating to the amount or type of evidence the Chamber will have to consider or relating to the introduction of particular pieces of incriminating evidence would 'necessarily have an impact on the outcome of the trial'). The Chamber also observes that one of the references provided by the Defence to support this submission appears to be incorrect.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

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

Judge Chang-ho Chung

Dated this 9 December 2015

At The Hague, The Netherlands