

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **8 July 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

**Decision on Defence request seeking leave to jointly appeal two oral decisions
regarding the admissibility of certain 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

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

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 seeking leave to jointly appeal two oral decisions regarding the admissibility of certain evidence'.

I. Background

1. On 9 June 2016, during the examination of Witness P-0190, the Chamber rejected¹ a request by the defence team for Mr Ntaganda ('Defence') for reconsideration² of the Chamber's oral decision of 6 June 2016³ authorising the Office of the Prosecutor ('Prosecution') to lead evidence on an alleged murder committed personally by Mr Ntaganda ('First Impugned Decision'). Noting the Defence's submission that the alleged murder was neither charged nor included in the Pre-Trial Brief, the Chamber emphasised that the relevant testimony had been allowed and led for a very limited purpose. With regard to the Defence's request to strike the transcript portions dealing with the alleged murder from the record, the Chamber found this not to be 'a proper measure', the Chamber being composed of professional judges who are 'able to evaluate any information contained in the record and to weigh it', and to assess whether the information should be taken into consideration or whether there is any prejudice that should prevent the Chamber from drawing any conclusions from the relevant part of the record.⁴
2. Also on 9 June 2016, the Chamber issued an oral decision on the 'Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0894'⁵ ('Second Impugned Decision',

¹ Transcript of hearing on 9 June 2016, ICC-01/04-02/06-T-99-Red-ENG WT, page 11, line 15 to page 12, line 1.

² ICC-01/04-02/06-T-99-CONF-ENG ET, page 6, lines 16-24.

³ Transcript of hearing on 6 June 2016, ICC-01/04-02/06-T-96-Red-ENG WT, page 61, line 19 to page 62, line 16.

⁴ ICC-01/04-02/06-T-99-Red-ENG WT, page 11, line 20 to page 12, line 1.

⁵ 19 May 2016, ICC-01/04-02/06-1326-Conf and ICC-01/04-02/06-1326-Red.

together with the First Impugned Decision, 'Impugned Decisions'), in which it *inter alia*: (i) admitted into evidence the statement of Witness P-0894 in its entirety, including some passages relating to the alleged murder of Colonel Lusala, an incident not charged; and (ii) rejected the Prosecution's request to conduct a *viva voce* examination of Witness P-0894 on this specific incident. The Chamber recalled its decision of 30 October 2015 ('30 October 2015 Decision')⁶ that the conduct of an accused person, 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* and clarified that any examination-in-chief in relation to such evidence should be limited.⁷

3. On 15 June 2016, the Defence sought leave to jointly appeal the Impugned Decisions ('Request').⁸
4. On 20 June 2016, the Prosecution filed a response, opposing the Request ('Response').⁹

⁶ 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-01/04-02/06-968.

⁷ ICC-01/04-02/06-T-99-CONF-Red WT, page 61, line 15 to page 63, line 8.

⁸ Request on behalf of Mr Ntaganda seeking leave to jointly appeal two oral decisions regarding the admissibility of evidence on specific murders not charged in the Updated Document containing the charges, ICC-01/04-02/06-1399-Conf.

⁹ Prosecution response to Defence's application for leave to appeal the two oral decisions regarding the admissibility of evidence on specific murders committed personally by Mr Ntaganda, ICC-01/04-02/06-1412-Conf.

II. Submissions

5. The Defence seeks leave to appeal the following issue that it submits arises from both Impugned Decisions:¹⁰

[w]hether evidence adduced by the Prosecution in relation to specific murders not charged in the [Updated Document Containing the Charges ('UDCC')], which Mr Ntaganda allegedly committed personally, is admissible' ('Issue').

6. According to the Defence, the Issue is an appealable one as it constitutes 'not merely a question over which there is a disagreement', but rather, 'identifies a topic requiring clear appellate directions'.¹¹ In this regard, the Defence argues that the Chamber: (i) failed to consider the differences between the situation underlying the 30 October 2015 Decision, relating to allegations of rape and sexual slavery committed personally by Mr Ntaganda - which is conduct not charged at all; and the situation at hand, concerning the admissibility of evidence related to a charge existing in the UDCC, where the risk of prejudice or confusion resulting from the admission of such evidence 'largely outweighs [its] relevance and probative value, if any'; and (ii) 'made a finding in the abstract that evidence implicating Mr Ntaganda personally in specific murders not charged in the UDCC has sufficient potential relevance to various modes of liability and to *mens rea*, and thus has *prima facie* probative value'.¹²
7. The Defence further submits that the Issue significantly affects the fair and expeditious conduct of the proceedings, as well as the outcome of the trial, including, it submits, because of potential 'confusion' as to the scope of the charge.¹³ It also argues that the immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings.¹⁴

¹⁰ Request, ICC-01/04-02/06-1399-Conf, para. 1.

¹¹ Request, ICC-01/04-02/06-1399-Conf, para. 13.

¹² Request, ICC-01/04-02/06-1399-Conf, paras 11-12.

¹³ Request, ICC-01/04-02/06-1399-Conf, paras 14-23.

¹⁴ Request, ICC-01/04-02/06-1399-Conf, paras 24-25.

8. The Prosecution submits that the Issue does not arise from the Impugned Decisions and is not appealable, arguing that it: (i) 'is premised on the incorrect assertion that the Chamber applied its prior ruling on admissibility of non-charged crimes "in the abstract", without balancing all the relevant factors including the relevance of the evidence and its potential prejudice for the Accused',¹⁵ and (ii) expresses a mere disagreement with the Impugned Decisions as the Request reiterates previous Defence arguments which have been previously heard and rejected by the Chamber.¹⁶
9. Assuming that the Issue was appealable, the Prosecution submits that the Defence fails to demonstrate that the other requirements of Article 82(1)(d) have been met.¹⁷

III. Analysis

10. The Chamber incorporates by reference the applicable law as set out in previous decisions on requests for leave to appeal.¹⁸
11. As a preliminary matter, the Chamber recalls that it has previously rejected a Defence request for leave to appeal a substantively similar, if slightly more broadly phrased, issue.¹⁹ At that time, the Chamber recalled the scope of its ruling, being that the admissibility of such evidence needs to be considered on a case-by-case basis.²⁰ It also addressed Defence submissions regarding, *inter alia*, the alleged burden placed on the Defence as a result of such evidence being heard, and the alleged consequent impact on the fairness and expeditiousness

¹⁵ Response, ICC-01/04-02/06-1412-Conf, para. 7, referring to the 30 October 2015 Decision, ICC-01/04-02/06-968.

¹⁶ Response, ICC-01/04-02/06-1412-Conf, paras 11-14.

¹⁷ Response, ICC-01/04-02/06-1412-Conf, paras 15-20.

¹⁸ 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.

¹⁹ 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', 9 December 2015, ICC-01/04-02/06-1047 ('9 December 2015 Decision').

²⁰ 9 December 2015 Decision, ICC-01/04-02/06-1047, paras 13-14.

of the proceedings.²¹ The Chamber considers those findings to also be of relevance in this instance.

12. However, turning to the Issue identified in the present Request, the Chamber considers that the Defence misrepresents the Impugned Decisions in arguing that the Chamber failed to consider the differences between the situation at hand and the situation underlying the 30 October 2015 Decision, and ‘made a finding in the abstract’.
13. In the Impugned Decisions, the Chamber carefully balanced the probative value of the relevant evidence against any potential prejudice its admission may cause, and applied the test set out in the 30 October 2015 Decision to the specific circumstances underlying the Impugned Decisions, rather than making a finding in the abstract, as argued by the Defence. In particular, the Chamber admitted the contested evidence with the caveat that the Prosecution may lead such evidence only for a limited purpose. The Chamber further stated that, being composed of professional judges, it is able to adequately weigh the evidence on the record and determine the purposes for which it may be considered. Accordingly, the Chamber finds that the Defence’s submissions, in support of the requirements of Article 82(1)(d) of the Statute having been met, misrepresent the Impugned Decisions and are speculative in nature.
14. The Defence has therefore failed to establish, and the Chamber does not consider, that the Issue constitutes an appealable issue arising from the Impugned Decisions which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In light of this, it is unnecessary for the Chamber to consider the remaining requirements of Article 82(1)(d) of the Statute.

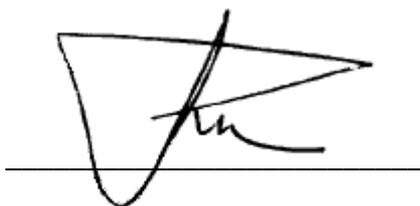
²¹ 9 December 2015 Decision, ICC-01/04-02/06-1047, para. 14.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the Defence and the Prosecution to file public redacted versions of the Request (ICC-01/04-02/06-1399-Conf) and the Response (ICC-01/04-02/06-1412-Conf) within two weeks of notification of the present decision.

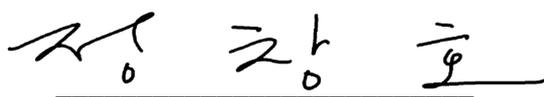
Done in both English and French, the English version being authoritative.

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

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be '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 8 July 2016

At The Hague, The Netherlands