

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

**Prosecution 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"**

Source: Office of the Prosecutor

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I. Introduction

1. The Defence's Application¹ seeking leave to appeal the Clarification Decision on the admissibility of evidence of Mr Ntaganda's personal commission of rape and sexual slavery² should be dismissed because it does not meet the threshold requirement for leave to appeal under article 82(1)(d) of the Rome Statute.
2. First, the proposed issues do not arise from the Decision because they are premised on incorrect assertions. In the alternative, the proposed issues are not appealable because they express no more than disagreements with the Chamber.
3. In any event, the Defence has failed to demonstrate either that any of the proposed issues significantly affect the fairness and expedition of the proceedings or the outcome of the trial, or that the immediate intervention of the Appeals Chamber will materially advance the proceedings.
4. For these reasons the Application should be dismissed.

II. Submissions

A. The proposed issues do not arise from the Decision or are not appealable

5. The Application fails to meet the threshold requirement for leave to appeal, which is the identification of an *appealable* issue arising from the Decision. An "issue" is an identifiable subject or topic *arising from the decision* requiring a decision for its resolution—not merely a question over which there is disagreement or conflicting opinion.³ If an issue misapprehends the disposition of the Chamber, or misrepresents a factual finding with which the applicants disagree in order to make

¹ ICC-01/04-02/06-993 ("Application").

² ICC-01/04-02/06-968 ("Clarification Decision" or "Decision").

³ ICC-01/04-168, para. 9.

it a point of law,⁴ it cannot be said to *have arisen from the decision* as such and must be dismissed.⁵ When an issue is premised on an “erroneous assertion” that the Chamber “decided” on a particular matter, it fails to meet this requirement.

6. Both proposed issues⁶ fail to meet these requirements: they do not arise from the Decision or, in the alternative, they express no more than disagreements with the Chamber. The proposed issues cannot be certified for appeal.

i. The First Issue misstates the Decision and hence does not arise from it. Alternatively it merely disagrees with the Decision

7. The First Issue⁷—whether evidence related to a crime allegedly committed personally by Mr Ntaganda, where he is charged under other modes of liability than direct perpetration in the Updated Document containing the charges (“UDCC”), is admissible—⁸ is premised on the incorrect assertions that the Chamber decided on the admission of such evidence, and that it made a general ruling governing admission of evidence for the remainder of the proceedings.⁹

8. To the contrary, the Chamber did not decide whether such evidence will be admitted,¹⁰ but simply rejected the Defence’s argument that it cannot be elicited and that *it should not be admissible in principle*.¹¹ The Chamber found that there is no obstacle in principle to its admissibility and allowed for the *possibility* of evidence of

⁴ See ICC-01/09-02/11-406, para. 46.

⁵ See ICC-01/05-01/13-1278, para. 9. See also ICC-02/11-01/15-117, para. 19; ICC-01/04-01/07-1732, paras. 15, 17-18; ICC-01/04-01/10-487, paras. 32-33; ICC-01/04-01/07-1088, paras. 33-35; ICC-01/04-535, paras. 26-29; ICC-01/04-01/10-106, p. 6.

⁶ Application, para. 1.

⁷ Application, para. 1(a) (“First Issue”).

⁸ Application, paras. 1(a), 13, 18.

⁹ Application, paras. 13, 18.

¹⁰ Decision, para. 14. Referring also to its prior decisions: ICC-01/04-02/06-450, para.45; ICC-01/04-02/06-519, para.15.

¹¹ Decision, para. 17. The Defence maintains that “evidence related to crimes not charged is *per se* not relevant”, Application, para. 18 (emphasis added). See also ICC-01/04-02/06-878, 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, para. 8 and p. 6.

Mr Ntaganda's direct involvement in the commission of these crimes to be led at trial.¹²

9. Further, contrary to the Defence's suggestion,¹³ the Chamber did not make a general ruling regarding the admission of evidence, nor did the Chamber impose on the Defence "*the burden* to oppose any attempt by the Prosecution to adduce such evidence on the basis of the resulting unfair prejudice and/or undue delay."¹⁴ Rather, while *the burden* of showing relevance and probative value of the proposed evidence remains on the Prosecution, the Chamber merely reiterated that "the key determination is whether the relevance and probative value of such evidence is outweighed by considerations such as unfair prejudice and undue delay".¹⁵

10. The Chamber recognised the ordinary admissibility standard. Like for any other proposed evidence, the Prosecution will need to establish the relevance and probative value of evidence related to crimes allegedly committed personally by Mr Ntaganda—for which he has been charged under modes of liability other than direct perpetration in the UDCC—as proof of modes of liabilities included in the UDCC.¹⁶ The Chamber will decide on a case by case basis on the Prosecution's submission—considering possible unfair prejudice or undue delay.¹⁷

11. The Defence misrepresents a factual finding, with which it merely disagrees, in an attempt to convert it into a point of law. The First Issue does not arise from the Decision.

12. In the alternative, to the extent that the Defence argues that the evidence of Mr Ntaganda's personal commission of crimes, where he is charged under other modes of liability than direct perpetration, should have been declared irrelevant and

¹² Decision, para. 17.

¹³ Application, paras. 13, 18.

¹⁴ Application, paras. 13, 17.

¹⁵ Decision, para. 14.

¹⁶ *Contra* Application, para. 13: "It also imposes on the Defence the burden [...] as opposed to requiring the Prosecution to establish the need to adduce such evidence in order to proving the essential elements of a different crime included in the UDCC". See also Application, para. 17.

¹⁷ Decision, para. 17.

inadmissible in principle, the First Issue is not appealable because it is merely a question on which the Defence disagrees.

ii. The Second Issue misstates the Decision and hence does not arise from it. Alternatively it merely disagrees with the Decision

13. The Second Issue¹⁸—whether crimes allegedly committed personally by Mr Ntaganda for which he has been charged under modes of liability other than direct perpetration in the UDCC, and as set out in the pre-trial brief, provides adequate notice to the Accused of the need to counter such allegations—¹⁹ is premised on an erroneous representation of the Chamber’s Decision.

14. Contrary to the Defence’s submission, the Chamber did not hold *as a general rule* “govern[ing] the admission of evidence for the remainder of the proceeding [that] *as long as* an allegation of a crime committed personally by Mr Ntaganda is included in the Prosecution’s Pre-Trial Brief [...] the Defence is on ‘notice’ and must inevitably respond to such allegation”.²⁰

15. First, the Chamber did not find that the Defence received adequate notice *solely through* but rather *including through* the Prosecution’s Pre-Trial Brief.²¹ Second, the Chamber did not make a general ruling but only addressed the concrete issue at hand and concluded that in this case the Defence “had full notice that [allegations of Mr Ntaganda’s personal commission of rape and sexual slavery] 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”.²²

¹⁸ Application, para. 1(b) (“Second Issue”).

¹⁹ Application, paras. 14-15.

²⁰ *Contra* Application, para. 15.

²¹ Decision, para. 15; *contra* Application, para. 15.

²² Decision, para. 15 (emphasis added).

16. The Defence misrepresents a factual finding, with which it merely disagrees, in an attempt to convert it into a point of law. The Second Issue does not arise from the Decision.

17. In the alternative—to the extent that the Defence challenges the Chamber’s factual conclusion that the notice was adequate in this case—the Second Issue is not an appealable issue but merely a question on which the Defence disagrees.

18. For these reasons the Application should be rejected without further consideration.

B. The other requirements of article 82(1)(d) are not met

i. None of the issues significantly affects the fairness and expedition of the proceedings or the outcome of the trial

19. Even accepting the proposed issues *arguendo*, the Defence has failed to demonstrate that the issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

20. As for the First Issue, the Defence argues it affects the fair conduct of the proceedings because—by finding evidence of Mr Ntaganda’s personal commission of crimes as a direct perpetrator *is not inadmissible* as a matter of principle—the Decision imposed on the Defence the burden “to object every time the Prosecution will seek to elicit” such evidence.²³ According to the Defence, the Prosecution is relieved from the burden of “justify[ing] the need to adduce such evidence to prove the crimes charged.”²⁴

21. The Defence’s argument is once again based on a misrepresentation of the Decision. Nothing in the Decision suggests that the Prosecution should be relieved from the burden of showing relevance and probative value—*vis-à-vis* the charged

²³ Application, para. 18.

²⁴ Application, para. 18.

crimes—of the evidence it wishes to present. Further, irrespective of whether the Defence objects to the Prosecution’s submissions, the Chamber reiterated that it will consider whether the relevance and probative value is outweighed by unfair prejudice or undue delay.²⁵

22. Similarly, contrary to the Defence submission,²⁶ the Decision does not unduly delay the proceedings because the Chamber has not yet ruled on the admission of the evidence.²⁷ As discussed above, the Decision did not rule on the admission of evidence but found that evidence of Mr Ntaganda’s personal commission of crimes as a direct perpetrator is not inadmissible in principle.²⁸ In addition, the testimony of witnesses that the Chamber finds—on a case-by-case basis—capable of providing relevant and valuable evidence would not necessarily *unduly* delay the proceedings.

23. With respect to the Second Issue, and contrary to the Defence’s submission,²⁹ the Decision does not impose “the need to investigate and *prepare a defence* to conduct which is not charged”.³⁰ To the contrary, the Defence should *prepare a defence* to the charged crimes in light of the factual circumstances in the Pre-Trial Brief—including evidence of Mr Ntaganda’s personal commission of crimes as a direct perpetrator. Whether this involves “significant time” is irrelevant.³¹

24. The Defence has failed to demonstrate that the proposed issues significantly affect the fair and expeditious conduct of the proceedings.

25. Further, the Defence has failed to substantiate its submission that the proposed issues would significantly affect the outcome of the trial.³² For the same reasons why they would not significantly affect the fair and expeditious conduct of the

²⁵ Decision, para. 14.

²⁶ Application, para. 19.

²⁷ Application, para. 19.

²⁸ Decision, paras. 14, 17.

²⁹ Application, para. 20.

³⁰ Application, para. 20 (emphasis added).

³¹ *Contra* Application, para. 20.

³² See Application, para. 2 and Section III’s heading stating in generic unsubstantiated terms that the proposed issues affect the outcome of the trial.

proceedings, the proposed issues would not significantly affect the outcome of the trial either.

ii. The immediate resolution by the Appeals Chamber will not materially advance the proceedings

26. The Defence has failed to show that the immediate resolution by the Appeals Chamber of the proposed issues will materially advance the proceedings.³³

27. As for the First Issue, the Defence's Application is premised on the incorrect assertion that the Chamber defined an erroneous admissibility standard for evidence of Mr Ntaganda's personal commission of crimes as a direct perpetrator.³⁴ As discussed above, the Chamber did not "impose on the Defence" any burden nor did it suggest that the Prosecution should be relieved from its burden of showing the relevance and probative value of such evidence.

28. Further, as emphasised throughout this response, the Chamber has not ruled on the admission of such evidence. The Defence may advance its challenges if and when the evidence is submitted by the Prosecution and the Chamber is called to decide on its actual admission. A resolution of this issue in the abstract by the Appeals Chamber at this stage is premature and not likely to provide significant guidance or assist the proceedings to "move forward". To the contrary, it would only cause an unnecessary delay in the proceedings.

29. In relation to the Second Issue,³⁵ the Defence has failed to explain why asking the Appeals Chamber to determine if and when Mr Ntaganda was on notice that the Prosecution's case included evidence of Mr Ntaganda's personal commission of crimes to prove these crimes under other modes of liability, may materially advance the proceedings.

³³ *Contra* Application, paras. 21-23.

³⁴ *Contra*, Application, para. 21. *See also* Application, paras. 13, 18 suggesting that the Chamber imposed on the Defence the burden of objecting to the admission of irrelevant evidence.

³⁵ Application, para. 22.

III. Relief requested

30. For all the reasons above, the Application should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 13th day of November 2015

At The Hague, The Netherlands