

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **20 June 2014**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

***IN THE CASE OF  
THE PROSECUTOR v. BOSCO NTAGANDA***

**Public**

**Prosecution's Response to Defence Application for Leave to Appeal the  
Decision Confirming the Charges**

**Source:** Office of the Prosecutor

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

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## Introduction

1. The Defence has sought leave to appeal (“Application”)<sup>1</sup> the decision on the confirmation of charges against Bosco Ntaganda (“Decision”)<sup>2</sup> on two grounds. First, the Defence seeks leave on the issue of whether the Chamber can confirm charges solely on the basis of evidence that the Defence asserts it cannot properly challenge. The Defence includes in this category indirect evidence, and evidence from anonymous or deceased witnesses (the “First Issue”).<sup>3</sup> Second, the Defence seeks leave to appeal on the question of whether Article 8(2)(e)(viii) requires the Prosecution to establish that the perpetrator specifically issued an order to displace civilians (the “Second Issue”).<sup>4</sup>
2. The Application should be dismissed. The First Issue does not amount to an appealable issue; rather it simply represents the Defence’s disagreement with the manner in which the Chamber appraised the evidence before it. Moreover, it does not meet the criteria for leave to appeal under Article 82(1)(d). Although the Second Issue arises from the Decision, it does not meet the criteria for leave to appeal.

## Submissions

3. In seeking leave, the Defence must first establish that the Application concerns an appealable issue rather than simply a disagreement or conflicting opinion.<sup>5</sup> Second, the Defence must establish that the Application fulfils the criteria established by Article 82(1)(d) for leave to appeal, namely that the Application raises an issue or issues that would significantly affect the fair and expeditious

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<sup>1</sup> ICC-01/04-02/06-312.

<sup>2</sup> ICC-01/04-02/06-309.

<sup>3</sup> Application, paras.4, 6-13.

<sup>4</sup> Application, paras.5, 21-27.

<sup>5</sup> ICC-01/04-168 OA3, paras.9-10.

conduct of the proceedings or the outcome of the trial and, concerning which, an immediate resolution may materially advance the proceedings.

*(a) The First Issue does not constitute an appealable issue*

4. The Appeals Chamber has held that “*only an issue* may form the subject-matter of an appealable decision.”<sup>6</sup> “An issue”, the Chamber has established, “is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion.”<sup>7</sup> The First Issue does not amount to an issue requiring resolution; rather it simply represents the Defence’s *disagreement* with the Chamber’s appraisal of the evidence.
5. The Defence does not contest the admissibility of indirect evidence or evidence from anonymous or deceased witnesses.<sup>8</sup> Rather, the First Issue is focused on the weight that a Pre-Trial Chamber can give to these categories of evidence and whether such evidence can be relied upon, on its own, to fulfil the requisite standard of proof under Article 61(7).<sup>9</sup>
6. As the Appeals Chamber has repeatedly held, appraisal of evidence is an inherently discretionary undertaking and “lies, in the first place,” with the Pre-Trial Chamber and the Trial Chamber.<sup>10</sup> The Appeals Chamber has also held that it “will not interfere with a discretionary decision of another Chamber unless that decision is vitiated by a legal error, a factual error or a procedural error, and only if the error materially affected the decision.”<sup>11</sup> Finally, the Appeals Chamber has further clarified that appellate intervention on a discretionary decision is justified

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<sup>6</sup> ICC-01/04-168 OA3, paras.9-10 (emphasis added).

<sup>7</sup> ICC-01/04-168 OA3, paras.9-10.

<sup>8</sup> The admissibility of the testimony of deceased witnesses is subject to a prior ruling of the Single Judge: ICC-01/04-02/06-308, para.31.

<sup>9</sup> Application, paras.4, 7-8, 13.

<sup>10</sup> ICC-01/04-02/06-271-Red OA, para.36; ICC-01/04-01/10-283 OA, para.17; ICC-01/05-01/08-2151-Red OA10, para.16; ICC-01/04-01/07-2259 OA10, para.75.

<sup>11</sup> ICC-01/04-01/07-2259 OA10, para.34; ICC-02/04-01/05-408 OA3, para.80; ICC-01/09-01/11-307 OA, para.89; ICC-01/09-02/11-274 OA, para.87.

only “(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.”<sup>12</sup>

7. The ultimate correctness of the Decision is irrelevant in assessing this Application;<sup>13</sup> instead, the Defence must establish that the Decision raises an appealable issue. The Defence must identify, with sufficient clarity, how the Chamber’s exercise of discretion in appraising the evidence amounts to an error. They fail to do so.
8. Rather, the Defence merely asserts in its Application that, on appeal, it will demonstrate how indirect evidence and evidence from anonymous or deceased witnesses is insufficient to establish substantial grounds to believe,<sup>14</sup> and how it was unable to properly challenge such evidence.<sup>15</sup> Accordingly, the First Issue amounts to no more than the Defence’s mere disagreement or conflicting opinion on how the Chamber weighed certain types of evidence in light of the Defence’s claimed difficulties in challenging it. This falls short of constituting an appealable issue.<sup>16</sup>

*(b) The First Issue does not meet the criteria for leave to appeal*

*The First Issue does not affect the fair or expeditious conduct of the proceedings*

9. In addition, the First Issue does not affect the fair or expeditious conduct of the proceedings. The Defence’s argument relies on the incorrect premise that they cannot properly challenge indirect evidence, or evidence from anonymous or

<sup>12</sup> ICC-02/04-01/05-408 OA3, para.80; ICC-01/09-01/11-307 OA, paras.89, 98, 110; ICC-01/09-02/11-274 OA, paras.87, 96, 108; ICC-01/09-01/11-1066 OA5, para.60.

<sup>13</sup> ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

<sup>14</sup> Application, paras.8-13.

<sup>15</sup> Application, paras.8, 10.

<sup>16</sup> ICC-01/04-168 OA3, paras.9-10.

deceased witnesses.<sup>17</sup> As the Single Judge of this Chamber stated in an earlier decision, the absence of a possibility to question a deceased witness does not infringe the rights of the Defence, “as it could still have challenged the evidence in question during the Hearing through other means”.<sup>18</sup> The same logic applies equally to indirect evidence.

10. Moreover, even assuming that the Defence’s ability to challenge the evidence was restricted in some way, this does not provide a basis upon which to challenge the Decision. First, as the Appeals Chamber has concluded “[t]he right to challenge the evidence [...] must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect.”<sup>19</sup> Second, this would not necessarily prejudice the Defence. Whether an accused is able to properly investigate information contained in anonymous hearsay, for instance, depends on the specific circumstances surrounding the evidence. As the Appeals Chamber previously stated in this case, “excerpts [from a UN expert report] relied upon [by the Pre-Trial Chamber] were sufficiently detailed to enable Mr Ntaganda to investigate and consequently challenge the relevant information and [...] he was not prejudiced by the anonymity of the sources of the information relied upon”.<sup>20</sup>

11. In sum, the Defence’s argument that it is unable to properly challenge indirect evidence, or evidence from anonymous or deceased witnesses, and that this affects the fair conduct of the proceedings, must be dismissed.

12. The Defence further argues that the confirmation of some of the charges<sup>21</sup> depends on an adjudication of the First Issue, and that the Chamber was unfair to

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<sup>17</sup> Application, para.15.

<sup>18</sup> ICC-01/04-02/06-308, para.31.

<sup>19</sup> ICC-01/04-01/06-774 OA6, para.47; see also ICC-01/04-01/07-475 OA, para. 68.

<sup>20</sup> ICC-01/04-02/06-271-Red OA, para.42.

<sup>21</sup> See the facts enumerated at paragraph 13 of the Application.

rely on certain types of evidence to establish those charges.<sup>22</sup> However, they do not substantiate this argument. Rather, the Defence merely lists the findings that it challenges and argues in general terms that the Chamber's reliance on indirect evidence or evidence from anonymous or deceased witnesses was unfair because it could not properly challenge it. This is insufficient to support an argument that the First Issue affects the fair or expeditious conduct of the proceedings. As the Appeals Chamber has held, whether the use of certain types of evidence affects the rights of the accused and fairness of the proceedings "will have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing."<sup>23</sup> Since the Defence has not shown how they were prejudiced by the Chamber's approach to the evidence, their argument that the First Issue affects the fair and expeditious conduct of the proceedings must be rejected.

*Immediate resolution of the First Issue by the Appeals Chamber will not materially advance the proceedings*

13. Finally, the Defence has not shown why immediate resolution of the First Issue by the Appeals Chamber will materially advance the proceedings. In particular, referral of the First Issue to the Appeals Chamber will not "remov[e] doubts about the correctness of [the Decision] or map[...] a course of action along the right lines [that] provides a safety net for the integrity of proceedings"<sup>24</sup> since the Appeals Chamber has previously ruled on key aspects of the First Issue.

14. Specifically, the Appeals Chamber has already found in this and in other cases that, under certain circumstances, it may well be appropriate for the decision on the confirmation of charges to rely on anonymous hearsay evidence.<sup>25</sup> In addition,

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<sup>22</sup> Application, paras.16-18.

<sup>23</sup> ICC-01/04-01/06-773 OA5, para. 51.

<sup>24</sup> ICC-01/04-168, paras. 14-16, 18.

<sup>25</sup> ICC-01/04-02/06-271-Red OA, para.42; see also ICC-01/04-01/06-773 OA5, paras.2, 40, 51; ICC-01/04-01/06-774 OA5, para.46.

the Appeals Chamber has held, in the context of confirmation proceedings, that the Defence's inability to fully challenge the Prosecution's evidence "does not mean that the use of such [evidence] at the confirmation hearing is necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."<sup>26</sup> Finally, the Appeals Chamber has confirmed that the Statute and the Rules do not preclude the Pre-Trial Chamber "from evaluating the evidence as is required by article 61 (7) of the Statute or otherwise limit the Chamber's authority to freely assess evidence."<sup>27</sup>

15. These general principles are equally applicable to indirect evidence and evidence from anonymous or deceased witnesses. As the Appeals Chamber has already provided sufficient guidance on the First Issue, its immediate resolution will not materially advance the proceedings in this case.

*(c) The Second Issue does not meet the criteria for leave to appeal*

16. The Second Issue, whether the Prosecution must show for the war crime of displacing civilians under Article 8(2)(e)(viii) that the perpetrator issued an order, does arise from the Pre-Trial Chamber's Decision.<sup>28</sup> However, since this issue does not meet the criteria for leave to appeal, it should be dismissed.

*The Second Issue does not affect the fair or expeditious conduct of the proceedings*

17. First, the Second Issue does not affect the fair and expeditious conduct of the proceedings.<sup>29</sup> Even if the Pre-Trial Chamber erred, the Defence will not be prejudiced if the charge of forcibly displacing civilians under Article 8(2)(e)(viii) proceeds to trial because the underlying facts are the same as those relied upon

<sup>26</sup> ICC-01/04-01/06-773 OA5, para.50; see also ICC-01/04-01/10-514 OA4, para.48.

<sup>27</sup> ICC-01/04-01/10-514 OA4, para.42.

<sup>28</sup> Decision, para.64: "for the purposes of the war crime of displacing civilians, the conduct by which the perpetrator(s) force(s) civilians to leave a certain area is not limited to an order, as referred to in element 1 of the relevant Elements of Crimes".

<sup>29</sup> *Contra* Application, paras.29-31.



by the Pre-Trial Chamber to confirm the charges against the accused for forcible transfer as a crime against humanity. Since the Defence must meet those facts in any event, no unfairness or impact on the expedition of the proceedings arises.

18. The Pre-Trial Chamber confirmed the crime of forcible transfer as a crime against humanity in Count 12. This was based on the same factual findings as relied on to establish the underlying criminal acts for the war crime of displacement of civilians in Count 13. In fact, the Decision assesses the relevant facts of both charges cumulatively at paragraphs 65-68. The Chamber confirmed the factual basis of the forcible transfer charge irrespective of the question raised under the Second Issue.<sup>30</sup> As such, for the purposes of defending himself at trial, the Defence will need to investigate and address those facts in any event.<sup>31</sup> Similarly, because the facts relied on by the Pre-Trial Chamber to establish the contextual elements of the war crime of displacing civilians were also relied upon by it to confirm the contextual elements of other war crimes,<sup>32</sup> the Defence will need to challenge those facts at trial in any event.

19. Thus, even if the Pre-Trial Chamber erred, resolution of the Second Issue would not affect the fair or expeditious conduct of the proceedings.

*Immediate resolution of the Second Issue by the Appeals Chamber will not materially advance the proceedings*

20. For the same reason, immediate resolution by the Appeals Chamber of the Second Issue would not materially advance the proceedings.<sup>33</sup> The Prosecution will lead the same crime base evidence to establish the facts for both counts 12 and 13, as well as for the contextual elements under Article 8. The Defence will need to

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<sup>30</sup> Decision, para.36, p.15, item (vii) and 65-68.

<sup>31</sup> *Contra*, Application, para.31.

<sup>32</sup> Decision, para.12. See also paras.13-30.

<sup>33</sup> *Contra*, Application paras.32-34.

respond to all the relevant facts and the related evidence, irrespective of the legal question raised under the Second Issue.

21. Likewise, because the Second Issue does not affect the factual parameters of the charges, there is no need to refer the matter to the Appeals Chamber for an immediate resolution in order to determine the boundaries within which victims may be allowed to participate in the proceedings.<sup>34</sup> The potential victims would be the same under both counts 12 and 13.
22. Moreover, even though the Pre-Trial Chamber did not confirm the mode of liability of ordering with respect to the crimes committed in the *Second Attack*,<sup>35</sup> nothing in the Decision prevents the Prosecution from submitting additional evidence at trial to establish that the Accused ordered the displacement of civilians during this attack, so as to establish the war crime of displacing civilians. If the Trial Chamber were satisfied that the Accused did, in fact, order the displacement of civilians, the Second Issue would be rendered moot. Consequently, immediate resolution of the issue by the Appeals Chamber is not required.

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<sup>34</sup> *Contra*, Application, para.34.

<sup>35</sup> Decision, para.152. For the crimes committed during the First Attack, the Trial Chamber found that “Mr. Ntaganda ordered UPC/FPLC members to commit [...] displacement of the civilian population” (para.148).

### Conclusion

23. For the above reasons, the Application should be rejected.



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Fatou Bensouda, Prosecutor

Dated this 20<sup>th</sup> day of June 2014

At The Hague, The Netherlands