

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

No.: ICC-01/04-02/06  
Date: 27 October 2015

**THE APPEALS CHAMBER**

**Before:** Judge Christine Van den Wyngaert, Presiding Judge  
Judge Sanji Mmasenono Monageng  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Raul Pangalangan

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

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

**Public**

**Prosecution's application to dismiss *in limine* Bosco Ntaganda's Appeal  
against Trial Chamber VI's decision in respect of Counts 6 and 9**

**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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**Victims Participation and Reparations  
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**Other**

## A. Overview

1. Mr Ntaganda has improperly filed his Appeal<sup>1</sup> under article 82(1)(a) of the Rome Statute. The proper course of action would have been to seek leave to appeal under article 82(1)(d) because the impugned Decision<sup>2</sup> is not “a decision with respect to jurisdiction”.<sup>3</sup> Mr Ntaganda’s direct Appeal should be dismissed *in limine* as inadmissible.
2. Although characterised as a jurisdictional challenge, Mr Ntaganda’s Appeal raises issues of statutory interpretation.<sup>4</sup> He does not challenge the Court’s jurisdiction *rationae materiae* over the crimes of rape and sexual slavery under article 8(2)(e)(vi) of the Statute. Rather, he disputes *the scope* of article 8(2)(e)(vi)’s application—specifically whether it applies when the victims are child soldiers.<sup>5</sup> Accordingly, in its Decision, Trial Chamber VI (“Chamber”) found that the questions raised by Mr Ntaganda are not of a jurisdictional nature but rather are issues of substantive law, which should be addressed at the end of trial and not prior to or at its commencement.<sup>6</sup>
3. Irrespective of its form, the substance of the Decision is not of a jurisdictional nature and does not fall under article 82(1)(a). Mr Ntaganda’s attempt to re-litigate before the Appeals Chamber ordinary issues of statutory interpretation without seeking leave of the Chamber must fail and his Appeal should be dismissed *in limine*.

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<sup>1</sup> ICC-01/04-02/06-909 (“Appeal”).

<sup>2</sup> ICC-01/04-02/06-892 (“Decision in respect of Counts 6 and 9” or “Decision”).

<sup>3</sup> See article 82(1)(a).

<sup>4</sup> See ICC-01/04-02/06-804 (“Application in respect of Counts 6 and 9” or “Application”); ICC-01/04-02/06-818 (“Prosecution’s response to application in respect of Counts 6 and 9” or “Prosecution’s response”).

<sup>5</sup> See Application, para. 7; Appeal, p. 5.

<sup>6</sup> Decision, para. 28.

## **B. Article 82(1)(a) requires an examination of substance and not form**

4. Article 82(1)(a) permits a direct appeal of “a decision with respect to jurisdiction or admissibility”. To determine whether a decision falls under article 82(1)(a), the Appeals Chamber must consider—on a case by case basis—the nature and substance of the decision rather than its form. The Appeals Chamber has repeatedly interpreted article 82(1)(a) to mean that “the right to appeal a decision on jurisdiction [...] is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber [has] issue[d] a ruling specifically on the jurisdiction of the Court”.<sup>7</sup> The decision must consist of or be based on a ruling on jurisdiction.<sup>8</sup> Thus “[i]t is the *nature*”<sup>9</sup>—not the form or the procedural context—that determines whether a decision is one “with respect to jurisdiction” and thus falls under article 82(1)(a). In this manner, a decision which does not expressly purport to address matters of jurisdiction or admissibility may in fact contain such a ruling<sup>10</sup> and, conversely, decisions which refer to matters of jurisdiction or admissibility may not in fact contain rulings in that respect. The latter scenario applies in this case.
5. Parties should not be permitted to circumvent their obligation to seek leave to appeal under article 82(1)(d) by disguising issues of statutory interpretation as jurisdictional matters. When an appellant improperly impugns a decision on statutory interpretation under article 82(1)(a), the Appeals Chamber should dismiss such an appeal *in limine*.

## **C. The impugned Decision did not rule on the Court’s jurisdiction**

6. One day before the commencement of the trial, Mr Ntaganda asked the Chamber not to exercise jurisdiction over Counts 6 and 9 because “[a]rticle 8(2)(e)(vi) [...] ”

<sup>7</sup> ICC-01/09-78, para. 16. *See also* ICC-01/11-01/11-74, paras. 10-11; ICC-01/11-01/11-126, para. 13.

<sup>8</sup> *See*, ICC-01/09-78, para. 15.

<sup>9</sup> ICC-01/09-78, para. 17 (emphasis added).

<sup>10</sup> *See*, ICC-01/13-47 OA, paras. 4-5, 7-12.

does not foresee the possibility of child soldiers being victims of the war crimes of rape and sexual slavery”.<sup>11</sup> Mr Ntaganda did not challenge whether the Court had jurisdiction over the crimes of rape and sexual slavery under article 8(2)(e)(vi). Rather, he disputed *the scope of application* of article 8(2)(e)(vi)—a question of statutory interpretation and application of substantive law to the facts of this case.<sup>12</sup> Mr Ntaganda incorrectly characterised his motion as a jurisdictional challenge under article 19(4) of the Statute and rule 58 of the Rules of Procedure and Evidence.<sup>13</sup>

7. The Chamber rejected the Application and did not rule on the jurisdiction of the Court.<sup>14</sup> It noted that “[t]he scope of challenges to jurisdiction has been defined narrowly by the Appeals Chamber” and that “challenges relating to the contours or elements of crimes do not [fall within the scope of a jurisdictional challenge] and are instead to be addressed at trial.”<sup>15</sup> This is contrasted to whether a crime *exists*, which is a question of jurisdiction.
8. On the facts of this case, the Chamber found that Mr Ntaganda did not challenge the Court’s jurisdiction over the crimes of rape and sexual slavery but was only disputing that child soldiers could be victims of such crimes.<sup>16</sup> Accordingly, the Chamber refused to address Mr Ntaganda’s arguments as it considered that they are questions “of substantive law [...] to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged”.<sup>17</sup> Rather than ruling on the Court’s jurisdiction, the Chamber found that Mr Ntaganda’s Application was not about jurisdiction.<sup>18</sup>

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<sup>11</sup> Application, para. 8.

<sup>12</sup> Response, paras. 20-24.

<sup>13</sup> Application, para. 1.

<sup>14</sup> Decision, p. 12.

<sup>15</sup> Decision, para. 24.

<sup>16</sup> Decision, para. 25.

<sup>17</sup> Decision, para. 28.

<sup>18</sup> Decision, para. 28.

9. Therefore, the impugned Decision neither decided nor ruled on jurisdiction, irrespective of having recalled article 19 and rule 58 in its introductory paragraph.<sup>19</sup> It rejected Mr Ntaganda's attempt to characterise his questions on substantive law as jurisdictional challenges. By its nature the impugned Decision does not constitute a decision with respect to jurisdiction which may be directly appealed under article 82(1)(a). The proper course of action for Mr Ntaganda would have been for him to have sought leave to appeal under article 82(1)(d) and not to have appealed the Decision directly under article 82(1)(a). He cannot now make up for this shortcoming.

#### **D. Request for directions on the future conduct of the proceedings**

10. In this case, before addressing any other issue in the Appeal, it will be necessary for the Appeals Chamber to examine *in limine* whether the Appeal is admissible. In similar situations, the Appeals Chamber has issued directions on the future conduct of the proceedings—including ordering the suspension of the briefing schedule of the appeal.<sup>20</sup>
11. Mindful that Mr Ntaganda's document in support of the appeal is due on Monday, 2 November 2015, the Prosecution requests the Appeals Chamber to provide directions with regard to the submission of the document in support of the appeal—including the suspension of the briefing schedule if deemed necessary.

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<sup>19</sup> Decision, p. 1.

<sup>20</sup> See, ICC-01/13-42, ICC-01/11-01/11-64.

## E. Relief

12. Mr Ntaganda's Appeal under article 82(1)(a) is inadmissible and should be dismissed *in limine* because the impugned Decision is not one "with respect to jurisdiction".
13. The Prosecution further asks the Appeals Chamber to issue directions on the future conduct of the proceedings following the filing of this application—including the suspension of the appeal briefing schedule if deemed necessary.




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**Fatou Bensouda, Prosecutor**

Dated this 27<sup>th</sup> day of October 2015

At The Hague, The Netherlands

Word Count: 1,348<sup>21</sup>

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<sup>21</sup> The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.