

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 13 November 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

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'"

Source: Office of Public Counsel for Victims (CLR1)

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

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I. INTRODUCTION

1. The Common Legal Representative of the former child soldiers (the “Legal Representative”) hereby files her 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’”.¹

2. The Legal Representative opposes the Defence’s request for leave to appeal the Decision in respect of the three issues identified. The application does not meet any of the requirements set out in article 82(1)(d) of the Rome Statute. Contrary to the Defence assertions, the two issues are not appealable since they (i) do not arise from the Decision and (ii) do not have any significant impact on the fair and expeditious conduct of the proceedings.

II. PROCEDURAL BACKGROUND

3. On 21 September 2015, during the examination-in-chief of Witness P-0901, the Prosecution asked the witness whether he knew if Mr Ntaganda had ‘wives’ amongst his escort.² The Defence for Mr Ntaganda objected to the question on the ground that the Prosecution was attempting to elicit from the witness evidence on charges not included in the Updated Document containing the charges.³

¹ See 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’”, No. ICC-01/04-02/06-993, 9 November 2015 (the “Defence Request”).

² See the transcript of the hearing of 21 September 2015, No. ICC-01/04-02/06-T-29-CONF-ENG, p. 58, line 16.

³ *Idem*, p. 58, lines 19 to 25.

4. On the same day, the Chamber overruled the Defence objection noting the existence of *“some linkage between [the Prosecution’s] questions and document on charges”*.⁴

5. On 1 October 2015, the Defence filed the *“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”*.⁵

6. On 30 October 2015, Trial Chamber VI (the *“Trial Chamber”*) issued 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”* (the *“Decision”*).⁶

7. On 9 November 2015, the Defence filed 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’”*.⁷ The Defence sought leave to appeal the Decision on two issues.

III SUBMISSIONS

8. Article 82(1)(d) of the Rome Statute provides for the possibility for the parties to seek leave to appeal *“a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in*

⁴ *Idem*, p.59, lines 5 to 6.

⁵ See the *“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”*, No. ICC-01/04-02/06-878, 1 October 2015.

⁶ See 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”*, No. ICC-01/04-02/06-968, 30 October 2015 (the *“Decision”*).

⁷ See the Defence Request, *supra* note 1.

the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

9. The jurisprudence of the Court clarified the various requirements of article 82(1)(d) of the Rome Statute.⁸ In this regard, the Appeals Chamber ruled that “[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.⁹ The Appeals Chamber stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁰ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹¹ The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹²

A. The two issues do not arise from the Decision

10. The Defence seeks leave to appeal the Decision on two issues. However, none of the two issues identified arises from the Decision.

11. The first issue relates to “whether evidence related to a crime allegedly committed personally by Mr Ntaganda, but which is not charged in the Updated Document containing

⁸ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

⁹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 8.

¹⁰ *Idem*, para. 9.

¹¹ *Ibid.*

¹² *Ibid.*, para. 10.

the charges [...] is admissible". The way in which the first issue is framed provides a clear indication that the Defence misreads the Decision. Indeed, the Chamber did not reach any definitive conclusion or make a final finding in relation to the admissibility of evidence pertaining to the direct commission by the accused of the acts of rape and sexual slavery. The Chamber only rejected the Defence request seeking to declare as inadmissible any item of evidence related to the direct commission by the accused of acts of rape and sexual slavery. Moreover, the Decision was based on a request for "clarification" regarding the admissibility of types of evidence, as opposed to an actual dispute as to the admissibility of specific pieces of evidence. The Chamber only confirmed that this category of evidence would not be declared as inadmissible *ab initio*, but would rather be subject to the ordinary admissibility test, which involves consideration on its relevance, probative value and potential prejudice to the rights of the accused. As such, the Decision did not declare any specific item either admissible or inadmissible.

12. Moreover, the Defence is wrong in asserting that the Decision imposes an additional "*burden to oppose any attempt by the Prosecution to adduce such evidence on the basis of the resulting unfair prejudice and/or undue delay*".¹³ The Decision merely restates the procedure for challenging evidence as laid out in the Decision on the conduct of the proceedings and article 69(5) of the Rome Statute. The Defence now appears to dispute the fact that it has to oppose, on a case-by-case basis, the admission of certain items of evidence. This specific issue clearly does not arise from the Decision, but rather from the Decision on the conduct of the proceedings which sets out the modalities for challenging the admission of evidence.¹⁴ The Defence did not seek leave to appeal the decision on the conduct of the proceedings and, now, improperly seeks to bring a challenge against the findings made therein by way of challenging the Decision.

¹³ See the Defence Request, *supra* note 1, para. 13.

¹⁴ See the "Decision on the conduct of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015.

13. The second issue namely, *“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”*, does not arise from the Decision. Nowhere in the Decision does the Chamber specify whether the allegations of rape and sexual slavery need to be countered by the accused or whether they must be addressed by the Defence in a specific manner. The Chamber simply highlighted the fact that the evidence related to those crimes were disclosed several months prior to the Defence raising its objection, specifying that the allegations referred to formed part of the Pre-Trial Brief.¹⁵ In any event, an item of evidence will only need to be addressed or “countered” by the Defence once it has been admitted into evidence. Only then can the opposing party allege prejudice from having to *“respond to such allegation”*.¹⁶ Insofar as the Chamber did not reach any definitive conclusions regarding the admissibility of specific items of evidence, no prejudice can arise from the Decision. The issue can only be raised when the Chamber decides to effectively admit the impugned items of into evidence.

14. Accordingly, the two issues, as framed by the Defence, do not meet the requirements of article 82(1)(d) of the Rome Statute. Moreover, similar requests for leave to appeal decisions regarding the admissibility of evidence have been denied as constituting mere disagreement with the relevant Chamber insofar as they sought to limit the type of evidence on which a Chamber can rely. In the instant case, Pre-Trial Chamber II ruled that such requests for leave to appeal are inconsistent with *“the Court’s established legal framework (lex lata) and jurisprudence”*.¹⁷ It further stated that such requests were improper because they seek to limit the *“discretionary powers*

¹⁵ See the Decision, *supra* note 6, para. 15.

¹⁶ See the Defence Request, *supra* note 1, para. 15.

¹⁷ See the “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’” (Pre-Trial Chamber II), No. ICC-01/04-02/06-322, 4 July 2014, para. 21.

*provided by virtue of articles 64(9) and 69(4) of the Statute, and rule 63(2) of the Rules, which govern the principle of free assessment of evidence by the relevant Chamber”.*¹⁸

B. The issues do not have any significant impact on the fair and expeditious conduct of the proceedings

15. Moreover, the Legal Representative submits that the two issues identified by the Defence will not have any significant impact on the fair and expeditious conduct of the trial.

16. The Defence asserts that the Decision places a “burden [...] on the Defence to object every time the Prosecution will seek to elicit evidence on such allegations and demonstrate that admitting such evidence results in an unfair prejudice and/or undue delay”.¹⁹ This specific contention that the Decision would lead to delays or prejudice to the Defence is based on the assumption that such type of evidence is, in the abstract, inadmissible. This assertion is plainly incorrect. The Chamber provided examples of how this type of evidence may be relevant and even admissible in the present case. Assessing on a case-by-case basis the admissibility of each item does not affect the fairness and the expeditiousness of the proceedings. To the contrary, it gives the parties and participants an opportunity to make focused and detailed submissions and to raise objections, where appropriate. It enables each party to present all the items believed to be relevant to its case which enhances the Court’s ability to determine the truth and to rule out irrelevant and inappropriate items of evidence. Moreover, the “fair conduct of the proceedings” is a broad notion that embraces not only *fairness towards the Accused*, [but also towards] *the victims and the Prosecution* and requires that the procedural and substantive rights of all participants be respected.²⁰ It would seem fair that the Prosecution to present all the items of

¹⁸ *Idem.*, para. 22.

¹⁹ See the Defence Request, *supra* note 1, para. 18.

²⁰ See the “Decision on the Prosecutor’s Applications for Leave to Appeal dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006” (Pre-

evidence it believes of assistance to the determination of the truth, and then subsequently decide on whether the items contested are inadmissible.

17. The Defence's assertion that the Decision "*affects the fairness of the proceedings as it imposes on the Defence the need to investigate and prepare a defence to conduct which is not charged*" is unfounded.²¹ This contention confuses the scope and content of the charges with the evidence deemed necessary to establish a criminal conduct. The admissibility of certain items of evidence does not necessarily imply that the entire conduct referred to in the evidence form part of the charges. Rather, certain items of evidence, while not directly related to the crimes or the mode of liability charged, can help establish or clarify the elements of the alleged crimes. Therefore, no prejudice can be alleged from the admission of such type of evidence. This understanding is consistent with the Chamber's finding in the Decision that evidence relating to "*the conduct of an accused, 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*".²² It is also consistent with the Chamber's holding that while it is "*undisputed that Mr Ntaganda has not been charged as a direct perpetrator with the crimes of rape and sexual slavery*", it is nevertheless "*unpersuasive [to contend] that evidence of the type challenged by the Defence does not have relevance to the confirmed charges*".²³

Trial Chamber I), No. ICC-02/04-01/05-90-US-Exp, 11 July 2006 (reclassified as public in 5 February 2007 pursuant to Decision ICC-02/04-01/05-135), para. 24.

²¹ See the Defence Request, *supra* note 1, para. 18.

²² See the Decision, *supra* note 6, para. 13.

²³ *Idem.*, para. 13.

FOR THESE REASONS, the Legal Representative respectfully request the Chamber to reject the Defence's request for leave to appeal the Decision in its entirety.

A handwritten signature in black ink, appearing to read 'Pellet', followed by a period.

Sarah Pellet
Common Legal Representative of the Former
Child soldiers

Dated this 13th Day of November 2015

At The Hague, The Netherlands