

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **20 June 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***

Confidential

**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**

Source: Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell
Mr William St-Michel

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence's Application¹ seeking leave to appeal two oral decisions² on the admissibility of evidence of Mr Ntaganda's personal commission of non-charged incidents of murder³ 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. The proposed Issue⁴ does not arise from the Decisions because it is premised on incorrect assertions. In any event, the Issue merely repeats arguments that the Chamber has already considered and dismissed on several occasions.⁵ As such, it is not appealable because it expresses no more than disagreements with the Chamber.
3. Further, the Defence has failed to demonstrate that the Issue significantly affects the fairness and expedition of the proceedings or the outcome of the trial, and that the immediate intervention of the Appeals Chamber may materially advance the proceedings.
4. For these reasons the Application should be dismissed.

II. Level of Confidentiality

5. The Prosecution files this response as "Confidential" pursuant to regulation 23bis(2) of the Regulations of the Court, because it responds to a submission of the same classification.

¹ ICC-01/04-02/06-1399-Conf ("Application").

² ICC-01/04-02/06-T-99-CONF-ENG, p. 11, l. 15 to p. 12, l. 11 ("First Impugned Decision"); ICC-01/04-02/06-T-99-CONF-ENG, p. 61, l. 15, to p. 63, l. 1 ("Second Impugned Decision"), collectively "Decisions".

³ By "non-charged murders" or "non-charged crimes" the Prosecution means murders or crimes for which Mr Ntaganda cannot be convicted as a direct perpetrator, but which may nonetheless be relevant as evidence to, *inter alia*, other charged crimes and/or modes of liability (including intent and knowledge), background, context, etc.

⁴ Application, para. 1 ("Issue").

⁵ See for instance ICC-01/04-02/06-T-96-CONF-ENG, p. 56, l. 9 to p. 58, l. 23 ("Objection to P-0190") where the Defence summarises its repeated unsuccessful attempts to challenge analogous decisions (*see* p. 56, l. 15 to p. 57, l. 8).

III. Submissions

A. The Issue does not arise from the Decisions and is not appealable

6. 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.⁶ If an issue misapprehends the disposition of the Chamber, or misrepresents a factual finding with which the applicant disagrees in order to make it a point of law,⁷ it cannot be said to *have arisen from the decision* as such and must be dismissed.⁸ When an issue is premised on an “erroneous assertion” that the Chamber “decided” on a particular matter, it fails to meet this requirement.

7. The Issue—whether evidence adduced by the Prosecution in relation to specific murders not charged in the updated document containing the charges,⁹ which Mr Ntaganda allegedly committed personally, is admissible—¹⁰ is premised on the incorrect assertion that the Chamber applied its prior ruling on admissibility of evidence of non-charged crimes¹¹ “in the abstract,” without balancing all the relevant factors including the relevance of the evidence and its potential prejudice for the Accused.¹²

8. To the contrary, the Chamber found that both the testimony of P-0190 and P-0894 have *prima facie* probative value—including in relation to various modes of

⁶ ICC-01/04-168, para. 9.

⁷ See ICC-01/09-02/11-406, para. 46.

⁸ 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.

⁹ ICC-01/04-02/06-402-AnxA (“UDCC”).

¹⁰ Application, para. 1.

¹¹ See ICC-01/04-02/06-968 (“Decision on admissibility of evidence of non-charged crimes”).

¹² See Application, paras. 11-12.

liability and the *mens rea* for crimes charged—because their evidence pertains to the conduct of the Accused during the temporal period of the charges.¹³

9. The Chamber further carefully balanced the probative value of this evidence against any potential prejudice for the Defence.¹⁴ It allowed the testimony of P-0190 and P-0894 on non-charged murders directly committed by Mr Ntaganda for “very limited purpose.”¹⁵ It expressly requested the Prosecution to limit its examination to the scope of the charges and not to exceed that scope when exploring the evidence of the murders.¹⁶ In other words, contrary to the Defence’s understanding, the Chamber found the evidence of non-charged murders potentially relevant to charged crimes, but without treating such evidence as relevant to crimes that were not charged.

10. The Decisions also addressed the Defence’s specific concern that the Chamber may be “confused” by the admission of this evidence.¹⁷ The Chamber noted that it is composed of professional judges that are “able to evaluate any information contained in the record and to weigh it, whether [they] should take it into consideration, or not, if there is some prejudice that should prevent [the Chamber] to make any conclusions from such part of the record.”¹⁸ Since the Defence has misapprehended the Chamber’s disposition, the Issue does not arise from the Decisions. As such it should be dismissed.

11. In any event, the Issue is not an appealable “issue” within the terms of article 82(1)(d) as it expresses a mere disagreement with the Chamber’s Decisions.¹⁹ As

¹³ In relation to P-0190 see First Impugned Decision, p. 11, l. 19, recalling its oral decision on P-0190’s testimony on 6 June 2016; ICC-01/04-02/06-T-96-CONF-ENG, p. 61, l. 19 to p. 62, l. 17. (“First Oral Decision on P-0190”). In relation to P-0894 see Second Impugned Decision, p. 62, l. 21 to p. 63, l. 1.

¹⁴ *Contra* Application, paras. 11-12.

¹⁵ First Impugned Decision, p. 11, ll.18-19. See also Second Impugned Decision at p. 62, l. 21, referring to the Chamber’s reasoning in its First Impugned Decision.

¹⁶ First Oral Decision on P-0190, p. 62, ll. 10-16.

¹⁷ Application, para.11.

¹⁸ First Impugned Decision, p. 11, l. 23 to p. 12, l. 1. See also Decision on admissibility of evidence of non-charged crimes, para.14.

¹⁹ *Contra* Application, para. 13.

conceded in the Application,²⁰ the Defence has already advanced the same arguments on several occasions²¹ including in relation to P-0190²² and P-0894.²³

12. By way of example, paragraph 11 of the Application repeats *verbatim* paragraph 28 of the Defence's Response to the Prosecution's rule 68(3) application for P-0894:

[T]he risk of prejudice or confusion resulting from the admission of evidence related to murders purportedly committed by Mr Ntaganda but *not* alleged in the UDCC – a risk which the Chamber found to be 'significantly reduced' in the case of evidence to the effect that Mr Ntaganda personally committed the crimes of rape and sexual slavery – largely outweighs the relevance and probative value, if any, of such evidence.²⁴

13. The Chamber heard and rejected the Defence's arguments, including the purported distinction between testimony of direct commission of non-charged murders and testimony of direct commission of non-charged rape. As discussed above, the Chamber did not merely apply "in the abstract" its prior ruling on evidence of non-charged rape, but rather tailored its findings to the specific facts at hand.²⁵

14. By merely restating its position and expressing its disagreement with the Chamber's Decisions, the Defence has failed to properly identify a discrete topic requiring a decision for its resolution.

²⁰ Application, paras. 10, 11, 15.

²¹ See for instance: ICC-01/04-02/06-878; Decision on admissibility of evidence of non-charged crimes; ICC-01/04-02/06-1047; ICC-01/04-02/06-T-59-CONF-ENG, p. 25, l. 9 to p. 26, l. 16; ICC-01/04-02/06-T-59-CONF-ENG, p. 29, ll.2-23; ICC-01/04-02/06-T-68-CONF-ENG, p. 74, l. 7 to p. 78, l. 2.

²² ICC-01/04-02/06-T-99-CONF-ENG, p. 6, l. 16-24 ("Reconsideration of First Oral Decision on P-0190"); Objection to P-0190. In its Objection to P-0190 the Defence conceded that "whenever the Prosecution attempted to do so, the Defence objected and we object again" (See Objection to P-0190, p. 56, l. 22-23).

²³ ICC-01/04-02/06-1365-Conf ("Response to Prosecution's rule 68(3) application for P-0894").

²⁴ Application, para.11 and Response to Prosecution's rule 68(3) application for P-0894, para. 28 (footnotes omitted).

²⁵ See above paras. 7-10.

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

i. The Issue does not significantly affect the fairness and expedition of the proceedings or the outcome of the trial

15. Even assuming, *arguendo*, that the Issue is an appealable “issue” arising from the Decisions within the terms of article 82(1)(d), the Defence has failed to demonstrate it significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

16. First, the Defence’s undeveloped assertion that the Decisions are “highly prejudicial”²⁶ is based on the erroneous premise that the Chamber allowed the testimony of P-0190 and P-0894 “in the abstract” without taking into account any prejudice that such evidence could cause to the Defence.²⁷ To the contrary the Chamber carefully balanced the probative value of this evidence against any potential prejudice for the Defence.²⁸

17. Second, the Defence states that it is prejudiced by the Chamber acknowledging that the Prosecution can adduce evidence about the uncharged murders for an “entirely new ground – i.e. establishing Mr Ntaganda’s discriminatory intent”.²⁹ However, the defence has been on notice for some time that this evidence has potential relevance to Mr Ntaganda’s discriminatory intent. Indeed, the Prosecution in its Pre-Trial Brief expressly alleged that:

“Specific aspects of NTAGANDA’s conduct further confirm his discriminatory intent. [...] NTAGANDA killed *non-originaires* or those he believed to have assisted *non-originaires*. In the First Attack, he killed prominent individuals such as Abbé BWANALONGA and Colonel LUSALA.”³⁰

²⁶ Application, paras. 14-15.

²⁷ Application, paras. 14-15.

²⁸ See above, paras. 7-10.

²⁹ Application, para. 16.

³⁰ ICC-01/04-02/06-503-AnxA-Red2, paras. 586-588. This section is headed “NTAGANDA intended to persecute non-Hema civilians and to forcibly displace them”.

Further, the Chamber repeatedly found that the conduct of the Accused during the temporal period of the charges is potentially relevant to the *mens rea* of the Accused,³¹ which necessarily includes his discriminatory intent in relation to the charges of persecution under article 7(1)(h).³²

18. Third, contrary to the Defence's apparent assumption,³³ there is no possibility that Mr Ntaganda could be convicted as a direct perpetrator of non-charged incidents of murder. It is for the Defence to decide whether to explore with the witness if non-charged murders occurred and how much time and resources to invest in cross-examining on such matters.³⁴ In any event, both P-0190 and P-0894 have already testified. The Defence's submission that the Issue would significantly affect the expeditious conduct of the proceedings³⁵ is based on the Defence's erroneous assumption that the Decisions will impact the future conduct of the proceedings in general when in fact they relate to a discrete and confined matter—the admissibility of part of P-0190 and P-0894's testimony.

19. Further, the Defence has not shown that the Issue *would* significantly affect the outcome of the trial. Rather, it merely submits that the Issue "*has the potential* to significantly affect the outcome of the trial."³⁶ As such the Defence's submission is speculative and should be dismissed. In any event, this argument is also premised on the incorrect assertion that Mr Ntaganda could be convicted as a direct perpetrator of non-charged incidents of murder.³⁷

³¹ See for instance Decision on admissibility of evidence of non-charged crimes, para. 13.

³² UDCC, Count 10.

³³ Application, para. 17.

³⁴ See Application, para. 17.

³⁵ Application, paras. 17, 19.

³⁶ Application, para. 20 (emphasis added). See also paras. 21-23.

³⁷ To the extent that the Defence takes issue with the possibility that evidence of P-0190 and P-0894 can be relied upon by the Chamber to enter a conviction as direct perpetrator of other *charged* incidents of murder, the argument is, at this stage, wholly speculative.

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

20. The Defence has also failed to show that the immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings. The Defence's submission is based—once again—on the wrong premise that the Decisions will impact the conduct of the proceedings in general.³⁸ To the contrary, the Decisions relate to a discrete and confined matter, the testimony of P-0190 and P-0894 which has already taken place. An interlocutory appeal will not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.

IV. Relief requested

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



Fatou Bensouda
Prosecutor

Dated this 20th day of June 2016

At The Hague, The Netherlands

³⁸ Application, para. 38.