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Date: **21 July 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***

Public

Public Redacted Version of “Request on behalf of Mr Ntaganda seeking leave to jointly appeal two oral decisions regarding the admissibility of evidence on specific murders not charged in the Updated Document containing the charges” dated 15 June 2016

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to: (i) Trial Chamber VI (“Chamber”)’s oral ruling of 9 June 2016 on a request for reconsideration submitted orally by Counsel representing Mr Ntaganda (“Defence”) on the same day (“Second Oral Decision” and “Request for Reconsideration”, respectively);¹ and (ii) the Chamber’s oral ruling of 9 June 2016 on the *“Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0894”* submitted by the Office of the Prosecutor (“Prosecution”) on 19 May 2016 (“Oral Decision on Prosecution 68(3) Application” and “Prosecution 68(3) Application”, respectively),² the Defence hereby submits this:

Request on behalf of Mr Ntaganda seeking leave to jointly appeal two oral decisions regarding the admissibility of evidence on specific murders not charged in the Updated Document containing the charges

“Defence Request for Leave to Appeal”

1. The Defence respectfully seeks the Chamber leave to jointly appeal the Second Oral Decision and the Oral Decision on Prosecution 68(3) Application – whereby the Chamber found admissible evidence implicating Mr Ntaganda as a direct perpetrator of specific murders not charged in the Updated Document containing the charges (“UDCC”) – on the following appealable issue:

Whether evidence adduced by the Prosecution in relation to specific murders not charged in the UDCC, which Mr Ntaganda allegedly committed personally, is admissible.

(“Issue”)

2. To the extent that it strikes at the core of the admissibility of evidence, the Defence submits that the Issue significantly affects the fair and expeditious

¹ First Impugned Decision: T-99-CONF-ENG, p.11, l.15 to p.12, l.11; Request for Reconsideration: T-99-CONF-ENG, p.6, ll.16-24.

² Second Impugned Decision: T-99-CONF-ENG, p.61, l.15 to p.63, l.1; Prosecution 68(3) Application: 19 May 2016, ICC-01/04-02/06-1326-Conf.

conduct of the proceedings. The Issue also has the potential to significantly affect the outcome of the trial. Furthermore, the Defence posits that immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings.

BACKGROUND

3. On 19 May 2016, the Prosecution sought the admission into evidence, pursuant to Rule 68(3) of the Rules of Procedure and Evidence (“Rules”), of certain passages of Witness P-0894’s statement as well as certain associated documents. The Prosecution excluded from the parts of Witness P-0894’s statement to be admitted the passages which contain evidence about [REDACTED] and sought leave to conduct an examination of the witness with the aim of eliciting evidence on these specific murders, from Witness P-0894, *viva voce*.³
4. On 3 June 2016, the Defence responded to the Prosecution 68(3) Application, opposing *inter alia* the Prosecution’s request to elicit evidence implicating Mr Ntaganda as a direct perpetrator of these specific murders, not charged in the UDCC, *viva voce*, arguing that such evidence is inadmissible.⁴
5. On 6 June 2016, during the Prosecution’s examination-in-chief of Witness P-0190, the Defence objected to the Prosecution eliciting from the witness evidence in relation to the murder of an individual named [REDACTED], who was allegedly killed by Mr Ntaganda himself, on the basis that this specific murder was neither found in the UDCC nor in the Prosecution’s Pre-Trial Brief.⁵ The Chamber overruled the objection.⁶

³ Prosecution 68(3) Application, paras.19-22.

⁴ “Response on behalf of Mr Ntaganda to ‘Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0894’”, 3 June 2016, ICC-01/04-02/06-1365-Conf (“Defence Response to the Prosecution 68(3) Application”), paras.20-37.

⁵ T-96-CONF-ENG, p.56, l.9 to p.58, l.23.

⁶ T-96-CONF-ENG, p.61, l.19 to p.62, l.17 (“First Oral Decision”).

6. On 8 June 2016, the Prosecution sought leave to reply to the Defence Response to the Prosecution 68(3) Application, in particular to the Defence submissions regarding the admissibility of evidence on Mr Ntaganda's direct perpetration of specific murders, not charged in the UDCC.⁷
7. On 9 June 2016, during its cross-examination of Witness P-0190, the Defence sought reconsideration of the Chamber's oral decision of 8 June 2016, arguing that the Prosecution's late disclosure of an exculpatory document increases the prejudicial effect of adducing evidence on this specific non-alleged murder.⁸ The Chamber rendered the First Impugned Decision, rejecting the Defence's request for reconsideration.⁹
8. On the same day, the Chamber issued the Second Impugned Decision, rejecting the Prosecution's request to conduct a *viva voce* examination of Witness P-0894 on the murder incidents, but nonetheless admitting into evidence the entirety of the witness's statement, including paragraphs 39 to 47 [REDACTED], which would allegedly have been committed by Mr Ntaganda – subject to the requirements of Rule 68(3) being met.

SUBMISSIONS

I. The Issue constitutes an appealable issue

9. At the outset, the Defence underscores that a request for leave to appeal is not concerned with whether the impugned decision is legally founded or not,¹⁰ but should rather be aimed at addressing the specific criteria set out in Article 82(1)(d) of the Statute.¹¹ The Defence respectfully submits that this *ratio* must

⁷ "Prosecution request to file a reply to the 'Response on behalf of Mr Ntaganda to 'Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0894'", 8 June 2016, ICC-01/04-02/06-1373-Conf ("Prosecution Request for Leave to Reply to Defence Response to the Prosecution 68(3) Application").

⁸ T-99-CONF-ENG, p.6, ll.16-24.

⁹ T-99-CONF-ENG, p.11, l.15 to p.12, l.11.

¹⁰ See, e.g., ICTY, *Slobodan Milošević* case, IT-02-54-T, "Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding", 20 June 2005, para.4.

¹¹ ICC-01/04-02/06-425-Conf-Exp, para.22.

also apply to decisions on requests for leave to appeal. Hence, in adjudicating this Defence Request for Leave to Appeal, the Chamber must consider solely whether the requirements set out in Article 82(1)(d) of the Statute are met, regardless of its views on the merits of a potential Defence appeal.

10. As noted by the Chamber in both impugned decisions,¹² the issue of admissibility of evidence regarding acts allegedly committed by Mr Ntaganda that are not specifically charged or mentioned in the UDCC has been previously addressed by the Chamber, which found that such evidence is not, in principle, inadmissible and that it has sufficient potential relevance, including in relation to other modes of liability and to *mens rea*.¹³ As underscored by the Chamber, the 'default position' arising from the First Decision on Admissibility of Evidence of Conduct not Charged is not that such evidence is admissible, but that its admissibility falls to be considered on a case-by-case basis.¹⁴
11. The present issue is an entirely different issue than that addressed in the First Decision on Admissibility of Evidence of Conduct not Charged. As outlined in the Defence Response to the Prosecution 68(3) Application,¹⁵ and incorporated by reference in the Defence First Oral Objection during the examination-in-chief of Witness P-0190,¹⁶ there are significant differences between the admissibility of evidence related to a conduct not charged *at all* and evidence about a charge *existing* in the UDCC, but circumscribed to one-alleged incident. In particular, the risk of prejudice or confusion resulting from the admission of evidence related to murders purportedly committed by

¹² Second Oral Decision, T-99-CONF-ENG, p.11, ll.18 *et ss.*; Oral Decision on Prosecution 68(3) Application, T-99-CONF-ENG, p.62, ll.21 *et ss.*

¹³ "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", 30 October 2015, ICC-01/04-02/06-968 ("First Decision on Admissibility of Evidence of Conduct not Charged"), paras.13, 17.

¹⁴ "Decision on Defence request for 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'", 9 December 2015, ICC-01/04-02/06-1047, para.14.

¹⁵ Defence Response to the Prosecution 68(3) Application, paras.28 *et ss.*

¹⁶ T-96-CONF-ENG, p.58, ll.7-13.

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 committed personally the crimes of rape and sexual slavery¹⁷ – largely outweighs the relevance and probative value, if any, of such evidence.

12. Significantly, when rendering the impugned decisions, the Chamber did not take into consideration the differences between the situation at hand and that addressed in the First Decision on Admissibility of Evidence of Conduct not Charged. While it is required to determine the admissibility of evidence of a conduct not charged in the UDCC on a ‘case-by-case basis’ after a careful balancing exercise of the relevant factors, including the prejudicial effect,¹⁸ the Chamber referred to its previous ruling and made a finding in the abstract that evidence implicating Mr Ntaganda personally in specific murders not charged in the UDCC has sufficient potential relevance to various modes of liability and to *mens rea*, and thus has *prima facie* probative value.¹⁹
13. As such, the Issue is not merely a question over which there is a disagreement. Rather, the Issue identifies a topic requiring clear appellate directions.

II. The Issue significantly affects the fair and expeditious conduct of the proceedings

14. To the extent that it strikes at the core of the admissibility of evidence, the Issue significantly affects the fair conduct of the proceedings. Indeed, pursuant to Article 69(4) of the Statute, a determination on the admissibility of evidence requires taking into account, *inter alia*, any prejudice that such evidence may cause to a fair trial.

¹⁷ First Decision on Admissibility of Evidence of Conduct not Charged, para.14.

¹⁸ First Decision on Admissibility of Evidence of Conduct not Charged, para.17.

¹⁹ First Oral Decision, T-96-CONF-ENG, p.62, ll.6-8, as upheld by the Second Oral Decision, T-99-CONF-ENG, p.11, ll.18 *et ss.*; Oral Decision on Prosecution 68(3) Application, T-99-CONF-ENG, p.62, ll.21 *et ss.*

15. The impugned decisions resulted in allowing the Prosecution to adduce evidence of Mr Ntaganda having killed himself certain individuals not mentioned in the UDCC. As set out in the Defence Response to the Prosecution 68(3) Application,²⁰ albeit for limited evidentiary purposes, adducing evidence implicating Mr Ntaganda as a direct perpetrator of murder incidents not charged in the UDCC is highly prejudicial.
16. Furthermore, in acknowledging that the Prosecution can adduce evidence about murder incidents not charged in the UDCC for an entirely new ground – *i.e.* establishing Mr Ntaganda's alleged discriminator intent²¹ – the Second Oral Decision, upholding the First Oral Decision, results in Mr Ntaganda having to adapt his defence at a late stage of the presentation of the Prosecution's case.
17. Finally, regardless of the evidentiary purpose which evidence of non-alleged murder incidents is intended to achieve, the Defence has the duty, in cross-examination, to explore with the witness in the first place whether the non-alleged incident has in fact occurred. Bearing in mind the possibility that Mr Ntaganda could be convicted of the charge of direct perpetration of the crime of murder on the basis of non-alleged incidents, as set out above, cross-examination of a witness [REDACTED] cannot be conducted on the premise that the incident did take place and be limited solely to the circumstances substantiating the other grounds of relevance argued by the Prosecution, such as the purported discriminatory intent of the alleged murder.
18. The impact of the Issue on the fair conduct of the proceedings is further highlighted by the Chamber's application of the Issue to ancillary procedural

²⁰ Defence Response to Prosecution 68(3) Application, paras.28-37.

²¹ T-96-CONF-ENG, p.59, ll.6-25.

issues that are directly related to Mr Ntaganda's fundamental right to full answer.²²

19. The Issue also significantly affects the expeditious conduct of the proceedings. As evidenced by the Defence's cross-examination of Witness P-0190 on the alleged murder of [REDACTED],²³ challenging a witness on evidence of a purported murder incident that is not charged in the UDCC is a lengthy and time-consuming exercise.

III. The Issue has the potential to significantly affect the outcome of the trial

20. In addition to the above, the Defence respectfully submits that the Issue, if not resolved, has the potential to significantly affect the outcome of the trial.
21. In regarding as admissible evidence implicating Mr Ntaganda personally in murder incidents not specifically referred to in the UDCC for certain evidentiary purposes,²⁴ the Chamber did not specifically rule out the possibility that such incidents, if deemed proven beyond reasonable doubt, could also form the basis of a conviction for the charge of direct perpetration of the crime of murder. Significantly, such a possibility was not at stake in the First Decision on Admissibility of Evidence of Conduct not Charged, which dealt with a conduct not charged *at all*.²⁵
22. In its Decision on the Updated DCC, the Chamber indicated that the 'comprehensive facts and circumstances in relation to the underlying acts' Mr Ntaganda is charged with are contained – either directly or by cross-reference – in section H(ii) of the UDCC.²⁶ However, given the ambiguity of the

²² The Chamber prevented the Defence from using an exhibit during its cross-examination of Witness P-0190, on the basis that the alleged murder of [REDACTED] is not a 'crucial issue': T-99-CONF-ENG, p.87, ll.16-21.

²³ See timestamps of T-99-CONF-ENG (RT), p.94, l.17 (15h10) to p.113, l.6 (15h53).

²⁴ Second Oral Decision, T-99-CONF-ENG, p.11, ll.18 *et ss.*; Oral Decision on Prosecution 68(3) Application, T-99-CONF-ENG, p.62, ll.21 *et ss.*

²⁵ See "Decision on the updated document containing the charges", 6 February 2015, ICC-01/04-02/06-450 ("Decision on the UDCC"), para.45.

²⁶ Decision on the UDCC, para.51.

Prosecution's position as to the factual scope of the charge of direct perpetration of the crime of murder,²⁷ the possibility for evidence adduced on non-alleged murder incidents to be relied upon by the Prosecution to seek a *conviction* under the charge of personal commission of the crime of murder cannot be excluded.

23. The Defence respectfully submits that the risk of evidence on specific non-alleged murders providing a basis for a conviction under the charge of direct perpetration of the crime of murder, resulting from the Issue, further highlights the need for an appellate intervention at this stage.

IV. Immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings

24. The recurrence of the issue of admissibility of evidence about murder incidents not charged in the UDCC,²⁸ the time-consuming exercise of challenging in cross-examination any and all murder incidents beyond the 'limited' evidentiary purposes argued by the Prosecution and the curtailment of Mr Ntaganda's right to full answer on the basis that such evidence is not a 'crucial' issue, are all consequences resulting from the Issue.
25. Immediate appellate resolution of the Issues will thus ensure that the presentation of the remaining of the Prosecution's case proceeds on a sound basis and will avoid, or certainly, minimize, any future litigation as to the admissibility of evidence on murder incidents not alleged in the UDCC.

²⁷ See T-37-CONF-ENG, p.40, ll.3-5; Prosecution 68(3) Application, para.20 ("In particular, Witness P-0894 is expected to provide evidence about [REDACTED], relevant to the Accused's intent and knowledge *as well as in support of the charges of direct perpetration or murder* and indirect co-perpetration of murder.") (emphasis added); Prosecution Request for Leave to Reply to Defence Response to the Prosecution 68(3) Application, para.6 (where the Prosecution refers to individuals 'who are *not referred to by name* in the Updated Document Containing the Charges' (emphasis added) instead of murder incidents that are not *charged*).

²⁸ See T-37-CONF-ENG, p.37, l.16 to p.44, l.4; T-68-CONF-ENG, p.76, l.2 to p.78, l.2.

CONFIDENTIALITY

26. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Request is classified as confidential, as it addresses matters raised in private session.

RELIEF SOUGHT

27. In light of the above, the Defence respectfully requests the Chamber to **GRANT** leave to appeal the impugned on the above outlined Issue.

RESPECTFULLY SUBMITTED ON THIS 21TH DAY OF JULY 2016

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands