

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 12 December 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

**Decision on request for leave to appeal the Chamber's decision rejecting the
Defence request for a stay of proceedings**

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 Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings'.

I. Procedural history

1. On 14 November 2016, the defence team for Mr Ntaganda ('Defence') filed an 'Urgent Request for Stay of Proceedings' ('Request for Stay'),¹ following receipt of a notice of disclosure from the Office of the Prosecutor ('Prosecution') detailing a volume of evidence obtained by the Prosecution pursuant to Article 70 of the Statute ('Prosecution Notice').²
2. On 15 November 2016, the Prosecution filed a response, opposing the Request for Stay.³
3. At the commencement of the hearing on 16 November 2016, the Chamber issued an oral decision rejecting the Request for Stay ('Impugned Decision').⁴
4. On 22 November 2016, the Defence filed a request for leave to appeal the Impugned Decision ('Request').⁵

¹ ICC-01/04-02/06-1629-Conf, along with a public redacted version (ICC-01/04-02/06-1629-Red).

² Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70, 7 November 2016, ICC-01/04-02/06-1616.

³ Prosecution's response to the Defence "Urgent Request for Stay of Proceedings" (ICC-01/04-02/06-1629-Conf), ICC-01/04-02/06-1636-Conf. A public redacted version was filed on 21 November 2016 as ICC-01/04-02/06-1636-Red.

⁴ Transcript of hearing on 16 November 2016, ICC-01/04-02/06-T-159-CONF-ENG ET, page 2, line 13 to page 7, line 24. Therein, at page 3, lines 17-21, the Chamber noted that, in the Request, '[t]he terms 'adjournment', 'suspension' and 'stay' appear to have been used almost interchangeably throughout the request. The Chamber considers that what is in fact being requested is an immediate adjournment. It has therefore considered the request on that basis and according to that standard, rather than against the more stringent standard required to obtain a stay of proceedings'. For the purposes of this Request, the term 'stay of proceedings' will be retained.

⁵ Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on "Urgent request for stay of proceedings", ICC-01/04-02/06-1645.

5. On 28 November 2016, responses were filed by the Prosecution ('Prosecution Response')⁶ and the Legal Representatives for Victims ('LRV Response').⁷

II. Submissions

6. The issue upon which leave to appeal is sought ('Issue') is:

'Whether the Chamber abused its discretion by declining to adjourn proceedings until the Defence has had a reasonable opportunity to review the late and massive disclosure by the Prosecution of unfiltered Rule 77 material obtained as a result of a thirteen-month Article 70 investigation with a view to (i) ensuring that all future cross-examinations are conducted in light of this vital disclosure and (ii) being able to offer submissions as soon as possible concerning the impact of the Article 70 investigation on the fairness of these proceedings which, may include proposing measures, if any are possible, that limit its prejudicial impact'.⁸

7. The Defence states that the Issue is an appealable one under Article 82(1)(d) of the Statute. It avers that the fairness of the proceedings is engaged because, in the absence of an adjournment: (i) cross-examinations will be conducted without the Defence having analysed the volume of disclosed information; (ii) the Defence has not been accorded the notice that would otherwise have been given pursuant to the review mechanism implemented by the Chamber during the restrictions litigation; and (iii) the Prosecution's late disclosure is of a 'nature, scale and consequence' that warrants immediate adjournment, and further 'delay' would impact the fairness of the proceedings.⁹ It argues that immediate resolution of the Issue may materially advance the proceedings, as continuing with the cross-

⁶ Prosecution's response to the Defence application for leave to appeal the oral decision on its "Urgent request for stay of proceedings", ICC-01/04-02/06-1660-Conf. A public redacted version was filed on 29 November 2016 (ICC-01/04-02/06-1660-Red).

⁷ Joint Response by the Common Legal Representative for the Former Child Soldiers and the Common Legal Representative for the Victims of the Attacks to the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on 'Urgent request for stay of proceedings'", ICC-01/04-02/06-1656.

⁸ Request, ICC-01/04-02/06-1645, para. 2.

⁹ Request, ICC-01/04-02/06-1645, para. 3. *See also* paras 39-43.

examination of eleven witnesses in error would cause ‘irreparable damage to the fairness of the trial proceedings leading to a mistrial’.¹⁰

8. In arguing that the Chamber abused its discretion in declining to adjourn the proceedings, the Defence also advances a number of arguments on the merits of several issues, submitting that ‘the nature of the alleged errors of law and fact in the present case illustrate[s] the nature of the harm that will be suffered immediately and irremediably by not adjourning the proceedings’.¹¹
9. The Prosecution argues that the Request should be rejected on the basis that the Issue is not appealable, as it expresses mere disagreement with the Chamber’s discretionary power under Article 64 to govern the conduct of the proceedings before it. The Prosecution argues further that the Issue does not arise from the Impugned Decision, as the Impugned Decision dealt with the Defence request for an *immediate* adjournment rather than precluding any future remedies.¹²
10. The Prosecution also argues that the Defence fails to demonstrate either that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, or that the Appeals Chamber’s immediate intervention may materially advance the proceedings, insofar as both the Request for Stay and present Request: (i) are based on speculation and assumption, as they were made prior to having concretely assessed the disclosed material and, apparently, without consulting Mr Ntaganda, and thus the impact of the disclosed material is as yet unknown; (ii) ignore the advance notice the Defence had of allegations of witness coaching and interference; and (iii) ignore the fact that the Chamber indicated it would adjudicate any requests ‘at such time as the Defence’s

¹⁰ Request, ICC-01/04-02/06-1645, para. 4. *See also* paras 44-48.

¹¹ Request, ICC-01/04-02/06-1645, para. 19. *See also* paras 17-18 and 20-38.

¹² Prosecution Response, ICC-01/04-02/06-1660-Red, para. 2. *See also* paras 5-11.

concerns materialize'.¹³ The Prosecution also avers that the Defence improperly advances the merits of a potential appeal.¹⁴

11. This argument is also put forward in the LRV Response, in which the Legal Representatives of Victims argue, *inter alia*, that the Request should be rejected as it erroneously addresses the merits of the appeal rather than addressing the Article 82(1)(d) criteria.¹⁵

III. Analysis

12. The Chamber incorporates by reference the applicable law on requests for leave to appeal as set out in previous decisions.¹⁶
13. As a preliminary matter, the Chamber indicates that, in accordance with this applicable law, its assessment of the Request has been confined to whether or not the criteria under Article 82(1)(d) of the Statute have been met, rather than adjudicating the merits or substance of the proposed appeal. As previous chambers have found, and as advanced in the LRV Response, 'the arguments on the merits or the substance of the appeal are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal has been granted'.¹⁷
14. In assessing whether the Request meets the Article 82(1)(d) requirements, the Chamber will first consider whether the Issue constitutes an appealable issue arising from the Impugned Decision. In this regard, the Chamber recalls the Appeals Chamber's finding that only an 'issue' may form the subject of an appealable decision, which must be 'an identifiable subject or topic requiring a

¹³ Prosecution Response, ICC-01/04-02/06-1660-Red, para. 3. *See also* paras 26-36.

¹⁴ Prosecution Response, ICC-01/04-02/06-1660-Red, paras 12-25.

¹⁵ LRV Response, ICC-01/04-02/06-1656, paras 16-20.

¹⁶ *See for example* Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, paras 20-21.

¹⁷ *See Situation in Uganda*, 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, 19 August 2005, ICC-02/04-01/05-20, para. 22, referred to in LRV Response, ICC-01/04-02/06-1656, footnote 25.

decision for its resolution'.¹⁸ The Chamber considers the Defence's broad formulation of the Issue to be inconsistent with this requirement, insofar as it constitutes disagreement with the Impugned Decision as a whole rather than identifying a suitably discrete issue stemming from the Impugned Decision.¹⁹

15. In particular, the Chamber considers that the Issue fails to identify any of the alleged errors which constituted the purported abuse of the Chamber's discretion in its rejection of the Request for Stay. Although the Request proceeds to outline arguments as to the merits of specific errors and their alleged impact on the proceedings, these factors are not particularised in the Issue itself. In addition, several of the supporting arguments in the Request fail to extend beyond mere disagreement with the Impugned Decision. For example, in arguing that unfairness has been occasioned by having to proceed with the cross-examination of certain witnesses without first having sufficient opportunity to review the disclosed material,²⁰ the Defence simply repeats its disagreement with the outcome of the Impugned Decision in rejecting the Request for Stay, without identifying any clear error therein or specific issue arising therefrom.
16. The manner in which the Issue is formulated also does not reflect the fact that the remedy sought, and therefore ruled upon, was specifically an *immediate*

¹⁸ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (OA 3), para. 9.

¹⁹ *See similarly*, Decision on Defence request for leave to appeal the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts', 16 September 2016, ICC-01/04-02/06-1513, para. 15; Decision on the Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 21 May 2015, ICC-01/04-02/06-604, para. 17; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, paras 11-12 and 17-18; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the request for leave to appeal the 'Decision on witness preparation and familiarisation, 13 January 2016, ICC-02/11-01/15-388, paras 10-12; Decision on request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' and other issues related to the presentation of evidence by the Office of the Prosecutor, 13 May 2016, ICC-02/11-01/15-524, para. 16.

²⁰ Request, ICC-01/04-02/06-1645, para. 28.

adjournment of proceedings, without prejudice to other future possible remedies.²¹

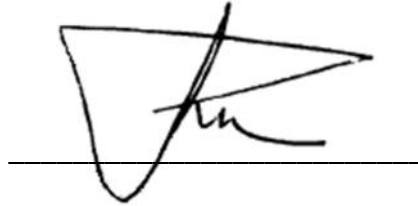
17. Therefore, the Chamber considers that the Defence has failed to specify the alleged legal or factual issue in a manner which could constitute an appealable issue for the purposes of Article 82(1)(d) of the Statute. Having so found, the Chamber need not consider whether the Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of trial, or whether immediate resolution by the Appeals Chamber may materially advance the proceedings.
18. Nonetheless, the Chamber considers that the Defence's submissions as to the alleged impact of the Issue on the fairness and expeditiousness of the proceedings are speculative, being based on speculation as to the content of the disclosed material and its relevance to the conduct of specific cross-examinations. Moreover, as the Defence made no substantive submissions on the impact of the Issue on the outcome of the trial, the Chamber does not consider it necessary to address that alternative limb further.

²¹ In the Impugned Decision, the Chamber held that 'it is undisputed that the Defence must have the opportunity to review the material to the extent relevant, as well as to consider the circumstances of the Prosecution's access to the material and, thereafter, to seek remedies for any such concrete prejudice which may have arisen' - ICC-01/04-02/06-T-159-CONF-ENG, page 5, lines 8 to 11.

FOR THE FOREGOING REASONS, THE CHAMBER, HEREBY

REJECTS the Request.

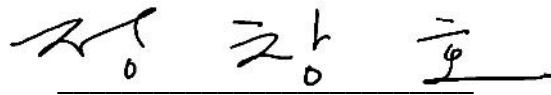
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated this 12 December 2016

At The Hague, The Netherlands