

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 13 April 2017

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 Defence request for leave to appeal the ‘Decision on Defence request
for extension of time to prepare for its presentation of evidence’**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**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*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on Defence request for leave to appeal the "Decision on Defence request for extension of time to prepare for its presentation of evidence"'.¹

I. Background

1. On 27 March 2017, the defence team for Mr Ntaganda ('Defence') filed a request ('Request')¹ seeking leave to appeal the 'Decision on Defence request for extension of time to prepare for its presentation of evidence' ('Impugned Decision').²
2. On 31 March 2017, the Prosecution and the Legal representatives of victims ('LRVs') filed their responses, the latter jointly, urging the Chamber to dismiss the Request ('Prosecution Response' and 'LRVs Response', respectively).³

II. Submissions

Defence

3. The Defence seeks leave to appeal on the following seven issues ('Issues'):
 - (i) Whether Counsel assigned to represent an accused in criminal proceedings, being on notice of the Prosecution's intention to use at trial material in its possession which has been disclosed, have a duty and/or obligation to review and analyse such material ('First Issue');
 - (ii) Whether the Prosecution's intended use of the [non-privileged telephone conversations of Mr Lubanga and of Mr Ntaganda from the Court's Detention Centre from 22 March 2013 onwards ('Conversations')] has a bearing on the materiality of the Conversations in the present proceedings ('Second Issue');

¹ Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for extension of time to prepare for its presentation of evidence', ICC-01/04-02/06-1836-Conf.

² ICC-01/04-02/06-1832.

³ Prosecution's response to the 'Request on behalf of Mr Ntaganda seeking leave to appeal "Decision on Defence request for extension of time to prepare for its presentation of evidence"', ICC-01/04-02/06-1845-Conf; Joint Response by the Common Legal Representative for the Victims of the Attacks and the Common Legal Representative for the Former Child Soldiers to the 'Defence's request seeking leave to appeal "Decision on Defence request for extension of time to prepare for its presentation of evidence"', ICC-01/04-02/06-1842-Conf.

- (iii) Whether the Conversations are, for a large part, devoid of any direct materiality to these proceedings ('Third Issue');
 - (iv) Whether the Chamber erred in law in holding that the Accused can be considered best placed to advise the Defence in relation to the witnesses and evidence to be selected for the Defence's presentation of evidence ('Fourth Issue');
 - (v) Whether in the present circumstances assistance provided by the Accused can significantly reduce the time required to review the conversations and prepare the case for the Defence ('Fifth Issue');
 - (vi) Whether in the present circumstances the Chamber's determination that the Defence has not shown good cause justifying an extension of the time limit to prepare the case for the Defence is manifestly unreasonable ('Sixth Issue');
 - (vii) Whether it is necessary at this stage for the Defence to determine the scope of the confidential Defence information in the possession of the Prosecution before the beginning of the case for the Defence ('Seventh Issue').
4. With regard to the First Issue, the Defence submits, *inter alia*, that the Impugned Decision is erroneous insofar as it is silent in respect of the notion that Counsel has a duty of diligence and conscientiousness and resulting obligation to review and analyse the Conversations.⁴
5. Concerning the Second Issue, the Defence submits that the Chamber erred by relying on the lack of materiality of the Conversations in the Impugned Decision without pronouncing on the impact of the Prosecution's intended use of the Conversations or the materiality of the Conversations in this case.⁵
6. With regard to the Third Issue, the Defence submits, *inter alia*, that: (i) the question of materiality of the Conversations goes beyond the relevance of facts related to the charges and the probative value and admissibility of evidence; and (ii) the Prosecution's intended use of the Conversations at trial and the absence of any directions from the Chamber as to whether the Prosecution can or cannot use them at trial and, if so, how, render the Conversations directly material to the proceedings. It argues that if the Prosecution is authorised to use the

⁴ Request, ICC-01/04-02/06-1836-Conf, paras 26-30.

⁵ Request, ICC-01/04-02/06-1836-Conf, para. 31.

Conversations during the Defence case, such use might have an effect on the conduct of the parties' examinations of witnesses and/or the Chamber's assessment of the probative value which can be attributed to the testimony of those witnesses.⁶

7. Regarding the Fourth Issue, the Defence submits that while the accused might be in a position to assist the Defence in relation to the general contents and context of his conversations, the Chamber erred in the Impugned Decision by finding that the accused is in a position to advise Counsel on legal matters; averring that information provided to Counsel by accused persons must always be verified and validated as well as discussed and analysed in detail with the client before acting upon it.⁷
8. With respect to the Fifth Issue, the Defence argues that considering the number of phone calls Mr Ntaganda made or received each month, it cannot be reasonably expected that his assistance would drastically cut down on the time necessary to review the Conversations, and that the Chamber erred in finding so in the Impugned Decision. It submits that it is unreasonable to expect an accused person to remember the entire contents of all telephone communications he had since 2013 and to recall whom he spoke to and when, and that Mr Ntaganda would have to listen, review, and analyse close to 900 hours of his conversations, and then convey the results of his review to Counsel and the Defence team. Furthermore, the Defence submits that the Chamber did not take into account the fact that 'over half of the telephone communications disclosed by the Prosecution were made by Mr Lubanga'.⁸
9. Regarding the Sixth Issue, the Defence argues that it is evident from the Impugned Decision that the Chamber did not factor the Conversations at all into

⁶ Request, ICC-01/04-02/06-1836-Conf, paras 32-39.

⁷ Request, ICC-01/04-02/06-1836-Conf, paras 40-43.

⁸ Request, ICC-01/04-02/06-1836-Conf, paras 44-48.

its calculations of the time limits imposed and in deciding to reject the Defence request for extension of time. It further submits that the time granted by the Chamber is 'manifestly unreasonable' in light of the volume of the Conversations and with regard to all of the other preparations required. The Defence submits that the Chamber's omission to address material arguments raised by the Defence, as well as its failure to give adequate weight to the parameters put forth by the Defence, have resulted in time limits imposed on the Defence which are 'grossly inappropriate, manifestly unreasonable', and which infringe Mr Ntaganda's 'minimum rights' under Article 67(1) of the Statute.⁹

10. Concerning the Seventh Issue, according to the Defence, the Chamber's finding that 'it is not necessary for the Defence to review the Conversations prior to the commencement of the presentation of evidence by the Defence in order to assess the impact of the Prosecution's access to detailed confidential Defence information', ought to be adjudicated by the Appeals Chamber for the purpose of avoiding that the Defence proceed with the presentation of its evidence without having had a genuine opportunity to conduct such assessment.¹⁰
11. The Defence argues that the Impugned Decision involves issues that significantly affect the fairness of the proceedings. In particular, it submits that by rejecting the Defence's request for extension of time, the Chamber is 'forcing' the Defence to begin bringing witnesses and presenting evidence before it has had a genuine opportunity to assess the contents of the Conversations and the impact of the Prosecution's possession of this information for the duration of the case for the Prosecution; and that '[b]y rushing the start of the Defence case in order to have an expeditious trial, the Chamber has neglected the [a]ccused's fundamental right to a fair trial and [...] to prepare his [d]efence adequately'.¹¹

⁹ Request, ICC-01/04-02/06-1836-Conf, paras 49-55.

¹⁰ Request, ICC-01/04-02/06-1836-Conf, paras 56-60.

¹¹ Request, ICC-01/04-02/06-1836-Conf, paras 61-64.

12. The Defence submits that an immediate resolution by the Appeals Chamber may materially advance the proceedings, as '[b]y forcing the Defence to start the presentation of its case when it is not fully prepared due to the colossal volume of Conversations to review beforehand, the entire Defence case will be flawed and will commence on a defective premise', and if during the final appeal stage of the proceedings the Appeals Chamber were to find that the time given to the Defence for the preparations of its case was insufficient, a retrial would be necessary.¹²

Prosecution

13. The Prosecution submits that the Request should be dismissed on the basis that the Issues 'do not accurately portray' the Impugned Decision, express no more than mere disagreements with it and, as such, do not constitute appealable issues within the meaning of Article 82(1)(d) of the Statute.¹³ The Prosecution further argues that the Defence fails to demonstrate that the Issues significantly affect the fair and expeditious conduct of the proceedings, or that immediate resolution of the Issues by the Appeals Chamber will materially advance the proceedings.¹⁴

LRVs

14. The LRVs submit that the Request should be rejected as it addresses the substance of the proposed appeal and does not meet the legal criteria set out in Article 82(1)(d) of the Statute. The LRVs aver that the arguments and identified Issues raise, at best, a mere disagreement with the Chamber's previous decisions, are repetitive of submissions already litigated before the Chamber and/or constitute arguments on the merit.¹⁵ Furthermore, the LRVs submit that the Defence fails to demonstrate that the Issues significantly affect the fair and

¹² Request, ICC-01/04-02/06-1836-Conf, paras 65-66.

¹³ Prosecution Response, ICC-01/04-02/06-1845-Conf, paras 2, 13-30.

¹⁴ Prosecution Response, ICC-01/04-02/06-1845-Conf, paras 2, 31-37.

¹⁵ LRVs Response, ICC-01/04-02/06-1842-Conf, paras 3, 22-36.

expeditious conduct of the proceedings, or that immediate resolution of the Issues by the Appeals Chamber will materially advance the proceedings.¹⁶

III. Analysis

15. The Chamber incorporates by reference the applicable law as set out in previous decisions on requests for leave to appeal.¹⁷
16. As a preliminary matter, the Chamber notes that most of the Defence submissions appear to argue the merits of the proposed appeal rather than addressing the specific criteria under Article 82(1)(d) of the Statute; the Chamber will not consider these substantive arguments and will confine its consideration to the latter.
17. The Chamber is not persuaded that the First, Second, Fourth, Fifth, Sixth and Seventh issues, as formulated by the Defence, constitute ‘issues’ arising from the Impugned Decision within the meaning of Article 82(1)(d) of the Statute.
18. With regard to the First Issue, the Chamber considers that it does not arise from the Impugned Decision. Contrary to the Defence assertion, the Chamber, without explicitly referring to any duty of counsel to review the material before it, simply found that the Defence has been on notice of allegations of the coaching of potential Defence witnesses since prior to the commencement of the trial, and while noting the amount of work required to review the Conversations, that in the circumstances, the requested extension of time for the preparation of the Defence’s presentation of evidence was not justified.
19. The Chamber considers that the Second Issue also does not arise from the Impugned Decision, as the Chamber did not address the matter related to the Prosecution’s intended use of the Conversations in the Impugned Decision. The

¹⁶ LRVs Response, ICC-01/04-02/06-1842-Conf, paras 37-47.

¹⁷ *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.

assertion that '[i]n the absence of directions issued by the Chamber regarding the use that can or cannot be made of the Conversations, it must be presumed that the Prosecution's intended use of the Conversations at trial significantly increases their materiality'¹⁸ is unduly speculative and therefore not capable of constituting an appealable issue that would significantly affect the fair and expeditious conduct of proceedings.

20. Concerning the Fourth and the Fifth Issues, the Chamber recalls that it did not state in the Impugned Decision that the accused could assist or himself engage in the review of Conversations, but rather that Mr Ntaganda can be considered best placed to advise the Defence team in relation to witnesses and evidence to be selected for the Defence's presentation of evidence, including whether any witnesses or lines of defence may be compromised or prejudiced by his prior conduct. Insofar as the Chamber factored Mr Ntaganda's capacity to provide assistance in the form of advice and information into the calculation of the relevant timelines for the commencement of the Defence case, it is clear from the Impugned Decision that it was one of several factors considered by the Chamber in reaching its decision. The Fourth and Fifth Issues therefore misrepresent the Impugned Decision and do not arise therefrom.

21. The Chamber considers that, in contesting the result of the Decision as a whole, the Sixth Issue constitutes a broad disagreement with the outcome of the Impugned Decision, rather than identifying a sufficiently discrete issue arising from it.¹⁹ As such, it does not constitute an appealable issue under Article 82(1)(d) of the Statute.

22. The Chamber is of the view that the Seventh Issue misrepresents the Impugned Decision. Contrary to the Defence's assertion, the Chamber did not find that it is

¹⁸ Request, ICC-01/04-02/06-1836-Conf, para. 31.

¹⁹ See *similarly*, Decision on Defence request for leave to appeal the 'Decision on Prosecution request seeking the admission of the medical report related to Witness P-0790 under Rule 68(2)(b) of the Rules', 13 February 2017, ICC-01/04-02/06-1784, para. 12, referring to relevant case law.

unnecessary for the Defence to review the Conversations prior to the commencement of the presentation of evidence by the Defence in order to assess the impact of the Prosecution's access to confidential Defence information. The Chamber only found that this argument does not justify 'at this stage' an extension of time for the Defence's preparations for the reasons addressed earlier in the Impugned Decision.

23. Having found that the First, Second, Fourth, Fifth, Sixth and Seventh issues do not constitute appealable issues, it is unnecessary for the Chamber to continue to consider the remaining criteria under Article 82(1)(d) of the Statute. Nonetheless, even if these issues were to constitute appealable issues, the Chamber considers that they would not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial. The Chamber notes that the Defence's arguments in this respect repeat its disagreement with the outcome of the Impugned Decision in rejecting the extension of time and fail to address the alleged impact of each issue on the fairness and expeditiousness of the proceedings and the outcome of the trial. The Chamber recalls that in the Impugned Decision, it stated that it 'will remain attentive to any difficulties the Defence may face during the course of its presentation of evidence, and, where necessary, retain a flexible approach to facilitate the Defence's preparations, including accommodating requests for changes in the order of witnesses or extended breaks between evidentiary blocks'.²⁰ In light of this, the Defence's arguments in support of the requirements of Article 82(1)(d) of the Statute having been met are unduly speculative. The Chamber further notes that the Defence failed to explain in particular how these issues would significantly affect the expeditious conduct of the proceedings, as required by Article 82(1)(d) of the Statute.

²⁰ Impugned Decision, ICC-01/04-02/06-1832, para. 23.

24. In respect of the Third Issue, while the Chamber finds that it arises from the Impugned Decision, the Chamber considers its impact on the fairness and expeditiousness of proceedings to be speculative, as the Defence submission that the Conversations are material if the Prosecution would be permitted to use them during the trial is based on the mere speculation that the Chamber may allow such use. Moreover, this issue is predicated on the supposition that the finding that the Conversations were, for a large part, devoid of any direct materiality to these proceedings was a determining factor relied on by the Chamber in reaching its decision to reject the Defence's request for additional time to prepare. As noted in the Impugned Decision, this consideration was one of several factors considered by the Chamber in reaching its decision to reject the Defence request for further time to prepare, alongside other considerations, several of which were entirely unrelated to the Conversations.²¹ In light of this, the Chamber considers that the Third Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

25. The Defence has therefore failed to establish that any of the Issues constitute issues which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In light of this, it is unnecessary for the Chamber to consider the remaining requirement of Article 82(1)(d) of the Statute. Nonetheless, noting that the Issues concern a request for extension of three additional months for the preparation of the Defence's presentation of evidence, and that the Chamber stated that it will remain attentive to any difficulties the Defence may face during the course of its presentation of evidence, and, where necessary, retain a flexible approach to facilitate the Defence's preparations, the Defence has further failed to show how, and the Chamber does not find that, an intervention of the Appeals Chamber at this stage may materially advance the proceedings.

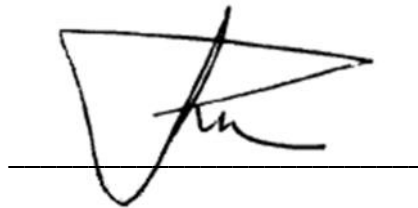
²¹ See Impugned Decision, ICC-01/04-02/06-1832, para. 22.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the parties and the LRVs to file public redacted versions of their respective filings within two weeks of notification of the present decision.

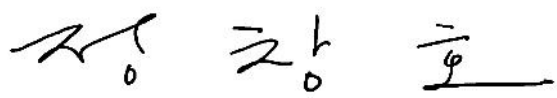
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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of stylized Korean characters, written over a horizontal line.

Judge Chang-ho Chung

Dated 13 April 2017

At The Hague, The Netherlands