

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 August 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 redacted version of

**‘Decision on Defence request for leave to appeal the Chamber’s decision on
postponement of the trial commencement date’**

Decision 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 Luc Boutin

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')¹ 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 Chamber's decision on postponement of the trial commencement date'.

I. Procedural history

1. On 9 October 2014, the Chamber set the commencement date for trial as 2 June 2015.²
2. On 22 April 2015, following a request by the defence team for Mr Ntaganda ('Defence'),³ the Chamber postponed the opening statements until the second or third week of July 2015 and the hearing of evidence provisionally until the week of 17 August 2015.⁴ The Chamber subsequently specified that the opening statements would take place on 7 to 9 July 2015⁵ and modified the start date of the first evidentiary block to 24 August 2015.⁶
3. On 26 June 2015, the Defence filed an 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial' ('Adjournment Request'),⁷ in which it requested the Chamber to 'immediately adjourn the proceedings until the Defence has been provided with a meaningful opportunity to be heard on the

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber VI as composed by the Presidency's 'Decision replacing a judge in Trial Chamber VI', 18 March 2015, ICC-01/04-02/06-521 and to the trial chamber in its previous composition.

² Corrigendum of 'Order Scheduling a Status Conference and Setting the Commencement Date for the Trial', ICC-01/04-02/06-382-Corr, para.8.

³ Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest with Public Annex A, 2 April 2015, ICC-01/04-02/06-541-Conf-Exp. A public redacted version was filed on the same day (ICC-01/04-02/06-541-Red).

⁴ Transcript of hearing on 22 April 2015, ICC-01/04-02/06-T-19-ENG ET WT, page 3, line 9 to page 8, line 4.

⁵ Order scheduling the opening statements, 16 June 2015, ICC-01/04-02/06-649.

⁶ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, page 24.

⁷ Corrected version of 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial', ICC-01/04-02/06-677-Conf-Exp-Corr. A public redacted version was filed on 29 June 2015 (ICC-01/04-02/06-677-Corr-Red).

merits of' various *ex parte* litigation that was ongoing before the Chamber ('*Ex Parte* Litigation')⁸ and 'adjudication of the same by the Chamber'.⁹

4. On 3 July 2015, in an oral decision, the Chamber postponed the opening statements until 2 September 2015 and the start of the presentation of evidence by the Office of the Prosecutor ('Prosecution') until 15 September 2015 ('Impugned Decision').¹⁰
5. On 10 July 2015, the Defence sought leave to appeal the Impugned Decision ('Defence Request').¹¹
6. On 15 July 2015, the Prosecution filed its response ('Prosecution Response'),¹² opposing the Defence Request.
7. Also on 15 July 2015, the Legal Representatives of Victims ('LRVs') filed a joint response ('LRVs Response'),¹³ in which they request the Chamber to dismiss the Defence Request.

⁸ What is referred to here as *Ex Parte* Litigations was in the Adjournment Request referred to by the Defence as 'Prosecution Allegations'. The Defence identified these as being Prosecution filings ICC-01/04-02/06-349-Conf-Red2, and related filings ICC-01/04-02/06-371-Conf-Red and ICC-01/04-02/06-635-Conf-Red, as well as certain related allegations contained in ICC-01/04-02/06-630-Conf-Red, and ICC-01/04-02/06-658-Conf-Exp (see footnote 3 of the Adjournment Request (ICC-01/04-02/06-677-Conf-Exp-Corr)).

⁹ ICC-01/04-02/06-677-Corr-Red, para 76.

¹⁰ Transcript of Hearing of 3 July 2015, ICC-01/04-02/06-T-22-CONF-ENG, page 4, line 5 to page 5, line 20.

¹¹ Application on behalf of Mr Ntaganda seeking leave to appeal the Chamber's oral decision on 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial', ICC-01/04-02/06-709-Conf-Exp, available to the Prosecution, Defence and Registry only. A public redacted version was filed that same day (ICC-01/04-02/06-709-Red).

¹² Prosecution's Response to the Defence's application for leave to appeal Trial Chamber's VI oral decision on the new trial date (ICC-01/04-02/06-709-Conf-Exp), ICC-01/04-02/06-720-Conf-Exp. A public redacted version was filed on the same day (ICC-01/04-02/06-720-Red).

¹³ Common Legal Representatives' joint response to the "Public redacted version of 'Application on behalf of Mr Ntaganda seeking leave to appeal the Chamber's oral decision on 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial'", ICC-01/04-02/06-723.

II. Submissions

Defence submissions

8. The Defence seeks leave to appeal the following issue ('Issue'):

As a result of the Impugned Decision setting a date for the commencement of trial rather than adjourning the proceedings as requested, the necessary conditions to ensure a fair trial in this case are not in place.¹⁴

9. The Defence submits that this is an appealable issue for the purposes of Article 82(1)(d) of the Statute, and is not merely a question over which there is disagreement or conflicting opinion.¹⁵ It further submits that 'a distinction must be made between the Issue and the alleged errors committed by the Chamber which gave rise to the same'.¹⁶

10. The Defence submits that the Issue is, *inter alia*, 'predicated on':

- i. the Chamber erroneously adjudicating the Defence Urgent Motion for Adjournment as seeking a delay rather than an adjournment;
- ii. the Chamber's failure to pronounce on the serious prejudice resulting from the information withheld from the Defence, which makes it impossible for the Defence to meaningfully respond to the Prosecution's allegations [REDACTED], to articulate the case for the defence and deliver an opening statement, as well as to prepare for cross-examination; and
- iii. the Chamber arbitrarily setting a new date for the commencement of trial which fails to take into account the impact of the Prosecution's allegations challenging the integrity of Defence investigations, which could have been avoided, had the Prosecution addressed this confidential issue with the Defence – from the moment it could – months earlier.¹⁷

11. The Defence states that in its Adjournment Request, it 'highlighted conditions which must be in place to ensure a fair trial'.¹⁸ In its view, the Chamber, in the Impugned Decision, addressed and pronounced on some of these conditions,

¹⁴ Defence Request, ICC-01/04-02/06-709-Red, para. 2.

¹⁵ Defence Request, ICC-01/04-02/06-709-Red, paras 3 and 25-30.

¹⁶ Defence Request, ICC-01/04-02/06-709-Red, paras 4 and 35.

¹⁷ Defence Request, ICC-01/04-02/06-709-Conf-Exp, para. 5

¹⁸ Defence Request, ICC-01/04-02/06-709-Red, para. 31.

but 'failed to pronounce on the other necessary conditions to ensure a fair trial in the present case'.¹⁹ The Defence argues that '[t]his error led the Chamber to arbitrarily set a date for the commencement of trial, which results in the necessary conditions to ensure a fair trial in this case, not being in place'.²⁰

12. The Defence submits that the Impugned Decision 'creates a situation which significantly affects the fair conduct of the proceedings'.²¹ In addition, it submits that the notion of expeditiousness cannot be 'entirely contingent upon an expedited start of the trial' and must also take into consideration the pace at which the trial will be conducted. In this regard, the Defence maintains that commencing the evidentiary stage of the proceedings on 15 September 2015 would result in delays. Therefore, the Defence argues that the Issue significantly affects both the fair and expeditious conduct of the proceedings.²²
13. Finally, the Defence submits that immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings.²³

Prosecution submissions

14. The Prosecution submits that the Defence Request does not accurately present the Impugned Decision and 'simply disagrees' with it.²⁴ It avers that the fact that the Chamber did not grant the Adjournment Request in full does not mean that the Chamber failed to rule on it or that the proceedings are not fair.²⁵
15. The Prosecution submits that the Defence Request ignores the Chamber's trial management powers and the range of measures which would be available should concrete problems for the Defence arise, making it 'speculative and

¹⁹ Defence Request, ICC-01/04-02/06-709-Red, paras 32-33.

²⁰ Defence Request, ICC-01/04-02/06-709-Red, para. 34.

²¹ Defence Request, ICC-01/04-02/06-709-Red, para. 37.

²² Defence Request, ICC-01/04-02/06-709-Red, paras 44-46.

²³ Defence Request, ICC-01/04-02/06-709-Red, paras 7 and 47-53.

²⁴ Prosecution Response, ICC-01/04-02/06-720-Red, paras 3 and 7.

²⁵ Prosecution Response, ICC-01/04-02/06-720-Red, para. 3.

incorrect' to argue at this stage that the trial will be unfair.²⁶ According to the Prosecution, the Defence's arguments on the expeditiousness of the proceedings are also 'speculative and unsupported'.²⁷ It submits that therefore immediate resolution of the Issue by the Appeals Chamber would not significantly affect the fairness and the requirements under Article 82(1)(d) of the Statute not being met.²⁸

16. The Prosecution further adds that intervention by the Appeals Chamber, if leave were to be granted, may delay the start of the trial and that the situation would have substantially evolved by the time the Appeals Chamber would be seised of the Issue.²⁹

LRVs submissions

17. The LRVs submit that no 'issue' in the meaning of Article 82(1)(d) of the Statute arises from the Impugned Decision.³⁰ The LRVs further submit that the Issue, as framed by the Defence, has no impact on the fairness and expeditiousness of the proceedings, or the outcome of the trial.³¹ According to the LRVs, it is therefore unnecessary to consider whether an immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings.³²
18. Regarding the Chamber's '[failure] to pronounce on the necessary conditions to ensure a fair trial' as put forward by the Defence,³³ the LRVs submit that the Issue is 'premised on the understanding that the Chamber's limited postponement, and the related rejection of the request for more time for

²⁶ Prosecution Response, ICC-01/04-02/06-720-Red, para. 10.

²⁷ Prosecution Response, ICC-01/04-02/06-720-Red, para. 11.

²⁸ Prosecution Response, ICC-01/04-02/06-720-Red, para. 8.

²⁹ Prosecution Response, ICC-01/04-02/06-720-Red, para. 14.

³⁰ LRVs Response, ICC-01/04-02/06-723, para. 22.

³¹ LRVs Response, ICC-01/04-02/06-723, para. 26.

³² LRVs Response, ICC-01/04-02/06-723, para. 32.

³³ Defence Request, ICC-01/04-02/06-709-Red, paras 33-34 and 50.

preparation, constitutes an appealable issue warranting the intervention of the Appeals Chamber'.³⁴

19. The LRVs aver that a further lengthy postponement of the trial would result in 'prejudice to the victims' right to have the truth established and [j]ustice rendered without delay',³⁵ and that the adjournment sought by the Defence 'goes against the very fundamentals of the integrity of the proceedings'.³⁶

III. Applicable law

20. Article 82(1)(d) of the Statute sets out the requirements applicable to the granting of a request for leave to appeal, as follows:

A. whether the decision involves an issue that would significantly affect:

- i. the fair and expeditious conduct of proceedings; or
- ii. the outcome of the trial; and

B. whether in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

21. The Chamber recalls that, for the purposes of the first prong of the test, the Appeals Chamber has defined an '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'.³⁷ The Chamber further notes that no automatic right of appeal is conferred by Article 82(1)(d) of the Statute. A right

³⁴ LRVs Response, ICC-01/04-02/06-723, paras 28-29.

³⁵ LRVs Response, ICC-01/04-02/06-723, para. 30.

³⁶ LRVs Response, ICC-01/04-02/06-723, para. 31.

³⁷ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 ('Appeals Chamber Judgment'), para. 9.

of appeal will arise only if, in the Chamber's opinion, the impugned decision 'must receive the immediate attention of the Appeals Chamber'.³⁸

IV. Analysis

22. The Chamber considers that the Issue inaccurately reflects the request for relief of which the Chamber was seised by way of the Adjournment Request and consequently mischaracterises the Impugned Decision. In the Adjournment Request, the Defence requested the Chamber to 'immediately adjourn the proceedings until the Defence has been provided with a meaningful opportunity to be heard on the merits of the [*Ex Parte* Litigation] and adjudication of the same by the Chamber'.³⁹ The Adjournment Request was thus expressly predicated upon adjudication of the *Ex Parte* Litigation by the Chamber following the receipt of submissions from the Defence.⁴⁰ However, the Issue suggests that the Chamber set a commencement date for trial 'rather than adjourning the proceedings as requested' and that as a result 'the necessary conditions to ensure a fair trial' are not in place.
23. Contrary to the Issue as framed, and the Defence's submissions that the Chamber 'arbitrarily' set a new commencement date for trial⁴¹ and that the Impugned Decision should have made 'sure that the necessary conditions are in place to ensure a fair trial',⁴² the Chamber was not required to put these conditions in place by way of the Impugned Decision itself in order to be responsive to the Adjournment Request. Instead of 'arbitrarily setting the commencement of trial on 2 September 2015', the Impugned Decision established that timeline with careful regard to the submissions made, both

³⁸ Appeals Chamber Judgment, ICC-01/04-168, para. 20. See also Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, ICC-01/04-02/06-519, paras 24-25; Decision on 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, paras 14-15.

³⁹ Adjournment Request, ICC-01/04-02/06-677-Corr-Red, para. 76.

⁴⁰ Adjournment Request, ICC-01/04-02/06-677-Corr-Red, paras 6, 16, 36, 59, 73 and 76.

⁴¹ Defence Request, ICC-01/04-02/06-709-Red, paras 5 and 37.

⁴² Defence Request, ICC-01/04-02/06-709-Red, para. 37. See also para. 28.

orally and in writing, and the relief sought.⁴³ In this regard, the Chamber also observes that it expressly based the Impugned Decision on its 'obligations under Article 64(2) of the Statute, in particular, to ensure the fairness of the trial and the rights of the accused'.⁴⁴ Further, the fact that the Defence disagrees with the Chamber as to whether the length of the adjournment granted ensures the fairness of trial, or whether all the alleged conditions have to be fulfilled for the trial to be fair, does not make the Issue an appealable issue.

24. Even if the Issue were to constitute an appealable issue, the Chamber considers that it would not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial. The Chamber observes in this regard that it made modifications to the trial schedule and also instructed the parties to consult as to the witnesses to be called during the first evidentiary block, indicating that it would allow for modifications to the order of the witnesses, where agreed upon by them.⁴⁵ These measures were meant to enable the adjudication of the *Ex Parte* Litigation, to the extent deemed appropriate by the Chamber, prior to the commencement of the evidentiary phase of the trial,⁴⁶ and to allow the Defence time to address its concerns and prepare for trial, including, to the extent deemed necessary by the Defence based on the information before it, to verify the reliability of information already in its possession relevant to witnesses appearing in the first evidentiary blocks. In this regard, the Chamber notes that whilst the Defence did not have all underlying materials on which the Prosecution's allegations related to [REDACTED] are

⁴³ See, e.g., ICC-01/04-02/06-T-22-CONF-ENG, page 4, lines 21-24; and [REDACTED], 3 July 2015, ICC-01/04-02/06-697-Conf-Exp. Additionally, at the time of issuing the Impugned Decision the Chamber was already seized of the [REDACTED] (ICC-01/04-02/06-658-Conf-Red) and was consequently mindful of the likely timelines for adjudication of that matter. Further decisions clarifying the timeline and scope of that litigation have since been issued (see, e.g., Decision on the Defence's expedited request for disclosure and related matters, 16 July 2015, ICC-01/04-02/06-731-Conf-Exp; and Decision on Defence request seeking access to confidential documents [REDACTED], 29 July 2015, ICC-01/04-02/06-754-Conf-Red).

⁴⁴ ICC-01/04-02/06-T-22-CONF-ENG, page 5, lines 2-4.

⁴⁵ ICC-01/04-02/06-T-22-CONF-ENG, page 5, lines 17-19.

⁴⁶ See e.g. [REDACTED], 3 July 2015, ICC-01/04-02/06-697-Conf-Exp, para. 11 (expressly providing that indication in respect of [REDACTED]).

based at the time of requesting the adjournment, these materials have since been disclosed to the Defence.⁴⁷ The Defence is therefore in a position to assess the 'integrity' and 'reliability' of its investigations. The Chamber further reiterates its guidance regarding the circumscribed scope of the *Ex Parte* Litigation.⁴⁸

25. Furthermore, the Chamber recalls that at the time of the Impugned Decision, it did not consider it useful 'to make any further modifications to the trial schedule',⁴⁹ thereby leaving open the possibility that such modification could be made in the future, should a legitimate need to do so arise. In addition, with respect to the Defence's statement 'requests for delays between witnesses [...] would have to be granted to ensure the fairness of proceedings',⁵⁰ the Chamber notes, as it did before,⁵¹ the Chamber's trial management powers and the range of measures available to assist the Defence should concrete difficulties arise. In the view of the Chamber, immediate resolution of the Issue by the Appeals Chamber would therefore not materially advance the proceedings.

⁴⁷ See [REDACTED]; and [REDACTED]. [REDACTED].

⁴⁸ ICC-01/04-02/06-T-22-CONF-ENG, page 2, line 18, to page 3, line 3, where the Chamber provided guidance having noted recent submissions that had been made by the Defence regarding the scope of the *Ex Parte* Litigation before the Chamber. These submissions included the Defence's characterisation of the [REDACTED] (see Adjournment Request, ICC-01/04-02/06-677-Corr-Red, paras 3 and 27), as well as the Defence's suggestion that the Chamber [REDACTED] (see [REDACTED]).

⁴⁹ ICC-01/04-02/06-T-22-CONF-ENG, page 5, lines 15-16.

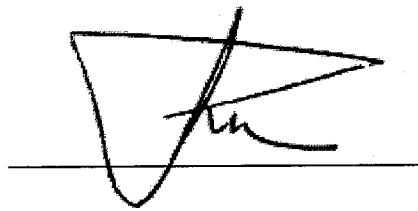
⁵⁰ Defence Request, ICC-01/04-02/06-709-Red, para. 45.

⁵¹ Decision on 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. 20.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request.

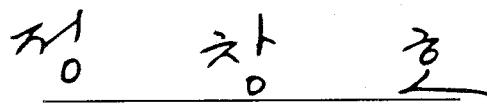
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by 'Ozaki' in a cursive script.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct, stylized characters in Korean script.

Judge Chang-ho Chung

Dated 4 August 2015

At The Hague, The Netherlands