

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 May 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

**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 ('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 2 April 2015, the defence team for Mr Ntaganda ('Defence') requested a postponement of the trial commencement until 2 November 2015 at the earliest.³ The request was opposed by the Office of the Prosecutor ('Prosecution')⁴ and the Legal Representatives of Victims ('LRVs').⁵
3. On 22 April 2015, in an oral decision, 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 ('Impugned Decision').⁶

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, ICC-01/04-02/06-541-Conf-Exp. A public redacted version (ICC-01/04-02/06-541-Red) was filed on the same day.

⁴ Prosecution's Response to the 'Urgent Defence Request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest', 14 April 2015, ICC-01/04-02/06-557-Conf-Exp. A public redacted version was filed on 15 April 2015 (ICC-01/04-02/06-557-Red).

⁵ Victims' observations in response to the 'Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest', 14 April 2015, ICC-01/04-02/06-556.

⁶ 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.

4. On 24 April 2015, the Defence sought leave to appeal the Impugned Decision ('Defence Request').⁷
5. The Prosecution ('Prosecution Response')⁸ and the LRVs ('LRV Response')⁹ filed responses opposing the Defence Request.

II. Submissions

6. The Defence seeks leave to appeal the following four issues which it submits arise from the Impugned Decision; that the Chamber erred by:
 - i. failing to provide a reasoned opinion setting out the reasons why the Defence submissions do not justify a postponement of the Prosecution's case of the length requested ('First Issue');
 - ii. failing to take into account the significant change in circumstances during the period from 11 September 2014 to 2 April 2015 ('Second Issue');
 - iii. conflating the right of the accused to have adequate time for the preparation of the defence with the right of the accused to know the case he has to meet ('Third Issue'); and
 - iv. holding that 'the other difficulties described by the Defence [...] fall within the range of normal investigative difficulties that might be anticipated in a case of this nature' and/or by failing to take into consideration the impact of the investigative difficulties encountered on the ability of the Defence to be

⁷ Request on behalf of Mr Ntaganda seeking leave to appeal the Chamber's decision on Defence urgent request for postponement of the Prosecution's case, ICC-01/04-02/06-572.

⁸ Prosecution's Response to the Defence Application for Leave to Appeal the Chamber's decision on the Defence urgent request for postponement of the Prosecution's case, 1 May 2015, ICC-01/04-02/06-586.

⁹ Common Legal Representatives' joint response to the "Request on behalf of Mr Ntaganda for leave to appeal the Chamber's decision on Defence urgent request for postponement of the prosecution case", 30 April 2015, ICC-01/04-02/06-582.

ready for trial ('Fourth Issue') (the First Issue, Second Issue, Third Issue and Fourth Issue are hereinafter collectively referred to as the 'Issues').¹⁰

Defence submissions

7. The Defence submits that each of the Issues is an appealable issue within the meaning of Article 82(1)(d) of the Statute.¹¹ In respect of the First Issue, it submits, *inter alia*, that although a Chamber need not explain 'every step of its reasoning', a decision 'must enable the parties to understand how the chamber reached its conclusions'.¹² In respect of the Second Issue, the Defence submits that the Chamber failed to consider, amongst other things: (i) the 'exceptional volume' of disclosure since 15 January 2015; (ii) the addition of 29 witnesses since 15 January 2015; and (iii) the resources used to address *ex parte* proceedings.¹³ In respect of the Third Issue, relying on a particular portion of the Impugned Decision,¹⁴ the Defence argues that the Chamber misunderstood the Defence arguments and 'erroneously considered a factor not raised by the Defence'.¹⁵ In respect of the Fourth Issue, the Defence indicates the points it would argue in relation to investigative difficulties and their impact on its readiness for trial should leave to appeal be granted.¹⁶
8. The Defence argues that each of the Issues affects the fair and expeditious conduct of the proceedings.¹⁷ It submits that the Issues impacted the Chamber's decision not to postpone the commencement of trial for the length of time requested by the Defence, and therefore affect the right of the accused to have

¹⁰ Defence Request, ICC-01/04-02/06-572, para. 1.

¹¹ Defence Request, ICC-01/04-02/06-572, para. 5.

¹² Defence Request, ICC-01/04-02/06-572, para. 11.

¹³ Defence Request, ICC-01/04-02/06-572, paras 14-16.

¹⁴ Defence Request, ICC-01/04-02/06-572, para. 17 quoting Impugned Decision, ICC-01/04-02/06-T-19-ENG ET WT, page 6, lines 9-12.

¹⁵ Defence Request, ICC-01/04-02/06-572, paras 18-20.

¹⁶ Defence Request, ICC-01/04-02/06-572, paras 23-24.

¹⁷ Defence Request, ICC-01/04-02/06-572, para. 34.

adequate time to prepare,¹⁸ and, as a 'direct consequence', the proceedings would be unfair.¹⁹ The Defence submits that the expeditiousness of the proceedings would be similarly impacted 'in many ways', identifying in particular that Defence cross-examinations would be less focused and longer and requests for delays would 'inevitably' have to be presented.²⁰

9. The Defence contends that immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings, *inter alia*, because whether or not the time allotted to the Defence violates the accused's right to have adequate time to prepare 'can only be addressed and decided at this stage'.²¹

Prosecution submissions

10. The Prosecution submits that none of the Issues constitute appealable issues,²² as the First and Third Issues misrepresent the Impugned Decision²³ and the Second and Fourth Issues 'merely disagree with it'.²⁴ In particular, the Prosecution submits that the First Issue 'is not correct' as the Chamber addressed the Defence's arguments and explained why it disagreed with them. The Prosecution further notes that a reasoned opinion only requires the Chamber to indicate the basis of its decisions with sufficient clarity.²⁵ The Prosecution submits that the Third Issue 'misunderstands' the Impugned Decision, and that the portion of the Impugned Decision referenced by the Defence was 'apposite' in addressing the Defence's submissions regarding the time needed to acquire an understanding of the Prosecution's case.²⁶

¹⁸ Defence Request, ICC-01/04-02/06-572, paras 27-31.

¹⁹ Defence Request, ICC-01/04-02/06-572, para. 32.

²⁰ Defence Request, ICC-01/04-02/06-572, para. 33.

²¹ Defence Request, ICC-01/04-02/06-572, paras 35-39.

²² Prosecution Response, ICC-01/04-02/06-586, paras 2-3.

²³ Prosecution Response, ICC-01/04-02/06-586, paras 2-3 and 4-7.

²⁴ Prosecution Response, ICC-01/04-02/06-586, paras 2-3 and 8-11.

²⁵ Prosecution Response, ICC-01/04-02/06-586, para. 4.

²⁶ Prosecution Response, ICC-01/04-02/06-586, paras 5-6.

11. The Prosecution submits that the Second Issue 'rests on the same arguments already advanced' by the Defence in its request for postponement, and therefore constitutes mere disagreement on matters which the Chamber has already considered.²⁷ In respect of the Fourth Issue, the Prosecution similarly argues that it represents 'mere disagreement with the Chamber's conclusion', and that the Chamber was 'not obliged to rehearse in full' the purported investigative difficulties identified by the Defence.²⁸
12. The Prosecution submits, in addition, that the Defence arguments that the Issues would significantly affect the fair and expeditious conduct of proceedings are, *inter alia*, speculative and unsupported.²⁹

LRVs submissions

13. The LRVs also oppose the Defence Request, submitting that it fails to meet the criteria under Article 82(1)(d) of the Statute.³⁰ Like the Prosecution, the LRVs submit that the Second and Fourth Issues – which repeat 'almost *verbatim*' arguments already made in the Defence's request for postponement – constitute a mere disagreement with the Chamber's conclusions.³¹ They submit that the Third Issue misrepresents the submissions which had been made to the Chamber and the conclusions reached in the Impugned Decision.³² In respect of the First Issue, the LRVs argue that it is 'plainly incorrect' and does not arise from the Impugned Decision.³³ They further argue that lack of a reasoned opinion would not *per se* qualify as an 'appealable issue' arising from the Impugned Decision.³⁴ Noting that the Chamber granted a 'limited postponement' of the trial commencement date, the LRVs submit that none of

²⁷ Prosecution Response, ICC-01/04-02/06-586, paras 8-10.

²⁸ Prosecution Response, ICC-01/04-02/06-586, para. 11.

²⁹ Prosecution Response, ICC-01/04-02/06-586, paras 12-15.

³⁰ LRVs Response, ICC-01/04-02/06-582, para. 1.

³¹ LRVs Response, ICC-01/04-02/06-582, para. 16. *See also* para. 13.

³² LRVs Response, ICC-01/04-02/06-582, para. 15.

³³ LRVs Response, ICC-01/04-02/06-582, para. 14.

³⁴ LRVs Response, ICC-01/04-02/06-582, para. 14.

the Issues affect the fair and expeditious conduct of proceedings or the outcome of the trial.³⁵

III. Applicable law

14. Article 82(1)(d) of the Statute sets 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.

15. 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'.³⁶ The Chamber further notes that no automatic right of appeal is conferred by Article 82(1)(d) of the Statute. A right of appeal will arise only if, in the Chamber's opinion, the impugned decision 'must receive the immediate attention of the Appeals Chamber'.³⁷

IV. Analysis

16. The Chamber does not consider that any of the Issues meet the requirements of Article 82(1)(d) of the Statute.

³⁵ LRVs Response, ICC-01/04-02/06-582, paras 17-21.

³⁶ *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.

³⁷ Appeals Chamber Judgment, ICC-01/04-168, para. 20.

17. The Chamber considers that the First and Second Issues, as framed, are insufficiently discrete. In the Chamber's view, the First Issue lacks the necessary specificity to constitute an appealable issue.³⁸ While the Chamber notes that in its submissions the Defence identifies certain specific points which it would argue should leave to appeal be granted,³⁹ the First Issue itself is framed in a broad manner which appears to implicate the entirety of the Impugned Decision. In framing the First Issue the Defence has consequently failed to adequately specify the alleged legal or factual issue in a manner which could constitute an appealable issue arising from the Impugned Decision. Similarly, the Second Issue appears to merely challenge the entirety of the reasoning in the Impugned Decision and to seek a *de novo* review of the matter by the Appeals Chamber, and therefore also does not constitute an appealable issue within the meaning of Article 82(1)(d) of the Statute.
18. The Chamber considers that the Third Issue misrepresents the Impugned Decision. The Chamber's statement in the Impugned Decision that the Defence should be assisted by having been provided with a clear outline of the Prosecution's case⁴⁰ does not give a basis for concluding that the Chamber conflated having knowledge of the case with the right to have adequate time to prepare. In the Impugned Decision the Chamber was explicitly mindful 'in particular [of] the right to have adequate time and facilities for preparation of the defence'.⁴¹ Moreover, as noted by the Prosecution and LRVs, the necessity of having 'full knowledge and understanding' of the Prosecution's case had been

³⁸ Decision on Defence request for leave to appeal the decision on restrictive measures and related matters, 15 January 2015, ICC-01/04-02/06-425-Conf-Exp, para. 25; *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, ICC-01/09-01/11-596, para. 11.

³⁹ Defence Request, ICC-01/04-02/06-572, paras 8-10.

⁴⁰ Impugned Decision, ICC-01/04-02/06-T-19-ENG ET WT, page 6, lines 9-12.

⁴¹ Impugned Decision, ICC-01/04-02/06-T-19-ENG ET WT, page 5, lines 13-15.

expressly raised by the Defence in its request for a postponement,⁴² and was appropriately addressed by the Chamber.

19. In respect of the Fourth Issue, it is apparent from the Impugned Decision that the Chamber fully considered the Defence's submissions, including the alleged investigative difficulties encountered.⁴³ However, the Chamber - 'having carefully considered all relevant factors'⁴⁴ - found the submissions to be either untimely⁴⁵ or attached a different weight to them in considering whether or not they justified a postponement of the length requested. The Chamber considers that - even if the alleged error was capable of constituting an appealable issue - the Fourth Issue would not significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial. The Defence's submissions in that regard - including that Defence cross-examinations would necessarily be 'less focused and longer' - are inadequately supported. Moreover, they fail to take account of the potential availability of other measures to assist the Defence, including, for example, in resourcing, in the ordering of witnesses or in the sitting schedule. In that regard, the Chamber notes, in particular, that the Defence has failed to acknowledge the Chamber's expressed intention not to sit continuously, but rather in blocks of five to six weeks, followed by a break of one or two weeks or potentially longer to take account of hearings in other cases in which one or more of the members of the Chamber sit.⁴⁶
20. In light of the findings made above, it is unnecessary for the Chamber to consider the remaining components of Article 82(1)(d) of the Statute. It is nonetheless noted that in light of, in particular, the Chamber's trial management powers, and the range of measures available to assist the Defence should

⁴² See e.g. ICC-01/04-02/06-541-Red, paras 4-5, 8, 15-16 and 29.

⁴³ See e.g. Impugned Decision, ICC-01/04-02/06-T-19-ENG ET WT, page 5, lines 19-22; page 5, line 25 – page 6, line 3.

⁴⁴ Impugned Decision, ICC-01/04-02/06-T-19-ENG ET WT, page 7, line 7.

⁴⁵ Impugned Decision, ICC-01/04-02/06-T-19-ENG ET WT, page 5, lines 19-23.

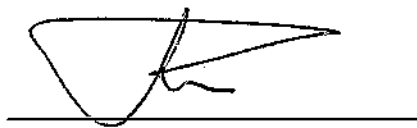
⁴⁶ ICC-01/04-02/06-T-19-ENG ET WT, page 10, line 20 – page 11, line 6.

concrete difficulties arise, the Chamber does not consider that immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request.

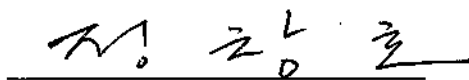
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 21 May 2015

At The Hague, The Netherlands