

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 13 June 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 stay of proceedings with prejudice to the Prosecution’**

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**

**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 by Majority, Judge Fremr dissenting, this 'Decision on Defence request for leave to appeal the "Decision on Defence request for stay of proceedings with prejudice to the Prosecution"'.

I. Background and Submissions

1. On 4 May 2017, the defence team for Mr Ntaganda ('Defence') filed a request ('Request')¹ seeking leave to appeal the 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution' ('Impugned Decision').²
2. The Defence seeks leave to appeal on the following eight issues ('Issues'):
 - (i) 'Whether the Chamber erred by failing to pronounce on the wilfulness of the Prosecution's conduct in assessing the appropriate remedy' ('First Issue');
 - (ii) 'Whether the Chamber erred by failing to find that, in the circumstances, it was imperative for the Prosecutor to segregate its Article 70 investigation from the Prosecution team in this case' ('Second Issue');
 - (iii) 'Whether the Chamber erred by finding that the confidential Defence information to which the Prosecution received access via the Conversations was limited' ('Third Issue');
 - (iv) 'Whether the Chamber erred in imposing an unreasonable burden on the Defence to provide 'concrete instances of the Prosecution having used the information in a manner resulting in undue prejudice' while accepting at face value the Prosecution's affirmation as to its use of such information' ('Fourth Issue');
 - (v) 'Whether the Chamber erred in holding that it was not competent to make any determination as to the reasons that justified non-disclosure of the materials related to the Article 70 proceedings and subsequently failing to pronounce on whether it had been deprived of the possibility to safeguard the rights of the Accused' ('Fifth Issue');
 - (vi) 'Whether the Chamber erred in holding that the Defence arguments as to the prejudice resulting from the *ex parte* nature of the Article 70 proceedings appear speculative and unclear' ('Sixth Issue');

¹ Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution', ICC-01/04-02/06-1888.

² ICC-01/04-02/06-1883.

- (vii) 'Whether the Chamber erred in not conducting a cumulative assessment of the prejudice suffered by Mr Ntaganda prior to concluding that it did not consider that the Prosecution's actions, without more, amounted to an abuse of process rendering a fair trial impossible' ('Seventh Issue')
 - (viii) 'Whether the Chamber erred in finding that any prejudice suffered by the Accused could be remedied by alternative measures, which are not proportional to the finding of prejudice and which do not provide appropriate relief neither retroactively nor prospectively' ('Eighth Issue').
3. The Defence argues that: (i) the Issues are 'essential to the correctness of the Impugned Decision and are, accordingly, appealable'; (ii) they significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial; and that (iii) an immediate resolution by the Appeals Chamber of these Issues will materially advance the proceedings.³
4. On 8 and 9 May 2017, the Office of the Prosecutor ('Prosecution') and the Legal representatives of victims ('LRVs') filed their responses, the latter jointly, both opposing the Request ('Prosecution Response' and 'LRVs Response', respectively).⁴ The Prosecution and the LRVs submit, *inter alia*, that the Defence merely disagrees with the Impugned Decision and that none of the Issues identified in the Request constitute 'appealable' issues arising from the decision. They further submit that, in any event, the Defence does not demonstrate that any of the proposed Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that the Appeals Chamber's intervention may materially advance the proceedings.⁵

³ Request, ICC-01/04-02/06-1888, para. 54.

⁴ Prosecution's response to the 'Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution'', ICC-01/04-02/06-1898; 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 'Request on behalf of Mr Ntaganda seeking leave to appeal "Decision on Defence request for stay of proceedings with prejudice to the Prosecution"', ICC-01/04-02/06-1892.

⁵ Prosecution Response, ICC-01/04-02/06-1898; LRVs Response, ICC-01/04-02/06-1892.

5. On 15 May 2017, the Defence sought leave to file a reply ('Request for leave to reply'),⁶ which the Prosecution opposed on 18 May 2017.⁷

II. Analysis

6. At the outset, concerning the Request for leave to reply, the Chamber recalls that, pursuant to Regulation 24(5) of the Regulations, participants may only reply to a response with the leave of the Chamber. In the present case, noting the matters upon which leave to reply was sought, the Chamber did not consider that it would have been assisted by further submissions on any of the identified issues in ruling upon the Request. The Chamber therefore rejects the Request for leave to reply.
7. Turning to the Request, the Chamber incorporates by reference the applicable law as set out in previous decisions on requests for leave to appeal.⁸
8. The Chamber is not persuaded that the First Issue, as formulated by the Defence, constitutes an 'issue' arising from the Impugned Decision within the meaning of Article 82(1)(d) of the Statute. Contrary to the Defence assertions that the Chamber 'omitted to pronounce' on 'the wilfulness of the Prosecution's conduct', and that '[t]he failure to determine this issue impacted directly on the reasoning denying the relief requested',⁹ the Chamber recalled that '[a]ccording to the Court's jurisprudence on stays of proceedings, it is not necessary to find that the Prosecution acted in bad faith'.¹⁰ Further, contrary to the Defence assertion, it is clear from the Impugned Decision that the Prosecution's conduct in the course of

⁶ Request on behalf of Mr Ntaganda seeking leave to reply to 'Prosecution's response to the "Request on behalf of Mr Ntaganda seeking leave to appeal Decision on Defence request for stay of proceedings with prejudice to the Prosecution"' (ICC-01/04-02/06-1898), ICC-01/04-02/06-1904.

⁷ Response to the Defence request for leave to reply to the 'Prosecution's response to the "Request on behalf of Mr Ntaganda seeking leave to appeal Decision on Defence request for stay of proceedings with prejudice to the Prosecution"' (ICC-01/04-02/06-1888), 9 May 2017, ICC-01/04-02/06-1898', (ICC-01/04-02/06-1904), ICC-01/04-02/06-1911.

⁸ 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.

⁹ Request, ICC-01/04-02/06-1888, para. 26.

¹⁰ Impugned Decision, ICC-01/04-02/06-1883, para. 21.

this litigation was indeed taken into consideration, together with several other factors, before urging the Prosecution to have any further review of the Conversations conducted by members of the Prosecution who are not, or are no longer, part of the trial team in the *Ntaganda* case.¹¹

9. The Chamber, by Majority, considers that the Seventh Issue misinterprets the Impugned Decision and, as such, that it does not arise from it. The Defence claims that the Chamber ‘failed to adopt a comprehensive and cumulative approach to the issue of prejudice which led to a manifest error in its determination’.¹² The Majority however recalls that the request for a stay was based ‘on a number of partly interrelated and overlapping arguments and allegations’, and that its conclusion that ‘it is possible to continue conducting a fair trial in the present case’ was clearly drawn after it had ‘considered the totality of the submissions made in relation to the Request’, thus indicating a clear cumulative assessment of the arguments raised and of any prejudice arising to the accused.¹³
10. Having found that the First and Seventh issues do not constitute appealable issues, it is unnecessary for the Majority to continue to consider, in relation to these Issues, the remaining criteria under Article 82(1)(d) of the Statute. With regard to the remaining issues (the Second, Third, Fourth, Fifth, Sixth and Eighth issues), the Chamber considers that they do arise from the Impugned Decision. However, the Majority considers that none of the eight Issues identified by the Defence would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial. The Majority recalls that in the Impugned Decision, while it did not find that the prejudice identified reached the threshold for a stay of proceedings, it stated that any prejudice may be remedied,

¹¹ See in this regard Impugned Decision, ICC-01/04-02/06-1883, para. 32; see also para. 61.

¹² Request, ICC-01/04-02/06-1888, para. 48.

¹³ Impugned Decision, ICC-01/04-02/06-1883, see in particular paras 25 and 61.

‘retroactively and prospectively’, through alternative measures.¹⁴ These include: (i) not allowing the Prosecution to use the material obtained in the context of the Article 70 proceedings during the Defence’s presentation of evidence unless specifically authorised by the Chamber as necessary for the determination of the truth pursuant to its duty under Article 69(3) of the Statute; (ii) urging the Prosecution to conduct any further review of the Conversations by members of the Prosecution who are not, or are no longer, part of the trial team of the *Ntaganda* case; (iii) and the possibility that ‘the Chamber may consider taking additional measures upon receipt of a substantiate application setting out concrete instances of prejudice’, including allowing the Defence to recall certain witnesses, and/or disregarding certain evidence.¹⁵ 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 and, ultimately, unfounded.

11. Furthermore, noting in particular that the Chamber indicated that it may consider taking additional measures upon receipt of specific requests, the Defence has further failed to show how, and the Majority does not find that, an intervention of the Appeals Chamber at this stage may materially advance the proceedings.

¹⁴ Impugned Decision, ICC-01/04-02/06-1883, paras 42-43, 61.

¹⁵ Impugned Decision, ICC-01/04-02/06-1883, para. 62.

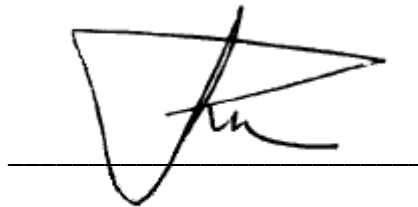
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for leave to reply; and

REJECTS, BY MAJORITY, the Request.

Judge Fremr appends a dissenting opinion.

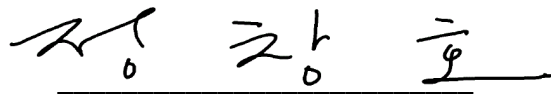
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a cursive 'r', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 13 June 2017

At The Hague, The Netherlands