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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

**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**

Source: Defence Team of Mr Bosco Ntaganda

Document 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

Me Stéphane Bourgon
Me Luc Boutin
Me William St-Michel

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Further to the oral decision on 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 with Public Annex A*”¹ issued by Trial Chamber VI (“Chamber”) of the International Criminal Court on 22 April 2015 (“Impugned Decision”),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

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

INTRODUCTION

1. The Defence respectfully submits that the Chamber’s decision to postpone the holding of the opening statements until the second or third week of July 2015 and to provisionally set the commencement of the hearing of evidence in the week of 17 August 2015, rests on mixed errors of law and fact warranting the intervention of the Appeals Chamber at this stage. More particularly, the Impugned Decision raises the following issues:
 - a. The Chamber erred by 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”);
 - b. The Chamber erred by failing to take into account the significant change in circumstances during the period from 11 September 2014 to 2 April 2015 (“Second Issue”);
 - c. The Chamber erred by 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

¹ ICC-01/04-02/06-541-Conf-Exp (“Request for Postponement”).

² ICC-01/04-02/06-T-19-ENG, p.3-8.

- d. The Chamber erred by 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 ready for trial (“Fourth Issue”).

(collectively, “Four Issues” or “Issues”)

2. The Defence respectfully submits that the Impugned Decision granting insufficient time for the Defence to be ready for trial is the direct result of these four errors.

SUBMISSIONS

I. The Issues constitute appealable issues pursuant to Article 82(1)(d) of the Statute

3. As recalled by the Chamber, for the purpose of Article 82(1)(d) of the Statute, an ‘issue’ is an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.³ It is necessary for the moving party to identify a discrete issue for resolution by the Appeals Chamber, rather than arguing that the entirety of the Chamber’s reasoning is erroneous.⁴
4. It is settled jurisprudence that a request for leave to appeal is not concerned with whether the impugned decision was correctly reasoned or not,⁵ but should rather be aimed at addressing the specific criteria set out in Article 82(1)(d) of the Statute.⁶ The Defence respectfully submits that this ratio

³ Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal, ICC-01/04-02/06-519 (“Decision on the Prosecution’s request for leave to appeal”), para.25.

⁴ Decision on the Prosecution’s request for leave to appeal, para.26.

⁵ See, e.g., *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, para.4.

⁶ ICC-01/04-02/06-425-Conf-Exp, para.22.

must also apply to decisions on requests for leave to appeal. Hence, in adjudicating requests for leave to appeal, the Chamber must consider solely whether the requirements set out in Article 82(1)(d) of the Statute are met, regardless of its views on the merits of a potential Defence appeal.

5. For the reasons explained below, the Defence respectfully submits that all of the above described issues constitute appealable issues within the meaning of Article 82(1)(d) of the Statute.

A. First Issue

6. Should leave to appeal be granted, the Defence will argue that the Chamber erred by failing to provide a reasoned opinion in support of its conclusion that the Defence submissions do not justify a postponement of the Prosecution's case of the length requested.⁷
7. Indeed, the Chamber failed to address critical submissions made by the Defence and, having noted certain submissions, failed to explain how the issues raised in support thereof did not warrant a postponement of the length requested.
8. Firstly, should leave to appeal is granted, the Defence will argue *inter alia* that the Chamber failed to make any reference to, as well as to consider the impact of on-going *ex parte* proceedings on the Defence's preparations for trial, more particularly the considerable resources which had to be invested in addressing these proceedings.⁸
9. Secondly, in the event leave to appeal be granted, the Defence will argue *inter alia* that even though the Chamber noted that the Defence "provided a detailed estimate of the work it considered remained to be completed before

⁷ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.5, ll.18-19.

⁸ See Request for Postponement, paras.66-71.

the commencement of trial”,⁹ it failed to pronounce as to whether the tasks mentioned therein are indeed necessary and reasonable or not, and whether the time estimates provided therein are indeed reasonable and justified or not.

10. Thirdly, should leave to appeal be granted, the Defence will also argue *inter alia* that the Chamber failed to identify the ‘other difficulties’ that relate to matters which in the Chamber’s view ‘do not legitimately justify the Defence postponement request’,¹⁰ as well as to provide the reasons why.
11. While it is cognizant that a trial chamber need not articulate every step of its reasoning when issuing a decision,¹¹ the Defence stresses that it is settled jurisprudence that a decision must nevertheless enable the parties to understand how the chamber reached its conclusions.¹² The Defence respectfully submits that the right of the Accused affected by the Impugned Decision – namely, the right to have adequate time to prepare for the defence¹³ – is of such importance that it warranted a detailed and reasoned opinion.
12. Considering that it identifies a clear error in the Chamber’s consideration of the Defence’s submissions – i.e. a lack of a reasoned opinion – and does not merely express a disagreement with the Chamber’s analysis, the Defence respectfully submits that the First Issue constitutes an ‘appealable issue’.

B. Second Issue

13. In concluding that the Defence submissions do not justify a postponement of the length requested, the Chamber considered *inter alia* that “a significant number of the issues raised by the Defence were either already known to it at

⁹ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.4, ll.5-6. See Request for Postponement, paras.83-97.

¹⁰ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.5, l.25, p.6, ll.2-3.

¹¹ Cf. *Lubanga case*, Dissenting Opinion of Judge Anita Ušacka, ICC-01/04-02/06-3121-Anx2 (“Dissenting Opinion of Judge Anita Ušacka”), para.26.

¹² Cf. Dissenting Opinion of Judge Anita Ušacka, para.26.

¹³ Article 67(1)(b) of the Statute.

the time it made submissions on the schedule for preparation for trial, or should reasonably have been anticipated by it at that stage”.¹⁴ In the Chamber’s view, these issues include: (i) the status of Defence investigations at that time; (ii) the impact of changes in the composition of the Defence team; and (iii) “to some extent” the potential volume of disclosure.¹⁵

14. Should leave to appeal be granted, the Defence will argue that the Chamber failed to consider the extraordinary change in circumstances which took place between 11 September 2014 – when the Defence stated that it would do everything that is in its power to be ready to begin by June 2015¹⁶ – and 2 April 2015, when the Defence submitted its Request for Postponement, as well as the impact thereof on the ability of the Defence to be ready for trial.
15. Indeed, the Chamber failed to consider *inter alia*: (i) the exceptional volume of material disclosed by the Prosecution since 15 January 2015 which has tripled the number of documents in the possession of the Defence until then;¹⁷ (ii) the exceptional addition since 15 January 2015 of 29 new witnesses the Prosecution intends to call;¹⁸ as well as (iii) the considerable resources which had to be invested in addressing on-going *ex parte* proceedings,¹⁹ all of which could not have reasonably been anticipated by the Defence on 11 September 2014.²⁰ The Chamber further failed to address the impact of this unforeseen change in circumstances on both the additional work to be performed to be ready for trial – such as investigations, analysis of material and work with the Accused – and the additional time necessary to conduct these activities.

¹⁴ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.5, ll.19-22.

¹⁵ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.5, ll.22-24.

¹⁶ ICC-01/04-02/06-T-13-ENG, p.56, ll.5-10. Counsel for the Defence specified that this undertaking was made “with the caveat that if there are delays in the obligations or on the undertakings of the Prosecution to disclose certain documents, then the trial date will have to be maybe adjusted accordingly.” (ICC-01/04-02/06-T-13-ENG, p.56, ll.8-10)

¹⁷ Request for Postponement, paras.15-24.

¹⁸ Request for Postponement, para.25.

¹⁹ Request for Postponement, paras.66-71.

²⁰ Request for Postponement, para.30.

16. Considering that it identifies a clear error in the Chamber's consideration of the Defence's submissions, and does not merely express a disagreement with the Chamber's analysis, the Defence respectfully submits that the Second Issue constitutes an 'appealable issue'.

C. Third Issue

17. In ruling that the Defence submissions do not justify a postponement of the length requested, the Chamber considered *inter alia* that "the Prosecution's detailed pre-trial brief and the updated Document containing the Charges should provide the Defence with a clear outline and understanding of the Prosecution's case in supplement to the information which had already been provided in the confirmation decision".²¹
18. Should leave to appeal be granted, the Defence will argue that the Chamber misunderstood the arguments of the Defence and conflated the right of the Accused to have adequate time to prepare for the defence with the right of the Accused to know the case he has to meet.
19. Indeed, the essence of the arguments made by the Defence is that additional time is required for the purpose of gaining a sufficient understanding of all material disclosed by the Prosecution – in particular, the additional material disclosed since 15 January 2015 and that related to 29 additional witnesses – and investigating the same, in order to be able to challenge the evidence expected to be adduced at trial (which follows from the right of the Accused to have adequate time to prepare for the defence).²² The Defence did not argue that more time is necessary for the Accused to understand the charges laid against him or the allegations in support thereof.

²¹ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.6, ll.9-12.

²² See Request for Postponement, paras.4, 16, 32. In fact, the Defence's reference to the Prosecution's pre-trial brief simply aimed at illustrating the significant change in the Prosecution's case and the impact thereof on the time necessary to understand the evidence expected to be adduced for the purpose of being able to effectively challenge the same: Request for Postponement, paras.40, 41.

20. Should leave to appeal be granted, the Defence will further argue that in conflating the two, the Chamber erroneously considered a factor not raised by the Defence in its Request for Postponement.
21. Considering that it identifies a clear error in the Chamber's consideration of the Defence's submissions, and does not merely express a disagreement with the Chamber's analysis, the Defence respectfully submits that the Third Issue constitutes an 'appealable issue'.

D. Fourth Issue

22. In finding that the Defence submissions do not justify a postponement of the length requested, the Chamber considered *inter alia* that "a number of 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".²³
23. Firstly, should leave to appeal be granted, the Defence will argue that the Chamber erred by considering that the investigative difficulties described by the Defence are of the kind "that might be anticipated in a case of this nature", without taking into consideration that the case to be investigated changed altogether since 11 September 2014.²⁴ The Chamber's error must be considered in light of its omission to refer to any of the investigative difficulties argued by the Defence,²⁵ other than difficulties encountered in securing the services of suitable investigators.²⁶
24. More importantly, should leave to appeal be granted, the Defence will argue that notwithstanding the nature of the investigative difficulties encountered, the Chamber failed to consider the impact of these difficulties on the ability of

²³ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.5, l.25, p.6, ll.1-2.

²⁴ See *supra*, paras.13-16.

²⁵ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.4, ll.1-2. See Request for Postponement, paras.47-52, and ICC-01/04-02/06-555-Conf-Exp ("Notice on Investigative Difficulties"), paras.1-4, 7-121. As instructed by the Chamber, the Defence will soon file a confidential redacted *ex parte* version of the Notice on Investigative Difficulties, only available to the Prosecution and the Defence.

²⁶ Impugned Decision, ICC-01/04-02/06-T-19-ENG, p.4, ll.1-2.

the Defence to be ready for trial. Indeed, the Defence explained in detail in its Request for Postponement as well as in its Notice on Investigative Difficulties the concrete effect of the difficulties encountered.²⁷

25. Considering that it identifies a clear error in the Chamber's consideration of the Defence's submissions, and does not merely express a disagreement with the Chamber's analysis, the Defence respectfully submits that the Fourth Issue constitutes an 'appealable issue'.

II. The Issues all affect the fair and expeditious conduct of proceedings

26. Pursuant to Article 82(1)(d) of the Statute, the moving party must demonstrate that the impugned decision involves an issue "that would significantly affect the fair and expeditious conduct of the proceedings *or* the outcome of the trial".²⁸
27. The four appealable issues described above directly impacted the Chamber's holding that the Defence submissions do not justify a postponement of the length requested, and ultimately, the time made available by the Chamber in the Impugned Decision for the Defence to be ready for trial.
28. The time made available by the Chamber in the Impugned Decision is intrinsically related to the fundamental right of the Accused to have adequate time to prepare for the defence.
29. As argued in the Request for Postponement, Mr Ntaganda cannot benefit from a fair trial unless the Defence has been able to adequately prepare for trial, which requires full knowledge and understanding of the Prosecution's case, a meaningful opportunity to effectively investigate, the necessary human and financial resources, and more importantly, sufficient time.²⁹

²⁷ See *inter alia* Request for Postponement, paras.50-52; Notice on Investigative Difficulties, paras.21, 56, 70- 73, 74, 79, 80, 86-88, 91, 111, 112, 117-121.

²⁸ Emphasis added.

²⁹ Request for Postponement, para.4.

30. Should leave to appeal be granted, the Defence will argue that the time allotted by the Impugned Decision, as a result of the Chamber's errors described in the Four Issues, constitutes a violation of the right of the Accused to have adequate time to prepare for the defence.
31. More particularly, the Defence will argue that the time allotted to the Defence pursuant to the Impugned Decision – which is 77 days short of the minimum time requested in the Request for Postponement – makes it impossible for the Defence to *inter alia* gain full knowledge and understanding of all material disclosed by the Prosecution, and to conduct the minimum investigations related to this material.
32. As a direct consequence, the proceedings would be unfair as the Defence would not be in a position to effectively challenge the evidence that will be adduced by the Prosecution. Hence, the Defence would be unable to fulfil its duty and obligations towards Mr Ntaganda. More importantly, the Chamber's truth seeking function would significantly be impaired as the evidence presented before it would not be properly tested.
33. Similarly, the expeditious conduct of the proceedings would significantly be affected in many ways. For instance, Defence cross-examinations will necessarily be less focussed and longer. Moreover, in some cases, requests for delays will inevitably have to be presented, leading to time-consuming litigation. It is also important to note that the time difference between hearing the first Prosecution witness during the week of 17 August 2015 and beginning the Prosecution's case on 2 November 2015, will actually contribute to the expeditious conduct of the proceedings – likely to last a few years – as the Parties, and more particularly the Defence, will be ready and more focussed, leading to a substantial reduction of the time required for the testimony of many witnesses.

34. It necessarily follows that the four above Issues – leading to the Impugned Decision granting the Defence insufficient time to be ready for trial – would significantly affect the fair and expeditious conduct of the proceedings.

III. An immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings

35. Pursuant to Article 82(1)(d) of the Statute, the Chamber must also be satisfied that an immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings.
36. At stake, is the date when the first Prosecution witness will be called pursuant to the Impugned Decision, which directly results from the four errors identified above.
37. Considering that pursuant to the Impugned Decision, the first Prosecution witness is scheduled to appear during the week of 17 August 2015, whether or not the time allotted to the Defence constitutes a violation of the right of the Accused to have adequate time to prepare for the defence, can only be addressed and decided at this stage.
38. Whether the Defence is right or not in submitting that the time allotted pursuant to the Impugned Decision: (i) is insufficient; and (ii) makes it impossible for the Defence to be ready for trial, is an issue of such importance that immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings.
39. Indeed, considering the potential adverse consequences on the fair and expeditious conduct of the proceedings – in the event the Defence is ordered to commence the trial without being ready to challenge the evidence expected to be adduced – it is imperative that the matter be resolved before the beginning of trial.

40. In addition, the fact that any attempt to take corrective action during trial – to palliate the fact that the Defence was not ready for trial when the first Prosecution witness was called – will necessarily lead to the expenditure of much more judicial resources, also demonstrates that resolving the matter immediately will materially advance the proceedings.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to **GRANT** leave to appeal the Impugned Decision on the Issues as outlined above.

RESPECTFULLY SUBMITTED ON THIS 24TH DAY OF APRIL 2015

A handwritten signature in dark ink, appearing to read 'S+B-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands