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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
“Decision on the Defence’s request for clarification of the admissibility of
evidence related to any allegations of rape and sexual slavery committed
personally by Mr Ntaganda”**

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Further to the *“Decision on the Defence’s request for clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda”* issued by Trial Chamber VI (“Chamber”) on 30 October 2015 (*“Impugned Decision”*),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Request on behalf of Mr Ntaganda seeking leave to appeal the
“Decision on the Defence’s request for clarification of the admissibility of
evidence related to any allegations of rape and sexual slavery committed
personally by Mr Ntaganda”**

INTRODUCTION

1. Bosco Ntaganda requests leave to appeal the Impugned Decision on two discrete issues, namely:
 - a. whether evidence related to a crime allegedly committed personally by Mr Ntaganda, but which is not charged in the Updated Document containing the charges (“UDCC”), is admissible (“First Issue”);² and
 - b. whether allegations of a crime allegedly committed personally by Mr Ntaganda, which are not found in the UDCC but are included in the Prosecution’s pre-trial brief, provide notice to the Accused of the need to counter such allegations (“Second Issue”).³
2. These issues are appealable. They also significantly affect the fair and expeditious conduct of proceedings or their outcome, and their immediate appellate resolution certainly may materially advance proceedings. On the contrary, the absence of immediate appellate resolution will likely obstruct and delay proceedings.

¹ ICC-01/04-02/06-968.

² Impugned Decision, para.17.

³ Impugned Decision, para.15.

SUBMISSIONS

I. Applicable law

3. A decision is subject to appeal, pursuant to Article 82(1)(d), where it:
 - involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
4. The Appeals Chamber has defined an ‘issue’ as “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination” and as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”⁴ Issues that have previously been recognised as appealable range from the correctness of a particular determination to the standard that has been applied as part of a determination. An appealable issue may be “legal or factual or mixed.”⁵
5. The second requirement under Article 82(1)(d) is that the issue involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. In particular, issues that “directly [relate] with the amount and type of evidence that the Chamber will have to

⁴ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9 (“DRC, Appeals Chamber LtA Decision”). See *Ntaganda*, Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date, ICC-01/04-02/06-604, 21 May 2015, para. 15.

⁵ *DRC*, Appeals Chamber LtA Decision, para. 9. Here are some examples of “legal” issues: *Ruto et al.*, Decision on the Defence’s Applications for Leave to Appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-1953-Red-Corr, 10 September 2015 (“*Ruto et al.*, Decision on Defence LtA”), paras. 20(v), 21 (“Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of ‘interference.’”); *Ruto et al.*, Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, ICC-01/09-01/11-817, 18 July 2013, para. 2(ii), 18-19 (“Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law.”); *Lubanga*, Decision on the prosecution request for leave to appeal the “Decision on Intermediaries”, ICC-01/04-01/06-2463-Conf, 2 June 2010, paras. 2, 8 (“The correctness of the standard and procedure established and applied by the Trial Chamber to determine whether the identity of an intermediary must be disclosed under Rule 77”)

consider when making its final determination in accordance with Article 74”⁶ or that relate to the introduction of particular pieces of incriminating evidence into the trial⁷ would necessarily have an impact on the outcome of the trial.

6. The third requirement is that the Trial Chamber be of the opinion that immediate appellate intervention would “materially advance the proceedings.” This involves an assessment of the degree to which an “authoritative determination” of the “matter posing for decision” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁸
7. The Appeals Chamber has also held that the criterion is met if immediate determination would “move forward” the proceedings, by “ensuring that the proceedings follow the right course” and “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines.”⁹ The purpose of such appeal is to avoid the consequences that would otherwise be embedded in the proceedings and which could “cloud or unravel the judicial process.”¹⁰ The applicable threshold is “*may* materially advance” not “*will* materially advance”.
8. Even though leave to appeal has been viewed as “exceptional”, it is nonetheless an important procedure that can “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹¹
9. The Prosecution has previously submitted in other proceedings, with which the Defence agrees, that a request for leave to appeal “must not engage on the

⁶ ICC-01/05-01/08-1169, para. 35.

⁷ ICC-01/04-01/07-2404, para. 30.

⁸ DRC, Appeals Chamber LtA Decision, para.14.

⁹ DRC, Appeals Chamber LtA Decision, para.15.

¹⁰ DRC, Appeals Chamber LtA Decision, para.16.

¹¹ DRC, Appeals Chamber LtA Decision, para.19.

merits or correctness of a Decision.”¹² The sole issue of concern, unlike in a request for reconsideration, is the consequences – not the correctness – of the appealable issues which arise from the decision on the conduct of proceedings, as well as the potential benefits for the conduct of proceedings that will arise from immediate appellate intervention.

10. It is also important to bear in mind that in pronouncing on a request for leave to appeal, whether the Chamber regards its decision as correct in law is not one of the criteria. Moreover, the Defence respectfully submits that Article 82(1)(d) confers no discretion to deny leave to appeal when the conditions set out therein are satisfied.

II. Both Issues are ‘appealable’ issues

11. The First and Second Issues arise from the Impugned Decision. Both Issues are important questions of law for which appellate resolution is essential, as they have the potential to impact the entire trial and are not limited to the sole testimony of Witness P-0901. As such, they are not merely ‘disagreements’ with the Impugned Decision.
12. The First Issue arises from the Chamber’s holding that:

[s]uch evidence [*i.e.* evidence on the commission of crimes of rape or sexual slavery by Mr Ntaganda as an individual, which are not charged in the UDCC] is not, in principle, inadmissible. Rather, a careful balancing is required on a case-by-case basis taking into account, in particular, the factors mentioned above [*i.e.* whether the relevance and probative value of such evidence are outweighed by considerations such as unfair prejudice and undue delay].¹³
13. Pursuant to the Chamber’s holding – which applies to and governs the admission of evidence for the remainder of the proceedings – the default position is that evidence of crimes allegedly committed personally by

¹² *Bemba et al.*, Corrected version of “Prosecution’s application for leave to appeal the “Decision on Witness Preparation and Familiarisation”, 21 September 2015, ICC-01/05-01/13-1276, ICC-01/05-01/13-1276-Corr, 21 September 2015, para. 24.

¹³ Impugned Decision, para.17, *referring to* para.14.

Mr Ntaganda, but which are not charged in the UDCC, is admissible. It also imposes on the Defence the burden to oppose any attempt by the Prosecution to adduce such evidence on the basis of the resulting unfair prejudice and/or undue delay,¹⁴ as opposed to requiring the Prosecution to establish the need to adduce such evidence in order to proof the essential elements of a different crime included in the UDCC. Resolution of the First Issue is thus essential for the determination of matters arising in the judicial cause under examination.

14. The Second Issue arises from the Chamber's determination that:

[o]n the question of notice, [...] the Defence has had full notice that such allegations were contained within the evidence upon which the Prosecution intended to rely, including through their inclusion in the Prosecution's pre-trial brief, filed over seven months ago.¹⁵

15. Pursuant to the Chamber's holding – which applies to and governs the admission of evidence for the remainder of the proceedings – as long as an allegation of a crime committed personally by Mr Ntaganda is included in the Prosecution's Pre-Trial Brief, despite the fact that it is not charged in the UDCC, the Defence is on 'notice' and must inevitably respond to such allegation, which, according to the Impugned Decision, is in principle admissible.
16. The Chamber's holding, which defeats the purpose of an updated document containing the charges, is thus an appealable issue as it raises an identifiable subject requiring a decision for its resolution.

III. Both Issues significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial

17. The First Issue has a substantial and direct impact on the fair conduct of the proceedings.
18. As a consequence of the Chamber's holding that evidence on crimes allegedly committed personally by Mr Ntaganda and not charged in the UDCC is not

¹⁴ Impugned Decision, para.14.

¹⁵ Impugned Decision, para.15.

inadmissible, the burden lies on the Defence to object every time the Prosecution will seek to elicit evidence on such allegations and demonstrate that admitting such evidence results in an unfair prejudice and/or undue delay. Considering that the Prosecution has the burden of proof, and that evidence related to crimes not charged is *per se* not relevant, the burden to justify the need to adduce such evidence to prove other charges must rest on the Prosecution. The burden imposed on the Defence thus affects the fair conduct of the proceedings.

19. The burden imposed also affects the expeditious conduct of the proceedings, taking into consideration that pursuant to the Prosecution's Pre-Trial Brief, at least five witnesses are expected to provide evidence on allegations of rape and sexual slavery committed by Mr Ntaganda personally.¹⁶ Examination-in-chief of these witnesses on allegations dealing with the personal conduct of the Accused will entail extensive cross-examination and inevitable related pleadings, which will unduly delay the proceedings.
20. With respect to the Second Issue, the Chamber's holding that the Defence is fully on notice of allegations found in the Prosecution's Pre-Trial Brief – even though they are not charged in the UDCC – plainly affects the fairness of the proceedings as it imposes on the Defence the need to investigate and prepare a defence to conduct which is not charged. Having to do so necessarily involves significant time and directly affects the expeditious conduct of the proceedings.

IV. Immediate appellate resolution of each of the two Issues will materially advance the proceedings

21. Immediate appellate resolution of the First Issue will set the correct admissibility standard for evidence related to crimes allegedly committed personally by Mr Ntaganda, but which are not charged in the UDCC. Hence,

¹⁶ Pre-Trial Brief, paras.100, 224(c).

a decision of the Appeals Chamber on the First Issue will ensure that the trial proceeds on a sound basis and will avoid any future litigation as to the admissibility of such evidence.

22. In relation to the Second Issue, a decision by the Appeals Chamber will pronounce and make clear, if and when, Mr Ntaganda is on notice of, and accordingly has to prepare a defence and respond to, crimes allegedly committed personally by Mr Ntaganda included in the Prosecution's Pre-Trial Brief, but not in the UDCC.
23. Beyond any doubt, resolution of both Issues by the Appeals Chamber will avoid and, at least, minimize litigation before the Chamber, as well as the time necessary to adduce evidence of crimes allegedly committed personally by Mr Ntaganda, which are not charged in the UDCC.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

GRANT leave to appeal the Impugned Decision on the First and Second Issues.

RESPECTFULLY SUBMITTED ON THIS 9TH DAY OF NOVEMBER 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands