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Date: **22 November 2016**

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 oral decision on
“Urgent request for stay of proceedings”**

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 Trial Chamber (“Chamber”)’s oral decision on “Urgent request for stay of proceedings” rendered on 16 November 2016 (“Impugned Decision”),¹ Counsel representing Mr Ntaganda (“Defence”) submit this:

**Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on
“Urgent request for stay of proceedings”
“Defence Request”**

INTRODUCTION

1. Mr Ntaganda seeks leave to appeal the Impugned Decision refusing to order an immediate adjournment of trial proceedings despite disclosure by the Prosecution of a substantial volume of Rule 77 material, on the basis of which it alleges, *inter alia*, that certain unidentified prospective Defence witnesses have been coached as part of a “broad scheme to pervert the course of justice”².
2. The issue for which leave to appeal is sought is: Whether the Chamber abused its discretion by declining to adjourn proceedings until the Defence has had a reasonable opportunity to review the late and massive disclosure by the Prosecution of unfiltered Rule 77 material obtained as a result of a thirteen-month Article 70 investigation with a view to (i) ensuring that all future cross-examinations are conducted in light of this vital disclosure and (ii) being able to offer submissions as soon as possible concerning the impact of the Article 70 investigation on the fairness of these proceedings which, may include proposing measures, if any are possible, that limit its prejudicial impact.
3. The Impugned Decision “involves an issue that would significantly affect the fair conduct of proceedings or the outcome of the trial” pursuant to Article

¹ T-159 p.1-8. Although the Defence request (ICC-01/04-02/06-1629-Red) was labelled as a request for stay of proceedings, the Chamber held that what was in fact being requested was an immediate adjournment and that it has therefore considered the urgent request for stay of proceedings on that basis and according to that standard.

² Prosecution Notice para.2.

82(1)(d) of the Statute. The fairness of the proceedings is engaged because: (i) elements of cross-examinations will be conducted without the Defence having analysed the huge volume of information in the possession of the Prosecution, it alleges destroys the credibility of those elements which, in turn, is the basis upon which some elements of cross-examination are conducted; (ii) the Defence has been deprived of the notice that would otherwise have been given pursuant to the review mechanism implemented by the Chamber during the restrictions litigation, whose purpose was precisely to preserve trial fairness; and (iii) the Prosecution's late disclosure is of a nature, scale and consequence – considering that in the present circumstances, the Defence is unable to take stock and assess the extreme volume of material disclosed and mitigate its effect unless an immediate adjournment is granted - that any further delay impacts on the fairness of the proceedings.

4. Immediate resolution of the issue may materially advance the proceedings. Proceeding with the cross-examination of eleven witnesses in error – a situation for which there is no subsequent remedy - would cause irreparable damage to the fairness of the trial proceedings leading to a mistrial. Immediate appellate resolution is accordingly necessary to “ensur[e] that the proceedings follow the right course,”³ and to provide a “safety net for the integrity of the proceedings.”⁴

BACKGROUND

5. On 2 September 2015, the trial of Mr Ntaganda began. 28 days later, the Prosecution obtained access to all non-privileged telephone conversations of Mr Lubanga and Mr Ntaganda, starting from 22 March 2013 onwards. Access to this material was ordered pursuant to a decision of the Single Judge of Pre-

³ *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, 13 July 2006 (“Leave to Appeal Judgment”), para.15.

⁴ Leave to Appeal Judgment, para.15.

Trial Chamber I without the knowledge of the Chamber⁵ and without the implementation of any independent screening mechanism to ensure that only information relevant to the alleged Article 70 breaches was being transmitted to the Prosecution team in this case.⁶

6. The Chamber “became aware of the fact that the Prosecution had been granted access to additional non privileged calls of the Accused” in May 2016.⁷
7. On two occasions, in June and September 2016, the Chamber urged the Prosecution to conclude its investigations in an expeditious manner and make the necessary disclosure to the Defence. The Trial Chamber emphasised that such investigations cannot be permitted to continue indefinitely in a manner that could impact the proceedings in Mr Ntaganda’s case.⁸
8. On 7 November 2016, the Prosecution informed the Defence of the material in its possession and that an Article 70 investigation had been underway for the previous 13 months. The Prosecution indicated that it would shortly be disclosing more than 20,000 audio recordings, contact and visitors logs, and summaries. On the same day, the Prosecution filed its Communication of the Disclosure of Evidence (“Prosecution Notice”).⁹
9. On 14 November 2016, the Defence submitted an urgent request seeking immediate adjournment of the proceedings in order to assess the extremely large volume of Rule 77 material disclosed by the Prosecution and evaluate the associated prejudice.¹⁰
10. On 15 November 2016, pursuant to the Chamber’s order, the Prosecution¹¹ and Legal Representatives for Victims¹² filed their responses.

⁵ T-159, p. 2 ln. 15-16.

⁶ ICC-01/04-02/06-1616, para.9.

⁷ T-159, p.2 ln. 15-16.

⁸ T-159, p.2 ln. 16-20.

⁹ ICC-01/04-02/06-1616.

¹⁰ ICC-01/04-02/06-1629.

¹¹ ICC-01/04-02/06-1636-Red.

11. On 16 November 2016, the Chamber rendered its oral decision rejecting the Defence request, holding that “a substantiated submission of ongoing prejudice which would be remedied by immediate adjournment – as opposed to possible other remedial measures – has not been established at this time.”¹³
12. On the same day the Defence applied orally for suspensive effect of the Impugned Decision for the purpose of seeking leave to appeal the same, until adjudication of its request. The Chamber rejected the Defence oral application, holding that the Defence “has not established a risk of irreparable harm.”¹⁴

I. Applicable Law

13. A decision is subject to interlocutory 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.

14. 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 a disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of the matter arising for determination in the judicial process. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.¹⁵

15. The issue must further be one that

its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding

¹² ICC-01/04-02/06-1635.

¹³ T-159 p. 7 ln. 18-21.

¹⁴ T-159, p.17 ln. 7-8.

¹⁵ Leave to Appeal Judgment, para. 9.

thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.¹⁶

16. 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”¹⁷ and “remove[] doubts about the correctness of the decision or map[] a course of action along the right lines.”¹⁸ The purpose of such an appeal is to avoid the consequences that would otherwise be embedded in the proceedings and which could “cloud or unravel the judicial process.”¹⁹

II. The Trial Chamber abused its discretion by declining to adjourn proceedings

17. An abuse of discretion can arise from the consideration of irrelevant facts, failing to consider relevant facts, a misappreciation of the relevant facts, or because the result is so unfair and unreasonable. These potential errors are subject to appellate review.²⁰ The Appeal Chamber’s functions “extend to reviewing the exercise of discretion by the [...] Chamber to ensure that the Chamber properly exercised its discretion.”²¹
18. The discretion in the present case directly impacts the right of the accused to have adequate time and facilities for the preparation of the Defence in the face of an extremely substantial non-disclosure involving a concrete and well-defined risk of prejudice. ICTY cases have been adjourned in circumstances involving non-disclosure of lesser magnitude.²²

¹⁶ Leave to Appeal Judgment, para. 14.

¹⁷ Leave to Appeal Judgment, para. 15.

¹⁸ Leave to Appeal Judgment, paras. 14-15.

¹⁹ Leave to Appeal Judgment, para. 16.

²⁰ *Kony et al.* OA 3 Judgment, para 80.

²¹ *Ibid.*

²² See *Prosecution v. Stanišić et al.*, Reasons for Decision Partially Granting the Stanišić Defence Motion for Suspension of Proceedings after the Summer Recess, IT-03-69-T, 28 September 2011; *Prosecution v. Karadžić*, Decision on Accused’s Motion for Suspension of Proceedings, IT-95-5/18-T, 18 August 2010.

19. Although a request for leave to appeal is addressed to the specific criteria set out in Article 82(1)(d), the nature of the alleged errors of law and fact in the present case illustrate the nature of the harm that will be suffered immediately and irremediably by not adjourning the proceedings.

A. The Chamber erroneously considered that the Defence's ability consult Mr Ntaganda mitigates the prejudice caused by the disclosure

20. The Chamber considered irrelevant factors in its determination whether to adjourn the proceedings. The Chamber's assessment that "the accused is best placed to advise the Defence team in relation to these applications, including in respect of whether lines of cross-examination being pursued may be compromised or prejudiced by his prior conduct"²³ constitutes the taking to account of a factor that does not mitigate the prejudice in question.

21. No meaningful consultation is possible without knowing the nature of the Prosecution's allegations. This is especially the case given the massive volume of Rule 77 material, and the lapse of time since the earliest recordings were made. Consultation in such circumstances does not mitigate the prejudice arising to any degree. This factor is, practically speaking, irrelevant or, in the alternative, was accorded much greater weight than it should have been given.

22. What is more, the material obtained by the Prosecution also comprises all of Thomas Lubanga's non-privileged conversations, which are apparently a significant aspect of its Article 70 investigation. Consultations with Mr Ntaganda cannot be of any assistance in reviewing this material.

B. The Chamber's consideration that the Defence had been notice by previous litigation on detention restrictions imposed on Mr Ntaganda was an irrelevant factor

23. The Chamber's finding that the Defence "must be presumed to have previously discussed the issue in some depth with Mr Ntaganda and to have been

²³ T-159 p.4, ln. 13-15.

conscious of it in conducting both its investigations and cross-examinations to date”²⁴ misappreciates the facts and/or constitutes an irrelevant factor.

24. The litigation on restrictions only involved a tiny sub-set of the telephone conversations in the possession of the Prosecution. The litigation on Mr Ntaganda’s restrictions was focused primarily on alleged intimidation of a limited number of witnesses. Moreover, witness coaching allegations were peripheral and vague in contrast with the substance of the information the Prosecution now claims to have at its disposal. The Prosecution Notice alleges a much broader scheme of witness coaching that throws into question a much wider range of Defence investigations, sources of information and potential witnesses.²⁵ Paradoxically, the Prosecution has not provided the Defence with the names of the witnesses who were allegedly coached.
25. Even if the Chamber’s presumption were correct, it constitutes an irrelevant consideration. Any measures taken by the Defence as a result of the restrictions litigation does not alter the fact that the Prosecution today, is in possession of a huge volume of Rule 77 material, including all of Bosco Ntaganda and Thomas Lubanga’s non-privileged conversations, on the basis of which it avers a much broader scheme to pervert the course of justice, involving additional potential Defence witnesses who would have been coached.
26. Defence investigations cannot continue in the light of the Prosecution’s allegations without knowing which potential Defence witnesses would have been coached and the nature of the coaching alleged to have taken place. Only then can the Defence have meaningful consultations with Mr Ntaganda in relation to these new allegations and adjust its investigations on this basis; all of which requires significant time and resources presently not available to the Defence.

²⁴ T-159, p.4 ln. 24 – p.5 ln.1.

²⁵ Prosecution Notice para. 2.

C. The Chamber erroneously applied a presumption that the majority of the conversations are related to “peripheral matters”

27. The Chamber misappreciated the facts in extrapolating from the restrictions litigation disclosure that the new and unrepresented massive disclosure of Rule 77 material probably only concerns “peripheral issues”²⁶. Whether the limited amount of material relied upon in the restrictions litigation concerned peripheral matters is an irrelevant consideration. It does not follow that the material obtained by Prosecution pursuant to its Article 70 investigation is also peripheral. Such a parallel cannot be made without assessing the material. Bearing in mind the nature of the Prosecution allegations of a “broad scheme to pervert the course of justice”²⁷ there is a very high likelihood that the material in the possession of the Prosecution is anything but peripheral. By drawing this parallel, there is a real and concrete risk, in the absence of an immediate adjournment, that trial proceedings will continue on a false presumption. If the Chamber’s presumption turns out to be in fact incorrect, it will be too late to restore the integrity of the proceedings and repair the resulting prejudice.

D. The Chamber misapprehended the impact the material would have on the cross-examination of witnesses

28. The Chamber failed to accord adequate or any weight to the prejudice to cross-examinations that will have to be conducted without an adjournment. The material disclosed not only could, but most likely does, affect the conduct of Defence cross-examination of witnesses. Numerous propositions are put to witnesses on an ongoing basis during cross-examination. These propositions are based on Defence investigations. Some of those propositions come from Prosecution disclosure, other propositions derive from Defence investigations, sources, and potential witnesses. Without an adjournment of the proceedings, the Defence is required to proceed on information that according to the Prosecution comes from persons deliberately obstructing the proper

²⁶ T-159, p. 5, ln. 23-24.

²⁷ Prosecution Notice para.2.

administration of justice. Recalling witnesses for further cross-examination is not an adequate remedy.²⁸ The Defence cannot undo its line of questioning once a witness has testified, nor can it undo the damage to the credibility of the witness or the integrity of its case in the eyes of even the most professional judges. In fact, there is no subsequent remedy possible if cross-examinations continue on the basis of tampered information unknown to the Defence, a consideration which the Chamber failed to accord proper weight.

E. The gravity of the disclosure further justifies an adjournment of the proceedings

29. The Chamber further did not attribute any or sufficient weight to the gravity of the disclosure violation. In the context of the restrictions litigation, the Chamber put in place a screening mechanism, the purpose of which was to ensure that the Prosecution did not come into possession of information to which it was not entitled and that might undermine trial fairness.
30. Regardless of the scope of the Prosecution Article 70 investigation, which presumably goes beyond obtaining the non-privileged conversations of Mr Lubanga and Mr Ntaganda, there was no reason for the Prosecution to depart from the mechanism put in place by the Chamber - without even informing the Chamber, which is responsible for ensuring the integrity of trial proceedings in this case, until May 2016 - and not to disclose the material obtained, which as a result would focus solely on relevant Article 70 material, on a rolling basis. Had the Prosecution not departed from the mechanism put in place, we would not be in the situation we are in today.
31. Despite the Prosecution's assertion that a well-founded and detailed request to the Pre-Trial Chamber for access to the Detention Centre recording and logs,

²⁸ See *Prosecution v. Karadžić*, Decision on Accused's Motion for Suspension of Proceedings, IT-95-5/18-T, 18 August 2010, para.7 ("The Chamber is also not satisfied that continuing with the trial proceedings, and allowing the accused to later recall certain witnesses for further cross-examination following his review of the seized material, if necessary, is sufficient, in this instance, to ensure his fair trial rights. Moreover, it will not be, in practical terms, conducive to the smooth conduct of the trial.")

which was approved by the Single Judge with due consideration of all relevant factors, no mechanism coming close to that put in place by the Chamber in the context of the restrictions litigation, appears to have been put in place.

32. Faced with an unprecedented massive disclosure of Rule 77 material, unfiltered, accumulated and processed over a thirteen-month period places the Defence in an untenable position. While the Chamber recognised that “the Defence must have the opportunity to review the material to the extent relevant, as well as to consider the circumstances of the Prosecution’s access to the material”²⁹ the Chamber failed to take into consideration the gravity of the Prosecution’s disclosure violation in terms of volume and unfiltered material, which must be review before proceedings can continue.

F. The Chamber did not consider the current schedule of proceedings

33. Although the Chamber concluded that “[i]t is undisputed that the Defence must have the opportunity to review the material to [...]”, appropriate consideration was not given to the inability of the Defence to perform this demanding and time-consuming task anytime soon in light of the current trial schedule.
34. Counsel and staff are all currently working on the cross-examination of the sixteen witnesses scheduled to testifying in a 29 trial day period in the context of the 7th evidentiary block.
35. The beginning of the next evidentiary block of an unprecedented duration, seven full weeks or 35 trial days, during which the Prosecution is expected to complete the presentation of its case, is scheduled for 16 January 2017, 30 days after the end of the present evidentiary block. There will be insufficient time between the 7th and 8th evidentiary block, which includes the winter recess, for the Defence team to review any significant portion of the massive volume of

²⁹ T-159, p. 5 ln. 8-10.

Rule 77 material disclosed by the Prosecution while simultaneously preparing for the cross-examination of the final Prosecution witnesses in this case.

36. Even if additional resources are granted by the Registry to undertake the imperatively and necessary review of the massive volume of Rule 77 material disclosed, this mammoth task cannot be accomplished without an immediate adjournment of the proceedings.
37. In this regard, the Chamber's holding that the information to be reviewed may of course impact aspects of Defence strategy but that such considerations could also be factored into the time granted for the preparation of the Defence case³⁰ constitutes a misappreciation of the current situation. The real and concrete risk of prejudice caused by the extremely late disclosure of a massive volume of unfiltered Rule 77 material by the Prosecution cannot be remedied after the Prosecution has closed its case.
38. Taking into consideration the inability of the Defence to conduct the necessary review of the material disclosed anytime soon and the need for this review to take place without delay, the Impugned Decision can only be seen as being manifestly unreasonable and an abuse of the Chamber's discretion.

III. The Decision Significantly Affects the Fairness of Proceedings

A. Continuing the cross-examination of witnesses without giving the Defence the opportunity to review the Rule 77 material disclosed impacts the fairness of the proceedings

39. The fairness of the proceedings is undoubtedly impacted by the continuation of the cross-examinations. The Defence is asked to continue its cross-examinations on the basis of investigations, potential witnesses and sources which, according to the Prosecution, are part of a "broad scheme to pervert the course of justice"³¹.

³⁰ T-159, p. 6 ln. 2-3.

³¹ Prosecution Notice para.2.

40. The prejudice to Mr Ntaganda bearing in mind that elements of cross-examination will be conducted without the Defence having analysed the massive Rule 77 material in the possession of the Prosecution it alleges destroys the credibility of those elements, is wholly unfair.
41. The fact that the material obtained by the Prosecution in the course of its Article 70 investigation was not vetted to ensure that the Prosecution did not come into possession of information that it was not entitled to and that no mechanism - as that put in place by the Chamber in the context of the restrictions litigation - was implemented, impacts in and of itself the fairness of the proceedings. Fairness demands that the Defence must know what is in the Prosecution's hand both in terms of relevant Article 70 material and material to which it was not entitled.
42. Taking into consideration the absence of subsequent remedy if a later review of the material disclosed reveals that cross-examinations proceeded in error and the necessity to determine whether the Prosecution came across information it was not entitled to have, it is imperative for the Defence to have the ability to review and analyse the Rule 77 material disclosed by the Prosecution immediately.
43. The Impugned Decision, declining to grant an immediate adjournment, deprives the Defence of the ability to conduct the necessary review and analysis of the huge volume of Rule 77 this material disclosed, anytime soon.³² As such, it also violates the right of Mr Ntaganda to have adequate time and facilities for the preparation of his defence - including the preparation and conduct of cross-examination - and accordingly impacts the fairness of proceedings.

³² See *Prosecution v. Stanišić et al.*, Reasons for Decision Partially Granting the Stanišić Defence Motion for Suspension of Proceedings after the Summer Recess, IT-03-69-T, 28 September 2011, para.16 (“[...] the Chamber generally accepted the factual representations by the Stanišić Defence that the disclosure recently reached a level that caused the Stanišić Defence to address the Chamber. The Chamber was aware that a large amount of disclosed documents creates difficulties to the Stanišić Defence and may necessitate reviews and investigations.”)

B. Immediate resolution may materially advance the proceedings

44. Immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings and ensure that the proceedings follow the right course.³³
45. Taking into consideration the gravity and the nature of the Prosecution allegations arising from its Article 70 investigation, *i.e.* that a number of potential Defence witnesses have been coached in the context of a broad scheme to pervert the course of justice, there is a real and concrete risk that the massive Rule 77 material disclosed by the Prosecution could reveal that elements of cross-examinations conducted by the Defence have been affected, without knowledge of the Defence.
46. Proceeding with the cross-examination of eleven witnesses in error, without the knowledge of the Defence, a situation for which there is no subsequent remedy, would cause irreparable damage to the fairness of trial proceedings, possibly leading to a mistrial.
47. With the aim of safeguarding the integrity of the proceedings, immediate resolution of the issue, namely:

Whether the Chamber abused its discretion by declining to adjourn proceedings until the Defence has had a reasonable opportunity to review the late and massive disclosure by the Prosecution of unfiltered Rule 77 material obtained as a result of a thirteen-month Article 70 investigation with a view to (i) ensuring that all future cross-examinations are conducted in light of this vital disclosure and (ii) being able to offer submissions as soon as possible concerning the impact of the Article 70 investigation on the fairness of these proceedings which, may include proposing measures, if any are possible, that limit its prejudicial impact.

³³ Leave to Appeal Judgment, para.15.

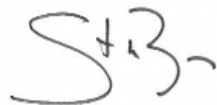
may materially advance the proceedings as it would remove doubts about the necessity to proceed with the review of the Rule 77 material disclosed by the Prosecution without any delay and whether immediately adjourning the proceedings is required for this purpose.

48. Unless the issue is immediately resolved on appeal, the cloud over this case moving forward could unravel the entire proceedings.

CONCLUSION

49. The issue, as described above, is appealable and not a mere disagreement between the parties. It also seriously impacts the fair conduct of the proceedings. Immediate resolution of the issue may materially advance the proceedings by preventing, if this is still possible, irreparable prejudice possibly leading to a mistrial.

RESPECTFULLY SUBMITTED ON THIS 22TH DAY OF NOVEMBER 2016



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