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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

Joint Response by the Common Legal Representative for the Former Child Soldiers and the Common Legal Representative for the Victims of the Attacks to the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on 'Urgent request for stay of proceedings'"

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative for the Former Child Soldiers and the Common Legal Representative for the Victims of the Attacks (the “Legal Representatives”) hereby submit their joint response to the “Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on ‘Urgent request for stay of proceedings’” (the “Defence Request” or the “Request”).¹

2. In essence, the Defence Request addresses the substance of the appeal and does not meet the legal criteria set out in article 82(1)(d) of the Rome Statute. The arguments and the issue “identified” raise, at best, a mere disagreement with the Chamber’s oral decision on the Defence request for stay of proceedings. The Request must therefore be rejected.

II. PROCEDURAL BACKGROUND

3. On 7 November 2016, the Prosecution publicly filed the “Prosecution’s Communication of the Disclosure of Evidence obtained pursuant to Article 70”² notice.

4. On 14 November 2016, the Defence urgently requested a stay of proceedings (the “Defence Request for Stay of Proceedings”).³

5. After having been directed to respond to the Defence Request for Stay of Proceedings by the filing deadline the next day,⁴ the Prosecution and Legal

¹ See the “Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on ‘Urgent request for stay of proceedings’”, No. ICC-01/04-02/06-1645, 22 November 2016 (the “Defence Request” or the “Request”).

² See the “Prosecution’s Communication of Disclosure of Evidence obtained pursuant to Article 70”, No. ICC-01/04-02/06-1616, 7 November 2016.

³ See the “Urgent Request for Stay of Proceedings”, No. ICC-01/04-02/06-1629-Conf, 14 November 2016. A public redacted version of the Request was filed on the same day. See the “Public redacted version of ‘Urgent Request for stay of Proceedings’”, No. ICC-01/04-02/06-1629-Red, 14 November 2016.

Representatives filed their respective responses opposing the Defence Request for Stay of Proceedings on 15 November 2016.⁵

6. On 16 November 2016, Trial Chamber VI (the “Chamber”) rendered an oral decision on the Defence’s “Urgent Request for Stay of Proceedings” (the “Decision” or the “Impugned Decision”),⁶ rejecting the request for immediate adjournment.⁷ The Chamber found 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 and the Defence request is therefore rejected”*.⁸ The Chamber also directed the Prosecution to assist the Defence in disclosing to the latter the relevant material in an identified, categorised way.⁹ The Defence then (i) gave notice that it would seek leave to appeal the decision,¹⁰ and (ii) made an oral application for suspensive effect of the Impugned Decision¹¹ until such time the Defence submits its request for leave of appeal.¹²

7. The Prosecution¹³ and the Legal Representatives opposed the Request for suspensive effect.¹⁴

⁴ See transcript of the hearing held on 14 November 2016, No. ICC-01/04-02/06-T-157-Red-ENG, p. 8, lines 4-5.

⁵ See the “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 Defence ‘Urgent Request for Stay of Proceedings’”, No. ICC-01/04-02/06-1635-Conf, 15 November 2016 and the “Prosecution’s response to the ‘Urgent Request for Stay of Proceedings’ (ICC-01/04-02/06-1629-Conf”, No. ICC-01/04-02/06-1636-Conf, 15 November 2016.

⁶ See the transcript of the hearing held on 16 November 2016, No. ICC-01/04-02/06-T-159-CONF-ENG ET, p. 2, line 13 to p. 7, line 24 (open session).

⁷ *Idem*, p. 7, lines 18-21.

⁸ *Ibid.* We underline.

⁹ *Ibid.*, p. 7, lines 6-17.

¹⁰ *Ibid.*, p. 8, lines 14-15 to p. 11, line 11.

¹¹ *Ibid.*, p. 8, lines 16 to p. 11, line 11.

¹² *Ibid.*, p. 11, lines 5-9.

¹³ *Ibid.*, p. 11, lines 14 to p. 12, line 19.

¹⁴ *Ibid.*, p. 12, lines 22-25 to p. 13, lines 1-4 and p. 13, lines 6-20.

8. On 17 November 2016, the Prosecution filed an “Addendum to the ‘Prosecution’s Communication of the Disclosure of Evidence obtained pursuant to Article 70’, 7 November 2016, ICC-01/04-02/06-1616”.¹⁵

9. On 22 November 2016, the Defence filed the “Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on ‘Urgent request for stay of proceedings’”.¹⁶

III. SUBMISSIONS

1. The criteria set forth in article 82(1)(d) of the Rome Statute

10. Article 82(1)(d) of the Rome Statute stipulates that “*a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*” may be appealed.

11. The jurisprudence of this Court clarified the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to establish their cumulative existence for leave to appeal to be granted.¹⁷ In particular, the Appeals Chamber previously held that “[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may

¹⁵ See the “Addendum to the ‘Prosecution’s Communication of the Disclosure of Evidence obtained pursuant to Article 70’, 7 November 2016, ICC-01/04-02/06-1616”, No. ICC-01/04-02/06-1637, 17 November 2016.

¹⁶ See the Request, *supra* note 1.

¹⁷ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 21. See also “Judgment on the Prosecutor’s Application for extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision denying Leave to Appeal” (Appeals Chamber”), No. ICC-01/04-168 OA 3, 13 July 2006, paras. 8 and 14.

state such an issue for consideration by the Appeals Chamber”.¹⁸ It also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁹ and defined the term “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”.²⁰ Accordingly, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason to be granted leave to appeal.²¹

12. The Appeals Chamber further considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.²² Indeed, “the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal”,²³ and “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.²⁴

13. A Chamber presented with an application for leave to appeal must not examine or consider “arguments on the merits or the substance of the appeal”, since these

¹⁸ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 17, para. 8.

¹⁹ *Idem*, para. 9.

²⁰ *Ibid.*

²¹ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

²² See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 17, para. 10.

²³ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the “Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

²⁴ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *supra* note 23, para. 4. See also the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

arguments may be more appropriately considered by the Appeals Chamber when and if leave to appeal is granted.²⁵

14. Moreover, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of “fairness” must be understood as referring to situations “*when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*”.²⁶ In turn, “expeditiousness” must be read as “*closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*”.²⁷

15. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²⁸

2. The Defence improperly addresses the merits of the appeal, rather than the criteria under article 82(1)(d) of the Statute

16. It is well-established that, when examining requests for leave to appeal, the relevant Chamber should limit its assessment to the requirements explicitly set out in article 82(1)(d) of the Rome Statute. In this regard, various Chambers have confirmed

²⁵ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 22.

²⁶ See *inter alia* the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.

²⁷ *Idem*, para. 18.

²⁸ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 17, para. 13.

the irrelevance of addressing arguments concerning the merits of the appeal before leave is granted.²⁹

17. The Request largely contains arguments pertaining to the merits of the appeal. The Defence devotes a significant part of its Request to discussing how the Chamber allegedly “*abused its discretion*” by not adjourning the proceedings;³⁰ how it erred in considering that “*the Defence’s ability [to] consult Mr Ntaganda mitigates the prejudice caused by the disclosure*”;³¹ how it took into account irrelevant factors by considering that “*the Defence had been [on] notice by previous litigation on detention restrictions*”;³² how it “*erroneously applied a presumption that the majority of the conversations are related to ‘peripheral matters’*”;³³ how it “*misapprehended the impact the material would have on the cross-examination of witnesses*”;³⁴ how the “*gravity of the disclosure further justifies an adjournment of the proceedings*”;³⁵ and how the Chamber allegedly failed to “*consider the current schedule of proceedings*”.³⁶

18. None of the above arguments relates, or is even remotely relevant, to the assessment under article 82(1)(d) of the Rome Statute. Rather, they either repeat the submissions already litigated before the Chamber or lay out the Defence’s prospective grounds of appeal. Taken together, these arguments may well qualify as

²⁹ See *inter alia* the “Decision on the Defence Request for Leave to Appeal” (Pre-Trial Chamber II), No. ICC-01/04-02/06-207, 13 January 2014, para. 8; the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”(Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, unsealed pursuant to Decision No. ICC-02/04-01/05-52 dated 13 October 2005, para. 15; the “Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II), No. ICC-02/04-112, 19 December 2007, para. 16. See also the “Decision on two requests for leave to appeal the ‘Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application’” (Trial Chamber I), No. ICC-01/04-01/06-2779, 4 August 2011, para. 10.

³⁰ See the Request, *supra* note 1, paras. 17 *et seq.*

³¹ *Idem*, paras. 20 *et seq.*

³² *Ibid.*, paras. 23 *et seq.*

³³ *Ibid.*, para. 27.

³⁴ *Ibid.*, para. 28.

³⁵ *Ibid.*, paras. 29-32

³⁶ *Ibid.*, paras. 33-38.

a “draft appeal brief”. Moreover, requests for leave to appeal should not serve as a means for re-litigating issues already settled by the Chamber. This includes, for instance, the Defence’s arguments concerning the impact of the disclosure on the fairness of the proceedings;³⁷ the fact that the additional materials disclosed would affect the cross-examination of Prosecution witnesses;³⁸ the length of the prosecution investigation;³⁹ the period of non-disclosure;⁴⁰ and the volume of the material disclosed.⁴¹

19. In line with the Court practice, the Chamber should not therefore consider the Defence’s substantive arguments contained in the Request. Doing so would not only improperly put the Chamber in a position where it has to review the merits of its own decisions, but would also interfere with the Appeals Chamber’s powers to carry out appellate review.

20. The only avenue where any such arguments may be re-considered by the Chamber would be in the context of a request for reconsideration. However, the Defence does not frame the Request as one for reconsideration and in the absence of new facts, or change in circumstances, there are no reasons justifying a modification or amendment of the Chamber’s previous findings. Indeed, the Chamber already established that *“while properly covered by the powers of a chamber, reconsideration of its own decisions is an exceptional measure which will only be taken when a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice”*.⁴² Reconsideration is, therefore, an exceptional remedy that can only be granted in

³⁷ See the “Urgent Request for Stay of Proceedings”, *supra* note 3, para. 2.

³⁸ *Idem*, para. 5.

³⁹ *Ibid.*, para. 7.

⁴⁰ *Ibid.*, paras. 7-8.

⁴¹ *Ibid.*, para. 13.

⁴² See the “Decision on the Defence request for reconsideration and clarification”, (Trial Chamber VI), No. ICC-01/04-02/06-483, 27 February 2015, para. 13. See also, *inter alia*, the “Decision on Defence request for reconsideration of oral ruling on admission of a document for impeachment purposes” (Trial Chamber VI), No. ICC-01/04-02/06-1473, 3 August 2016, para. 7.

limited circumstances and none of the requirements for granting such a request are met in the present instance.

3. The Request does not meet the criteria of article 82(1)(d) of the Rome Statute

a. The “issue” identified does not arise from the Impugned Decision

21. The Legal Representatives submit that the Defence fails to identify an “issue” arising from the Impugned Decision, as required by article 82(1)(d) of the Rome Statute. This is apparent from the way in which the purported “issue” is phrased.

22. The issue as framed is : “[w]hether 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.”⁴³

23. The Impugned Decision did not address the general impact on the Defence cross-examination of future witnesses, nor did it address the issue of authorising submissions on the impact of article 70 investigations. These two aspects of the “issue” clearly do not arise from the Impugned Decision. As the Chamber expressly stipulated, the scope of the Impugned Decision is limited to “*the question of whether an immediate adjournment is warranted*”, and the Chamber stressed that “*nothing in this decision should be read as prejudicing any further request from either party related to the matters raised in the Prosecution notice*”.⁴⁴ Likewise, the Chamber did recognise the relevance of the materials disclosed, as well as the right of the Defence to review

⁴³ See the Request, *supra* note 1, para. 2.

⁴⁴ See the transcript of the hearing held on 16 November 2016, *supra* note 6, p. 4, lines 1-3.

them.⁴⁵ The Defence's view that it is necessary to conduct a full review of the entirety of the materials before proceeding with any of the remaining Prosecution witnesses constitutes a mere disagreement with the Chamber's Decision, and does not, in any event, give rise to an appealable issue that would warrant appellate review. Such disagreement is further reflected in the Defence's inability to specify any concrete prejudice the Impugned Decision will have to its cross-examination of the specific prosecution witnesses scheduled to testify during this evidentiary block.⁴⁶

24. Furthermore, the Chamber's consideration was limited to whether an *immediate* postponement is warranted, as opposed to the possibility of a possible future adjournment in general. The Defence's contention that the "*gravity of the disclosure further justifies an adjournment of the proceedings*"⁴⁷ does not therefore arise from the Impugned Decision. Likewise, contrary to the Defence assertions,⁴⁸ the Impugned Decision does not make a definitive ruling on the current schedule of proceedings.

b. The "issue" identified by the Defence does not affect the fair and expeditious conduct of the proceedings

25. Since, as demonstrated *supra*, the issue identified by the Defence does not arise from the Decision, the Request must be dismissed on this basis alone. Assuming *arguendo* that said issue arises from the Decision, the Legal Representatives oppose the Defence's contention that it significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial.

⁴⁵ *Idem*, p. 5, lines 8-10: "It is undisputed 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 [...]".

⁴⁶ *Ibid.*, p. 5, lines 5-8: "The Chamber further acknowledges the fact that the Defence is understandably not currently in a position to identify specific instances of concrete prejudice arising from the content of the disclosed material".

⁴⁷ See the Request, *supra* note 1, paras. 29 *et seq.*

⁴⁸ *Idem*, paras. 33 *et seq.*

26. As indicated by the Chamber,⁴⁹ the Defence did not establish any concrete prejudice arising from the material disclosed. It is therefore speculative to assess at this stage whether the Impugned Decision may affect the fairness of the proceedings.

27. Moreover, and contrary to the Defence's submissions,⁵⁰ the Defence is not precluded from reviewing the disclosed material.

28. Further, despite the lack of proof of concrete prejudice to the accused or to the fairness of proceedings, the Chamber did take preventive measures aimed at mitigating any potential prejudice arising from the disclosure, recognising in particular the possible need for "*additional assistance*" and resources, and instructed the Registry to take appropriate action in this regard.⁵¹

29. In light of all these factors, the Defence cannot reasonably argue that the fairness of the proceedings is affected by the Impugned Decision.

c. A "postponement of the proceedings" would not "materially advance the proceedings", nor would an appeal lead to granting the relief sought

30. The Legal Representatives submit that, as demonstrated *supra*, since the "issue" identified by the Defence in the Defence Request does not affect the fair and expeditious conduct of the proceedings it is unnecessary to consider whether an immediate resolution by the Appeals Chamber of the said issue may materially advance the proceedings.⁵² However, if by extraordinary, the Chamber were to find that the "issue" identified by the Defence arises from the Impugned Decision and affects the fair and expeditiousness of the proceedings or the outcome of the trial, the

⁴⁹ See the transcript of the hearing held on 16 November 2016, *supra* note 6, p. 5, lines 5-8.

⁵⁰ See the Request, *supra* note 1, paras. 39 *et seq.*

⁵¹ See the transcript of the hearing held on 16 November 2016, *supra* note 6, p. 6, lines 12-15.

⁵² See *inter alia* the "Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing" (Pre-Trial Chamber I), No. ICC-02/11-01/11-530, 8 October 2013, para. 42.

Legal Representatives posit that contrary to the Defence's assertions,⁵³ an immediate postponement of the presentation of evidence toward the middle of a major evidentiary block would not materially advance the proceedings.

31. To the contrary, such a postponement would not only affect all the logistical preparations in place, but would also disrupt the schedule of this trial, the schedule of other ongoing trials, the protective measures in place, as well as the preparations of the parties and participants in these proceedings. Moreover, any postponement would be contrary to the right of the victims to the truth and Justice without undue delay.

32. In any event, authorising an appeal would not lead to granting the relief sought by the Defence since granting the Request would not *per se* result in the immediate adjournment of the proceedings.

FOR THE FOREGOING REASONS the Legal Representatives respectfully request that the Chamber dismiss the Request.



Dmytro Suprun
Common Legal Representative for the
the Victims of the Attacks



Sarah Pellet
Common Legal Representative for
Former Child soldiers

Dated this 28th Day of November 2016

At The Hague, The Netherlands

⁵³ See the Request, *supra* note 1, paras. 44 *et seq.*