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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

Public redacted version of the "Prosecution's response to the Defence application for leave to appeal the oral decision on its 'Urgent request for stay of proceedings'" 28 November 2016, ICC-01/04-02/06-1660-Conf

Source: **Office of the Prosecutor**

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

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I. Introduction

1. The Defence's application[1] seeking leave to appeal Trial Chamber VI's[2] decision denying an adjournment of the trial[3] should be dismissed because it does not meet the threshold requirements for leave to appeal under article 82(1)(d) of the Rome Statute.

2. First, the issue is not appealable because it expresses no more than a disagreement with the Chamber's proper exercise of its discretionary power, under article 64 of the Statute, to govern the conduct of proceedings before it. Nor, because the Chamber's Decision was confined to denying the specific remedy of immediate adjournment, does it even arise from the Decision.

3. Second, the Defence fails to demonstrate either that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and that the Appeals Chamber's immediate intervention may materially advance the proceedings. Both the original request and Application are based on speculation and assumption, made prior to having concretely assessed the disclosed material or, apparently, without consulting the Accused. And both ignore the significant advance notice the Defence has had of allegations that the Accused was coaching Defence witnesses, which should have resulted in enhanced measures to safeguard Defence investigations. Further, the Chamber held that it would consider any subsequent requests at such time as the Defence's concerns materialize. Accordingly, appellate intervention at this stage is unwarranted.

[1] ICC-01/04-02/06-1645-Conf ("Application").
[2] ("Chamber").
[3] ICC-01/04-02/06-T-159-CONF-ENG, p.2, ln 12 to p.7 ln 21 ("Decision").

II. Level of Confidentiality

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this filing is submitted as confidential because it refers to confidential decisions that have not yet been made public. The Prosecution will file a public redacted version of this filing in due course.

III. Submissions

A. The proposed issue is not appealable

a. The proposed issue is a mere disagreement with the Decision

5. The Application fails to identify an appealable issue arising from the Decision. An "issue" is an identifiable and discrete subject or topic requiring a decision for its resolution and *not merely a matter over which there is disagreement or conflicting opinion*.[4]

6. The decision whether to grant an adjournment of trial is within the Chamber's discretionary powers under article 64 of the Statute.[5] Indeed, the Defence acknowledges the discretionary nature of the Chamber's decision.[6]

7. The Chamber's decision is strictly confined to the Defence's request for an immediate adjournment. The Chamber did not preclude any other future remedies. Indeed, to the extent that the Issue explores other remedies, it does not even arise from the Decision. Moreover, the Chamber's reasoning as framed by the Defence's request, was based on two sub-issues: (i) first, alleged *potential* prejudice in cross-examining Prosecution witnesses; and (ii) second, alleged need to assess the *potential*

[4] *See* ICC-01/04-168 OA3, para. 9; ICC-02/11-01/15-117 paras. 19-22; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27. (emphasis added)
[5] *See* ICC-01/09-02/11-908, para.76: "[…] the Chamber observes that an adjournment is a discretionary remedy arising from the Chamber's responsibility to control the conduct of proceedings in a fair and expeditious manner."
[6] Application, para.17.

impact on the fairness of the proceedings so that, if any unfairness is eventually identified, to consider appropriate remedies as soon as possible.[7] Although it denied the Defence's request for an immediate adjournment, the Chamber expressly stated that nothing in the decision "should be read as prejudicing **any further request** from either party related to the matters raised in the Prosecution notice" [emphasis added].[8] The Defence fails to acknowledge this finding.

8. In reaching its decision on the first sub-issue, the Chamber considered relevant factors, namely and critically, that the disclosed information and the Prosecution's allegations emanate from the Accused's own telephone conversations. As such, the Accused himself is best placed to advise the Defence team as to whether any lines of cross-examination have been or will be compromised by his prior conduct or not.[9] The Defence disagrees with this decision but fails to show an abuse of the Chamber's discretion.

9. Indeed, and contrary to the Defence's arguments,[10] the Accused *is* best placed to advise whether he has engaged with others in a scheme to coach witnesses and advance false lines of defence and whether the witnesses scheduled to testify in this block have been affected in this regard. The Chamber properly and reasonably considered that *the Accused*, not the Prosecution, is of fundamental importance to the Defence to understand the content and context of his own telephone conversations. The Accused may have engaged in conduct aimed at advancing false lines of defence; he cannot in good faith claim that he is prejudiced and needs time because he does not yet know the extent to which his schemes have been uncovered.

10. In any event, the Prosecution indicated in its response to the application for a stay of proceedings that it would disclose the summaries of telephone conversations

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[7] Decision, p.3, line 25 to p.4, line 9.
[8] Decision, p.4, lines 2-3.
[9] Decision, p.4, lines 12-18.
[10] Application, para.20.

it reviewed[11] and the Chamber ordered the Prosecution to provide additional information to facilitate the Defence's review.[12] Again, the Defence fails to note these findings.

11. In deciding the second sub-issue, the Chamber considered relevant factors, including the voluminous nature of the disclosed material, that the Defence will have to review the material in order to identify any concrete prejudice or unfairness, that the disclosed information does not directly relate to the charges and that allegations of coaching by the Accused using his telephone communications has been known to the Defence since well before the start of trial. And, importantly, that Defence counsel is presumed to have discussed the issue with the Accused and to have been conscious of it when investigating and cross-examining Prosecution witnesses.[13] The Chamber also considered the Defence's arguments on the length of the article 70 investigation and the temporary non-disclosure of the detention centre calls and records. It found that none of these grounds warranted an immediate adjournment of the trial. It further noted that some of these grounds might be relevant "at the time of arguing specific instances of concrete prejudice".[14] Once again, the Defence disagrees with this decision but fails to demonstrate that the Chamber abused its discretion. Nor does it acknowledge that future applications are neither precluded nor predetermined.

b. *The Defence improperly and incorrectly advances the merits of a potential appeal*

12. All six arguments advanced to purportedly show that the Chamber abused its discretion[15] lack factual and legal foundation and must fail. Moreover, the Defence significantly, and improperly, advances the merits of any prospective appeal,

[11] Decision, p.6, lines 20-23.
[12] Decision, p.7, lines 10-17.
[13] Decision, p.4, line 23 to p.5, line 1.
[14] Decision, p.6, lines 6-7.
[15] Application, paras.20-38.

without first meeting the leave to appeal test. The Prosecution addresses these arguments only to the extent that they may be viewed through the article 82(1)(d) lens.

13. First, as set out above, the Chamber properly considered that the Accused is best-placed to advise the Defence team on the impact his conversations and any scheme he directed to coach witness will have on the cross-examination of Prosecution witnesses currently scheduled to testify during the seventh evidentiary block.[16] The Defence's suggestion that it cannot meaningfully consult with the Accused because it does not know the nature of the Prosecution's allegations,[17] completely ignores the Prosecution's prior allegations that the Accused and others were involved in a scheme to coach witnesses and the Chamber's own preliminary findings on the issue.

14. The Defence's arguments about the time needed to review Thomas Lubanga's calls are misplaced. Indeed, the Prosecution does not allege that Thomas Lubanga's involvement was done without the Accused's knowledge. As the Chamber held, and contrary to the Defence's submission,[18] the Accused cannot sustainably argue that his own participation in the scheme - that also engaged other actors on his behalf - unfairly prejudices his own rights.[19] Nor will the Prosecution's provision of the names of people it alleges were coached provide greater insight than the Accused himself can into the extent of the problem, or the lack of a problem.[20] The Defence has not substantiated its assertion that meaningful consultations with the Accused cannot take place until the Prosecution discloses the identity of potentially coached witnesses.[21]

[16] Application, paras.20-22.
[17] Application, para.21.
[18] Application, para.22.
[19] Decision, p.5, lines 1-3.
[20] Application, paras.24, 26.
[21] Application, para.26.

15. Second, and closely linked to its first argument, the Defence claims that the Chamber erred in considering the prior notice of allegations of coaching because, it argues, this is an irrelevant factor.[22] To the contrary, the Chamber rightly considered the import of the significant, advance notice of allegations of coaching,[23] and correctly concluded that the Defence must have considered these early allegations when conducting its investigations.[24]

16. These allegations of coaching were not "peripheral and vague"[25]; they were specific, timely and troubling. They not only included allegations by the Prosecution, they also included several serious findings by the Chamber based on a review of the Accused's telephone conversations from the Detention Centre.[26] The Defence had a sufficient basis to ensure that its investigations were not tainted by witness coaching.

17. Nor has the Defence shown that the significant, advance notice of coaching allegations was "irrelevant"[27] to the Chamber's decision. The Defence request must be put in its proper context, as the Chamber did: the Defence is alleging potential prejudice due, in part, to the timing of the disclosure alleging a vast scheme of witness interference, including coaching. It should be beyond dispute that information related to the length of time the Defence has known of these issues is critical to a proper consideration of the Defence's request for an immediate

[22] Application, paras.23-26.
[23] Decision, p.4, lines 19-23.
[24] Decision, p.4, lines 23-25.
[25] Application, para.24.
[26] In July 2015, the Chamber held: [REDACTED]; In August 2015: "*the Chamber finds that reasonable grounds exist to believe that the use of codes was meant to disguise attempts to disclose confidential information or to interfere with witnesses, including […] by way of* ***coaching***". […]*The Chamber considers that* ***coaching of witnesses*** *is a form of witness interference and has the potential to severely affect the integrity of the proceedings. […] the Chamber nonetheless finds there to be reason to believe that Mr Ntaganda instructed his interlocutors* ***to coach witnesses****, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by Mr Ntaganda and the necessity of synchronising the stories.*" (ICC-01/04-02/06-785-Conf-Exp, paras.50 and 56); on 7 September 2016, in the context of ongoing litigation to restrict the Accused's telephone communications from the detention centre that "*in a context where the Chamber has previously found there to be reason to believe* ***that Mr Ntaganda both engaged in witness coaching himself****, and directed his interlocutors to do so, the fact that preparations for any defence case should currently be actively underway is a relevant consideration*". (ICC-01/04-02/06-1494-Conf-Exp-Red, para.30). (emphasis added)
[27] Application, para.26.

adjournment. It was incumbent on the Defence, having had such advance notice of a potential issue, to implement concrete measures to avoid, or at least minimize, the impact of potential coaching to its case.

18. Third, the Defence has not shown that the Chamber erred in considering that, based on its own previous review of a limited number of the Accused's telephone conversations, significant portions will not have direct materiality to these proceedings but will, rather, relate to peripheral issues.[28] The Chamber was plainly not stating that it had reviewed the recently disclosed recordings in full, nor was it in any way affirming the materiality of what *is* in fact contained in them. The Chamber was clear that this will require some level of review with the Accused. The Defence expresses a contrary opinion, but does not demonstrate any error in the Chamber's reasoning. Nor was this the sole, or even primary, basis for the Chamber's decision.

19. Fourth, the Defence advances flawed arguments on the *potential*[29] impact of the disclosure to its cross-examination of the witnesses in the current evidentiary block.[30] Yet again, the Defence fails to acknowledge that it has been on notice since August 2014 that the Prosecution alleged the Accused was abusing his telephone privileges to communicate with others in possible violation of article 70 of the Statute, and since the first Registry report on 10 March 2015 of allegations that he coached potential Defence witnesses.[31] And the Chamber made serious preliminary findings of coaching. It is plain that the Prosecution did not have access to more information than the Accused in relation to these allegations, and the limited information it did have access to demonstrate the likelihood that potential Defence witnesses had been coached prior to meeting Defence lawyers. The Defence, again, fails to set out any of

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[28] Application, para.27.
[29] Application, para.28 "The material disclosed *not only could, but most likely does*, affect the conduct of Defence cross-examination of witnesses" (emphasis added).
[30] Application, para.28.
[31] ICC-01/04-02/06-658, paras.28-29.

the measures it took to safeguard its ongoing investigations in the wake of this information.

20. Fifth, the Defence challenges the Decision by arguing that the Chamber failed to attribute any or sufficient weight to the gravity of the disclosure. In light of the Chamber's clear findings, this is no more than a mere disagreement. It relies on an incorrect presumption that the Prosecution had not informed the Chamber of its request to the Pre-Trial Chamber until May 2016, and that somehow this caused prejudice to the Defence.[32] [REDACTED].[33] The Prosecution therefore acted accordingly. And the Defence merely disagrees with the course of action at this belated stage.

21. The Defence's reliance on two cases from the ICTY is inapposite. Neither of the cases deals with a situation of disclosure of the Accused's own material further to allegations that the Accused was coaching witnesses and where the Accused could independently assess the impact of such disclosure to his case. On the contrary, both cases relate to disclosure of information – both incriminating and potentially exculpatory - directly relevant to the charges.[34]

22. Although the Defence continues to characterise the Prosecution's disclosure of the telephone records as "late" and "untimely",[35] it fails to acknowledge: (i) the Chamber's decision authorising non-disclosure of certain summaries of the Accused's conversations under rule 81(2); (ii) the imperative for confidentiality in investigating alleged crimes under article 70; (iii) the fact that there was a five-month delay before the first summaries were available; and, most critically, (iv) the fact that the disclosure relates to *the Accused's own recorded communications* and *his own alleged*

[32] Application, paras.6 and 30.
[33] [REDACTED].
[34] *Prosecutor v. Karadzic*, Decision on Accused's Motion for Suspension of Proceedings, IT-95-5 18-T, 18 August 2010; *Prosecutor v. Stanisic*, Reasons for partially granting the Stanisic Defence Motion for suspension of proceedings after the summer recess, IT-03-69-T, 28 September 2011.
[35] Application, paras.2, 3, 18, 29, 32.

conduct in coaching and interfering with witnesses. In any event, the Chamber considered this point and properly held that it was not a factor that militated in favour of an immediate adjournment of proceedings, although it could be a factor in relation to future requests for specific relief at such time as the Defence can articulate any concrete prejudice.[36] Accordingly, the Defence has not established that the Chamber either failed to consider this factor or abused its discretion.[37] Appellate review is, therefore, unwarranted.

23. Nor does the Decision predict the outcome of a properly founded request for particular remedies in the future.

24. Finally, the Defence argues that the Chamber did not consider the current schedule of proceedings in reaching its decision; in particular, the alleged limited time the Defence will have to review the disclosed material between the date of disclosure and the end of the Prosecution's case.[38] But the Chamber did consider this factor: it acknowledged the voluminous nature of the disclosed material and that the Defence must have the opportunity to review the material and assess the impact and consider potential remedies, if any are required.[39] The Chamber did not consider that this necessitated an immediate adjournment because: (i) significant portions of the recordings will not have any direct materiality to these proceedings; (ii) the Defence has been on notice of these allegations since before the start of trial; (iii) any impact to Defence strategy can be factored into the time granted for the preparation of the Defence case.[40] The Chamber further recognised that the review of the disclosed material would likely require additional resources and noted that any requests should be directed to the Registry and that the Prosecution should also provide

[36] Decision, p.6, lines 6-7.
[37] Application, paras.29-32.
[38] Application, paras.33-38.
[39] Decision, p.5, lines 4-14.
[40] Decision, p.5, line 11 to p.6, line 3.

reasonable information as may assist the Defence.[41] It was not unreasonable or abusive for the Chamber, in its discretion, to consider that even if Defence strategy were affected, the Accused himself was not prejudiced by his own attempts to frustrate the trial. Nor has the Defence shown that it is so.

25. The Defence, far from identifying an appealable issue, merely expresses its dissatisfaction and disagreement with the Chamber's ruling. For these reasons, the Application should be dismissed.

c. The other requirements of article 82(1)(d) are not met

i. The issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

26. The Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.[42] Since the Issue is not appealable, it should be dismissed without further consideration.

27. Nevertheless, the Defence has failed to demonstrate that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

28. The Defence argues that fairness of the proceedings is "undoubtedly impacted"[43] by continuing to cross-examine witnesses on the basis of investigations, witnesses and sources that may be tainted in whole or in part and that this is "wholly unfair".[44] The unfairness of which the Defence complains has not yet been established and, in any event, it cannot be accepted that a situation of the Accused's own making has created unfair prejudice for him.

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[41] Decision, p.6, lines 12-17.

[42] ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria are cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

[43] Application, para.39.

[44] Application, para.40.

29. The Defence also argues that it is the lack of a system to "vet" the Accused's telephone conversations that has created unfairness, because "fairness demands that the Defence must know what is in the Prosecution's hands both in terms of relevant article 70 material and material to which it was not entitled".[45] An Accused cannot engage in criminal conduct aimed at interfering with the course of justice and subsequently claim that he has a right to advance notice as to whether his conduct has been discovered in the form of disclosure. Once again, the Chamber was not unreasonable or abusive in concluding that the Accused is able to advise the Defence on any impact to strategy and cross-examination and that "the Defence cannot now sustainably argue that a situation of the accused's own making unfairly prejudices his rights".[46] Accordingly, the Defence argument that not granting an immediate adjournment violates the Accused's right to have time and facilities for the preparation of his defence is untenable.

30. Moreover, the Chamber considered the potential impact of well-founded arguments of fundamental unfairness and held that "even if it should in due course be established that the fairness of the proceedings has already been impacted, including as hypothesised by the Defence from the Prosecution having had access to aspects of Defence strategy, the Chamber does not consider that this would be capable of being remedied by an immediate adjournment".[47] The Chamber could only adjudicate the issue before it: whether an immediate adjournment of the proceedings was warranted in the circumstances, and not whether, in the abstract and prior to a review of the material or discussions with the Accused, the Accused's right to a fair trial has been violated.

31. Further, the Defence's submissions are wholly speculative as they impermissibly require the Chamber to speculate now on the impact on the fairness of

[45] Application, para.41.
[46] Decision, p.5, lines 1-3.
[47] Decision, p.6, lines 7-11.

the proceedings of the Decision.[48] Neither speculation, nor "mere potential" to affect the fairness or expeditiousness of the trial is sufficient to reach the article 82(1)(d) threshold.[49]

32. The Defence surmises that "there is a real and concrete risk" that the disclosed material could reveal that elements of cross-examination have been affected.[50] The Defence speculates about possible prejudice as a result of the disclosure before any review of the material or discussion with the Accused. Yet again, speculation as to what may or may not happen in the future does not render an issue appealable.

33. The Chamber considered all relevant factors before it and determined that the Defence had not provided sufficient grounds to warrant an immediate adjournment of the proceedings. It also held that it would entertain future requests by either party related to the disclosed material.[51] The Defence fails to acknowledge any of the remedies at its disposal—let alone exercise them. In these circumstances, not only is any unfairness purely hypothetical, any interlocutory intervention on this basis would only serve to delay the proceedings.

34. The Defence further submits that the issue may significantly affect the outcome of the trial,[52] but does not provide any argument in support. The Defence's claim should therefore be rejected as unsubstantiated.

ii. The immediate resolution by the Appeals Chamber will not materially advance the proceedings

35. The immediate resolution by the Appeals Chamber will not advance the proceedings.[53] An interlocutory appeal will not materially advance the proceedings

[48] Application, para.28 "*The material disclosed not only could, but most likely does, affect the conduct of Defence cross-examination of witnesses*".
[49] *See e.g.,* ICC-02/11-01/15-117, paras. 23-25; ICC-02/11-01/15-643-Conf, footnote. 32
[50] *See* Application, para.45.
[51] Decision, p.4, lines 2-3.
[52] Application, para.3.

in the sense of ensuring that the proceedings follow the right course.[54] The Defence's submission is based on the *potential* impact of the disclosed material to Defence investigations and cross-examination strategy or to the fairness of the trial and concludes incorrectly that continuing with the trial would cause "irreparable damage".[55] The Appeals Chamber has repeatedly held that interlocutory appeals are not a forum to provide advisory opinions but rather are a second instance review.[56] Indeed, even if the issue were considered to affect the fairness of the proceedings (which it does not), the Chamber may properly refuse leave to appeal.[57] Given the Chamber's trial management powers and ability to consider further suitable remedies if and when concrete difficulties arise, immediate resolution by the Appeals Chamber would not materially advance the proceedings.

36. Further, since any suggested unfairness at this stage is wholly speculative, an immediate resolution of the issue by the Appeals Chamber will not materially advance proceedings but rather will delay them.[58]

IV. Conclusion

37. Appellate intervention is not required. Nor has the test for review by the Appeals Chamber been met. The Defence continually looks to the Chamber and to the Prosecution for assistance in understanding the Accused's own conversations

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[53] *Contra* Application, para.4.
[54] ICC-01/04-01/06-2404, para. 33.
[55] Application, para.4.
[56] *See* ICC-01/04-503 OA4 OA5, para. 30 ("the role of an advisory body" is "beyond and outside the scope of [the Appeals Chamber's] authority"); ICC-01/04-01/07-3132 OA12, para. 7. *See also* ICC-01/04-01/06-772 OA4, para. 4 ("The Appeals Chamber recalls that it does not provide guidance on the interpretation of the law [...] to the parties").
[57] ICC-01/05-01/13-1898, para. 17; ICC-01/09-01/11-1154, para. 28.
[58] ICC-01/04-01/06-2109, para. 22; ICC-01/09-01/11-1154, para. 28; ICC-01/04-01/06-1557, para. 25. *See also,* ICC-02/11-01/15-569, paras.34 and 36: "*34. However, the Chamber is of the view that the interlocutory appeals process is not designed for answering abstract legal questions. [...] 36. The scenario described by the Defence has not materialised yet and it is therefore highly hypothetical and premature [...].*" *See also,* ICC-02/11-01/15-524, para.19: "[...] *the aforesaid Issues [do not] satisfy the first limb of Article 82(1) (d) of the Statute as the Defense has failed to show specifically how the identified issues have actually - rather than speculatively — affected the fair and expeditious conduct of the current proceedings in a significant manner. The references to the fairness of the proceedings made by the Defense remain too general and too broad to support any argument as to a significant effect on the fairness."*

and conduct, and alleges that without an immediate adjournment it cannot conceivably continue the trial. Yet, the Application ignores the possibility of the Accused's own assistance to explain his conversations immediately[59] so that counsel can assess any impact to its cross-examination plan or case strategy and, thereafter, make informed submissions or specific requests. As the Prosecution stated in its response to the Defence request for an adjournment, the disclosure may well put Defence counsel in a difficult position but the Chamber had to evaluate whether the Accused, not Defence counsel, suffered prejudice requiring an immediate adjournment of proceedings.[60] It determined, rightly, that he did not.

V. Relief requested

38. For all the reasons above, the Application should be dismissed.

Fatou Bensouda
Prosecutor

Dated this 29th day of November 2016
At The Hague, The Netherlands

[59] Application, para.38.
[60] ICC-01/04-02/06-1636-Red, para.33.