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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 “Decision on Defence request for stay of proceedings with prejudice to the Prosecution”

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 Trial Chamber VI (“Chamber”)’s “Decision on Defence request for stay of proceedings with prejudice to the Prosecution” dated 28 April 2017 (“Impugned Decision”)¹ rejecting the “Defence request for stay of proceedings with prejudice to the Prosecutor” (“Defence Request for Stay”),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Request on behalf of Mr Ntaganda seeking leave to appeal “Decision on Defence request for stay of proceedings with prejudice to the Prosecution”

“Defence Request Seeking Leave to Appeal”

INTRODUCTION

1. The Defence seeks leave to appeal the Impugned Decision pursuant to Article 82(1)(d) of the Court’s Statute (“Statute”). The Impugned Decision rejected the Defence Request for Stay on the basis that, subject to certain corrective measures, a fair trial continues to be possible. The Impugned Decision involves eight appealable issues, each of which inherently affects the fair and expeditious conduct of proceedings, and its outcome. Immediate appellate resolution may, and will, materially advance the proceedings by ensuring that an error that is so fundamental to the integrity and viability of proceedings is addressed now, thus obviating the expense and time associated with irretrievably unfair and defective proceedings. The Appeals Chamber, given the fundamental nature of the alleged errors, should determine the correctness of the Chamber’s approach immediately.

2. The Defence Request for Stay, in short, called upon the Chamber to decide whether the trial against Mr Ntaganda could continue or not. It was asked to balance the interests of the international community to put an individual accused of crimes under the Statute against the need to sustain the efficacy of the judicial process as a vigorous agent of justice. It is therefore of the essence that the Appeals Chamber rule

¹ ICC-01/04-02/06-1883.

² ICC-01/04-02/06-1830-Conf; ICC-01/04-02/06-1830-Red (21 March 2017).

on such vital issue now so that there can be a final decision at this stage of the proceedings, without having to wait for the final appeal on the charges.

3. By ordering that the trial continue, the Impugned Decision, at its core, directly and substantially impacts Mr Ntaganda's right to have a fair trial. The Impugned Decision, taken as a whole, thus significantly affects the fair and expeditious conduct of the proceedings and the outcome of Mr Ntaganda's trial. The Defence has identified eight distinct appealable issues that directly arise from the Impugned Decision and that meet the test applicable before the Court for leave to appeal ("Appealable Issues").

4. The continuation of the trial and the Accused's most fundamental rights being at stake, immediate resolution of these Appealable Issues by the Appeals Chamber is required. Any potential determination by the Appeals Chamber that the lack of segregation of the Conversations³ from the members of the Office of the Prosecutor ("Prosecution") in the main case and their *ex parte* access to vast amounts of confidential Defence information did indeed amount to an abuse of process justifying a stay of proceedings has to be made now before the trial further continues without the essential conditions for a fair trial being fulfilled.

5. Any brief delay that may be caused now pending adjudication of the Appealable Issues by the Appeals Chamber will be offset by the vital importance of such adjudication at this stage of the proceedings for the preservation of the integrity of international criminal justice. The issues raised are also of systemic importance to the Court as a whole and are, to a substantial extent, already pending before the Appeals Chamber in the *Bemba* appeal. The danger of proceeding on an incorrect footing is therefore high, and in respect of issues fundamental to trial fairness. Immediate appellate resolution is, accordingly, appropriate and necessary to avoid irremediably tainting the proceedings.

³ See para.7 *infra*.

6. Leave has previously been granted by Trial Chambers for a stay of proceedings, illustrating their intrinsic significance to fairness and the outcome of proceedings.⁴

PROCEDURAL BACKGROUND

7. On 20 March 2017, the Defence filed the Defence Request to Stay, wherein it argued that the Prosecution sought and obtained, without any restriction, all of Mr Ntaganda (and Mr Lubanga)'s non-privileged telephone conversations from the Court's Detention Centre ("Conversations" and "Detention Centre", respectively), knowing very well that the Conversations contained confidential Defence information, which the Prosecutor failed to immediately segregate from the Prosecution team in this case.⁵ The Defence further submitted that the Prosecution team, being in possession of such confidential Defence information, presented the *quasi* totality of its case while hiding from the Accused the fact that it had obtained all of his non-privileged conversations.⁶ The Defence argued that this created an irreparable prejudice for the Accused and that the Prosecutor's conduct of her Article 70 investigation impacted on Mr Ntaganda's fundamental rights in this case so gravely that only one remedy was warranted in the circumstances: a stay of proceedings with prejudice to the Prosecutor.⁷

8. The Prosecution responded on 30 March 2017, opposing the Defence Request for Stay ("Prosecution Response to Defence Request for Stay"),⁸ on the basis that it failed to articulate any facts that would amount to an abuse of process or that would warrant the exceptional remedy of a stay of proceedings, that it misconstrued the factual context of the Article 70 investigation, and advanced speculative and

⁴ *Situation in the Democratic Republic of the Congo, Prosecutor v. Lubanga*, ICC-01/04-01/06-T-314-ENG, pages 17-23 (granting a Prosecution appeal); *Situation in the Democratic Republic of the Congo, Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1859 (granting a Defence appeal).

⁵ Defence Request for Stay, para.6.

⁶ Defence Request for Stay, paras.6-8.

⁷ Defence Request for Stay, paras.12-13.

⁸ ICC-01/04-02/06-1840-Conf; ICC-01/04-02/06-1840-Red (6 April 2017).

unfounded arguments.⁹ The Prosecution further argued that the Defence suffered no prejudice and that it cannot be argued that there is an apprehension of bias on the part of the Chamber.¹⁰

9. On 31 March 2017, the Legal Representatives of Victims (“LRVs”) filed a joint response, also opposing the Defence Request for Stay.¹¹

10. On 10 April 2017, having been granted leave by the Chamber, the Defence filed its “Reply on behalf of Mr Ntaganda to ‘Prosecution’s response to the ‘Defence Request for Stay of Proceedings with prejudice to the Prosecutor’” (ICC-01/04-02/06-1830-Conf)”.¹² In its reply, the Defence argued that (i) the Prosecution Response to Defence Request for Stay misconstrued the overall premise for the Defence Request for Stay, namely the abuse of process resulting from the Prosecution team knowingly requesting and obtaining confidential Defence information during the presentation of its case without the Defence being informed; (ii) the Prosecution Response to Defence Request for stay misconstrued the Defence argument pertaining to the lack of segregation between the main trial and the Article 70 investigation; (iii) the Prosecution Response to Defence Request for Stay improperly made references to “false Defence strategy”; and (iv) the Prosecution failed to adequately explain the necessity of the *ex parte* character of the Article 70 investigation.

11. The Chamber issued the Impugned Decision on 28 April 2017. The Chamber first considered that it was not competent to make any determination on the legality of investigative measures adopted by the single judge of the pre-trial chamber designated for the purpose of the Article 70 investigation (“Single Judge”).¹³ In relation to the segregation of the Article 70 investigation from the Prosecution team in this case, the Chamber found that it would have been preferable for the Prosecution to have engaged a separate team to conduct that investigation and that

⁹ ICC-01/04-02/06-1840-Red, paras.1-2.

¹⁰ ICC-01/04-02/06-1840-Red, para. 5, 8.

¹¹ ICC-01/04-02/06-1841-Conf; ICC-01/04-02/06-1841-Red (2 May 2017).

¹² ICC-01/04-02/06-1857-Conf; ICC-01/04-02/06-1857-Red.

¹³ Impugned Decision, para.24.

the Prosecution did not follow best practices in this regard but that, without more, this did not amount to abuse of process rendering a fair trial impossible.¹⁴

12. The Chamber went on to find that the fact that the Prosecution had access to Defence information was prejudicial to the Accused as it placed the Prosecution in an unduly advantageous position *vis-à-vis* the Defence.¹⁵ However, the Chamber was not convinced that this prejudice reaches the threshold for a stay of proceedings and, instead, deemed that it could be remedied by less drastic retroactive and prospective corrective measures.¹⁶ Further, the Chamber did not consider that the *ex parte* nature of the proceedings resulted in prejudice to the Accused warranting a stay of the proceedings.¹⁷ It also held that the Defence's submissions as to the apprehension of bias on the part of the Chamber were unfounded.¹⁸

13. The Chamber concluded that it was possible to continue conducting a fair trial in the present case and that, therefore, the threshold required to justify a stay of proceedings had not been met. Nonetheless, it decided that "the Prosecution shall not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence's presentation of evidence unless specifically authorised by the Chamber as necessary for the determination of the truth pursuant to its duty under Article 69(3) of the Statute, upon receipt of a substantiated request to be filed sufficiently in advance of the intended use."¹⁹ The Prosecution was also urged "to have any further review of the Conversations conducted by members of the Prosecution who are not, or are no longer, part of the trial team of the *Ntaganda* case."²⁰ As a retroactive remedy, the Chamber stated that it "may consider taking additional measures²¹ upon receipt of a substantiated application setting out

¹⁴ Impugned Decision, para.32.

¹⁵ Impugned Decision, para.42.

¹⁶ Impugned Decision, para.43.

¹⁷ Impugned Decision, para.51.

¹⁸ Impugned Decision, para.59.

¹⁹ Impugned Decision, para.61.

²⁰ Impugned Decision, para.61.

²¹ Footnote added. The measures may include allowing the Defence to recall Prosecution witnesses, and/or disregarding certain evidence, *see* Impugned Decision, para.62.

concrete instances of prejudice as a result of the Prosecution having unduly benefitted from its access to the Conversations.”²²

APPLICABLE LAW

14. A decision is subject to interlocutory appeal, pursuant to Article 82(1)(d) of the Statute, where it:

[i]nvolves 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.

15. 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.”²³ ‘Essential’ in this context must be understood as meaning essential to some judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion.”²⁴

16. The notion of “materially advance” involves examination 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.”²⁵ 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”²⁶ and “remove[] doubts about the correctness of the decision or map[] a course of action along the right lines.”²⁷ The purpose of such an appeal is to avoid the consequences that would otherwise be embedded in the proceedings and which could “cloud or

²² Impugned Decision, para.62.

²³ *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.9.

²⁴ *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim’s Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para.8.

²⁵ Leave to Appeal Judgment, para.14.

²⁶ *Id.*, para.15.

²⁷ *Id.*, paras.14-15.

unravel the judicial process.”²⁸ The applicable threshold, importantly, is not that interlocutory resolution “*will* materially advance” the proceedings, but only that it “*may*” do so.

17. A request for certification is not concerned with whether a decision was correctly reasoned, but only whether the issues *significantly affect the fairness of the proceedings*.²⁹ This being the case, the “materially advance” criterion can be assessed only in relation to the consequences, not the correctness, of the decision from which interlocutory appeal is sought.

SUBMISSIONS

18. Eight distinct Appealable Issues directly arise from the Impugned Decision.

19. Following this Chamber’s approach in ruling upon previous Defence requests for leave to appeal, the Defence has first identified the Appealable Issues, before turning, for each of them, to the actual requirements set out in Article 82(1)(d), namely that (i) the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial; and (ii) an immediate resolution by the Appeals Chamber may materially advance the proceedings.

20. The Defence respectfully submits that whether an issue constitutes an ‘appealable issue’ is a legal determination. If the issue raised by a party meets the criteria set out by the Appeals Chamber, *ie* “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”,³⁰ it is an appealable issue. The two-pronged-test in Article 82(1)(d) of the Statute focuses on the consequences, not the merits, of the issues. What matters is whether one or more of the appealable issues is essential to the determination by the

²⁸ *Id.*, para.16.

²⁹ *Muthaura et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)”, ICC-01/09-02/11-253, 18 August 2011, para.28.

³⁰ Leave to Appeal Judgment, para.9.

Appeals Chamber of the relief sought in the Defence Request for Stay. The Defence has identified these elements for each of the Appealable Issues.

21. The interests of justice are served by immediate appellate determination whether it is fair to continue proceedings in this case. The consequences of an incorrect decision in respect of the Impugned Decision and the Appealable Issues are irreparable.³¹ It is indeed crucial to avoid continuing with the trial when the circumstances are such that the Appeals Chamber may ultimately make a finding of mistrial. In a manner similar to an appeal on jurisdiction or admissibility which a party may file directly, as of right, with the Appeals Chamber,³² an appeal on a request for a stay of proceedings must be decided immediately by the Appeals Chamber so grave are the consequences on the continuation of the proceedings.

22. Finally, the Defence notes that the arguments presented herein are made for the sole purpose of requesting leave to appeal the Impugned Decision. If leave to appeal is granted, the Defence will present its arguments on the substance of the Appealable Issues before the Appeals Chamber.

³¹ The Defence further notes that party seeking, in its appeal on the Chamber's decision on the charges pursuant to Article 74 of the Statute, to challenge the approach or findings adopted by a trial chamber on a specific issue must have first challenged the issue with that trial chamber. A party cannot remain silent on a matter and forego direct review of an interlocutory decision only to return to this matter in the appeal from final judgement. See *Nizeyimana v. Prosecutor*, Case No. ICTR-00-55C-A, Judgement, 29 September 2014, para.285. In the absence of a showing of special circumstances, the party will be deemed to have waived its right to bring the issue in question as a valid ground of appeal. *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44C-A, Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007, para.6; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para.21. In *Lubanga*, for instance, a bench of the Appeals Chamber refused to address Mr Lubanga's submissions as to the failure of the Prosecutor to investigate exonerating circumstances on the basis that he had not challenged the approach or findings of the *Lubanga* Trial Chamber in the relevant decision on that issue. See *Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para.155. See also *Situation in the Central African Republic, In the Case of the Prosecutor v. Bemba*, ICC-01/05-01/08-3472-Corr-Red, Public Redacted Version of "Corrected Version of 'Prosecution's Response to Appellant's Document in Support of Appeal'", 19 January 2017 (originally filed on 21 November 2016), ICC-01/05-01/08-3472-Conf, para.20.

³² Article 82(1)(a) of the Statute.

I. First Appealable Issue – Whether the Chamber erred by failing to pronounce on the wilfulness of the Prosecution’s conduct in assessing the appropriate remedy

23. The Impugned Decision explains that “according to the Court’s jurisprudence on stay of proceedings, it is not necessary to find that the Prosecution acted in bad faith”³³ and that a stay would be appropriate where it would be “repugnant or odious to the administration of justice to allow the case to continue”.³⁴ The Chamber, despite noting the Defence argument that “the Prosecution was already aware that it would obtain confidential Defence information and thereby gain ‘an undue advantage contrary to the most basic principles of fairness,’”³⁵ then failed to address and take into account the wilfulness of the Prosecution’s conduct as a factor in assessing the propriety of a stay of proceedings.

24. The Chamber, in particular, noted³⁶ but failed to pronounce on the core Defence argument that the Prosecutor sought to obtain the unfiltered and unrestricted access to all of the Conversations, without instituting any “Chinese walls,” knowing and intending that confidential Defence information would be obtained by the Prosecution team in this case. In so doing, the Prosecution acted in deliberate disregard of basic principles of fairness, and in disregard of previous advice issued by the Appeals Chamber.

25. This Issue arises from the Impugned Decision in which the Chamber noted the Defence argument but failed to pronounce on it while at the same time acknowledging that stay of proceedings was available in situations where it would be odious to continue the trial. The Chamber failed to consider all relevant arguments put before it in relation to the relief requested and/or failed to give reasons in respect of this important consideration in determining whether to grant a stay. The wilfulness of the Prosecution’s conduct was a relevant consideration, even if not the only relevant consideration. The Chamber failed to address, *inter alia*, the

³³ Impugned Decision, para.21.

³⁴ Impugned Decision, para.20.

³⁵ Impugned Decision, para.26, referring to Defence Request for Stay, para.41.

³⁶ Impugned Decision, para.26, referring to Defence Request for Stay, para.41.

Defence's arguments concerning (i) the Prosecution's knowledge of the type and extent of the material they sought to obtain through their Article 70 investigation; (ii) its forum-shopping to avoid the constraints imposed by this Trial Chamber; (iii) the unnecessary and prolonged *ex parte* nature of the Article 70 proceedings; and (iv) the presentation of the Prosecution case in the possession of confidential Defence information without the knowledge of the Defence. These were relevant considerations that were not addressed and that impact directly on the Chamber's decision not to grant a stay.

26. This issue arises from the Impugned Decision. No reasonable trial chamber could have omitted to pronounce on this issue. The failure to determine this issue impacted directly on the reasoning denying the relief requested, and significantly affects both the fair and expeditious conduct of the proceedings, and the outcome of the trial. The proceedings may, accordingly, be materially advanced by immediate resolution of an issue that will otherwise irremediably tarnish the integrity of the proceedings, and certainly their outcome. The requirements under Article 82(1)(d) are therefore fulfilled with regard to the First Appealable Issue.

II. Second Appealable Issue – Whether the Chamber erred by failing to find that, in the circumstances, it was imperative for the Prosecutor to segregate its Article 70 investigation from the Prosecution team in this case

27. In the Impugned Decision, the Chamber noted the Appeals Chamber's finding in *Bemba* that "it is preferable that staff members involved in a case are not assigned to related Article 70 proceedings of this kind"³⁷ and held that this Appeals Chamber's finding should be seen in light of the aforementioned considerations,³⁸ and that its applicability needs to be determined on a case-by-case basis, in light of the circumstances at hand.³⁹

³⁷ Impugned Decision, para.31.

³⁸ Referring in the previous paragraph to the Court's legal framework, *see* Impugned Decision, para.30.

³⁹ Impugned Decision, para.31.

28. The Defence posits that no reasonable trial chamber could have concluded that, in the specific circumstances of the case where, in a blatant violation of due process one party presented its case having information about the other party without that party being aware, the Prosecution merely did not follow best practice as opposed to concluding that it was imperative for the Prosecution to segregate the two proceedings.

29. Further, the resolution of this Issue is essential for the determination of the Defence Request for Stay. This Issue related to the lack of segregation of confidential Defence information from the Prosecution team in the main case is central to the Defence Request for Stay and the Chamber erred in the exercise of its discretion when pronouncing on it. The Appeals Chamber must therefore pronounce on it immediately as it is essential to the determination as to whether the Prosecution's conduct amount to abuse of process and this would manifestly advance the proceedings. Further, given its potential impact on the Chamber's evaluation of the prejudice suffered by the Accused, this Issue significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial. The requirements under Article 82(1)(d) are therefore fulfilled with regard to the Second Appealable Issue.

III. Third Appealable Issue – Whether the Chamber erred by finding that the confidential Defence information to which the Prosecution received access via the Conversations was limited

30. In the Impugned Decision, the Chamber noted “that the extracts identified by the Defence indeed include information on the whereabouts of the accused and other individuals at the relevant time, names of individuals who could have provided information for the Defence and potential witnesses, and which may therefore be relevant to defence strategy.”⁴⁰ It went on to find “that the fact that the Prosecution had access to this material was prejudicial to the accused as it places the

⁴⁰ Impugned Decision, para.42.

Prosecution in an unduly advantageous position *vis-à-vis* the Defence”⁴¹ and that “the Prosecution’s access to such information is in itself prejudicial”.⁴² Nonetheless, it found that “the information which may be relevant to defence strategy appears to be limited.”⁴³

31. First, the Defence posits that, having made these findings as to the nature of the information received and the ensuing prejudice suffered by the Accused, no reasonable trial chamber could have concluded that the information in the Conversations “which may be relevant to defence strategy appears to be limited”.

32. Second, in reaching this conclusion, the Chamber failed to take important Defence submissions into consideration, namely that in the Conversations, Mr Ntaganda provided or received indications as to information that he considered useful in countering allegations made by the Prosecution and explained how such information could be obtained and indicated flaws in the Prosecution’s theory.⁴⁴ These were important elements of the Defence Request for Stay that the Chamber erroneously failed to consider in its determination that the Defence information in the Conversations to which the Prosecution received access was limited.

33. Further, the resolution of this Issue is essential for the judicial determination of the Defence Request for Stay. This Issue is central to the Defence Request for Stay and the Chamber erred in the exercise of its discretion when pronouncing on it and failing to consider, in its determination, material Defence submissions. In the event the Appeals Chamber were to consider as valid the Defence arguments regarding the extent and nature of the confidential Defence information available to the Prosecution through the Conversations, the impact on the prejudice determined by the Chamber in the Impugned Decision is certain. The Appeals Chamber must therefore pronounce on it immediately and this would materially affect the proceedings. Further, this Issue significantly affects both the fair and expeditious

⁴¹ Impugned Decision, para.42.

⁴² Impugned Decision, para.43.

⁴³ Impugned Decision, para.43.

⁴⁴ Defence Request for Stay, para.59.

conduct of the proceedings and the outcome of the trial. The requirements under Article 82(1)(d) are therefore fulfilled with regard to the Third Appealable Issue.

IV. Fourth Appealable Issue – Whether the Chamber erred in imposing an unreasonable burden on the Defence to provide ‘concrete instances of the Prosecution having used the information in a manner resulting in undue prejudice’ while accepting at face value the Prosecution’s affirmation as to its use of such information

34. With regard to the prejudice caused from the Prosecution’s possession of confidential Defence information throughout the presentation of its case, the Chamber held that “the Defence has not identified concrete instances of the Prosecution used the information in a manner resulting in ‘undue’ prejudice.”⁴⁵ Notwithstanding the high burden placed on the Defence, the Chamber in the following sentence simply noted “the Prosecution’s claim that the information obtained in the context of the Article 70 proceedings was ‘used to assess whether the [a]ccused and others were engaged in criminal misconduct, and not to select witnesses or make any other litigation-related assessment’”.⁴⁶

35. First, the Defence posits that the Chamber erred in imposing an unreasonable burden on the Defence to provide ‘concrete instances of the Prosecution having used the information in a manner resulting in undue prejudice’ while accepting at face value the Prosecution’s affirmation as to the use it made of such information during the Prosecution case.

36. Considering (i) the Chamber’s own findings on the nature of the Defence information the Prosecution team in this case gained access to as well as on the inherent prejudicial aspect of this access, (ii) the Defence argument showing how the prejudice materialised,⁴⁷ (iii) the volume of information in the Conversations received by the Prosecution, and (iv) the fact that the Prosecution presented almost the entirety of its case while in possession of this information, without the Defence

⁴⁵ Impugned Decision, para.43.

⁴⁶ Impugned Decision, para.43.

⁴⁷ Defence Request for Stay, paras. 65,80.

being aware, no reasonable trial chamber could have concluded that the Defence had not demonstrated 'concrete instances' of the prejudicial manner in which the Prosecution had used the information from the Conversations.

37. Second, the Defence submits that no reasonable trial chamber, considering all the relevant circumstances, could have given weight to the Prosecution's affirmation that it did not use the information in the Conversations for any litigation-related assessment. In support, the Defence refers to the absence of (i) any material information provided by the Prosecution concerning the identity of the members of the Prosecution team in this case who had access to the Conversations; (ii) any material information concerning the identity of the members of the Prosecution team involved in the review, analysis, and use of the Conversations; (iii) any material information regarding the mandate given to the members of the Prosecution team involved; (iv) any material information concerning any *other* steps taken to assess whether the Accused and others were engaged in criminal misconduct in the context of the Article 70 proceedings; and (v) any sworn affidavit submitted by the Prosecution in support of its submission. The Defence further refers to (i) the Prosecution's requests to have certain conversations admitted over the bar table and seeking the imposition of additional disclosure obligations on the Defence; and the fact that (ii) the Prosecution waited until it had presented almost all of its case before informing the Defence of the Conversations in its possession.

38. Further, the resolution of this Issue is essential for the judicial determination of the Defence Request for Stay. This Issue is central to the Defence Request for Stay and the Chamber erred in the exercise of its discretion when pronouncing on it. In the event that the Appeals Chamber were to consider as valid the Defence arguments in this regard, the impact on the prejudice determined by the Chamber in the Impugned Decision is certain. This Issue therefore significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial. The Appeals Chamber must therefore pronounce on it immediately and this would

materially affect the proceedings. The requirements under Article 82(1)(d) are therefore fulfilled with regard to the Fourth Appealable Issue.

V. Fifth Appealable Issue – Whether the Chamber erred in holding that it was not competent to make any determination as to the reasons that justified non-disclosure of the materials related to the Article 70 proceedings and subsequently failing to pronounce on whether it had been deprived of the possibility to safeguard the rights of the Accused

39. The Chamber held that “in the present case, *ex parte* classification of the relevant proceedings was initially ordered by the Pre-Trial Chamber” and that “it is not competent to make any determination as to the reasons that justified non-disclosure of the materials related to the Article 70 proceedings”.⁴⁸

40. The Defence posits that the Chamber erred in deciding it was not competent to make such determination while at the same time failing to pronounce on the interconnected Defence submission that by the Prosecution’s forum-shopping to the Pre-Trial Chamber which was not justified by legal requirements,⁴⁹ it had been deprived of the possibility to safeguard the rights of the Accused. Once it had decided that it was not in a position to question the *ex parte* nature of the Article 70 investigation as a whole, the Chamber had an inherent duty to address the Defence’s argument that, as a result of the Prosecution’s actions, it was deprived of the opportunity to safeguard the fundamental rights of the Accused. It not doing so, it erred in the exercise of its discretion.

41. Moreover, the Chamber failed to address and consider the Defence arguments that *ex parte* was not justified in the circumstances. Even if the Chamber cannot pronounce on the legality of the measures ordered by the Single Judge, it had sufficient information in its possession – if only as a result of the restrictions litigation before it which preceded the Prosecution’s actions – to consider and address the Defence argument that, in the circumstances, there was no need to keep

⁴⁸ Impugned Decision, para.50.

⁴⁹ Defence Request for Stay, paras.5,45.

ex parte the part of the Article 70 proceedings that pertained to the Conversations, and to draw the appropriate conclusion. It erred in not doing so.

42. Further, the resolution of this Issue is essential for the determination of the Defence Request for Stay. This Issue is central to the Defence Request for Stay and the Chamber erred in the exercise of its discretion when pronouncing on it and failing to consider, in its determination, a material Defence argument. In the event that the Appeals Chamber were to consider as valid the Defence arguments in this regard, the impact on the prejudice determined by the Chamber in the Impugned Decision is certain. This Issue therefore significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial. The Appeals Chamber must therefore pronounce on it immediately and this would materially affect the proceedings. The requirements under Article 82(1)(d) are therefore fulfilled with regard to the Fifth Appealable Issue.

VI. Sixth Appealable Issue – Whether the Chamber erred in holding that the Defence arguments as to the prejudice resulting from the *ex parte* nature of the Article 70 proceedings appear speculative and unclear

43. In the Impugned Decision, the Chamber held that “the arguments of the Defence on this point – the prejudice resulting from the maintenance of the *ex parte* nature of the proceedings until filing of the Prosecution’s notice – appear speculative and unclear as to the alleged prejudice suffered in the present case, and how it would otherwise had[sic] acted had it been aware of the Article 70 investigations.”⁵⁰

44. In the Defence Request for Stay, the Defence submitted that the initial *ex parte* character of the Article 70 proceedings and its prolongation throughout most of the presentation of the Prosecution case provided the Prosecution with an undue and unfair advantage and resulted in grave prejudice to the Accused. It provided examples as to what it would have done differently had it been aware that the Prosecution was in possession of the Conversations.⁵¹

⁵⁰ Impugned Decision, para.51.

⁵¹ Defence Request for Stay, paras.43-44, 51, 56, 69, 74-75

45. Having considered the Defence arguments in paragraphs 43, 44, 51, 56, 69, 74, and 74 of the Defence Request for Stay, and having itself twice reiterated to no avail, that the Article 70 investigation should be concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence should be made as soon as possible, no reasonable trial chamber could have concluded that the Defence arguments related to the prejudice suffered from the *ex parte* nature of the Article 70 investigations are unclear and speculative.

46. Further, the resolution of this Issue is essential for the determination of the Defence Request for Stay. This Issue is central to the Defence Request for Stay and the Chamber erred in the exercise of its discretion when pronouncing on it. In the event that the Appeals Chamber were to consider as valid the Defence arguments in this regard, the impact on the prejudice determined by the Chamber in the Impugned Decision is certain. This Issue therefore significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial. The Appeals Chamber must therefore pronounce on it immediately and this would materially affect the proceedings. The requirements under Article 82(1)(d) are therefore fulfilled with regard to the Sixth Appealable Issue.

VII. Seventh Appealable Issue – Whether the Chamber erred in not conducting a cumulative assessment of the prejudice suffered by Mr Ntaganda prior to concluding that it did not consider that the Prosecution’s actions, without more, amounted to an abuse of process rendering a fair trial impossible

47. At the outset of the analysis in the Impugned Decision, the Chamber found that the Prosecution’s lack of segregation of the Article 70 investigation from the Prosecution team in this case, without more, did not amount to an abuse of process rendering a fair trial impossible.⁵² The Chamber ultimately concluded that “it is possible to continue conducting a fair trial in the present case”.⁵³

⁵² Impugned Decision, para.32.

⁵³ Impugned Decision, para.61.

48. The Defence submits that the Chamber, despite noting that it “considered the totality of the submissions made in relation to the ‘[Defence Request for Stay]’”⁵⁴, failed to adopt a comprehensive and cumulative approach to the issue of prejudice which led to a manifest error in its determination that the prejudice suffered by Mr Ntaganda did not amount to an abuse of process rendering a fair trial impossible. In this regard, the Chamber failed to consider that, as demonstrated by its own findings, (i) the Prosecution gained access to confidential Defence information related to Defence strategy; (ii) the information in the possession of the Prosecution is prejudicial to the Defence as it places the Prosecution in an unduly advantageous position *vis-à-vis* the Defence; and (iii) the confidential Defence information acquired by the Prosecutor as part of the Article 70 investigation remains in the possession and the knowledge of the Prosecution team.

49. Further, the resolution of this Issue is essential for the determination of the Defence Request for Stay. This Issue is central to the Defence Request for Stay and the Chamber erred in the exercise of its discretion when pronouncing on it. In the event that the Appeals Chamber were to consider as valid the Defence arguments in this regard, the impact on the prejudice determined by the Chamber in the Impugned Decision is certain. This Issue therefore significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial. The Appeals Chamber must therefore pronounce on it immediately and this would materially affect the proceedings. The requirements under Article 82(1)(d) are therefore fulfilled with regard to the Seventh Appealable Issue.

VIII. Eighth Appealable Issue – Whether the Chamber erred in finding that any prejudice suffered by the Accused could be remedied by alternative measures, which are not proportional to the finding of prejudice and which do not provide appropriate relief neither retroactively nor prospectively

50. As already mentioned above, the Chamber found that through the Conversations, the Prosecution gained access to “information on the whereabouts of the accused and other individuals at the relevant times, names of individuals who

⁵⁴ Impugned Decision, para.61.

could have provided information for the Defence and potential witnesses, and which may therefore be relevant to defence strategy” and that access to such information “is prejudicial to the accused as it places the Prosecution in an unduly advantageous position vis-à-vis the Defence”.⁵⁵ Notwithstanding this grave finding, the Chamber decided “that any prejudice may be remedied, retroactively and prospectively, through alternative, less drastic measures” than a stay of proceedings.⁵⁶ The prospective measures ordered are that (i) the Prosecution shall not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence’s presentation of evidence unless specifically authorised by the Chamber as necessary for the determination of the truth, upon receipt of a substantiated request to be filed sufficiently in advance of the intended use; and (ii) the Prosecution is urged to have any further review of the Conversations conducted by members of the Prosecution who are not, or are no longer, part of the trial team on this case.⁵⁷ As retroactive measures, the Chamber ordered that it may consider taking additional measures, such as allowing the Defence to recall Prosecution witnesses and/or disregarding certain evidence, upon receipt of a substantiated application from the Defence.⁵⁸

51. The Defence posits that the Chamber manifestly erred in granting measures which are neither proportional to its own finding of prejudice nor adequately corrective of the harm suffered in the past and protective of the fundamental rights of the Accused for the remainder of the case.

52. If granted leave to appeal the Defence will show that the remedies ordered by the Chamber are not appropriate in light of the prejudice caused by the Prosecutor’s conduct.

53. Further, the resolution of this Issue is essential for the determination of the Defence Request for Stay. This Issue is central to the Defence Request for Stay and

⁵⁵ Impugned Decision, para.42.

⁵⁶ Impugned Decision, para.43.

⁵⁷ Impugned Decision, para.61.

⁵⁸ Impugned Decision, para.62.

the Chamber manifestly erred in the exercise of its discretion when pronouncing on it. In the event that the Appeals Chamber were to consider as valid the Defence arguments in this regard, the impact on the prejudice determined by the Chamber in the Impugned Decision is certain. This Issue therefore significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial. The Appeals Chamber must therefore pronounce on it immediately and this would materially affect the proceedings. The requirements under Article 82(1)(d) are therefore fulfilled with regard to the Eighth Appealable Issue.

CONCLUSION

54. Leave to appeal the Impugned Decision is requested pursuant to Article 82(1)(d) of the Statute. The Appealable Issues as described above are essential to the correctness of the Impugned Decision and are, accordingly, appealable. They significantly affect the fair and expeditious conduct of the proceedings *and* the outcome of trial. Further, an immediate resolution by the Appeals Chamber of these Appealable Issues will materially advance the proceedings.

RELIEF SOUGHT

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

GRANT the Defence leave to appeal the Impugned Decision on the basis of the above outlined Appealable Issues.

RESPECTFULLY SUBMITTED ON THIS 4TH DAY OF MAY 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands