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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

Prosecution's response to the "Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution'" (ICC-01/04-02/06-1888)

Source: **Office of the Prosecutor**

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Introduction

1. The Defence request[1] for leave to appeal the decision denying a permanent stay of proceedings[2] should be dismissed because it fails to meet the cumulative requirements for leave to appeal under article 82(1)(d) of the Rome Statute.

2. As recalled in the Decision, "the threshold for a trial chamber to impose a stay of proceedings is high, and […] a trial chamber 'enjoys a margin of appreciation, based on its innate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached.'"[3]

3. The Defence merely disagrees with the Chamber's assessment, both of the relevant circumstances and the measures appropriate to safeguard the integrity of this trial. Thus, none of the issues identified in the Request constitutes an 'appealable' issue, genuinely arising from the Decision. Nor in any event does the Defence demonstrate that any of the proposed issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that the Appeals Chamber's intervention may materially advance the proceedings. These conditions are cumulative; failure of any is fatal to the application.[4]

4. The Prosecution stresses, consistent with its previous submissions, that it acts only to ensure the proper administration of justice. Notwithstanding the additional guidance now provided by this Chamber in the Decision, which is duly noted, the Prosecution does not accept the characterisation by the Defence of its conduct, or its motivations. To the contrary, the Prosecution has accessed records of Mr Ntaganda's non-privileged communications solely with the purpose of protecting the witnesses

[1] ICC-01/04-02/06-1888 ("Request").
[2] ICC-01/04-02/06-1883 ("Decision").
[3] Decision, para. 22 (footnotes not included).
[4] *Contra* Request, para. 54.

in this case and investigating alleged violations of article 70 of the Statute. At all times, it has done so with appropriate judicial supervision.

Prosecution Submissions

5. The Request primarily argues that leave to appeal should be granted on the basis of the Defence opinion that the proposed issues "inherently affect[] the fair and expeditious conduct of proceedings, and its outcome".[5] It further asserts that, "similar to an appeal on jurisdiction or admissibility", which may be filed "as of right", "an appeal on a request for a stay of proceedings *must* be decided immediately by the Appeals Chamber so grave are the consequences".[6] Yet these statements are incorrect.

6. First, although the Request correctly notes that *some* chambers have granted leave to appeal decisions concerning requests to stay the proceedings,[7] it fails to acknowledge that other chambers have *denied* such applications.[8] This fatally undermines any view that the supposed "intrinsic significance to fairness and the outcome of proceedings" means that leave to appeal these decisions must *always* be granted.[9] To the contrary, like any other matter of trial management, certification for appeal depends on this Chamber's own assessment of the criteria in article 82(1)(d).[10] That assessment is unfettered and, on the basis of the arguments in the Request, leave to appeal may properly be denied.

7. Second, and moreover, there is no basis to consider that these proceedings are "irretrievably unfair and defective".[11] The Chamber found that the Defence had

[5] Request, para. 1. *See also* para. 3.
[6] Request, para. 21 (emphasis added).
[7] Request, para. 6 (citing ICC-01/04-01/06-T-314-ENG, pp. 17-23; ICC-01/04-01/07-1859).
[8] *See e.g.* ICC-01/05-01/08-3273 ("*Bemba* Stay ALA Decision"); ICC-01/05-01/08-3382.
[9] *Contra* Request, para. 6.
[10] *See also* ICC-01/05-01/08-532, para. 12 ("[A]s has been stated by other chambers of this court, the remedy of article 82(l)(d) of the Statute reflects a restrictive approach, favouring 'as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions'").
[11] *Contra* Request, para. 2. *See also* paras. 5, 21.

made no showing of "concrete" prejudice,[12] even though it acknowledged that the Defence may have suffered prejudice in principle.[13] Moreover, and in any event, the Chamber expressly set out in the Decision the means by which it could and would continue to guarantee the fairness of this trial. Not only did it restrict the Prosecution's use of the material obtained in the course of its article 70 investigation,[14] but it also specifically emphasised that it "may consider taking additional measures upon receipt of a substantiated application setting out concrete instances of prejudice", if any, sustained by the Defence.[15] This may include recalling certain witnesses or disregarding certain evidence. Although the Defence may disagree with these measures, there is no basis to consider that they are inadequate.[16] Accordingly, the Defence arguments concerning the alleged impact on the fairness of these proceedings are purely abstract and speculative. Leave to appeal cannot be granted on such a basis.[17]

8. Indeed, each of the issues proposed for certification rests on, and is flawed by, these fundamental misconceptions. Nor in any event do they constitute 'appealable' issues,[18] which require showing "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or

[12] Decision, paras. 43 ("the Defence has not identified concrete instances of the Prosecution having used the information in a manner resulting in undue prejudice to the accused"), 61 ("the threshold required to justify a stay of proceedings has not been met"), 62 (additional measures may be taken on the basis of "a substantiated application setting out concrete instances of prejudice").
[13] *See* Decision, paras. 42 ("the fact that the Prosecution has had access to such information is prejudicial to the accused as it places the Prosecution in an unduly advantageous position vis-à-vis the Defence"), 43 ("the Prosecution's access to such information is in itself prejudicial"). Although the Prosecution by no means seeks to lessen the significance of these findings, it notes that they might better be understood as 'potential' prejudice since there is no showing of a concrete impact on these proceedings. They are thus a form of declaratory relief. *See e.g.* ICTY, *Prosecutor v. Karadžić*, Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011, Partially Dissenting Opinion of Judge Kwon, paras. 1-8. This does not mean that chambers may not think it appropriate, nonetheless, to order measures to avert any consequent concrete prejudice, as in this case. *See also* Decision, para. 43 (referring to the remedy of "any" prejudice, "retroactively and prospectively").
[14] Decision, para. 61.
[15] Decision, para. 62.
[16] *See below* para. 30.
[17] *See e.g. Bemba* Stay ALA Decision, paras. 6, 9.
[18] *See generally* ICC-01/04-168, 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.

conflicting opinion."[19] To the contrary, although the Defence has sought to cloak its disagreement with the Decision in a variety of guises, none of the proposed issues is anything more than an impermissible attempt at re-litigation.[20]

First Issue: whether the Chamber erred by failing to pronounce on the wilfulness of the Prosecution's conduct in assessing the appropriate remedy

9. The first issue is not 'appealable' because it addresses a matter which, as the Defence notes,[21] did not need to be settled in order to decide the request for a permanent stay of proceedings. Nor does the issue genuinely arise from the Decision.

10. The Defence alleges that the Chamber erred by "fail[ing] 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"[22]—yet, contradicting itself, it recognises specifically that "[t]he Chamber, in particular, noted" this argument.[23] Consequently, it can neither be said that "[t]he Chamber failed to consider all relevant arguments" nor that it "failed to give reasons" or "omitted to pronounce on this issue."[24] Rather, the Chamber simply decided the issue in a way which the Defence did not wish, declining to adopt specific language to chastise the Prosecution—but which the Defence does not assert to be legally incorrect. In any event, the Defence makes no effort to substantiate its claim that "[t]he failure to determine this issue"—or, rather, to decide it the way the Defence wished—"impacted directly on the reasoning denying the relief requested".[25] To the contrary, nothing in the Decision supports this view, which is wholly speculative.

[19] ICC-01/04-02/06-760-Red, para. 21, fn. 37 (citing ICC-01/04-168, para. 9).
[20] *See e.g.* ICC-01/05-01/13-1963, paras. 19-21.
[21] Request, para. 23 (quoting the Decision: "according to the Court's jurisprudence on stay of proceedings, it is not necessary to find that the Prosecution acted in bad faith").
[22] Request, para. 23.
[23] Request, para. 24. *See also* para. 25.
[24] *Contra* Request, paras. 25-26.
[25] Request, para. 26.

11. In any event, the Defence fails to show that the proposed issue significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial.[26] It is not the intention of the Prosecution which is material in this respect but its *actions*—nor, indeed, is there any basis to suggest that the Prosecution's intentions ever went beyond fairly presenting its case and discharging its obligations under articles 68 and 70.[27] Nothing in the Chamber's further guidance to the Prosecution, which has been duly noted, suggests anything of the kind. Nor could the intervention of the Appeals Chamber change this in any material way.

Second 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

12. The second proposed issue is undeveloped, and merely disagrees with the conclusion of the Chamber. Although the Defence asserts that "no reasonable trial chamber" could have determined that it was not "imperative for the Prosecution to segregate" these proceedings from the article 70 proceedings, this claim is wholly unsubstantiated. To the contrary, it appears to reflect an intention simply to re-litigate the same arguments—which were methodically summarised and considered in the Decision[28]—before the Appeals Chamber. Merely framing a disagreement as an abuse of discretion is insufficient to show that it is 'appealable'.

13. Furthermore, the Request is vague as to the impact of the proposed issue on the fair and expeditious conduct of the proceedings, or the outcome of the trial, basing its claim only on the "*potential* impact on the Chamber's evaluation of the prejudice suffered by the Accused".[29] This is insufficient. Nor is this rectified by the Defence claim that it is "essential" for the Appeals Chamber to pronounce on the

[26] *Contra* Request, para. 26. *See also above* paras. 6-8.
[27] *See* Decision, paras. 32, 42-43, 50-51, 61.
[28] Decision, paras. 26-32.
[29] Request, para. 29 (emphasis added). *See also above* paras. 6-8.

alleged abuse of process immediately. To the contrary, this Chamber has now, presumptively, settled the matter.

Third Issue: whether the Chamber erred by finding that the confidential Defence information to which the Prosecution received access via the Conversations was limited

14. The third proposed issue does not genuinely arise from the Decision. The Defence asserts that "no reasonable trial chamber could have concluded that the information in the Conversations 'which may be relevant to defence strategy appears to be limited'",[30] but bases this on the contention that "the Chamber failed to take important Defence submissions into consideration".[31] This is incorrect. The Decision not only recalls the Defence request for the Chamber to "evaluate the Conversations",[32] which were "non-privileged telephone conversations made by the accused",[33] but specifically states that:

> the Chamber's evaluation of the Conversations relied upon by the Defence in support of its Request will be limited to the purpose of assessing the extent of Defence information obtained by the Prosecution and any resulting prejudice to the accused.[34]

15. The Chamber then expressly stated that it *had* "assessed the Defence's arguments in light of the supporting material provided" and noted that the information in question "may […] be relevant to defence strategy."[35]

16. In this context, the Defence claim that the Chamber reached erroneous conclusions of fact by failing to consider the content of the Conversations is unsustainable. The Chamber was not obliged exhaustively to set out every aspect of

[30] Request, para. 31.
[31] Request, para. 32. *See also* Request, para. 33 ("the Chamber erred in the exercise of its discretion when pronouncing on it and failing to consider, in its determination, material Defence submissions").
[32] Decision, para. 40.
[33] Decision, para. 39.
[34] Decision, para. 41.
[35] Decision, para. 42.

its analysis, nor is there anything in its brief summary which suggests that it overlooked anything of consequence.

17. Furthermore, and in any event, the Request fails to show how the proposed issue significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial.[36] It is neither "certain" that a different approach by the Chamber concerning the proposed issue would have altered the outcome of its decision, let alone the fairness of the proceedings more generally.[37]

Fourth 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

18. The fourth proposed issue does not genuinely arise from the Decision. Although it is true that the Chamber found that the Defence had not "identified concrete instances of the Prosecution having used the information in a manner resulting in undue prejudice to the accused",[38] this was not a "high" or "unreasonable" burden.[39] To the contrary, it was nothing more than the ordinary requirement for the moving party to support its claims when seeking relief.[40] Nor is the alternative Defence argument, fashioned as an error of fact, any better grounded in the Decision. None of the factors identified by the Defence shows how "the Prosecution […] *used* the information from the Conversations",[41] nor indeed is there any basis to conclude these factors were not considered by the Chamber.

[36] *See also above* paras. 6-8.
[37] *Contra* Request, para. 33.
[38] Decision, para. 43.
[39] *Contra* Request, paras. 34-35.
[40] *See also* Decision, para. 51 (noting that "the arguments of the Defence […] appear speculative and unclear as to the alleged prejudice suffered in the present case").
[41] *Contra* Request, para. 36.

19. Similarly, in such circumstances, the Request is wrong to assert that "weight was given to the Prosecution's affirmation that it did not use the information in the Conversations for any litigation-related assessment",[42] which the Chamber merely "note[d]".[43] Questions of 'weight' are legally relevant when a chamber evaluates two competing bodies of evidence. But, in these circumstances, where the Defence had not identified any particular incidence of prejudice,[44] the Chamber did not need to 'weigh' this against the Prosecution's position. In *Bemba*, the Trial Chamber rejected a similarly formulated issue on a similar basis.[45]

20. Nor in any event does the proposed issue significantly affect the fair and expeditious conduct of the proceedings.[46] The Chamber specifically determined that any "retroactive[]" prejudice may be remedied through the measures that it ordered.[47] Moreover, it further allowed that the Defence may, in the future, bring a "substantiated application setting out concrete instances of prejudice", and that the Chamber may provide appropriate relief in this eventuality.[48] Accordingly, the failure of the Defence to show concrete instances of prejudice at this time does not mean, *arguendo*, that any such prejudice is irremediable.

Fifth 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

21. The fifth proposed issue misinterprets the Decision, and therefore does not genuinely arise from it. The Chamber did not "fail[] to pronounce" on the Defence submission that "it had been deprived of the possibility to safeguard the rights of the

[42] *Contra* Request, para. 37.
[43] Decision, para. 43.
[44] *See above* para. 7.
[45] *See e.g.* *Bemba* Stay ALA Decision, paras. 28-32.
[46] *Contra* Request, para. 38. *See also above* paras. 6-8.
[47] Decision, paras. 43, 61.
[48] Decision, para. 62. *See also* para. 43.

Accused."[49] To the contrary, the Chamber expressly stated that it adopted the approach of the *Bemba* Trial Chamber in similar circumstances, which held that it was *ultra vires* "to review the legality of investigative measures ordered by the single judge of the pre-trial chamber" but that "it *was* still bound by its duty to ensure that the [trial] proceedings […] were fair and that the rights of the accused were respected."[50] The Defence merely disagrees with the conclusion reached by the Chamber in carrying out this duty.

22. Furthermore, the subsequent reasoning of the Chamber concerning disclosure, which is also criticised by the Defence, must be understood in this context. As the Chamber noted, although it would not review the order of the Pre-Trial Chamber, it had "reminded the Prosecution […] that any related applicable disclosure of information to the Defence should be made as soon as possible."[51] The Prosecution has done exactly that, and complied with its disclosure obligations in this trial.[52] Indeed, this current litigation arose directly out of that disclosure. The implication in the Request that such disclosure has not been made is thus wholly unsubstantiated.

23. Proper disclosure in this case is also quite different from permitting the Defence to embark on a fishing expedition concerning every aspect of the article 70 investigation. The Chamber set out its view of the law on *ex parte* proceedings,[53] and—since the Prosecution's article 70 investigation is supervised by the Pre-Trial

[49] *Contra* Request, para. 40.
[50] Decision, para. 24 (emphasis added). *See also* para. 50 (recalling that it acted "in line with the approach set out in paragraph 24").
[51] Decision, para. 50. *See also* para. 51.
[52] Decision, para. 7.
[53] Decision, para. 49.

Chamber[54]—there was no reasonable basis to draw the inference apparently sought by the Defence.[55]

24. In any event, the Defence fails to show that the proposed issue significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial.[56] No specific arguments are developed in this respect, and the impact of this issue can be no more than speculative. The Chamber emphasised that it would continue to safeguard the integrity of these proceedings, and there is no showing that disclosure was not properly made.

Sixth 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

25. The sixth proposed issue is no more than a disagreement with the Chamber's characterisation of the Defence arguments as "speculative and unclear",[57] and therefore is not 'appealable'. There is no necessary contradiction between this assessment by the Chamber and the Defence view that it gave "examples as to what it would have done differently".[58] Nor is it sufficient merely to assert that the Chamber's conclusion constituted an abuse of discretion.[59] A generalised challenge to the correctness of the Chamber's conclusion does not render the issue appealable.[60]

26. The Defence does not show that this issue significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial.[61] Again, the Defence fails to develop any argument in this respect, but merely repeats the same

[54] Decision, para. 50 ("*ex parte* classification of the relevant proceedings was initially ordered by the Pre-Trial Chamber […], as provided for under Rule 81(2)").
[55] *Contra* Request, para. 41 (recalling that it had invited the Chamber to draw the "appropriate conclusion" from, allegedly, the fact that the *ex parte* status of materials relating to the article 70 investigation had been maintained when "there was no need").
[56] *Contra* Request, para. 42. *See also above* paras. 6-8.
[57] Decision, para. 51.
[58] *Contra* Request, paras. 44-45.
[59] *Contra* Request, para. 45.
[60] *See* ICC-01/04-02/06-1779, para. 7.
[61] *Contra* Request, para. 46.

vague reasoning as for other proposed issues. Even if the Chamber had not considered these Defence arguments speculative, there is no basis to assume that the Decision would have reached a different outcome—this follows not only from the multi-factored nature of the Chamber's analysis,[62] but also its view that the trial could fairly continue even if it were necessary to grant additional measures to remedy or to avert any particular prejudice for which an adequate showing is made.[63]

Seventh 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

27. The seventh proposed issue misrepresents the Decision, and therefore does not genuinely arise from it. It reflects the mere disagreement of the Defence with the Chamber's conclusion. Thus, the Defence asserts that the Chamber "failed to adopt a comprehensive and cumulative approach to the issue of prejudice which led to a manifest error in its determination".[64] Yet nowhere does it show any reason to doubt the Chamber's express assurances that it had duly:

- considered the Defence arguments "in order to determine whether any of them, *in isolation or combination*, reach the threshold of warranting a stay of proceedings",[65] and

- "considered the *totality* of the submissions made in relation to the Request".[66]

28. Reference to the Chamber's "own findings" does not mean that its conclusion could not have been based on a cumulative assessment of those findings.[67] Indeed,

[62] Decision, para. 51.
[63] *See above* paras. 7, 20.
[64] Request, para. 48.
[65] Decision, para. 25 (emphasis added).
[66] Decision, para. 61 (emphasis added). This observation is acknowledged by the Defence: Request, para. 48.
[67] *Contra* Request, para. 48.

without some further showing, the presumption must always be the contrary. Accordingly, the Decision must be understood to be based on a cumulative assessment, just as the Defence suggests.

29. The Defence does not show that this issue significantly affects the fair and expeditious conduct of these proceedings, or the outcome of the trial.[68] Its arguments are undeveloped and vague.

> ***Eighth 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***

30. The eighth proposed issue is no more than a disagreement with the relief ordered by the Chamber, and is not 'appealable'. Beyond asserting that the Chamber "manifestly erred", the Request does not articulate why the measures ordered "are neither proportional" to the Chamber's finding "nor adequately corrective", retrospectively or prospectively.[69] Indeed, in reality, the issue appears simply to be a vehicle designed to allow the Defence to relitigate "the prejudice caused by the Prosecutor's conduct" before the Appeals Chamber.[70]

31. In any event, the issue cannot significantly affect the fair and expeditious conduct of these proceedings, or the outcome of the trial.[71] The Chamber specifically based the relief ordered on the fact that the Defence had *not* shown any concrete instance of prejudice, and allowed that it might make further orders if such a showing were made.[72] Nowhere in the Request does the Defence articulate a reasoned basis on why this approach is insufficient. Nor indeed would the Appeals Chamber's intervention materially advance this question. To the contrary, if the

[68] *Contra* Request, para. 49. *See also above* paras. 6-8.
[69] *See* Request, para. 51.
[70] *See* Request, para. 52.
[71] *Contra* Request, para. 53. *See also above* paras. 6-8.
[72] *See* Request, para. 50; *above* paras. 7, 20.

Defence can show a concrete instance of prejudice, this Chamber has already said that it is willing to hear the application and to order the appropriate relief.

Conclusion

32. For all the reasons above, the Request should be dismissed.

Fatou Bensouda
Prosecutor

Dated this 9th day of May 2017
At The Hague, The Netherlands