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Date: **7 June 2017**

TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public

Joint Response of the Common Legal Representatives for the Victims to the Defence's Urgent Request for Leave to Appeal Trial Chamber VI's Decision of 1 June 2017

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. The Common Legal Representative for the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (the "Legal Representatives") hereby submit their joint response to the "Urgent Request for leave to appeal 'Decision on Defence request for leave to file a 'no case to answer' motion', 1 June 2017, ICC-01/04-02/06-1931" (the "Defence Request" or the ''Request'').[1]

2. The Defence Request should be denied, as all of the purported issues fail to satisfy the cumulative criteria set forth in article 82(1)(d) of the Rome Statute.

II. PROCEDURAL BACKGROUND

3. On 25 April 2017, the Defence moved Trial Chamber VI (the "Chamber") for leave to file a motion for a partial judgment of acquittal.[2]

4. On 8 May 2017, the Legal Representatives as well as the Prosecution filed their respective responses, each opposing the request for leave to move for partial acquittal.[3]

5. On 29 May 2017, the Chamber informed the parties and participants that it had rejected the Defence request for leave to move for partial acquittal, and indicated

[1] See the "Urgent Request for leave to appeal 'Decision on Defence request for leave to file a 'no case to answer' motion', 1 June 2017, ICC-01/04-02/06-1931", No. ICC-01/04-02/06-1937, 6 June 2017 (the "Defence Request" or the "Request"). A courtesy copy of the Request was communicated to the Chamber, parties, and participants by Email on 5 June 2017 at 22:28.
[2] See the "Request for leave to file a motion for partial judgment of acquittal", No. ICC-01/04-02/06-1879-Conf, 25 April 2017.
[3] See the "Joint Response by the Common Legal Representatives of the Victims to the Defence 'Request for Leave to file motion for partial judgment of acquittal', No. ICC-01/04-02/06-1891-Conf, 8 May 2017; "Prosecution's response to the 'Request for leave to file motion for partial judgment of acquittal', No. ICC-01/04-02/06-1879-Conf", No. ICC-01/04-02/06-1894-Conf, 8 May 2017.

that it would place the reasons for its decision on the record by way of a formal written decision.[4]

6. On 1 June 2017, the Chamber rendered the "Decision on Defence request for leave to file a 'no case to answer' motion (the "Impugned Decision").[5]

7. On 6 June 2017, the Defence filed its Request, wherein it contends that three separate issues should be certified for appeal.[6] It argues that the immediate resolution of these issues by the Appeals Chamber is necessary to safeguard the fair and expeditious conduct of the proceedings.[7]

III. SUBMISSIONS

8. The Impugned Decision falls within the category of "other decisions" for which leave to appeal must be sought on distinct, identifiable 'issues' the immediate resolution of which may materially advance the proceedings. The Defence Request fails to meet the legal criteria applicable to requests for leave to appeal that are not appealable as of right.

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

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

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[4] See the transcript of the hearing of 29 May 2017, No. ICC-01/04-02/06-T-206-CONF ENG ET, p. 5, lines 1-4 (open session).
[5] See the "Decision on Defence request for leave to file a 'no case to answer' motion", No. ICC-01/04-02/06-1931, 1 June 2017 (the "Impugned Decision").
[6] See the Defence Request, *supra* note 1, para. 2.
[7] *Idem*, para. 3.

10. The two components set out in article 82(1)(d) of the Rome Statute are not only complementary, but also cumulative in nature; they must thus both be satisfied in order for leave to appeal to be granted.[8] In particular, "[o]*nly an 'issue' may form the subject-matter of an appealable decision*".[9] The Appeals Chamber defined the term "issue" as "*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*".[10]

11. The Appeals Chamber further considered that "[n]*ot every issue may constitute the subject of an appeal. It must be one apt to 'significantly affect',* i.e. *in a material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'*".[11] Indeed, "*the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal*",[12] and "[l]*eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances*".[13]

12. Moreover, in analysing whether an appealable issue would "significantly affect" the fair and expeditious conduct of the proceedings under article 82(1)(d) of

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[8] See the "Decision on Prosecutor's Application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under article 58" (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 21. See also the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", paras. 8 and 9 and the "Judgment on the Prosecutor's Application for extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision denying Leave to Appeal" (Appeals Chamber), No. ICC-01/04-168 OA 3, 13 July 2006, paras. 8 and 14.

[9] See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 8, para. 9.

[10] *Idem.*

[11] *Ibid.*, para. 10.

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

[13] See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", *supra* note 12, para. 4. See also the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

the Rome Statute, the notion of "fairness" must be understood as referring to situations "*when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage* vis-à-vis *its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*".[14] In turn, "expeditiousness" must be read as "*closely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*".[15]

13. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the "outcome of the trial" under article 82(1)(d) of the Rome Statute, "[t]*he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence*".[16]

2. The Defence Request reflects a "conflicting opinion"

The first 'issue' is but an expression of conflicting opinion

14. The first identified issue is premised on the Defence's interpretation of the Impugned Decision and its conflicting opinion about the approach adopted by the Chamber. In particular, the Defence contends that the Chamber "*even expressly contemplat*[ed] *the possibility that it may be proceeding on* […] *charges in the absence of* [sufficient] *evidence*".[17] It concludes from its reading of the Impugned Decision that the Accused was "*now required to answer charges on which the Prosecution may have presented no evidence sufficient to convict*".[18]

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[14] See, *inter alia*, the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure" (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.
[15] *Idem*, para. 18.
[16] See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 8, para. 13.
[17] See the Defence Request, *supra* note 1, para. 11, referring to para 26 of the Impugned Decision.
[18] *Idem*, para. 11.

15. The Defence interpretation of the Chamber's Decision is inherently flawed, as it focuses on an isolated sentence of the relevant reasoning and seeks to interpret the Chamber's reference to "*even if successful*"[19] to constitute a definite determination of the case at hand. However, the Impugned Decision states in relevant part that a motion for 'no case to answer' "*may contribute to a shorter and more focused trial*"[20] but "*ought to be entertained only if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings*".[21] The Chamber in paragraphs 26 and 27 of the Impugned Decision enounces a general principle. It only considers the case at hand in paragraph 28 of the Impugned Decision in which it considers that the present case does not meet the conditions which would warrant the Chamber granting leave to file a 'no case to answer' motion.[22] The Chamber did not – contrary to the Defence's argument – "*contemplat*[e] *the possibility that the trial should proceed against Mr Ntaganda even in respect of charges on which no sufficient evidence was presented by the Prosecution*".[23]

The second issue misinterprets the Impugned Decision

16. The Defence avers that the Chamber considered only the expeditiousness of the trial and failed to consider the fair conduct of the proceedings, thereby failing to uphold the Accused's rights to be tried without undue delay, to remain silent, and not to be subject to the reversal of the burden of proof.[24]

17. In relevant part, the Impugned Decision states that "[m]*indful of its obligations under Article 64 of the Statute, the Chamber* […] *considers that a motion arguing that there is no case to answer* […] *ought to be entertained only if it appears sufficiently likely to the*

[19] *Ibid*., para. 11.
[20] See the Impugned Decision, *supra* note 5, para. 26.
[21] *Idem*.
[22] *Ibid*., para. 28.
[23] See the Defence Request, *supra* note 1, para. 20.
[24] *Idem*, paras. 1-2.

Chamber that doing so would further the fair and expeditious conduct of the proceedings".[25] There is nothing in the Chamber's reasoning that suggests that it omitted to consider fair trial rights alongside expeditiousness of the proceedings. To the contrary, the Chamber's express reference to these considerations demonstrates that they formed part of its decision making process.

18. It thus follows that the purported 'issue' does not arise from the Impugned Decision in the sense that it would require a decision for its resolution. The 'issue' is but a more difference in opinion regarding the outcome of the balancing exercise of fair trial rights and the expeditiousness of the proceedings. Accordingly, the legal requirements are not fulfilled and leave to appeal should be denied accordingly.

The identified third issue contradicts the Defence's own submissions

19. The Defence's third issue, namely "*whether declining to entertain a Defence motion for a judgement of (partial) acquittal is a discretionary matter*"[26] not only contradicts the submissions it makes elsewhere, but, moreover, does not arise from the Impugned Decision. Furthermore, the Defence repeats previous submissions that the mechanism of seeking a judgment of acquittal should lie with the Defence as of right deriving from the right to a fair trial.[27]

20. First, the Defence avers that a 'no case to answer' motion is a "*fundamental component*" of a fair adversarial trial found in the Rules of the ICTY, ICTR, SCSL, STL and Kosovo Specialist Chambers, which, in its submissions, "*prescribe*" that a Trial Chamber "*has no discretion <u>not</u> to dismiss charges*" for which insufficient evidence has been adduced.[28] This argument not only fails to acknowledge that an equivalent

[25] See the Impugned Decision, *supra* note 5, para. 26.
[26] See the Defence Request, *supra* note 1,para. 2 (iii).
[27] *Idem*, para. 15. See also the "Request for leave to file motion for partial judgment of acquittal", *supra* note 2, paras. 11-12.
[28] See Defence Request, para. 15.

provision was specifically omitted from the Court's legal framework,[29] but it similarly fails to take into consideration that it was only by virtue of the Chamber's decision on the conduct of proceedings that the possibility of bringing such a motion before this Chamber was established in the first place.

21. Had the matter really been such an affront to the fair trial rights of the Accused, the Defence would and should have sought leave to appeal and challenge the discretionary nature of the matter at that time. However, the Defence never sought leave to appeal the Decision on the conduct of proceedings when it had the opportunity to do so. It cannot now challenge the procedural rules laid down at the beginning of the trial merely because it disagrees with the outcome of its request for leave to submit a motion of 'no case to answer' two years after these rules were set. Mere disagreement and conflicting opinion rather than a distinct issue requiring the immediate resolution by the Appeals Chamber cannot form the basis of an appeal and should therefore not be certified by the Chamber.

22. Second, in the same Request, the Defence argues that, just as a Chamber may have inherent powers implied from its character as a judicial institution, so too must the character of the criminal proceedings compel procedures to ensure fairness.[30] It further asserts that "[e]*ntertaining a motion to dismiss is an essential corollary of the right to remain silent*".[31] In essence, the Defence argues that the Chamber has inherent powers to conduct the proceedings with full respect for the Accused's fair trial rights

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It should be noted that the Defence relies on the original version of the ICTY Rule 98*bis*, which has been significantly revised since 1998.

[29] The Legal Representatives refer to their earlier submissions on this point. See the "Joint Response by the Common Legal Representatives of the Victims to the Defence 'Request for Leave to file motion for partial judgment of acquittal'", No. ICC-01/04-02/06-1891-Conf, 8 May 2017, paras. 12-16. It is further noteworthy that the Defence, in its original submissions on the conduct of the proceedings argued that "[w]*hile the legal framework of the Court is silent with respect to the submission of a 'no case to answer' motion – although this is a procedure provided for in the Rules of Procedure and Evidence before the ad hoc tribunals – the Parties agree that this is nevertheless open to the Accused to submit such an application after the close of the Prosecution's case. In the event it elects* [sic] *submit such an application* […]". See the "Submission on behalf of Mr Ntaganda on the conduct of proceedings and on modalities of victims' participation at trial", No. ICC-01/04-02/06-548, 7 April 2015, paras. 66-67 (emphasis added).

[30] See the Defence Request, *supra* note 1, para. 17.

[31] *Idem*.

– in other words, that the Chamber enjoys discretion to adapt the proceedings as necessary to ensure their fairness. The Legal Representatives fail to see how the Defence can, on the one hand, rely on the discretionary powers of the Chamber and, on the other hand, challenge their validity by virtue of its third 'issue'. It is, moreover, noteworthy that the Defence does not seek to challenge the *exercise* of the Chamber's discretion, but rather the existence of this discretionary power in the first place.[32]

23. Third, the Defence contends that it was "[a]*n unstated premise of the Trial Chamber's decision*" that it had the discretion to decline to consider whether no evidence has been presented that justifies proceeding with the case on the charges the Defence eventually sought to challenge.[33] The 'issue' is squarely based on a speculative interpretation of the Impugned Decision. As such, the issue does not *arise* from the Impugned Decision. On this basis alone, the Chamber should decline certification.

24. Finally, the Defence argues that, by implication, the Chamber erroneously took the discretionary decision to continue with the trial for charges for which the Prosecution has allegedly not presented sufficient evidence.[34] There are a number of flawed elements to this argument. First, the Defence assumes that the Chamber conducted some form of *proprio motu* review upon the completion of which it took a decision to continue the trial. Second, the Defence assumes that this purported review reached a certain conclusion, namely that there was insufficient evidence. Third, it presupposes that there was indeed insufficient evidence on the record to support the charges it sought to challenge. None of these assumptions are reflected in

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[32] It is unclear whether the Defence challenges the existence of a discretionary power to entertain or not a "no case to answer" motion or whether it challenges the alleged discretionary decision by the Chamber "*to proceed with the trial for charges upon which the Prosecution has presented no sufficient evidence*" set out in paragraph 22 of the Request. Although the Legal Representatives understand the third identified 'issue' to refer to the former, the argument contained in paragraph 22 of the Defence Request is nevertheless addressed in these submissions.

[33] See the Defence Request, *supra* note 1, para. 22 (emphasis added).

[34] *Idem*.

the reasoning provided in the Impugned Decision. The part of the Impugned Decision quoted by the Defence in support of its argument expresses a mere hypothesis within the general principle; it does not address the facts and circumstances of the present case. As stated above, the Chamber applied the principle it set out only in paragraphs 28 and 29 of the Impugned Decision.

25. Accordingly, the issue does not arise from the Impugned Decision and certification should be denied as "*the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal*".[35]

FOR THE FOREGOING REASONS, as none of the 'issues' the Defence identifies in its Request fulfils the applicable legal criteria, the Legal Representatives respectfully request that the Chamber dismiss the Defence Request in its entirety.

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

Sarah Pellet
Common Legal Representative for Former Child soldiers

Dated this 7th Day of June 2017

At The Hague, The Netherlands

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