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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 "Prosecution's response to the Defence's 'Request for Reconsideration or, In the Alternative, Leave to Appeal Issues Relating to Determination of Motion to Suspend Defence Investigators'", 24 July 2015, ICC-01/04-02/06-746-Conf-Exp

Source: **Office of the Prosecutor**

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Introduction

1. The Ntaganda Defence requests the Trial Chamber to reconsider three aspects[1] of its decision denying an expedited request for disclosure and related matters.[2] The Request for Reconsideration should be dismissed, since it fails to meet the stringent legal requirements for reconsideration. Critically, the Request fails to show "a clear error in the Chamber's reasoning"; nor does it demonstrate that such reconsideration "is necessary to avoid a miscarriage of justice."

2. Equally, the Defence's application for leave to appeal on three alleged issues,[3] advanced in the alternative to the Request, should be dismissed. All three Issues merely disagree with the Chamber's findings. The Defence's conflicting opinion is based on a misunderstanding of the Decision. Thus, the Issues are not appealable.

3. Further, none of the three Issues meet the criteria under article 82(1)(d) of the Statute. Not only do the Issues fail to demonstrate any impact on the fairness and expedition of the proceedings, they also do not warrant any appellate intervention at this stage. The Appeals Chamber's immediate resolution of the matter would not advance the proceedings.

4. To the contrary, the Request/Application underscores the Defence's continuing failure to heed the Chamber's advice "[not] to act as counsel for the Investigators in this litigation before the Chamber."[4]

Level of Confidentiality

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed on a confidential *ex parte* basis, consistent with the classification of the Defence

[1] ICC-01/04-02/06-734-Conf-Exp ("Request for Reconsideration" "Request" and "Application"), para.1 (requesting reconsideration of (i) the standard adopted to determine the motion to suspend the investigators; (ii) the Chamber's alleged failure to order the disclosure of P-0190's statements under rule 76(3); (iii) the Chamber's alleged failure to extend the deadline to permit consultations with the suspended investigators).
[2] ICC-01/04-02/06-731-Conf-Exp ("Decision").
[3] Request for Reconsideration", "Request" and "Application". Here, "Issues".
[4] Decision, para.29.

Application. The Prosecution submits that it is appropriate to file a public redacted version of this filing.

Submissions

A. The Request for Reconsideration is unfounded

6. The Defence asks the Chamber to reconsider its Decision on three issues: (i) the standard of "reasonable grounds to believe" adopted to determine the motion to suspend the Defence investigators; (ii) the Chamber's alleged failure to order the disclosure of P-0190's statements under rule 76(3) and the applicable jurisprudence; and (iii) the Chamber's alleged failure "to extend the deadline to permit adequate consultations with the individuals whose conduct is primarily at issue".[5] As shown below, none of these three issues warrant reconsideration. Not only does the Request misapprehend the law on reconsideration, the arguments advanced fall short of meeting the criteria for reconsideration.

(i) The Request misapprehends the law on reconsideration

7. This Court's law on the test for reconsideration is clear. As the *Ntaganda* Chamber has recently held, "[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice."[6] The Chambers have consistently underscored the exceptional nature of this remedy.[7] The Request fails to acknowledge the restricted nature of this remedy.[8]

8. Moreover, in line with the exceptional nature of reconsideration, new legal arguments are only relevant if they arise from new facts and circumstances that have

[5] Request for Reconsideration, paras.1-27.
[6] ICC-01/04-02/06-611, para.12. *See also* ICC-01/09-02/11-863, para.11; ICC-01/04-01/06-2705, para.18 (the Chamber may reconsider past decisions when they are "manifestly unsound and their consequences are manifestly unsatisfactory.")
[7] *See* ICC-01/04-02/06-611, para.12; ICC-01/09-01/11-1813, para.19.
[8] *Contra* Request, para.2.

arisen since the decision was rendered.[9] The principle of expeditious proceedings would be frustrated if parties were permitted re-litigate an issue every time counsel conceived a new legal argument. In particular, when purportedly new arguments result from a party's earlier deficient submissions or merely repeat rejected submissions, as the Request does, such arguments do not properly arise post-decision.[10] Therefore, these circumstances do not warrant reconsideration.

(ii) The Chamber need not reconsider its decision on the standard of "reasonable grounds to believe"

9. The Request fails to demonstrate that the Chamber erred in its reasoning when it articulated the standard of "reasonable grounds to believe" to decide if the Defence investigators should remain suspended. Neither does it show that reconsideration of the standard is necessary to avoid a miscarriage of justice.

10. First, the Request is incorrect to suggest that its arguments on the standard are new.[11] To the contrary, the Defence has had ample opportunity to advance its arguments on the "balance of probabilities" standard it prefers and it did so. At the status conference of 3 July 2015, the issue of the applicable standard was discussed by the Defence at length, at its own initiative.[12] Defence Counsel made detailed oral submissions at the status conference that "the standard must be at a minimum the standard of *prépondérance de preuve*."[13] The Defence further emphasised its preference

[9] ICC-01/09-01/11-1813, para.19, stating "New facts and arguments *arising since the decision* was rendered *may* be relevant to this assessment." (emphasis added). *See also* ICC-01/09-02/11-863, paras.11-12, where the Chamber found that reconsideration was warranted in light of an appeals judgement rendered after its decision.
[10] The Request's reliance on the selected paragraph of the Prosecution's submissions in *Lubanga* is inapposite: the paragraph makes clear that reconsideration was considered the most appropriate course when "*the parties were not put on notice of, and thus did not have an opportunity to present arguments* in relation to the points for which reconsideration is sought[…]" *See* ICC-01/04-01/06-120, para.9 (emphasis added); *contra* Request, para.2.
[11] *Contra* Request, para.13.
[12] ICC-01/04-02/06-T-21-CONF-EXP-ENG, p.10 lns.3-5, where Defence Counsel stated "[t]he only thing that can prevent this or at least put some kind of limits on this is to examine the allegations and determine to some kind of standard whether this has been established or not." ; p.21,ln.20 – p.22, ln.20, where Defence Counsel stated *inter alia* "[a]nd that's why I want to address the Chamber on the applicable standard […] we're no longer dealing with a reasonable grounds to believe. We're past that stage." Defence Counsel also indicated that he "prepared something much longer" and "the standard is very important."
[13] ICC-01/04-02/06-T-21-CONF-EXP-ENG,p.29, ln.17 – p. 32, ln.11. *Contra* Request, para.4.

for this standard in its reply of 14 July 2015,[14] but chose only to make a "passing reference to this standard".[15] That the Chamber was unpersuaded by the content of these submissions is not grounds for reconsideration.[16]

11. Second, the Defence's request to reconsider the standard of "reasonable grounds to believe" merely disagrees with the Chamber's finding. Such disagreement cannot show that the Chamber erred. Indeed, the Chamber, having considered the Defence submissions at the status conference, carefully articulated its reasons for adopting this standard.[17]

(i) The Chamber first reiterated its earlier guidance that the *ex parte* matters before it fell within the framework of requests for "certain restrictive, preventive or protective measures", and that the applicable standard "shall consequently also be no higher than that required for this purpose[…]".[18]

(ii) Following this, the Chamber underscored that decisions on suspension of investigators *inter alia* were administrative matters over which the Registrar had foremost competence. The Chamber emphasised that it did not "consider itself the appropriate forum for making any definitive criminal or disciplinary determination regarding the allegations raised." It would only consider the allegations "to the extent necessary to form a view on whether or not there are reasonable grounds to believe that one or both of the Investigators have engaged in conduct sufficiently detrimental to the integrity of the proceedings and the safety and well-being of witnesses to warrant the relief requested including, in particular, their suspension." [19]

[14] ICC-01/04-02/06-718-Conf-Exp ("Defence Reply of 14 July 2015"), para.7.
[15] Request, para.6.
[16] *See* Decision, para.27, where the Chamber noted that "no jurisprudential support was provided" for the Defence position.
[17] Decision, paras.27-30.
[18] Decision, para.28. ICC-01/04-02/06-T-22-CONF-ENG, p.2, ln.20-p.3, ln.9.
[19] Decision, paras.29, 30.

(iii) In light of the specific nature of its review, the Chamber also reminded the Defence that it was not their place "to act as counsel for the Investigators in this litigation before the Chamber."[20]

The Chamber's reasoning for adopting the "reasonable grounds to believe" standard was clear. No error was made.

12. Third, the Defence submissions are contradictory. Although it argues that its motion of 2 July 2015 did not request the Chamber to determine the applicable standard, the Defence, on the very next day, made detailed submissions on the standard at the status conference.[21] Thus, the record does not suggest that the Defence "responded in passing [on the issue of the standard], as seemed appropriate under the circumstances."[22] Moreover, the Defence was on notice from 3 July 2015 that the Chamber would subsequently rule on the applicable standard[23] and could have made any further submissions it thought necessary. Further, contrary to the Request,[24] the Chamber need not limit itself to the Defence submissions in deciding a matter. It can rule on all relevant and related matters. Therefore, no matter whether the Defence failed to make more comprehensive submissions, or whether it exercised a strategic choice to not address the standard in greater detail, the Chamber's reasoning and findings are beyond reproach.

13. Fourth, the Request misunderstands the Decision. Although it insists that "[t]rial motions are generally determined according to the balance of probabilities standard",[25] the Request ignores that the Chamber reasoned that the "reasonable grounds to believe" standard would be appropriate in light of the limited nature of its review. Indeed, the Chamber held that it would only determine if the provisional

[20] Decision, para.29.
[21] Request, paras.4-6.
[22] Request, para.6.
[23] ICC-01/04-02/06-T-22-CONF-ENG, p.3, lns.7-9, where the Chamber stated that its position would be elaborated in further detail when ruling on the relevant requests.
[24] Request, paras.4-5.
[25] Request, paras.7-11.

suspension of the investigators should continue. It would not make any definitive criminal or disciplinary determination. Nor was it required to conduct a fuller assessment of the allegations beyond what was necessary to decide if the suspension was warranted for the integrity of the proceedings and the safety and well-being of witnesses.[26]

14. The Request does not explain why labelling certain discrete decisions (including from other tribunals) as "matters of judicial decision-making"—absent a proper showing of their relevance to the Chamber's decision on suspension of these investigators—would imply that the Chamber had erred.[27] Likewise, the argument as to "the absence of any element of wilfulness"[28] disregards both the limited scope of the Chamber's review at this stage and the Defence's own role *vis-à-vis* the suspended investigators.

15. Moreover, the authority relied upon in the Request is inapposite. Both the *Bemba* decision on challenges to the admissibility of the case under article 19(2)(a) and abuse of process, and the Prosecution's submissions on the admissibility of Saif Al-Islam Gaddafi's case before this Court are distinguishable from the issues in these proceedings.[29] They do not relate to matters of the provisional suspension of Defence investigators for allegedly interfering with witnesses.

16. The "policy reasons" advanced by the Defence and its attempt to impugn P-0190's credibility prior to trial and cross-examination[30] are irrelevant, speculative and consequently unpersuasive.[31]

[26] Decision, paras.28-30.
[27] Request, paras.8-10.
[28] Request, para.12.
[29] *Contra* Request, para.7. *See* ICC-01/05-01/08-802, paras.201-204; ICC-01/11-01/11-276-Red2, para.2.
[30] Request, para.11.
[31] *See* Request, para.11, referring to "past experience" of unrelated cases before other Tribunals (MICT, ICTR and ICTY). *See also* para.11, fn.30, where the Defence submits on the merits and credibility of P-0190's testimony.

17. For these reasons, the Defence fails to demonstrate that the Chamber should reconsider its decision on the applicable standard to assess the provisional suspension of the investigators.

(iii) The Chamber need not reconsider its decision rejecting the Defence's overly broad request for disclosure

18. The Request fails to demonstrate that the Chamber must reconsider its decision rejecting the Defence's overly broad and vague requests for disclosure relating to P-0190. The Request disagrees with this Court's law and the Chamber's assessment on the necessary disclosures. It also persists in speculation as to the existence of undisclosed material. Yet, the Request shows no error in the Chamber's reasoning. Moreover, since the audio recording of the 26 June 2015 meeting with P-0190 and related transcripts have since been disclosed, reconsideration with respect to this material is moot.

19. First, contrary to the Request,[32] the Chamber need not reconsider its decision rejecting the Defence's sweeping requests for disclosure for "any information obtained from [P-0190], during any contact with him." The Chamber had good reason to find that the Defence's request was "too broad to be meaningfully considered within the framework of [r]ule 76",[33] a position that was properly grounded in the law.[34] Although disclosures under rule 76 may cover screening notes of initial contacts or interviews with persons specifically in connection with the investigation, or statements or other records of questioning of persons the Prosecution intends to call as witnesses,[35] rule 76 does not extend to the disclosure of "any prior contact". "Any information" from a witness is not necessarily a

[32] Request, para.21.
[33] Decision, para.19.
[34] ICC-01/04-02/06-705-Conf ("Prosecution Response of 9 July 2015"), paras.25-34.
[35] ICC-01/09-01/11-743-Red, paras.16,20; ICC-02/05-03/09-295 A02, paras.22-23. *See also* Decision, para.19; Prosecution Response of 9 July 2015, paras.29-33.

disclosable "statement" under rule 76.[36] The Request, apart from disagreeing with the Chamber's assessment, shows no error.

20. Second, the Request also assumes—incorrectly—that the Prosecution would not disclose the audio recording of the 26 June 2015 interview with P-0190. However, it was never the intention of the Prosecution to withhold this material. Indeed, the audio recording and relevant transcripts have since been disclosed on 24 July 2015, in the ordinary course and with minimal redactions. In light of this disclosure, and contrary to the Request,[37] the Defence request "to reconsider [the Chamber's] refusal to take account of the non-disclosure of the audio of the 26 June 2015 interview with Witness P-0190" is moot. Likewise, the Request fails to disclose any error in disregarding the Defence submissions on the 26 June 2015 interview and transcripts. These submissions were excluded because the Defence failed to comply with the scope of the reply.[38] A request for reconsideration is not an avenue to remedy a party's earlier non-compliance.

21. Third, the Request fails to acknowledge the Chamber's finding that "the majority of the additional material requested in the Defence Motion" had been disclosed.[39] Significantly, the Prosecution has fulfilled its disclosure obligations relating to P-0190 in good faith.[40] Indeed, the Prosecution has disclosed the following:

(i) The audio file of the recorded conversation between Witness P-0190, LOGO and [REDACTED] on 7 March 2015 ("Recorded Conversation")[41];

[36] Decision, para.19. The Prosecution notes that the Defence does not challenge the Chamber's findings under rule 77 (Decision, paras.20-22). The Chamber disregarded the portions of the Defence Reply of 14 July 2015 on disclosure of "any other contacts with P-0190, at any time during [the Prosecution's] investigations". It exceeded the scope of what was authorised. It found, however, that such information was not necessary for responding to the suspension motion. (Decision, para.16).
[37] Request, para.21.
[38] Decision, para.16. The Chamber found that such information was not necessary for responding to the suspension motion.
[39] Decision, para.17.
[40] Prosecution Response of 9 July 2015, para.35.
[41] The Prosecution is preparing amended versions of the transcript and translation of the Recorded Conversation based on the enhanced version. It will disclose these to the Defence as soon as practicable. As a courtesy, the Prosecution will provide a tracked-changes version of the amended transcript and translation.

(ii) Photographs of the "*registre*"and "*deux messages*" mentioned by Witness P-0901 in his statement of 25 March 2015;

(iii) The handwritten notes taken by Witness P-0190 during his 24 March 2015 interview with the Prosecution;

(iv) The available results of investigative measures taken to date in relation to Witness P-0190's telephone;[42]

(v) The enhanced version of the Recorded Conversation and the preliminary report of the expert who prepared the enhancement;

(vi) The witness statement from P-0190 dated 26 June 2015 regarding the Recorded Conversation and handwritten notes he took during this interview; and

(vii) The audio recording and related transcripts of the 26 June 2015 interview with P-0190.

22. Against this backdrop of the Prosecution's substantial good faith disclosure compliance relating to P-0190, the Request hypothesises as to the existence of undisclosed material. The Chamber correctly found the Defence's submission "that the Prosecution must have had additional contact with P-0190 since 12 February 2015" was merely speculative.[43] Contrary to the Request,[44] there are no "express and implied indications of non-disclosure." Absent a concrete showing that such material even exists, the Request cannot persuade. Neither is a request for reconsideration the appropriate channel to raise purported disclosure issues.

23. For these reasons, no reconsideration of the Chamber's decision denying the Defence's disclosure requests is warranted.

[42] Prosecution Response of 9 July 2015, para.2.
[43] Decision, para.22; *Contra* Request, paras.14,21; Defence Reply of 14 July 2015, paras.11-16.
[44] Request, para.21.

(iv) The Chamber need not reconsider its decision denying the Defence request for an extension of time until 21 August 2015

24. Yet again, the Request fails to show that the Chamber erred in denying the Defence's request for time until 21 August 2015 to respond to the suspension motion.[45] To the contrary, the Request merely disagrees with the Chamber's determination of a routine trial management matter. Moreover, the Request misunderstands the Decision. It appears to wrongly assume that the role of the Defence is to represent the investigators as counsel in the litigation on the suspension motion. The Chamber has held otherwise.[46]

25. First, the Request merely expresses the Defence's opposition to the time granted to it to consult with the investigators. However, it was well within the Chamber's purview to decide—bearing in mind the limited purpose of the Defence's consultation with the suspended investigators and its circumscribed role in the litigation on suspension—that a delay until after the judicial recess was excessive and unjustified.[47] Although the Defence may disagree with the Chamber's assessment, it does not show that the Chamber erred.

26. Second, the Request misunderstands the scope of the Defence's permitted intervention in this litigation. Contrary to the Request,[48] unlike the Defence's role as counsel for Ntaganda, the Defence need not have "notice" of the core allegations against the suspended investigators, and information of the detail and quality necessary to prepare a criminal defence.

27. Nor, contrary to the Request,[49] is there any demonstration that the Chamber "may not have fully appreciated" the nature of the information. Although the

[45] Request, paras.22-27.
[46] Decision, para.29.
[47] Decision, paras.26-32.
[48] Request, paras.23-24.
[49] Request, para.24.

Defence contests the nature of the information available to it,[50] the Chamber found that it had adequate information to enable it to respond."[51] Not only has the Defence had access to the redacted suspension motion and supporting material since 26 June 2015, it also has had the audio version of the recording since 3 and 10 July 2015. As the Chamber found, the Defence already has access to "certain relevant information from the Investigators."[52] Further, as the Chamber emphasised,[53] the Defence was aware of certain allegations on [REDACTED]'s interactions with P-0190 since March 2015.[54] As the Chamber correctly found, such information is sufficient. The Defence advances a contrary opinion, but does not meet the legal test for reconsideration. Further, in this context, the timing of the Prosecution's filing of the suspension motion is irrelevant, nor does the Defence establish why that is not so.[55]

28. Third, the Defence simply disagrees with the Chamber's assessment that its consultation with the investigators in person was unnecessary. The Chamber's assessment is correct. The Request fails to acknowledge the limited nature of the Chamber's review on the provisional suspension. In fact, as stated, the Chamber's determination need not encompass each of the separate allegations raised in the suspension motion. Given that the Defence already has sufficient relevant information, and that its contact with the investigators at this stage is confined to "the narrow purpose of preparing its response" to the suspension motion,[56] the Request does not persuade that the Chamber erred in any manner. Nor does the Request substantiate why consultations with the VWU (now VWS) and the Registry as to the viability of communicating with the investigators would be necessary.[57] The

[50] Request, para.23. The Prosecution is unable to respond to this aspect of the Request, as it refers to an *ex parte* filing (ICC-01/04-02/06-717-Conf-Exp) unavailable to it.
[51] Decision, paras.26, 31.
[52] Decision, para.31, referring to ICC-01/04-02/06-711-Conf-Exp, para.20. The Prosecution is unable to access an unredacted version of this filing, including the contents of para.20.
[53] Decision, para.26.
[54] *See* ICC-01/04-02/06-691-Conf-Exp, para.31, noting that on 11 March 2015, the Prosecution informed the Defence that P-0190 reported to them that he was pressured by [REDACTED] who would have told him that "he had to switch side (*sic*)".
[55] *Contra* Request, para.26.
[56] Decision, para.31.
[57] Request, para.25.

Chamber may have rejected the Defence's preferred manner of communicating with the investigators, [58] but that does not show error.

29. For these reasons, no reconsideration of the Chamber's decision denying the Defence's requested extension of time until 21 August 2015 is warranted.

30. Because the Request fails to meet the test for reconsideration, it should be dismissed.

B. The Application for leave to appeal is unfounded

31. The Defence's Application seeking leave to appeal the Decision under article 82(1)(d) must similarly fail. As outlined above, all three Issues merely disagree with the Decision, and are not appealable. In addition, the First and Second Issues do not arise from the Decision. As the Appeals Chamber has held, "only an issue may form the subject-matter of an appealable decision. […] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."[59] Moreover, according to the Appeals Chamber's consistent case law, mere disagreements or conflicting opinions fall short of constituting appealable issues.[60]

32. Nor do any of the Issues meet the article 82(1)(d) criteria. In these circumstances, leave to appeal the Decision cannot be granted.

(i) The First Issue is not appealable

33. The First Issue—whether the Chamber was correct in the standard by which it will adjudicate the suspension of the investigators[61]—merely disagrees with the

[58] *Contra* Request, para.25.
[59] ICC-01/04-168 OA3, para.9; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7. *See also* ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para.4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."
[60] *See e.g.*, ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.25; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.
[61] Application, para.31.

Decision. The Application insists on the Defence's preference for the "balance of probabilities" standard, despite the Chamber's carefully reasoned Decision to adopt the "reasonable grounds to believe" standard. However, no matter the Defence's partiality for a particular legal standard, the First Issue remains the Defence's conflicting opinion and is not appealable.

34. Equally, the First Issue does not arise from the Decision. As shown above,[62] the Application misunderstands the Chamber's findings and their supporting rationale, and even, the restricted nature of the Chamber's review of the suspension.

35. For these reasons, the First Issue should be dismissed.

(ii) The Second Issue is not appealable

36. The Second Issue—whether the Chamber failed to order the disclosure, pursuant to rule 76(3), of all P-0190's statements[63]— does not arise from the Decision because the Application misapprehends it. The Application fails to acknowledge the Chamber's finding that the majority of the requested information had in fact been disclosed.[64] The Decision also noted the Prosecution's submission that it had made a good faith assessment of its disclosure obligations, and had "already disclosed all relevant information currently available in relation to P-0190."[65] Significantly, although much of the Application hinges on the purported non-disclosure of the audio recording of the 26 June 2015 interview with P-0190,[66] this material has since been disclosed. As such, these aspects are now moot.

[62] *See* paras.9-17.
[63] Application, para.31. *See* paras.18-23.
[64] Decision, para.17.
[65] Decision, para.23.
[66] Request/Application, paras.14-21.

37. Furthermore, the Second Issue simply disagrees with the Chamber's assessment of what may or may not be disclosed.[67] At this stage, the Application's re-litigation of the matter cannot render the Issue appealable.

38. For these reasons, the Second Issue should be dismissed.

(iii) The Third Issue is not appealable

39. The Third Issue—whether the Chamber erred in not extending the deadline to permit adequate consultations with the suspended investigators[68]— merely disagrees with the Decision over a routine trial management matter. A Chamber may or may not grant a requested extension of time, but that does not make the Issue appealable. Further, the Application fails to consider that the Chamber granted the Defence a limited extension of time until 31 July 2015 to consult with the investigators and file its response. Instead, the Defence maintains that it still requires time until 21 August 2015. As shown above,[69] the Application's reasons for requiring such an extension remain unconvincing. The Ntaganda Defence does not represent the investigators; they have sufficient material to respond in this limited litigation. Moreover, the Defence has not concretely shown why the investigators must be consulted in person.

40. For these reasons, the Third Issue should be dismissed.

(iv) The article 82(1)(d) test is not met.

41. The Application fails to meet the article 82(1)(d) test for leave to appeal.

42. The Application does not show any significant impact on the fairness of the proceedings. Although the Defence claims that the suspension of the Defence investigators will prejudice its ability to cross-examine witnesses,[70] any such alleged

[67] Decision, paras.17-23.
[68] Application, para.31.
[69] *See* paras.24-29.
[70] Application, para.33.

prejudice has already been remedied. The Chamber adjourned the proceedings for two months—from 7 July 2015 until 2 September 2015—to grant the Defence additional time at this stage.[71] Indeed, the evidentiary phase of the proceedings will only begin on 15 September 2015.[72] In so determining, the Chamber, in particular, considered the Defence's state of trial readiness. It had specific regard to its obligations under article 64(2) to ensure the fairness of the trial and the rights of the accused, and ordered both the evidentiary phase of the proceedings, and the opening statements, to be postponed.[73] The Application does not argue that this remedy will not suffice. Even so, the Chamber may address concrete issues of prejudice if and when they should arise.[74] However, arguing a hypothetical unfairness of the trial, at this stage and in the context of this case, is unwarranted. Likewise, the Application's claim of "the lack of disclosure in respect of P-0190"[75] is unfounded. The Prosecution has complied with its disclosure obligations, and the Defence has not shown otherwise. In these circumstances, the fairness of the proceedings is not affected.

43. Nor is the expedition of the proceedings significantly affected. By claiming that "the Defence is required to request repeated adjournments because of lack of access to investigators, or doubt about the reliability of past investigations",[76] the Application advances only conjecture. The Application fails to acknowledge the existing remedy of the postponement of trial: it therefore does not adequately explain why it cannot effectively use this interim time until September 2015 to re-organise its investigations as it deems necessary, so the trial may proceed smoothly. The Defence is not precluded from raising concerns as they arise, and the Chamber may address them at the appropriate stage. Moreover, the Application speculates on the content of P-0190's testimony, and claims—without support—that the witness may need to be

[71] ICC-01/04-02/06-T-22-CONF-ENG, p.4, ln.4-p.5, ln.20.
[72] *Ibid.*
[73] *Ibid.*
[74] *See e.g.* ICC-02/11-01/15-117, para.25; ICC-01/04-02/06-604, paras.19-20.
[75] Application, para.35.
[76] Application, para.33.

recalled.[77] Such arguments cannot demonstrate "concrete and irremediable prejudice."[78]

44. The Application does not allege any impact on the outcome of the trial.

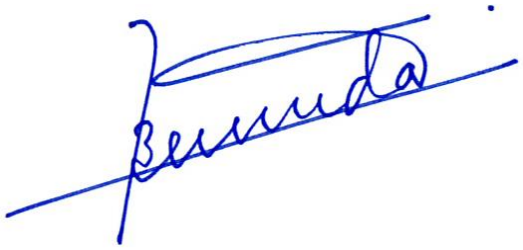
45. Finally, the Application fails to show that immediate appellate intervention is necessary. To the contrary, the Appeals Chamber's immediate resolution would not materially advance the proceedings. The Trial Chamber has not yet ruled on whether the provisional suspension of the investigators should be continued. Moreover, as the Decision states, the Registrar has foremost competence over administrative matters and decisions on the suspension and removal of members of a Defence team.[79] As such, at this stage, absent any decision on the matter, any appellate intervention, if at all, would be premature. Neither is the Appeals Chamber an advisory body to address general principles or hypothetical matters.[80] When significant portions of the Request/Application misapprehend the Decision, the Appeals Chamber's intervention is not required to correct the misunderstanding.

46. Because none of the Issues are appealable and since they fail to meet the article 82(1)(d) criteria, the Application should be dismissed.

[77] Application, para.34.
[78] *Contra* Application, para.33.
[79] Decision, para.29.
[80] ICC-01/04-503 OA4 OA5 OA6 ("*DRC Situation* Appeal Decision of 30 June 2008"), para.30.

Conclusion

47. The Request for Reconsideration/Application should be dismissed. The Request fails to establish "a clear error in the Chamber's reasoning"; nor does it demonstrate that such reconsideration "is necessary to avoid a miscarriage of justice." Likewise, the Application, which is based on identical facts as the Request, also fails. The three Issues advanced are not appealable. They also fail to meet the article 82(1)(d) test.



Fatou Bensouda, Prosecutor

Dated this 19th day of February 2021
At The Hague, The Netherlands