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No.: ICC-01/04-02/06
Date: 23 September 2019

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Urgent request for reconsideration of the “Decision on Mr Ntaganda’s request for an extension of the page and time limit for the filing of the appeal brief and related matters”

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 the submission of the Defence “Request for extension of the page limit and time to file appeal brief” on 11 September 2019 (“Defence Request for Extension”)¹ and the “Decision on Mr. Ntaganda’s request for an extension of the page and time limit for the filing of the appeal brief and related matters” issued on 20 September 2019 (“Impugned Decision”),² Counsel representing Mr. Ntaganda (“Defence or Mr. Ntaganda”) hereby submit this:

Request for Reconsideration of the “Decision on Mr Ntaganda’s request for an extension of the page and time limit for the filing of the appeal brief and related matters”

“Defence Request for Reconsideration”

INTRODUCTION

1. The Defence respectfully submits that the Impugned Decision seriously impedes the ability of the Defence to brief the 15 grounds of appeal in the “Defence Notice of Appeal”³, thereby resulting in an injustice that can be avoided without prejudice to the timely adjudication of Mr. Ntaganda’s appeal or to the Prosecution.
2. Accordingly, the Defence requests the Appeals Chamber (“Chamber”) to reconsider the Impugned Decision ordering Mr. Ntaganda to : (i) “file his appeal brief in relation to the first two grounds of appeal identified in his notice of appeal by Monday 7 October 2019”⁴; and (ii) grant a limited

¹ Request for extension of page limit and time to file appeal brief, 11 September 2019, ICC-01/04-02/06-2398.

² Decision on Mr Ntaganda’s request for an extension of the page and time limit for the filing of the appeal brief and related matters, 20 September 2019, ICC-01/04-02/06-2415.

³ Mr. Ntaganda’s Notice of Appeal against the Judgement pursuant to Article 74 of the Statute, ICC-01/04-02/06-2359, 9 September 2019, ICC-01/04-02/06-2396.

⁴ Impugned Decision, para.2, p.4.

extension of 50 pages, for a total 150 pages, to be distributed between the Defence split appeal briefs.

3. Consequently, for the reasons stated in, the Defence requests the Chamber to:
 - (i) order Mr. Ntaganda to file his appeal brief in relation to the first ground of appeal only, on 11 November 2019,⁵ with all of the remaining grounds to be briefed by 14 January 2020; and (ii) grant a further extension of 50 pages, for a total of 200 pages, for the briefing of the entire appeal.

APPLICABLE LAW

4. The Chamber has an inherent discretion to reconsider its previous decisions. Reconsideration of a decision by a Chamber may be appropriate “[...] to prevent an injustice”.⁶

SUBMISSIONS

I. The novelty of and the prejudice associated with the submission of an appeal brief split in two parts

5. The Defence has been unable to find any precedent of an appellant being ordered to brief his grounds of appeal in two separate documents, on different dates, in the absence of modification to the related notice of appeal.
6. Beyond the impact on the overall coherence of the arguments submitted in support of the appeal, the main prejudice associated with split appeal briefs is the impediment on the ability of the Appellant to determine the length of submissions appropriate and/or required for each ground of appeal.
7. More importantly, it imposes on the Appellant the obligation to decide at this stage, weather it is appropriate and/or necessary to drop certain grounds of

⁵ 120 days following the notification of the Trial Judgment.

⁶ Decision on the Defence request for reconsideration, ICC-01/04-02/06-611, 27 May 2015, para.12.

appeal entirely, before being able to assess the interrelation between arguments submitted in support of each ground. This is particularly significant in this case, considering the number of grounds of appeal to be briefed and the number of pages presently allocated.

II. The number of pages allocated is insufficient to brief all 15 grounds of appeal

8. Although the Chamber found that “the scope and range of the arguments anticipated in the present appeal constitute exceptional circumstances justifying the grant of a reasonable extension of the page limit”⁷, it considered that an extension of 50 pages should be sufficient.
9. Considering the complexity and novelty of the grounds of appeal and the numerous findings of facts and law that must be addressed, the Defence respectfully submits that it would not be possible to meaningfully brief all 15 grounds of appeal within a maximum of 150 pages, in particular if the appeal brief is to be split in two documents.
10. By way of comparison, the Chamber previously authorized the filing of appeal briefs of 115 pages in the *Bemba et al.*,⁸ 120 pages in the *Lubanga* case,⁹ and 200 pages in the *Bemba* case,¹⁰ all of which relate to cases of a much lesser scope, addressing significantly fewer charges for which the accused were found guilty and dealing with shorter judgements comprising far fewer findings of fact.

⁷ Impugned Decision, para.20.

⁸ *Bemba et al.*, Decision on Mr Babala’s request for an extension of page limit for his document in support of the appeal, 23 March 2017, ICC-01/05-01/13-2124.

⁹ *Lubanga*, Decision on Mr Lubanga’s request for an extension of the page limit, 28 November 2012, ICC-01/04-01/06-2946.

¹⁰ *Bemba*, Decision on Mr Bemba’s Request for an Extension of Page Limit for his Document in Support of the appeal, 11 July 2016, ICC-01/05-01/08-3405.

11. Considering the scope, range and complexity of the arguments anticipated in support of its 15 grounds of appeal, the Defence would necessarily have to drop certain grounds of appeal, thereby resulting in an injustice, in particular at this earlier stage of the appeal proceedings.
12. Should the Chamber deem necessary to hear further submissions in support of the scope, range and complexity of the 15 grounds included in the Defence Notice of Appeal, the Defence suggests that convening a pre-appeal status conference would be the most appropriate vehicle to do so.

III. The time allocated to brief the first two grounds of appeal is insufficient

13. In the Impugned Decision, the Chamber considered that “Mr Ntaganda has provided convincing justification for his Request and that good cause has been shown for a reasonable extension of the 90-day time limit prescribed in regulation 58(1) of the Regulations.”¹¹
14. The Chamber noted, in particular, “[...] Mr Ntaganda’s submissions regarding: (i) the factual and legal complexity and the scope of the appeal; (ii) the concurrent burdens of the sentencing and reparations proceedings; and (iii) the unavailability of the Conviction Decision in the language that Mr Ntaganda fully understands and speaks.”¹²
15. However, in deciding to order Mr. Ntaganda to file his first two grounds of appeal identified in his notice of appeal by Monday, 7 October 2019, the Chamber focused primarily on only one of these justifications, namely “the Appeals Chamber notes that the translation issue does not appear to impact on the first two grounds of appeal”.¹³ Accordingly, the Defence deems necessary and appropriate to draw the attention of the Chamber on

¹¹ Impugned Decision, para.12.

¹² Impugned Decision, para.12.

¹³ Impugned Decision, para.15.

information that was not available when filing the Defence Request for Extension.

16. Until 20 September 2019, the Defence was involved in preparations for the sentencing phase of the proceedings against Mr. Ntaganda, culminating in hearings held during the week of 16 to 20 September 2019. Moreover, on 20 September 2019, the Defence was ordered to file a 60-page sentencing brief on 30 September 2019 as well as a 35-page response to the Prosecution and the Participants' sentencing briefs, by 7 October 2019.
17. Furthermore, on 20 September 2019, the Defence was ordered to submit its Response to the "Registry's observations, pursuant to the Single Judge's 'Order for preliminary information on reparations' of 25 July 2019, ICC-01/04-02/06-2366" on 3 October 2019.¹⁴ The Defence notes that its Response was originally due on 20 September 2019,¹⁵ but the filing date had to be extended due to the 16-20 September hearings, the date of which had not been set when the original order was issued.
18. What is more, up until 9 September 2019, the Defence devoted all of the resources available for the appeal on the drafting of its Notice of appeal.
19. Consequently, the Defence is placed in a position of having to brief two significant grounds of appeal within a 14-day period, which seriously impedes the ability of the Defence to adequately brief these two grounds.
20. The Prosecution, on the other hand, would benefit from two full months to respond to the first two grounds, thereby creating a situation of inequality. It

¹⁴ Email sent on behalf of Trial Chamber VI to the parties and participants, 18 September 2019, 18:50.

¹⁵ Order for preliminary information on reparations, 25 July 2019, ICC-01/04-02/06-2366.

is also noteworthy that the Defence would have to respond to the Prosecution appeal by 9 December 2019.¹⁶

IV. Grounds 1 and 2 cannot be meaningfully briefed by 7 October 2019

21. Grounds 1 and 2 cannot be meaningfully briefed within 14 days, *i.e.* by 7 October 2019, due to *inter alia* the complexity and novelty of the issues raised therein and further translations issues.
22. Regarding the second ground of appeal, it is significant that it contains no less than five (5) sub-grounds, some of which were the object of requests for leave to appeal during trial¹⁷ that were denied by Trial Chamber VI.¹⁸ Consequently, now that the proceedings have reached the appeal stage, it is essential – as much for the Appellant as in the interest of safeguarding the fairness of proceedings before the Court – to have these significant issues adjudicated by the Chamber.
23. The first of these sub-grounds in particular, dealing with the Prosecution's access and use of Mr. Ntaganda's non-privileged communications from the

¹⁶ Impugned Decision, para.22; 60 days following notification of the Prosecution appeal brief.

¹⁷ Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on "Urgent request for stay of proceedings", 22 November 2016, ICC-01/04-02/06-1645; Request on behalf of Mr Ntaganda seeking leave to appeal "Decision on Defence request for stay of proceedings with prejudice to the Prosecution", 4 May 2017, ICC-01/04-02/06-1888; Request on behalf of Mr Ntaganda seeking leave to appeal the "Decision regarding confidential material in the *Lubanga* case", 5 January 2016, ICC-01/04-02/06-1072; Request on behalf of Mr Ntaganda seeking leave to reply to "Prosecution's Reponse to the Defence's 'Request for orders in relation to Witness P-0046 and disclosure of related MONUC documents'", 21 May 2016, ICC-01/04-02/06-1350-Conf; Request on behalf of Mr Ntaganda seeking reconsideration of the Chamber's oral decision of 22 April 2015 on the Prosecution request to amend its List of Evidence, 29 April 2015, ICC-01/04-02/06-577.

¹⁸ Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings, 12 December 2016, ICC-01/04-02/06-1677; Decision on Defence request for leave to appeal the 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution', 13 June 2017, ICC-01/04-02/06-1955; Decision on Defence request seeking leave to appeal the 'Decision regarding confidential material in the *Lubanga* case', 18 February 2016, ICC-01/04-02/06-1179; Decision on Defence request seeking orders in relation to Witness P-0046 and disclosure of related MONUC documents, 2 June 2016, ICC-01/04-02/06-1360; Decision on the Defence request for reconsideration, 27 May 2015, ICC-01/04-02/06-611.

Court's Detention Centre without the Defence being informed, which has never been addressed by the Chamber, is of major importance. Briefing this sub-ground is not only complex and resource intensive, it also raises substantial reliability and translation issues. Indeed, from the 4,684 non-privileged conversations¹⁹ obtained by the Prosecution, only 104 were the object of a transcript and translated – for a total of 1180 pages – and only 622 were the object of summary translations, without a transcript first being made – for a total of 1633 pages – while all other conversations are only available in audio files, without transcriptions or translations.

24. It necessarily follows that briefing the totality of the second ground of appeal is a time consuming exercise that will have to be conducted in parallel to the briefing of the other grounds of appeal.
25. As for the first ground of appeal, the Defence acknowledges that it can be briefed in a relatively short period of time. Nonetheless, the Defence respectfully submits that with a view to avoiding the risk of a reasonable apprehension of bias arising in relation to the sentence to be imposed on Mr. Ntaganda, it would be appropriate and prudent to avoid briefing the same before Trial Chamber VI determines Mr. Ntaganda's sentence pursuant to article 76.²⁰

V. Extending the deadline from 7 October to 11 November 2019 would not prejudice the timely adjudication of Mr. Ntaganda's appeal

26. In light of the foregoing, the Defence respectfully requests the Chamber to reconsider the Impugned Decision, thereby avoiding the resulting prejudice to the Appellant, by: (i) ordering Mr. Ntaganda to file his appeal brief in relation

¹⁹ Request for extension of page limit and time to file appeal brief, 11 September 2019, ICC-01/04-02/06-2398, para.15.

²⁰ It is expected that the Decision pursuant to article 76 will be rendered before the end of October 2019.

to the first ground of appeal only, on 11 November 2019, with all of the remaining grounds to be briefed by 14 January 2020; and (ii) granting a further extension of 50 pages, for a total of 200 pages, for the briefing of the entire appeal in two separate documents.

27. In addition to avoiding prejudice to the Appellant, modifying the briefing schedule in this manner will not impact the expeditious conduct of the proceedings and a timely consideration of the appeal. Indeed, the Defence would file its appeal brief in relation to the first ground by 11 November 2019, the Prosecution would respond to the first ground of appeal by 6 January 2020²¹, the Defence would file its appeal brief with respect to all other grounds by 14 January 2020, and the Prosecution would respond to the remaining grounds by 16 March 2020.²² The Prosecution would not be precluded from submitting its appeal brief on 7 October 2019, and the Defence would be in a position to respond to the Prosecution appeal on 9 December 2019.²³
28. In the event the Chamber insists on having a minimum of two grounds of appeal briefed by 11 November 2019, the Defence respectfully submits that the only other ground that can meaningfully be briefed by this date, as it does not raise any translation issue, is Ground 3.
29. As for granting the Defence an extension of 50 additional pages, which is necessary to brief its appeal arguments in two separate documents and fully addressing all 15 grounds of appeal, the Defence respectfully submits that it would neither impact the timely adjudication of Mr. Ntaganda appeal nor prejudice the Prosecution.

²¹ 60 days following notification of the appeal brief in relation to the first ground of appeal.

²² 60 days following notification of the appeal brief in relation to all other grounds of appeal.

²³ 60 days following notification of the Prosecution appeal brief.

RELIEF SOUGHT

30. In light of the above, the Defence respectfully requests the Appeals Chamber to:

GRANT the Defence Request for Reconsideration;

RECONSIDER the Impugned Decision;

ORDER Mr. Ntaganda to file his appeal brief in relation to the first ground of appeal only, on 11 November 2019; or in the alternative

ORDER Mr. Ntaganda to file his appeal in relation to the first and third grounds of appeal only, on 11 November 2019; and

GRANT a further extension of 50 pages, for a total of 200 pages to brief the entire appeal.

RESPECTFULLY SUBMITTED ON THIS 23TH DAY OF SEPTEMBER 2019

A handwritten signature in dark ink, appearing to read 'S+B' with a flourish at the end.

Me Stéphane Bourgon, Counsel representing Bosco Ntaganda

The Hague, The Netherlands