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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 Document

Common Legal Representatives' joint response to the "Request on behalf of Mr Ntaganda for leave to appeal the Chamber's decision on Defence urgent request for postponement of the prosecution case"

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. On behalf of the victims participating in the present case, the Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Child soldiers (the “Legal Representatives”) hereby submit, in accordance with regulation 65(3) of the Regulations of the Court, this joint response to the “Request on behalf of Mr Ntaganda for leave to appeal the Chamber’s decision on Defence urgent request for postponement of the prosecution case” dated 24 April 2015 (the “Request”).¹ The Request fails to meet the criteria under article 82(1)(d) of the Rome Statute and accordingly must be dismissed.

II. PROCEDURAL BACKGROUND

2. On 7 April 2015, the Defence filed a request seeking to postpone the presentation of the Prosecution’s case until 2 November 2015 at the earliest² (the “Postponement Request”).

3. On 22 April 2015, the Chamber issued an oral decision on the Postponement Request,³ finding that “*the Defence submissions [do not] justify a postponement of the length requested*”,⁴ but nevertheless considered it appropriate to postpone the trial “*until the second or third week of July 2015*”⁵ (the “Impugned Decision”).

4. On 24 April 2015, the Defence filed the Request seeking leave to appeal the Impugned Decision in relation to the following issues:

¹ See the “Request on behalf of Mr Ntaganda seeking leave to appeal the Chamber’s decision on Defence urgent request for postponement of the Prosecution’s case”, No. ICC-01/04-02/06-572, 24 April 2014 (the “Request”).

² See the “Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest”, No. ICC-01/04-02/06-541-Red, 2 April 2015 (the “Postponement Request”).

³ See the transcript of the Status Conference held on 22 April 2015, No. ICC-01/04-02/06-T-19-ENG ET, p. 5, line 18 to p. 7, line 10.

⁴ *Idem*, p. 5, line 18.

⁵ *Ibid.*, p. 7 line 8.

- “a. The Chamber erred by failing to provide a reasoned opinion setting out the reasons why the Defence submissions do not justify a postponement of the Prosecution’s case of the length requested (the “First Issue”);*
- b. The Chamber erred by failing to take into account the significant change in circumstances during the period from 11 September 2014 to 2 April 2015 (the “Second Issue”);*
- c. The Chamber erred by conflating the right of the Accused to have adequate time for the preparation of the defence with the right of the Accused to know the case he has to meet (the “Third Issue”); and*
- d. The Chamber erred by holding that “the other difficulties described by the Defence [...] fall within the range of normal investigative difficulties that might be anticipated in a case of this nature” and/or by failing to take into consideration the impact of the investigative difficulties encountered on the ability of the Defence to be ready for trial (the “Fourth Issue”).”⁶*

III. JOINT RESPONSE OF THE LEGAL REPRESENTATIVES

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

5. Article 82(1)(d) of the Rome Statute limits the possibility to request leave to appeal *“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”*.

6. The jurisprudence of the Court established the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.⁷

7. In this regard, the Appeals Chamber determined that *“[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the*

⁶ See the Request, *supra* note 1, para. 1.

⁷ 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” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber".⁸ The Appeals Chamber also stated that "[o]nly an 'issue' may form the subject-matter of an appealable decision",⁹ and 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 Accordingly, the mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal.¹¹

8. The Appeals Chamber also 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'".¹²

9. Moreover, pursuant to the constant jurisprudence of the Court, "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",¹³ and "[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances".¹⁴

⁸ 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 7, para. 8.

⁹ *Idem*, para. 9.

¹⁰ *Ibid.*

¹¹ See the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'" (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

¹² 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 7, para. 10.

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'" (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.

¹⁴ 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 13, 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.

10. Furthermore, a Chamber presented with an application for leave to appeal must not examine or consider *“arguments on the merits or the substance of the appeal”*, since these arguments may be more appropriately considered by the Appeals Chamber when and if leave to appeal is granted.¹⁵

11. According to the established jurisprudence, in analysing whether an appealable issue would *“significantly affect”* the fair and expeditious conduct of the proceedings under article 82(1)(d) of 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”*.¹⁶ 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”*.¹⁷

12. 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”*.¹⁸

¹⁵ 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, 19 August 2005, par. 22.

¹⁶ See e.g. 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.

¹⁷ *Idem*, para. 18.

¹⁸ 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 7, para. 13.

2. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Request

a. No “issue” arises from the Impugned Decision

13. The Legal Representatives submit that the Defence fails to identify an “issue” that arises from the Impugned Decision, as required by article 82(1)(d) of the Rome Statute. Most arguments contained in the Request were already considered and dismissed by the Chamber in the Impugned Decision. In fact, the Defence reiterates or makes arguments similar to those previously advanced before the Chamber concerning most of the subjects addressed in the Request, without presenting additional submissions. Consequently, the contentions raised by the Defence in the Request simply reflect a mere disagreement with the conclusions of the Chamber and therefore do not meet the requisite threshold for leave to appeal to be granted.

14. Regarding the First Issue, the Defence makes a general statement alleging that the Chamber erred “*by failing to provide a reasoned opinion setting out the reasons why the Defence submissions do not justify a postponement of the Prosecution’s case of the length requested*”.¹⁹ The Legal Representatives submit that a lack of reasoning, if any, does not *per se* qualify as an “appealable issue”, since what is required under article 82(1)(d) of the Rome Statute is the identification of a specific question arising from the Impugned Decision. There is no obligation for the Chambers of the Court to provide a full explanation for each and every aspect of their decisions, particularly where the issues addressed are procedural in nature. This is consistent with the jurisprudence of the European Court for Human Rights, which has constantly stated that “Article 6 § 1 [ensuring fair trial guarantees] *obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument*”²⁰ and that “*the extent to which [the] duty to give reasons applies may vary according to the nature*

¹⁹ See the Request, *supra* note 1, paras. 1 and 6-12.

²⁰ See ECHR, *Perez v. France*, Application No. 47287/99, 12 February 2004, para. 81; *Garcia Ruiz v. Spain*, Application No. 30544/96, 21 January 1999, para. 26 ; *Van de Hurk v. The Netherlands*, Application No. 16034/90, 19 April 1994, para. 61.

of the decision and can only be determined in the light of the circumstances of the case”.²¹ Moreover, the lack of reasoning alleged by the Defence does not arise from the Impugned Decision, since the Chamber provided several reasons for its decision, stating for instance that the issues raised “*were either already known to it at the time it made submissions on the schedule for preparation for trial, or should reasonably have been anticipated by it at that stage*”.²² The Chamber further clarified that the remaining matters “*do not legitimately justify the Defence postponement request*”.²³ The Defence contention that the Chamber “*failed to provide a reasoned opinion*” is thus plainly incorrect and cannot in any way constitute an appealable issue within the meaning of article 82(1)(d) of the Rome Statute. In relation to the other specific arguments put forward by the Defence namely, the impact of *ex parte* proceedings on the Defence’s preparations for trial²⁴ and the estimated amount of work required for trial preparation,²⁵ the Legal Representatives contend that said arguments relate to the merits of the proposed appeal and are therefore irrelevant to the determination of the Request.

15. Regarding the Third Issue,²⁶ the Legal Representatives submit that the Defence’s arguments appear to be based on a misrepresentation of the submissions made before the Chamber, and fail to properly reflect the conclusions adopted in the Impugned Decision. First, the Chamber’s conclusion that “*the Prosecution’s detailed pre-trial brief and the updated Document containing the Charges should provide the Defence with a clear outline and understanding of the Prosecution’s case*”²⁷ does not address the question related to the adequacy of the time required for the preparation of the defence, and is limited to the consideration of the accused’s knowledge of the case against him. The alleged confusion does not therefore arise from this specific finding

²¹ See ECHR, *Ruiz Torija v. Spain*, Application No. 18390/91, 9 December 1994, para. 29; *Hiro Balani v. Spain*, Application No. 18064/91, 9 December 1994, para. 27.

²² See the transcript of the Status Conference held on 22 April 2015, *supra* note 3, p. 5, lines 18-20.

²³ *Idem*, p. 6, line 3.

²⁴ See the Request, *supra* note 1, para. 8.

²⁵ *Idem*, para. 9.

²⁶ *Ibid.*, paras. 17-22.

²⁷ See the transcript of the Status Conference held on 22 April 2015, *supra* note 3, p. 6, lines 9-11.

of the Chamber. Second, the alleged conflation of the accused's right to adequate time for preparation and his rights to know the case against him does not arise from the Impugned Decision, but rather from the Postponement Request filed by the Defence. While the Defence now contends that it *"did not argue that more time is necessary for the Accused to understand the charges laid against him"*,²⁸ this statement is directly contradicted by the Defence's previous submissions, in which it stated that *"[d]ue to the exceptional volume of materials disclosed by the Prosecution since 15 January 2015 [...] the Defence is unable to acquire the minimum required understanding of the Case against the Accused"*.²⁹ There was therefore a clear linkage in the Postponement Request between the volume of disclosure and the right of the accused to know the case against him. The Defence's contention that the *"Chamber misunderstood the arguments of the Defence"*³⁰ is thus without merit and does not arise from the Impugned Decision. For the same reason, the Defence's argument that the *"Chamber considered a factor not raised by the Defence"* must be dismissed as unfounded.³¹

16. Moreover, the Legal Representatives submit that Second Issue regarding the impact of changed circumstances since 11 September 2014, and the Fourth Issue regarding the Defence's investigative difficulties, constitute a mere disagreement with the Chamber's conclusions. This is evidenced by the way the Defence frames the appealable issues. The two grounds repeat almost *verbatim* the arguments already made in the Postponement Request.³² In so doing, the Defence fails to identify clear and precise appealable issues arising from the Impugned Decision itself, but rather attempts to re-litigate matters already previously resolved by the Chamber. The Second and Fourth Issues of the Request should therefore be dismissed as such, as

²⁸ See the Request, *supra* note 1, para. 19.

²⁹ See the Postponement Request, *supra* note 2, para. 15.

³⁰ See the Request, *supra* note 1, para 18.

³¹ *Idem*, para. 20.

³² See the Postponement Request, *supra* note 2, paras. 47-52 (arguing difficulties encountered in the conduct of Defence investigations), and paras. 18 *et seq.* (claiming a change in circumstance as a result of the volume of disclosure).

the procedure for leave to appeal should not be used as a vehicle to reconsider repetitive arguments that have already been fully examined by the Chamber.

b. The “issues” raised by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

17. If, by extraordinary, the Chamber were to find that the four “issues” identified by the Defence arise from the Impugned Decision, the Legal Representatives submit that none of these issues has an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial, as required by article 82(1)(d) of the Rome Statute.

18. The Legal Representatives note, at the outset, that the Postponement Request was, in effect, partially granted by the Chamber. Indeed, although the Defence had requested a postponement of nearly five months to prepare for trial, the Chamber only granted a postponement of less than two months. The Chamber held that *“opening statements in the trial should be postponed until the second or third week of July 2015”*.³³ In deciding on the Postponement Request, the Chamber also recognized that the extension of time granted *“may assist the Defence in completing its review of the incriminatory material disclosed to date”*.³⁴

19. The Legal Representatives submit in this regard that all the “issues” identified by the Defence are premised on the understanding that the Chamber’s limited postponement, and the related rejection of the request for a more extended time frame for preparation, constitutes an appealable issue warranting the intervention of the Appeals Chamber. However, the practical effects of the Impugned Decision on the rights of the Defence are rather limited, since the Chamber has already granted an extension of time. Granting leave to appeal in the circumstances cannot be justified and will have no bearing on the fair and expeditious conduct of the

³³ See the transcript of the Status Conference held on 22 April 2015, *supra* note 3, p. 7, lines 7-9.

³⁴ *Idem*, p. 7, lines 1-2.

proceedings. To the contrary, authorizing appellate review of the Impugned Decision at this stage will further impede the parties' and participants' preparations for trial and may result in further postponements of the commencement date. This is particularly true in light of the Defence submissions regarding the impact of *ex parte* proceedings on its ability to adequately prepare for trial.³⁵

20. The Defence also makes a series of speculative and unsupported allegations, contending that the time granted by the Chamber "*constitutes a violation of the right of the Accused*",³⁶ "*makes it impossible for the Defence to inter alia gain full knowledge and understanding of all material disclosed by the Prosecution*"³⁷ and "*would be unfair as the Defence would not be in a position to effectively challenge the evidence*".³⁸ The Legal Representatives submit that these arguments are too general and lack of the requisite specificity. It is also premature for the Chamber to engage in a thorough examination of the arguments put forward by the Defence, as these matters may be adequately addressed when the trial begins. In the absence of reference to other particular facts or to concrete difficulties, it is submitted that the Defence has failed to demonstrate that the "issues" identified in the Request affect the fair and expeditious conduct of the proceedings.

21. The Legal Representatives submit that, as demonstrated *supra*, since none of the fourth "issues" identified by the Defence in its Request affects the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these issues may materially advance the proceedings.³⁹

³⁵ See the Request, *supra* note 1, para. 8.

³⁶ *Idem*, para. 30.

³⁷ *Ibid.*, para. 31.

³⁸ *Ibid.*, para. 32.

³⁹ See the "Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing" (Pre-Trial Chamber I), No. ICC-02/11-01/11-530, 8 October 2013, para. 42.

FOR THESE REASONS, the Legal Representatives respectfully request the Chamber to dismiss the Defence Request.



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Victims of the Attacks



Sarah Pellet
Common Legal Representative of the
Child soldiers

Dated this 30th Day of April 2015

At The Hague (The Netherlands) and Carnac (France)