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No.: ICC-01/04-02/06

Date: 10 July 2015

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 “Application on behalf of Mr Ntaganda seeking leave to appeal the Chamber’s oral decision on ‘Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial’”

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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Section**

Further to the oral decision on the *“Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial”*¹ rendered in open session by Trial Chamber VI (“Chamber”) of the International Criminal Court (“Court”) on 3 July 2015 (“Impugned Decision”),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Application on behalf of Mr Ntaganda seeking leave to appeal the Chamber’s oral decision on “Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial”

“Defence Application”

OVERVIEW

1. The Defence respectfully submits that the Chamber’s decision to postpone the holding of opening statements until 2 September 2015 and the commencement of the evidentiary stage on 15 September 2015, warrants the intervention of the Appeals Chamber at this stage.
2. The Impugned Decision raises a single issue, namely:

As a result of the Impugned Decision setting a date for the commencement of trial rather than adjourning the proceedings as requested, the necessary conditions to ensure a fair trial in this case are not in place

(“Issue”)

3. Pursuant to the well-established jurisprudence of the Court, resolution of the Issue requires a decision, namely the adjournment of the proceedings until the conditions are in place to ensure a fair trial. As such, the Issue is not merely a question over which there is disagreement or conflicting opinion and constitutes an appealable issue.

¹ ICC-01/04-02/06-677-Conf-Exp-Corr (“Defence Urgent Motion for Adjournment”). A public redacted version of the Defence Urgent Motion for Adjournment was submitted on 29 June 2015: ICC-01/04-02/06-677-Corr-Red.

² ICC-01/04-02/06-T-22-CONF-ENG, pp.3(11.24-25)-5(11.1-20).

4. In this regard, a distinction must be made between the Issue and the alleged errors committed by the Chamber which gave rise to the same.
5. In this case, the Issue is predicated on *inter alia*:
 - i. the Chamber erroneously adjudicating the Defence Urgent Motion for Adjournment as seeking a delay rather than an adjournment;
 - ii. the Chamber's failure to pronounce on the serious prejudice resulting from the information withheld from the Defence, which makes it impossible for the Defence to meaningfully respond to the [REDACTED], to articulate the case for the defence and deliver an opening statement, as well as to prepare for cross-examination; and
 - iii. the Chamber arbitrarily setting a new date for the commencement of trial which fails to take into account the impact of the [REDACTED] challenging the integrity of Defence investigations, which could have been avoided, had the Prosecution addressed this confidential issue with the Defence – from the moment it could – months earlier,

which result in the necessary conditions to ensure a fair trial in this case, not being in place.
6. The Issue would significantly affect the fair and expeditious conduct of the proceedings.
7. More importantly, an immediate resolution of the Issue by the Appeals Chamber is required as it will materially advance the proceedings.

CONFIDENTIALITY

8. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court (“RoC”), this Defence Application is submitted on a confidential and *ex parte* basis – only available to the Chamber, Prosecution, VWU and Defence – as it refers to filings bearing the same classification.
9. In the interests of justice and for the sake of the publicity of the proceedings before the Court, a public redacted version of the Defence Application is submitted separately.
10. The redactions applied to the public redacted version are limited to what is strictly necessary to achieve the aim sought by the confidential classification of the various filings referred to in this Defence Application. Mindful of the imperative necessity to protect the safety of witnesses, while at the same time favouring the publicity of the Court’s proceedings, the Defence has exercised utmost caution in applying such redactions.

PROCEDURAL BACKGROUND

11. On 8 August 2014³ and on 10 June 2015,⁴ the Prosecution submitted *ex parte* requests seeking the Chamber to impose *inter alia* [REDACTED].
12. On 7 March 2015,⁵ the Defence reported to the Prosecution an inadvertent contact between its investigators and a Prosecution witness, namely [REDACTED].

³ ICC-01/04-02/06-349-Conf-Exp (“[REDACTED]”). A confidential version of the Prosecution Request [REDACTED] with less redactions was filed on 19 December 2014: ICC-01/04-02/06-349-Conf-Red2. The Defence notes that the Prosecution inappropriately referred to the existence of this filing during a hearing held in open session on 23 October 2014: ICC-01/04-02/06-T-16-ENG, p.6(II.10-12).

⁴ ICC-01/04-02/06-635-Conf-Exp (“[REDACTED]”). The Defence was notified of a confidential redacted version of the Prosecution Request [REDACTED] on 11 June 2015: ICC-01/04-02/06-635-Conf-Red.

⁵ ICC-01/04-02/06-T-21-CONF-EXP-ENG, p.20(II.3-5). [REDACTED].

13. On 11 March 2015,⁶ a meeting between the Prosecution and the Defence was held – at the request of the Prosecution – to discuss this inadvertent contact.
14. On 24 March 2015,⁷ the Prosecution [REDACTED].
15. On 27 March 2015,⁸ the Defence met with the Prosecution for the purpose of discussing *inter alia* how best to ensure the protection of witnesses. During this meeting, no mention was made by the Prosecution that on 24 March 2015, it [REDACTED] on 7 March 2015.
16. On 19 June 2015,⁹ the Prosecution filed an *ex parte* request seeking [REDACTED] on 7 March 2015.
17. On 23 June 2015,¹⁰ the Chamber issued its “[REDACTED]”, thereby *inter alia* [REDACTED] of 19 June 2015.
18. On 25 June 2015,¹¹ the Defence informed the Chamber and the Prosecution that further to [REDACTED] of 19 June 2015, it [REDACTED].
19. On 26 June 2015, the Defence submitted its Urgent Motion for Adjournment.
20. On 29 June 2015,¹² the Chamber convened a status conference to “discuss” the Defence Urgent Motion for Adjournment.
21. On 30 June 2015,¹³ the Prosecution submitted its response to the Defence Urgent Motion for Adjournment.

⁶ ICC-01/04-02/06-T-21-CONF-EXP-ENG, p.20(lI. 5-18).

⁷ [REDACTED].

⁸ ICC-01/04-02/06-T-21-CONF-EXP-ENG, p.20(lI.20-25)-21(lI.1-3).

⁹ ICC-01/04-02/06-658-Conf-Exp (“[REDACTED]”). The Defence was notified of a confidential redacted version of the Prosecution Request [REDACTED] on 26 June 2015.

¹⁰ ICC-01/04-02/06-667-Conf-Exp (“[REDACTED]”).

¹¹ ICC-01/04-02/06-673-Conf-Exp.

¹² Email from a Legal Officer of the Chamber to the Prosecution, Legal Representatives of the Victims and the Defence, 29 June 2015, 16:03.

¹³ ICC-01/04-02/06-685-Conf-Exp (“Prosecution Response to Defence Urgent Motion for Adjournment”). A public redacted version of the Prosecution Response to Defence Urgent Motion for Adjournment was filed on the same day: ICC-01/04-02/06-685-Red.

22. On 2 July 2015,¹⁴ the Defence submitted an expedited motion seeking: (i) [REDACTED]; (ii) [REDACTED]; and (iii) variation of the time limit for the purpose of responding to [REDACTED].
23. On 3 July 2015,¹⁵ the Chamber issued *proprio motu* an order clarifying a matter raised in the Defence Urgent Motion for Adjournment, namely [REDACTED] before the start of the evidentiary phase of the trial.
24. The same day, the Chamber heard the parties during an *ex parte* status conference held in closed session, following which it rendered the Impugned Decision in open session.

SUBMISSIONS

I. The Issue constitutes an appealable issue pursuant to Article 82(1)(d) of the Statute

25. As recalled by the Chamber, for the purpose of Article 82(1)(d) of the Statute, an ‘issue’ is an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹⁶ It is necessary for the moving party to identify a discrete issue for resolution by the Appeals Chamber, rather than arguing that the entirety of the Chamber’s reasoning is erroneous.¹⁷
26. It is settled jurisprudence that a request for leave to appeal is not concerned with whether the impugned decision was correctly reasoned or not,¹⁸ but should rather be aimed at addressing the specific criteria set out in Article 82(1)(d) of the Statute.¹⁹ The Defence respectfully submits that this *ratio* must also apply to decisions on requests for leave to appeal. Hence, in

¹⁴ ICC-01/04-02/06-691-Conf-Exp.

¹⁵ ICC-01/04-02/06-697-Conf-Exp (“[REDACTED]”).

¹⁶ ICC-01/04-02/06-519 (“Decision on the Prosecution’s Request for Leave to Appeal”), para.25.

¹⁷ Decision on the Prosecution’s Request for Leave to Appeal, para.25.

¹⁸ See, e.g., *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, para.4.

¹⁹ ICC-01/04-02/06-425-Conf-Exp, para.22.

- adjudicating this Defence Application, the Chamber must consider solely whether the requirements set out in Article 82(1)(d) of the Statute are met, regardless of its views on the merits of a potential Defence appeal.
27. For the following reasons, the Defence posits that the Issue raised by the Impugned Decision constitutes an appealable issue.
 28. The fact that further to the Impugned Decision, the necessary conditions to ensure a fair trial are not in place, constitutes an identifiable subject, the resolution of which requires a decision.
 29. Indeed, resolution of the Issue raised by the Impugned Decision requires a decision: (i) confirming whether the conditions identified in the Defence Urgent Motion for Adjournment are indeed necessary to ensure a fair trial; (ii) pronouncing on whether, as a result of the Impugned Decision which sets 2 September 2015 as the commencement date of the trial, these conditions are in place; and, if not, (iii) adjourning the proceedings.
 30. This is certainly not a question over which there is a mere disagreement or conflicting opinion.
 31. In this regard, it is significant that in its Urgent Motion for Adjournment, the Defence highlighted conditions which must be in place to ensure a fair trial, including *inter alia*: (i) the resolution of [REDACTED] before the commencement of trial; (ii) the Chamber pronouncing on the merits of [REDACTED], in order to confirm or infirm the integrity and reliability of Defence investigations; (iii) the Defence having adequate time and resources to validate past Defence investigations in the event [REDACTED]; (iv) the Defence gaining access to all information underpinning the [REDACTED], with a view to shaping the case for the defence and preparing for cross-examination; and (v) [REDACTED].

32. In its [REDACTED] and the Impugned Decision, the Chamber addressed and pronounced on some of these conditions, including *inter alia*, the resolution of the [REDACTED] before the commencement of trial and the [REDACTED].
33. However, the Chamber failed to pronounce on the other necessary conditions to ensure a fair trial in the present case, which were argued by the Defence in its Urgent Motion for Adjournment as well as during the 3 July 2015 Status Conference.
34. This error led the Chamber to arbitrarily set a date for the commencement of trial, which results in the necessary conditions to ensure a fair trial in this case, not being in place.
35. In this regard, the Defence recalls the fundamental distinction which must be made between the appealable issue and alleged errors committed by the Chamber, which gave rise to the same. The Issue outlined above does not merely express an error on the part of the Chamber. Quite to the contrary, it highlights a fundamental question, the resolution of which requires the immediate intervention of the Appeals Chamber as it significantly affects the fair and expeditious conduct of the proceedings.

II. The Issue would significantly affect the fair and expeditious conduct of the proceedings

36. Pursuant to Article 82(1)(d) of the Statute, the moving party must demonstrate that the impugned decision involves an issue “that would significantly affect the fair and expeditious conduct of the proceedings *or* the outcome of the trial”.²⁰
37. Evidently, the Issue strikes at the core of the fairness of the proceedings. Indeed, the Issue highlights the fact that far from making sure that the necessary conditions are in place to ensure a fair trial, the Impugned Decision – arbitrarily setting the commencement of trial on 2 September 2015 whereas

²⁰ Emphasis added.

- significant issues have yet to be resolved – creates a situation which significantly affects the fair conduct of the proceedings. In fact, with respect to the conditions in place to ensure a fair trial, the resulting prejudice to the Defence is now greater than before the Impugned Decision was rendered.
38. In particular, in setting 2 September 2015 as the firm date for the commencement of trial in the present circumstances, the Impugned Decision fails to take into consideration that the fairness of the proceedings cannot be ensured in this case until the integrity of Defence investigations has been definitely ascertained. The issue at stake goes way beyond the time necessary to [REDACTED], which underlies the *ratio* of the Impugned Decision.
 39. Indeed, despite the limited additional time made available, the Defence cannot: (i) articulate the case for the defence and deliver its opening statement; and (ii) prepare for cross-examination, until the reliability of its investigations has been confirmed or infirmed.
 40. Only an adjournment of the proceedings until the uncertainty resulting from [REDACTED] – which, it is important to recall, could and should have been raised much more earlier – has been dissipated, can make sure that the necessary conditions are in place to ensure a fair trial in this case.
 41. This requires, at a minimum: (i) the Chamber ruling on the merits of the [REDACTED]; and (ii) the Defence conducting the necessary investigative activities to validate past investigations in the event [REDACTED]. From that moment, it is also necessary for the Defence, in order to be ready for trial, to have adequate time and resources to complete the investigation missions that were scheduled to take place before the evidentiary phase of the trial.²¹

²¹ See [REDACTED].

42. In these circumstances, the limited postponement ordered by the Chamber fails to take into account the imperative necessity for these activities to be performed before the trial can begin.
43. Hence, further to the Impugned Decision, the necessary conditions are not in place to ensure a fair trial, which significantly affects the fair conduct of the proceedings.
44. Furthermore, the Defence submits that the expeditious conduct of the proceedings cannot be entirely contingent upon an expedited start of the trial. Indeed, the notion of expeditiousness must take into consideration not only the commencement date, but also the pace at which the trial will be conducted.
45. If the evidentiary phase of the trial was to commence on 15 September 2015 in accordance with the Impugned Decision, it will inevitably be plagued with requests for delays between witnesses, which would have to be granted to ensure the fairness of the proceedings. Considering that the specific activities which have to be conducted by the Defence have been identified and are clearly known, this is not a matter of speculation.
46. It follows from the above that in addition to significantly affecting the fair conduct of the trial, the Issue similarly affects significantly the expeditious conduct of the proceedings.

III. The immediate resolution of the Issue by the Appeals Chamber may materially advance the proceedings

47. Pursuant to Article 82(1)(d) of the Statute, the Chamber must also be satisfied that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.

48. The Defence posits that regardless of the outcome of the appeal – should leave to appeal be granted – a decision by the Appeals Chamber on the Issue will materially advance the proceedings.
49. Indeed, in the present circumstances, the Defence respectfully submits that the conditions are not in place to ensure a fair trial in this case. At stake is the safety of the verdict to be rendered by the Chamber pursuant to Article 74, following a trial which could be quite lengthy.
50. Considering that the Impugned Decision did not pronounce as to whether the necessary conditions to ensure a fair trial – argued by the Defence in its Urgent Motion for Adjournment as well as during the 3 July 2015 Status Conference – are in place, it is critical for the Appeals Chamber to do so.
51. On the one hand, should the Appeals Chamber find that as a result of the Impugned Decision, the necessary conditions to ensure a fair trial in this case are not in place, it will order the adjournment of the proceedings until such time as these conditions are in place, thereby ensuring that the trial can proceed on a sound basis.
52. On the other hand, should the Appeals Chamber find that the necessary conditions to ensure a fair trial in this case are in place, it will pronounce on the matter, also ensuring that the trial can proceed on a sound basis.
53. Put otherwise, the resolution of the Issue – which results from a situation created primarily by the [REDACTED] raised at the eleventh hour – will materially advance the proceedings.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

GRANT leave to appeal the Impugned Decision on the Issue.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF JULY 2015

A handwritten signature in black ink, appearing to read 'StB' with a stylized flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands