

**Cour  
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**International  
Criminal  
Court**

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Date: 15 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 Document**

**Common Legal Representatives' joint response to the "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:** 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 of the Victims of the Attacks and the Common Legal Representative of the Child Soldiers (the “Legal Representatives”), on behalf of the victims they represent, hereby submit their joint response to the “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’” (the “Defence Request”)<sup>1</sup> in accordance with regulation 65(3) of the Regulations of the Court. It is submitted that the Defence Request fails to meet the criteria set forth in article 82(1)(d) of the Rome Statute and should therefore be dismissed.

## II. PROCEDURAL BACKGROUND

2. On 9 October 2014, Trial Chamber VI (the “Chamber”) set the commencement date for trial as 2 June 2015.<sup>2</sup>

3. On 7 April 2015, the Defence filed a request seeking the postponement of the presentation of the Prosecution’s case until 2 November 2015 at the earliest.<sup>3</sup>

4. On 22 April 2015, the Chamber issued an oral decision whereby it postponed the commencement of the trial *“until the second or third week of July 2015”* (the “22 April 2015 Decision”).<sup>4</sup>

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<sup>1</sup> See the “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’”, No. ICC-01/04-02/06-709-Red, 10 July 2015 (the “Defence Request”).

<sup>2</sup> See the “Corrigendum of ‘Order Scheduling a Status Conference and Setting the Commencement Date for the Trial’ (Trial Chamber VI), No. ICC-01/04-02/06-382-Corr, 9 October 2014, para.8.

<sup>3</sup> 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.

5. On 24 April 2015, the Defence filed a request for leave to appeal the 22 April 2015 Decision.<sup>5</sup> This request was denied on 21 May 2015.<sup>6</sup>

6. On 29 June 2015, the Defence filed an urgent request for adjournment ("Request for Adjournment").<sup>7</sup>

7. On 30 June 2015, the Prosecution submitted its response to the Request for Adjournment, stating that it did not oppose a reasonable adjournment to allow the Defence additional time.<sup>8</sup>

8. On 2 July 2015, the Legal Representatives filed their joint observations opposing the Request for Adjournment.<sup>9</sup> They further requested the Chamber to order the Defence to provide a lesser redacted version of the Request for Adjournment.<sup>10</sup>

9. On 3 July 2015, the Chamber held an *ex parte* status conference, which the Legal Representatives were not authorised to attend, to discuss the Request for Adjournment. During the public hearing held on same day, the Chamber rendered

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<sup>4</sup> See the transcript of the proceedings, No. ICC-01/04-02/06-T-19-ENG ET WT, 22 April 2015, p. 3 (the "22 April 2015 Decision").

<sup>5</sup> 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 2015.

<sup>6</sup> See the "Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date" (Trial Chamber VI), No. ICC-01/04-02/06-604, 21 May 2015.

<sup>7</sup> See the "Public redacted version of 'Corrected version of 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until necessary conditions are in place to ensure a fair trial', 26 June 2015, ICC-01/04-02/06-677-Conf-Exp'", No. ICC-01/04-02/06-Corr-Red, 29 June 2015 (the "Request for Adjournment").

<sup>8</sup> See the "Public redacted version of Prosecution Response to the 'Confidential redacted version of 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until necessary conditions are in place to ensure a fair trial'", No. ICC-01/04-02/06-685-Red, 30 June 2015.

<sup>9</sup> See the "Public redacted version of 'Joint observations on the 'Public redacted version of 'Corrected version of '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', 26 June 2015, ICC-01/04-02/06-677-Conf-Exp'", No. ICC-01/04-02/06-690-Red, 2 July 2015, para. 25.

<sup>10</sup> See the Request for Adjournment, *supra* note 7, p. 11.

its decision on the Request for Adjournment whereby it partially granted said request and decided in particular that “[t]he opening statements are to take place on 2 to 4 September 2015. The evidentiary stage, with the first three witnesses scheduled for the first block will then commence on 15 September” (the “Impugned Decision”).<sup>11</sup> The Chamber rejected the Legal Representatives’ request to be provided with a lesser redacted version of the Request for Adjournment.<sup>12</sup>

10. On 10 July 2015, the Defence submitted a request for leave to appeal the Impugned Decision.<sup>13</sup>

11. On 15 July 2015, the Prosecution submitted a redacted version of its response to the Defence Request.<sup>14</sup>

### III. PRELIMINARY MATTER

12. As a preliminary matter, the Legal Representatives observe that, due to the extensive nature of the redactions applied to the Request for Adjournment and the present Defence Request, as well as the fact that they were not authorised to attend the *ex parte* status conference held on 3 July 2015 wherein the Request for Adjournment was discussed, the victims have *de facto* been deprived of the possibility to effectively participate in the determination of the issue which directly touches upon their very personal interests. For the very same reason, the Legal Representatives are also prevented from submitting meaningful observations in response to the Defence Request.

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<sup>11</sup> See the transcript of the proceedings, No. ICC-01/04-02/06-T-22-CONF-ENG ET, 3 July 2015, p. 5, lines 12-14 (the “Impugned Decision”).

<sup>12</sup> *Idem*, p. 3, lines 16-20.

<sup>13</sup> See the Defence Request, *supra* note 1.

<sup>14</sup> See the “Public redacted version of “Prosecution’s Response to the Defence’s application for leave to appeal Trial Chamber’s VI oral decision on the new trial date (ICC-01/04-02/06-709-Conf-Exp)”, No. ICC-01/04-02/06-720-Red, 15 July 2015.

13. The Legal Representatives further observe that pursuant to regulation 65(3) of the Regulations of the Court, victims are entitled to submit a response to the Defence Request. They submit that in accordance with “internationally recognized human rights”,<sup>15</sup> the requirements of a “fair trial” entails, *inter alia*, that each participant in the proceedings must have “the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision”.<sup>16</sup> They also recall principle 21 of the Basic Principles on the Role of Lawyers, pursuant to which:

*“[i]t is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time”.<sup>17</sup>*

14. Not being privy to essential elements whereupon both the Request for Adjournment and the Defence Request are based, the Legal Representatives are unable to adequately address the issue at stake on behalf of the victims they represent and, therefore, to properly fulfil their mandate and to discharge their obligations with respect to their clients under the Code of Professional Conduct for counsel. In this regard, they reiterate their observations presented in their joint submissions of 2 July 2015.<sup>18</sup> The exclusion of the Legal Representatives from debates

<sup>15</sup> In this regard, see “Judgment on the Prosecutor’s Application for extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision denying Leave to Appeal”, No. ICC-01/04-168, 13 July 2006, para. 11.

<sup>16</sup> See ECHR, *Mantovanelli v. France*, Application No. 21497/93, Judgment of 18 March 1997, para. 33; *Nideröst-Huber v. Switzerland*, Application No. 18990/91, Judgment of 18 February 1997, para. 24; *Lobo Machado v. Portugal*, Application No. 15764/89, Judgment of 20 February 1996, para. 31; *Vermeulen v. Belgium*, Application No. 19075/91, Judgment of 20 February 1996, para. 33; *Ruiz-Mateos v. Spain*, Application No. 12952/87, Judgment of 12 September 1993, para. 63.

<sup>17</sup> See the Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. The document is available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

<sup>18</sup> See the “Public redacted version of ‘Joint observations on the ‘Public redacted version of ‘Corrected version of ‘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’, 26 June 2015, ICC-01/04-02/06-677-Conf-Exp’”, *supra* note 9.

affecting core personal interests of the victims they represent is all the more questionable that they recall that they are bound by the Code of Professional Conduct for counsel when dealing with sensitive or confidential information raised by either the Defence or the Prosecution.

#### IV. JOINT RESPONSE OF THE LEGAL REPRESENTATIVES

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

15. 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”*.

16. 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.<sup>19</sup> 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 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”*.<sup>20</sup> The Appeals Chamber also stated that *“[o]nly an ‘issue’ may form the subject-matter of an appealable decision”*,<sup>21</sup> 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*

<sup>19</sup> 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”, *supra* note 15, paras. 8 and 14.

<sup>20</sup> 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. 8.

<sup>21</sup> *Idem*, para. 9.

*conflicting opinion*".<sup>22</sup> Accordingly, the mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal.<sup>23</sup>

17. 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'".<sup>24</sup>

18. 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",<sup>25</sup> and "[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances".<sup>26</sup>

19. 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.<sup>27</sup>

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<sup>22</sup> *Ibid.*

<sup>23</sup> 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.

<sup>24</sup> 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 15, para. 10.

<sup>25</sup> 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.

<sup>26</sup> 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 25, 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.

<sup>27</sup> 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, para. 22.



20. 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”*.<sup>28</sup> 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”*.<sup>29</sup>

21. 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”*.<sup>30</sup>

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

### *a. No “issue” arises from the Impugned Decision*

22. 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.

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<sup>28</sup> 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.

<sup>29</sup> *Idem*, para. 18.

<sup>30</sup> 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 15, para. 13.

23. In particular, the Defence seeks leave to appeal for only one reason, namely, because it disagrees with the Chamber's approach of "*setting a date for the commencement of trial rather than adjourning the proceedings as requested*".<sup>31</sup>

24. It follows from the very formulation of the single "issue", as further developed subsequently, that, despite its blank statements to convince otherwise,<sup>32</sup> the Defence is simply in disagreement with the decision of the Chamber to set a fixed new date for the commencement of trial rather than to pronounce itself on an adjournment as requested in the Request for Adjournment.<sup>33</sup>

25. The Defence's arguments were already considered and dismissed by the Chamber in the Impugned Decision; some of the arguments are even similar to those previously advanced before the Chamber concerning the very subject addressed in the Request for Adjournment. Consequently, the contentions raised by the Defence in the Defence 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.

*b. The "issue" raised by the Defence does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial*

26. If, by extraordinary, the Chamber were to find that the "issue" identified by the Defence arises from the Impugned Decision, the Legal Representatives submit that this issue has no impact on the fairness and expeditiousness of the proceedings, nor the outcome of the trial as required by article 82(1)(d) of the Rome Statute.

27. Not being privy to important elements affecting the personal interests of the victims they represent, the Legal Representatives nevertheless note that the Request

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<sup>31</sup> See the Defence Request, *supra* note 1, para. 2.

<sup>32</sup> *Idem*, paras. 30 and 35.

<sup>33</sup> *Ibid.*, para. 5.

for Adjournment was considered by the Chamber in light of the parties' submissions and further information provided by the Registry, and consequently was partially granted. Indeed, when deciding on the Request for Adjournment, the Chamber *"heard further submissions from the parties and inquired with the Registry about certain practical matters related to one of the issues the Defence faces"*, and considered that *"these submissions have clarified the nature of the issues the Defence faces in terms of trial readiness"* and further considered that *"the Defence's request was predicated to a substantial degree on a matter which has been clarified separately in an order issued this morning"*.<sup>34</sup>

28. It seems therefore difficult to argue that the Chamber *"failed to pronounce on the necessary conditions to ensure a fair trial"* as put forward by the Defence.<sup>35</sup>

29. In this regard, the Legal Representatives submit that the "issue" identified by the Defence is only premised on the understanding that the Chamber's limited postponement, and the related rejection of the request for more time 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 proceedings. To the contrary, authorising 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.

30. The Legal Representatives submit that a balancing exercise between competing interests is required when considering any request for adjournment of the proceedings. Such a consideration simply entails that, in the circumstances of the

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<sup>34</sup> See the Impugned Decision, *supra* note 11, p. 4, lines 18-24.

<sup>35</sup> See the Defence Request, *supra* note 1, paras 33, 34 and 50.

present case, a further lengthy postponement of the trial cannot be granted because of the resulting prejudice to the victims' right to have the truth established and Justice rendered without delay. In this regard, the Legal Representatives reiterate their submissions according to which "fair trial" guarantees shall apply throughout the proceedings not only to the Defence, but to all the parties and participants, including victims, and shall furthermore prevail over the specific interests of the parties.<sup>36</sup>

31. The Legal Representatives submit that a request for adjournment as sought by the Defence "*until the integrity of Defence investigations has been definitely ascertained*" and "*until [...] the necessary conditions are in place to ensure a fair trial in this case*"<sup>37</sup> is particularly worrying and clearly goes against the very fundamentals of the integrity of the proceedings in the present case.

32. The Legal Representatives submit that, as demonstrated *supra*, since the "issue" identified by the Defence in the Defence Request does not affect the fair and expeditious conduct of the proceedings, nor the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on said issue may materially advance the proceedings.<sup>38</sup>

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<sup>36</sup> See the "Public redacted version of 'Joint observations on the 'Public redacted version of 'Corrected version of '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', 26 June 2015, ICC-01/04-02/06-677-Conf-Exp''", *supra* note 9, paras. 22-25.

<sup>37</sup> See the Defence Request, *supra* note 1, paras. 38 and 40.

<sup>38</sup> See *e.g.* 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.



Dmytro Suprun  
Common Legal Representative of the  
Victims of the Attacks



Sarah Pellet  
Common Legal Representative of the  
Child soldiers

Dated this 15<sup>th</sup> Day of July 2015

At The Hague, The Netherlands