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No.: **ICC-01/04-02/06**
Date: **10 November 2016**

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 “Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI’s decision regarding the admissibility of evidence related to events beyond the temporal scope of the Updated Document containing the charges”, 11 October 2016, ICC-01/04-02/06-1578-Conf

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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Legal Representatives of Applicants

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**Victims Participation and Reparations
Section**

Further to the Trial Chamber VI (“Chamber”)’s oral ruling of 5 October 2016 (“Decision”) overruling the Defence objection regarding the admissibility of evidence beyond the temporal scope of the charges and the subsequent leading of the Witness,¹ Counsel representing Mr Ntaganda (“Defence”) submit this:

Request on behalf of Mr Ntaganda seeking leave to appeal Trial Chamber VI’s decision regarding the admissibility of evidence related to events beyond the temporal scope of the Updated Document containing the charges

“Defence Request seeking Leave to Appeal”

INTRODUCTION

1. Leave is sought to appeal Chamber’s Decision² to overrule the Defence objection concerning the eliciting of evidence during the direct examination of Witness P-0365 related to events beyond the temporal scope of the Updated Document containing the charges (“UDCC”). The issue for which leave is sought is:

Whether evidence adduced by the Prosecution related to events beyond the temporal scope of the charges can be used to lead a witness to provide similar evidence in relation to a period within the temporal scope of the charges.

(“Issue”)

2. The Defence submits that the Issue significantly affects the fair and expeditious conduct of the proceedings and may significantly affect the outcome of the trial. Immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings.

¹ ICC-01/04-02/06- T-147-CONF-ENG ET 05-10-2016 56/113 SZ T, p.56, ln.10-18.

² ICC-01/04-02/06- T-147-CONF-ENG ET 05-10-2016 56/113 SZ T, p.57, ln.12-13.

I. Applicable Law

3. A decision is subject to interlocutory appeal, pursuant to Article 82(1)(d), where it:

[i]nvolves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

4. The Appeals Chamber has defined an “issue” as “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”³ “Essential” in this context must be understood as meaning essential to some judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion.”⁴
5. The notion of “materially advance” involves examination of the degree to which an “authoritative determination” of the “matter posing for decision” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁵ The Appeals Chamber has also held that the criterion is met if immediate determination would “move forward” the proceedings, by “ensuring that the proceedings follow the right course”⁶ and “remove[] doubts about the correctness of the decision or map[] a course of action along the right lines.”⁷ The purpose of such an appeal is to avoid the consequences that would otherwise be embedded in the proceedings and which could “cloud or unravel the judicial

³ *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, 13 July 2006 (“Leave to Appeal Judgment”), para. 9.

⁴ *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim’s Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para.8.

⁵ Leave to Appeal Judgment, para. 14.

⁶ *Id.*, para. 15.

⁷ *Id.*, paras. 14-15.

process.”⁸ The applicable threshold, importantly, is not that interlocutory resolution “*will* materially advance” the proceedings, but only that it “*may*” do so.

6. A request for certification is not concerned with whether a decision was correctly reasoned, but only whether the issues *significantly affect the fairness of the proceedings*.⁹ This being the case, the “materially advance” criterion can be assessed only in relation to the consequences, not the correctness, of the decision from which interlocutory appeal is sought.

II. The Issue is Appealable Admissibility of the Information

7. The issue of admissibility of evidence regarding events going beyond the temporal scope of the UDCC has been previously addressed by the Chamber, both orally and in writing. The Trial Chamber has affirmed that, as a matter of principle, evidence concerning events outside the scope of the UDCC is not necessarily irrelevant or lacking in probative value. As underscored by the Chamber, the ‘default position’ is not that such evidence is automatically admissible, but that its admissibility falls to be considered on a case-by-case basis.¹⁰
8. The Impugned Decision, however, signals a departure from this approach. Rather than determining that the admissibility of information outside the temporal scope of the UDCC should be decided on a case-by-case basis, the Trial Chamber ruled that no further objections on the issue would be entertained:

⁸ *Id.*, para. 16.

⁹ *Muthaura et al.*, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’”, ICC-01/09-02/11-253, 18 August 2011, para. 28.

¹⁰ Decision on Prosecution’s first request for the admission of documentary evidence, ICC-01/04-02/06-1181, p.9, para.14.

See also: T-94-CONF-ENG ET, p.3, ln.5-15; T-96-CONF-ENG ET, p.73, ln. 22-23; T-144-CONF-ENG ET, p.64, ln.13-18 & p.69, ln.19-22.

Really, I find wasting of time if you repeat the objection which was made a few days, two days ago, in fact in the same style, same way with the same argumentation. I mean this speech of Mr Ntaganda also I guess from 2004. And as we said, generally, it doesn't matter if such a behaviour, such an act, such a speech has something to do with 2002-2003 with the charges, if such a behaviour could assist us in our decision about the charges, it should be -- the questioning should be focused also on that, which is exactly this case. I don't want to hear any more submission on it because this issue I find solved.¹¹

Consequently, the Impugned Decision reflects a categorical inclusionary rule in respect of evidence related to events going beyond the temporal scope of the UDCC.

9. Other Tribunals and Trial Chambers have generally insisted that information outside the temporal scope should only be admitted on a case by case basis, and being mindful of the potential prejudice to an accused. As stated in *Bagosora et al.*:

Evidence of past crimes, introduced merely to blacken the character of the Accused and show a propensity and capacity to commit the crimes charged, is improper. This is so because the damning effect of the evidence tends to outweigh its true probative value and to obscure more direct evidence of the crime alleged. In this sense, the evidence is "prejudicial" in a manner that compels exclusion.¹²

10. The particular technique applied by the Prosecution, reflected in the Issue for which leave is sought, is using information from outside the temporal scope of the charges (2004) as a springboard to lead the witness into providing evidence concerning an ostensibly similar event that occurred during the

¹¹ ICC-01/04-02/06- T-147-CONF-ENG ET 05-10-2016 56/113 SZ T, p.56, ln.11-18.

¹² *Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY, ICTR-98-41-T, 18 September 2003, para.17.

period of the charges (2002 to 2003). The Prosecution may be expected to apply this technique in the future. The potential prejudice and impact on the proceedings is therefore substantial. Further, the Issue is not merely a question over which there is a disagreement. Rather, the Issue identifies a topic requiring clear appellate directions.

III. The Decision Significantly Affects the Fair and Expeditious Conduct of Proceedings

11. To the extent that it strikes at the core of the admissibility of evidence, the Issue significantly affects the fair conduct of the proceedings. Indeed, pursuant to Article 69(4) of the Statute, a determination on the admissibility of evidence requires taking into account, *inter alia*, any prejudice that such evidence may cause to a fair trial.
12. The Impugned Decision resulted in allowing the Prosecution to adduce evidence regarding similar events during the period of the charges by leading the witness using the answers given regarding 2004 as a springboard. These leading questions, only possible thanks to the answers given by Witness P-0365 to the questions regarding the period outside the temporal scope of the charges, are highly prejudicial to the Accused. Furthermore, the preclusion of case-by-case objections constitutes the adoption of a categorical inclusionary rule.
13. The Issue also significantly affects the expeditious conduct of the proceedings. The admission of information related to events beyond the scope of the UDCC might very well require refutation by the Defence in respect of that same information. [REDACTED].¹³ Addressing such grave allegations is a lengthy and time-consuming exercise concerning matters that should be of peripheral or no relevance to the charges being adjudicated.

¹³ [REDACTED]; [REDACTED].

IV. Immediate Resolution May Materially Advance the Proceedings

14. The recurrence of the issue of admissibility of evidence related to events beyond the temporal scope of the charges, the time-consuming nature of challenging in cross-examination any evidence elicited related to events going beyond the period of the charges, the use of this information by the Prosecution to lead the witness into providing incriminating evidence and the curtailment of Mr Ntaganda's right to full answer on the basis that such evidence is not a 'crucial' issue, are all consequences resulting from the Issue.
15. Immediate appellate resolution of the Issue will thus ensure that the presentation of the remaining of the Prosecution's case proceeds on a sound basis and will avoid, or certainly, minimize, any future litigation regarding the use of evidence elicited in relation to events beyond the period of the charges to lead the witness into giving similar evidence concerning the period of the charges. Moreover, it would materially advance proceedings and would be an appropriate way in which to remove any doubt as to the correctness of the Impugned Decision, thus providing a "safety net for the integrity of the proceedings".¹⁴

CONFIDENTIALITY

16. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Request is classified as confidential, as it addresses matters raised in private session.

¹⁴ Decision on Defence request for leave to appeal the "Decision reviewing the restrictions placed on Mr Ntaganda's contacts," ICC-01/04-02/16-1513 16-09-2016 9/10 EO T, para.19.

RELIEF SOUGHT

17. In light of the above, the Defence respectfully requests the Chamber to **GRANT** leave to appeal the Impugned Decision on the basis of the above outlined Issue.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF NOVEMBER 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands