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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***

Confidential

**Response of the Common Legal Representative of the Former Child Soldiers to the
“Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order
Setting certain Deadlines regarding the Presentation of Evidence by the
Prosecution and the Defence Case”**

Source: Office of Public Counsel for Victims (CLR1)

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 for the Former Child Soldiers (the "Legal Representative") respectfully submits her response to the "Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order Settling certain Deadlines regarding the Presentation of Evidence by the Prosecution and the Defence Case"¹ (the "Defence Request").

2. The Legal Representative strongly opposes the Defence Request insofar as it seeks variation of the Chamber's deadline for notification of prospective Defence witnesses. The request for reconsideration is unfounded and does not fulfil the legal criteria for reconsideration. The Defence is yet again trying to buy time, following the rejection by the Chamber of its multiple attempts to obtain an adjournment when the Chamber has clearly ruled on the matter. The Defence Request should therefore be rejected.

3. As to the Defence's request to schedule the end of the presentation of the Prosecution's case and the presentation of any evidence or views by LRVs in two shorter blocks, including a minimum two week-adjournment in between, the Legal Representative leaves it to the Chamber to make its proper determination.

II. PROCEDURAL BACKGROUND

4. On 19 October 2016, Trial Chamber VI (the "Chamber"), issued the "Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution" (the "Order setting certain deadlines")² instructing, *inter alia*, the Defence "to provide the Chamber, [by 16 December 2016], on an *ex parte* basis, with a

¹ See the "Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order Settling certain Deadlines regarding the Presentation of Evidence by the Prosecution and the Defence Case", No. ICC-01/04-02/06-1683-Conf, 15 December 2016 (the "Defence Request").

² See "Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution" (Trial Chamber VI), No. ICC-01/04-02/06-1588, 19 October 2016.

*preliminary list of witnesses it intends to call, indicating the time estimates for the examination of the witnesses".*³

5. On 7 November 2016, the Prosecution publicly filed the "Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70"⁴ notice.

6. On 14 November 2016, the Defence submitted a courtesy copy of its urgent request seeking an adjournment.⁵ The Defence then orally addressed the Chamber, seeking the interim relief of suspension of proceedings until the Chamber would rule on its request for stay.⁶

7. The Legal Representative for the Former Child Soldiers opposed the interim relief, arguing that the Chamber should proceed with hearing the evidence of the upcoming witnesses.⁷

8. After deliberation, the Chamber ruled that the examination-in-chief of the upcoming witness P-0911 should proceed.⁸ It stated that it had specifically considered that "*prejudice to the Defence would mainly arise in respect of potential cross-examination of this witness*".⁹ The Chamber further directed the Prosecution and Legal

³ *Idem*, para. 11.

⁴ See the "Prosecution's Communication of Disclosure of Evidence obtained pursuant to Article 70", No. ICC-01/04-02/06-1616, 7 November 2016.

⁵ See Email correspondence from the Defence to the Chamber, Prosecution and Participants dated 14 November 2016 at 9:26. The request for formally filed later on that day.

⁶ See transcript of the hearing of 14 November 2016, No. ICC-01/04-02/06-T-157-ENG-RT, p. 3, line 3 to p. 4, line 22.

⁷ *Idem*, p. 6, lines 15-23.

⁸ *Ibid*, p. 9, lines 24-25. The Presiding Judge further clarified that it "*will have first to evaluate the response from prosecution and participants to [the Defence] submission. And very likely also to -- but then probably only orally to hear [the Defence] reply to the response. So I guess that before, before that we can't start with cross-examination. But one of the [sic] option is that it would mean that there is still some possibility we would start cross-examination not [Tuesday, 15 November 2016], but on Wednesday.*" See *Ibid.*, p. 35, lines 1-8.

⁹ *Idem*, p. 10, lines 3-4.

Representatives to file their respective responses to the Defence request for a stay of the proceedings by 16:00 on 15 November 2016.¹⁰

9. On 16 November 2016, Trial Chamber VI (the “Chamber”) rendered an oral decision rejecting the Defence’s “Urgent Request for Stay of Proceedings”.¹¹ The Chamber found that *“a substantiated submission of ongoing prejudice which would be remedied by immediate adjournment – as opposed to possible other remedial measures – has not been established at this time and the Defence request is therefore rejected”*.¹² The Chamber directed the Prosecution to assist the Defence in disclosing to the latter the relevant material in an identified, categorised way.¹³ The Defence then (i) gave notice that it would seek leave to appeal the decision,¹⁴ and (ii) made an oral application for suspensive effect of the Impugned Decision¹⁵ until such time the Defence submits its request for leave of appeal.¹⁶

10. The Prosecution¹⁷ and the Legal Representatives opposed the Request for suspensive effect.¹⁸ The same day the Chamber rejected the request for suspensive effect.¹⁹

11. On 17 November 2016, the Prosecution filed an “Addendum to the ‘Prosecution’s Communication of the Disclosure of Evidence obtained pursuant to Article 70’, 7 November 2016, ICC-01/04-02/06-1616”.²⁰

¹⁰ *Ibid.*, p. 10, lines 5-7.

¹¹ See the transcript of the hearing held on 16 November 2016, No. ICC-01/04-02/06-T-159-CONF-ENG ET, p. 2, line 13 to p. 7, line 24 (open session).

¹² *Idem.* We underline.

¹³ *Ibid.*, p. 7, lines 6-17.

¹⁴ *Ibid.*, p. 8, lines 14-15 to p. 11, line 11.

¹⁵ *Ibid.*, p. 8, lines 16 to p. 11, line 11.

¹⁶ *Ibid.*, p. 11, lines 5-9.

¹⁷ *Ibid.*, p. 11, lines 14 to p. 12, line 19.

¹⁸ *Ibid.*, p. 12, lines 22-25 to p. 13, lines 1-4 and p. 13, lines 6-20.

¹⁹ *Ibid.*, p. 16 line 24 to p. 17, line 20.

²⁰ See the “Addendum to the ‘Prosecution’s Communication of the Disclosure of Evidence obtained pursuant to Article 70’, 7 November 2016, ICC-01/04-02/06-1616”, No. ICC-01/04-02/06-1637, 17 November 2016.

12. On 22 November 2016, the Defence filed the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on 'Urgent request for stay of proceedings'".²¹

13. On 24 November 2016, the Prosecution filed the "Prosecution's Communication of the Disclosure of Evidence".²²

14. On 28 November 2016, the Defence filed an "Urgent Request for Reconsideration of Decision Denying Adjournment".²³

15. On 1 December 2016, the Chamber rendered an oral decision rejected the Defence request for reconsideration dated 28 November 2016.²⁴

16. On 12 December 2016, the Chamber issued the "Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings".²⁵

17. On 15 December 2016, the Defence filed the "Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order Settling certain Deadlines regarding the Presentation of Evidence by the Prosecution and the Defence Case".²⁶

²¹ See the Request, *supra* note **Error! Bookmark not defined.**

²² See the "Prosecution's Communication of Disclosure of Evidence", No. ICC-01/04-02/06-1649, 24 November 2016.

²³ See the "Urgent Request for Reconsideration of Decision Denying Adjournment", No. ICC-01/04-02/06-1655-Conf, 28 November 2016.

²⁴ See the transcript of the hearing held on 1st December 2016, No. ICC-01/04-02/06-T-169-CONF-ENG RT, p. 3 line 10 to p. 8, line 22.

²⁵ See the "Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings", No. ICC-01/04-02/06-1677, 12 December 2016.

²⁶ See the Defence Request, *supra* note 1.

III. SUBMISSIONS

18. Before responding to the merits of the Request, Legal Representative deplores the Defence's failure to notify the courtesy copy of the Request to the Legal Representatives. This is despite the fact that the filing not being classified as *ex parte* and notwithstanding its subject-matter which concerns the general scheduling of trial proceedings, an issue of central importance to the interests of the victims.

The deadline for submission of an ex-parte, tentative list of witnesses does not adversely affect Defence preparations

19. The Defence avers that the deadline set by the Chamber to submit a provisional list of witnesses would affect its preparation.²⁷ This argument is without merit.

20. It is not disputed that the Defence would have to review article 70-related materials and make an assessment as to their potential impact for the Defence case. In this regard, the Chamber has already instructed the Registry to address any Defence request for additional resources as a matter of urgency, with a view to facilitating Defence preparation.²⁸ The Defence appears now to have access to these additional resources, but avers that "*due to the recruitment process and the up-coming holiday period, it will not be possible for any additional personnel to assist with the review of the material disclosed before the first week of January 2017*".²⁹

21. As the Chamber already indicated, the purpose of the provisional list of witnesses is "*to facilitate the expeditious planning of the case*".³⁰ Moreover, such a list is only tentative and does not impose any definitive commitment on the part of the

²⁷ *Idem*, para. 1.

²⁸ See the transcript of the hearing held on 16 November 2016, *supra* note 11, p. 6, lines 12-17.

²⁹ See the Request, para. 16.

³⁰ See the "Corrigendum of 'Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution', 19 October 2016, ICC-01/04-02/06-1588" (Trial Chamber VI), No. ICC-01/04-02/06-1588-Corr, 12 December 2016, para. 11.

Defence.³¹ Indeed, the Chamber made it clear that the proposed list and related time estimates would be necessarily based on “*the situation prevailing at that time*”.³² Nothing therefore prevents the Defence from subsequently amending the list by adding or removing witnesses on the basis of a further examination and review of the material disclosed. The fact that the Defence is required to provide a provisional list of its prospective witnesses shortly before the end to the prosecution case is not only reasonable and appropriate, but also necessary for the proper management and administration of the case. The notice requirement does not prejudice in any way the interests or the rights of the accused. To the contrary, it contributes to the efficient and expeditious conduct of the proceedings.

22. Accordingly, the Defence Request merely expresses a disagreement with the Order setting certain deadlines.

The Request is ill-timed and mainly repeats arguments previously considered

23. The Legal Representative further submits that the Defence Request is ill-timed. Despite having been on notice of the deadline since 19 October 2015, and having received the disclosed material between 7 and 23 November 2016, the Defence only chose to make this “expedited” Request by way of a courtesy copy in the evening of 14 December 2016, *i.e.* 48 hours before the expiration of its deadline. In the circumstances, it is difficult to resist the inference that the late filing of the Request was carefully chosen so as to gain some tactical advantage by effectively extending the notice deadline.

24. Incidentally, the Legal Representative notes that the late timing of Defence Request limits the ability of the parties and participants to respond to important requests and runs contrary to the interests of Justice.

³¹ *Idem.*

³² *Ibid.*

25. In addition to the timing of the Request, the Legal Representative posits that the reconsideration threshold is not met. Indeed, as the Chamber previously established that *"while properly covered by the powers of a chamber, reconsideration of its own decisions is an exceptional measure which will only be taken when a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice"*.³³ However, the Defence does also not demonstrate that an exceptional measure is called for in the circumstances.

26. In this regard, the Defence argues that "[s]ignificant new facts" have come into existence since the Order setting certain deadlines was issued.³⁴ This claim is without merit.

27. The Defence specified five "new facts" that it submits justify reconsideration of the Chamber's decision. With the exception of factor (v), *i.e.* the postponement of the testimony of four Prosecution witnesses, all the other factors identified were addressed and settled by the Chamber in the decision on stay of proceedings.³⁵ In that decision, the Chamber held that the Defence had failed to *"identify specific instances of concrete prejudice"*.³⁶ As in previous submissions, the Request fails to specify any concrete impact arising from article 70 materials, particularly in support of the argument that the Defence's cross-examination would be affected by recent disclosure. Absent such a showing, the Request should be dismissed. Moreover, the Legal Representative maintains the view that the alleged conduct of the Accused cannot constitute a reasonable ground for the Defence to argue that the latter is prejudiced by the proceedings.

³³ See the "Decision on the Defence request for reconsideration and clarification", (Trial Chamber VI), No. ICC-01/04-02/06-483, 27 February 2015, para. 13. See also, *inter alia*, the "Decision on Defence request for reconsideration of oral ruling on admission of a document for impeachment purposes" (Trial Chamber VI), No. ICC-01/04-02/06-1473, 3 August 2016, para. 7.

³⁴ See the Defence Request, *supra* note 1, para. 2.

³⁵ See the transcript of the hearing held on 16 November 2016, No. ICC-01/04-02/06-T-159-CONF-ENG ET, p. 2, line 13 to p. 7, line 24 (open session).

³⁶ *Idem.*, p. 5 lines 6-7.

28. Moreover, although the postponement of four prosecution witnesses may qualify as a “new fact”, it is submitted that the impact of such new fact impact is minimal and is insufficient to meet the threshold for reconsideration. Moreover, the Order setting certain deadlines is very clear since the Chamber expressly emphasised that “*it will not consider the Defence bound by the contents of [the preliminary list of witnesses]*”.³⁷

The request for scheduling two evidentiary blocks, instead of a single block

29. The Legal Representative does not take a position in relation to the Defence request that the end of the presentation of the Prosecution’s case and the presentation of any evidence or views by LRVs be scheduled in two shorter blocks, instead of one evidentiary block.

30. In summary, the request must be rejected, because the Defence does not establish the circumstances required by the legal criteria and, moreover, fails to establish that an exceptional measure is called for in the circumstances.

IV. CONFIDENTIALITY

31. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the response is classified as “confidential” as it refers to documents filed with the same classification.

³⁷ See the “Corrigendum of ‘Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution’, 19 October 2016, ICC-01/04-02/06-1588”, *supra* note 30, para. 11.

FOR THE FOREGOING REASONS the Legal Representative requests that the Defence Request be rejected insofar as it seeks variation of the Chamber's deadline for notification of the list of prospective Defence witnesses.



Sarah Pellet
Common Legal Representative of the
Child soldiers

Dated this 15th Day of December 2016

At The Hague, The Netherlands