

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 31 March 2017

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

Joint Response by the Common Legal Representative for the Victims of the Attacks and the Common Legal Representative for the Former Child Soldiers to the “Defence’s request seeking leave to appeal ‘Decision on Defence request for extension of time to prepare for its presentation of evidence ’”

Source: Office of Public Counsel for Victims

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the “Legal Representatives”) hereby submit their response to the “Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision on Defence request for extension of time to prepare for its presentation of evidence ’” (the “Defence Request” or the “Request”) filed on 27 March 2017.¹

2. The Defence submits that the “Decision on Defence request for extension of time to prepare for its presentation of evidence” (the “Impugned Decision”)² significantly affects the fair and expeditious conduct of the proceedings and the outcome of Mr Ntaganda’s trial.³ It identified seven appealable issues that, in its submission, require immediate resolution by the Appeals Chamber, namely: (i) Counsel has a duty to review and analyse trial material to be used by the Prosecution; (ii) the use of the material obtained by the Prosecution pursuant to the Article 70 Investigation (the “Conversations”) has a bearing on the materiality of the Conversations in the present case; (iii) the Conversations have a direct materiality to these proceedings; (iv) the Chamber erred in law by holding that the accused is best placed to advise the Defence in relation to the witnesses and evidence to be selected for the preparation of the case; (v) the assistance provided by the accused cannot significantly reduce the time required to review the Conversations; (vi) the Chamber’s determination that the Defence has not shown good cause justifying an extension of time is manifestly unreasonable; and (vii) the Defence needs to determine the scope of the confidential Defence information in possession of the Prosecution.

¹ See the “Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision on Defence request for extension of time to prepare for its presentation of evidence ’”, No. ICC-01/04-02/06-1836-Conf, 27 March 2017 (the “Defence Request”).

² See the “Decision on Defence request for extension of time to prepare for its presentation of evidence” (Trial Chamber VI), No. ICC-01/04-02/06-1832-Conf, 22 March 2017 (the “Impugned Decision”).

³ See the Defence Request, *supra* note 1, paras. 2 and 16.

3. In essence, the Defence Request addresses the substance of the proposed appeal and does not meet the legal criteria set out in article 82(1)(d) of the Rome Statute. The arguments and the identified “issues” raise, at best, a mere disagreement with the Chamber’s previous decisions. The Request must therefore be rejected in its entirety.

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” instructing, *inter alia*, the Defence “to provide the Chamber, [by 16 December 2016], on an ex parte basis, with a preliminary list of witnesses it intends to call, indicating the time estimates for the examination of the witnesses”.⁴

5. On 7 November 2016, the Prosecution publicly filed the “Prosecution’s Communication of the Disclosure of Evidence obtained pursuant to Article 70”⁵ which material includes the Conversations.

6. On 14 November 2016, the Defence submitted an urgent request for stay of proceedings seeking an immediate adjournment in arguing that the newly disclosed material was of such volume and nature that it needed adequate time and facilities to review it.⁶ It also sought the suspension of proceedings pending the Chamber’s decision thereon.⁷ The latter was opposed by the Prosecution and the Legal Representatives.⁸

⁴ See the “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, para. 11.

⁵ See the “Prosecution’s Communication of Disclosure of Evidence obtained pursuant to Article 70”, No. ICC-01/04-02/06-1616, 7 November 2016

⁶ See email from the Defence to the Chamber, Prosecution and Participants dated 14 November 2016 at 9:26. The request was formally filed later on that day, see the “Urgent Request for Stay of Proceedings”, No. ICC-01/04-02/06-1629-Conf, 14 November 2016.

⁷ See the transcript of the hearing held on 14 November 2016, No. ICC-01/04-02/06-T-157-Red-ENG WT, p. 3, line 2-11.

⁸ *Idem*, p. 4, lines 24, 25, p. 5, lines 9-21, p. 5, line 25 to p. 6, lines 1-2.

7. On 16 November 2016, the Chamber, after receiving the responses from the Prosecution⁹ and the Legal Representatives,¹⁰ denied the Defence request for stay of the proceedings.¹¹

8. 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'".¹² The request was denied on 12 December 2016.¹³

9. On 28 November 2016, the Defence filed an "Urgent Request for Reconsideration of Decision Denying Adjournment"¹⁴ which was rejected by the Chamber on 1st December 2016.¹⁵

10. On 15 December 2016, the Defence filed 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".¹⁶ The Prosecution,¹⁷ the Common Legal Representative of the Former Child Soldiers¹⁸ and

⁹ See the "Prosecution's response to the Defence's 'Urgent request for stay of proceedings'", No. ICC-01/04-02/06-1636-Conf, 15 November 2016.

¹⁰ See the "Joint response by the Common Legal Representative of the Attacks and the Common Legal Representative of the Former Child Soldiers to the Defence's 'Urgent request for stay of proceedings'", No. ICC-01/04-02/06-1635-Conf, 15 November 2016.

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 See the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on Urgent request for stay of proceedings'", No. ICC-01/04-02/06-1645, 22 November 2016.

¹³ See the "Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06, 12 December 2016.

¹⁴ See the "Urgent Request for Reconsideration of Decision Denying Adjournment", No. ICC-01/04-02/06-1655-Conf, 28 November 2016.

¹⁵ See the transcript of the hearing held on 1st December 2016, ICC-01/04-02/06-T-169-CONF-ENG ET, pp. 3, line 2 to p. 7 line 8.

¹⁶ See 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", No. ICC-01/04-02/06-1683-Conf, 15 December 2015.

¹⁷ See the "Prosecution's 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'", No. ICC-01/04-02/06-1684-Conf, 15 December 2016.

¹⁸ See the "Response of the Common Legal Representative of the Former Child Soldiers to the 'Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order Settling certain

The Common Legal Representative of the Victims of the Attacks¹⁹ opposed the Expedited Request on 15 December 2016. On 16 December 2016, the Chamber denied the Defence request for reconsideration of the 19 October Order.²⁰

11. On 30 January 2017, the Chamber issued the "Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence" setting a schedule leading up to the commencement of the presentation of evidence by the Defence.²¹

12. On 6 March 2017, the Defence filed the "Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence"²² which was rejected by the Chamber on 22 March 2017.²³ The Chamber held, *inter alia*, that (i) the Defence has been on notice of the allegation of the potential Defence witnesses prior to the commencement of the trial in the context of the litigation on restrictions; (ii) the accused is best placed to advise the Defence team in relation to the witnesses and evidence to be selected; (iii) the Conversations are devoid of any direct materiality to these proceedings.²⁴

13. On 20 March 2017, the Defence filed a second request for stay of proceedings with prejudice to the Prosecutor.²⁵

Deadlines regarding the Presentation of Evidence by the Prosecution and the Defence Case", No. ICC-01/04-02/06-1685-Conf, 15 December 2016 (reclassified public on 11 January 2017).

¹⁹ See email correspondence from the Legal Representative of victims of the Attacks to the Chamber, the Prosecution and the Defence dated 15 December 2016 at 15:26.

²⁰ See the "Decision on Defence request for reconsideration of order setting certain deadlines" (Trial Chamber VI), No. ICC-01/04-02/06-1688, 16 December 2016.

²¹ See the "Decision supplementing the Decision on the Conduct of Proceedings and providing directions related to preparations for the presentation of evidence by the Defence" (Trial Chamber VI), No. ICC-01/04-02/06-1757, 30 January 2017.

²² See the "Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence", No. ICC-01/04-02/06-1815-Conf, 6 March 2017.

²³ See the Impugned Decision, *supra* note 2.

²⁴ *Idem*, para. 17

²⁵ See the "Defence Request for stay of proceedings with prejudice to the Prosecutor", No. ICC-01/04-02/06-1830-Conf, 20 March 2017. A public redacted version of the Request was filed on 21 March 2017.

14. On 27 March 2017, the Defence filed its Request.²⁶

III. CONFIDENTIALITY

15. Pursuant to regulations 23bis(1) and (2) of the Regulations of the Court, this filing is filed confidentially, as it constitutes a response to a request bearing the same classification. A public redacted version of this response will be filed in due course.

IV. SUBMISSIONS

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

16. Article 82(1)(d) of the Rome Statute stipulates that “*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*” may be appealed.

17. 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”.²⁷ The Appeals Chamber also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,²⁸ 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”.²⁹ Accordingly, a mere dispute over the correctness of a Chamber’s

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

²⁷ 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” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 8.

²⁸ *Idem*, para. 9.

²⁹ *Ibid.*

reasoning does not constitute sufficient reason to grant leave to appeal.³⁰ The “issue” should not merely challenge the entirety of the reasoning in the Impugned Decision which amounts to seeking a *de novo* review of the matter by the Appeals Chamber.³¹

18. The Appeals Chamber further 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’”.³² Indeed, “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”,³³ and “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.³⁴

19. 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

³⁰ 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.

³¹ 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, para. 17.

³² 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 27, para. 10.

³³ 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.

³⁴ *Idem*, 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.

decision”.³⁵ 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”.³⁶

20. Moreover, 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.³⁷

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”.³⁸

B. The Defence failed to identify appealable issues within the criteria of article 82(1)(d) of the Rome Statute

1. The “issues” are repetitive and/or constitute arguments on the merits

22. The seven identified appealable “issues” either repeat submissions already litigated before the Chamber and/or lay out argument on the Defence’s prospective grounds of appeal.

³⁵ See *inter alia* 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.

³⁶ *Idem*, para. 18.

³⁷ See the “Decision on request for leave to appeal the Chamber’s decision rejecting the Defence request for a stay of proceedings”, *supra* note 13, para. 13. See also 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.

³⁸ 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 27, para. 13.

23. It is well-established that, when examining requests for leave to appeal, the relevant Chamber should limit its assessment to the requirements explicitly set out in article 82(1)(d) of the Rome Statute. In this regard, various Chambers have confirmed the irrelevance of addressing arguments concerning the merits of the appeal before leave is granted.³⁹ Moreover, the Chamber itself already recalled that, when considering a request for leave to appeal, it will not adjudicate on the merits or substance of the proposed appeal.⁴⁰

24. The Request largely contains arguments pertaining to the merits of the proposed appeal. For instance, the Defence provides arguments (i) on the use of the Conversations by the Prosecutor and its probable impact on the present proceedings;⁴¹ (ii) on an alleged error of the Chamber when holding that the accused was best placed to advise the Defence;⁴² (iii) on the reduction of time preparation with the accused's assistance;⁴³ (iv) on the volume of the Conversations;⁴⁴ (v) on the time needed for the accused to assist his lawyers in reviewing the Conversations,⁴⁵ and (vi) on an alleged error of the Chamber when assessing the impact of the Prosecution's access to confidential Defence information.⁴⁶

³⁹ See *inter alia* the "Decision on the Defence Request for Leave to Appeal" (Pre-Trial Chamber II), No. ICC-01/04-02/06-207, 13 January 2014, para. 8; 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, unsealed pursuant to Decision No. ICC-02/04-01/05-52 dated 13 October 2005, para. 15; the "Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II), No. ICC-02/04-112, 19 December 2007, para. 16. See also the "Decision on two requests for leave to appeal the 'Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application'" (Trial Chamber I), No. ICC-01/04-01/06-2779, 4 August 2011, para. 10.

⁴⁰ See the "Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings", *supra* note 13, para. 13.

⁴¹ See the Defence Request, *supra* note 1, paras. 31-39.

⁴² *Idem*, paras. 40-43.

⁴³ *Ibid.*, paras. 44-48.

⁴⁴ *Ibid.*, paras. 46 and 49-55.

⁴⁵ *Ibid.*, para. 46.

⁴⁶ *Ibid.*, paras. 56-60.

25. In essence, these arguments go to the merits of a prospective appeal and are not relevant to the assessment under article 82(1)(d) of the Rome Statute. The Chamber should not therefore consider these substantive arguments contained in the Request.⁴⁷

26. Moreover, requests for leave to appeal should not serve as a means for re-litigating issues already settled by the Chamber.

27. Indeed, the Defence, when previously seeking leave to appeal the oral decision on its urgent request for stay of proceedings, already raised the issue of the Chamber's assessment that the accused was best placed to advise the Defence team – which constitutes the Defence's fourth "appealable issue" in its new Request.⁴⁸ Similarly, the Defence was also in a position to oppose the Chamber's finding that the Defence has been on notice about the Article 70 Investigation through previous litigation on Mr Ntaganda's communications restrictions which it submits anew in form of its first "appealable issue".⁴⁹ When mentioning the "*duty and/or obligation to review and analyse such material*" in its Request,⁵⁰ the Defence does not raise any new "issue". It just states in a broad and general fashion that Counsel needs to fully review the Conversations, even if it was on notice of the Prosecution's intention to use the material derived from the Article 70 Investigation. The Legal Representatives do not consider that this general duty to review the material only applies to Counsel, and it does not prevent Counsel to delegate this duty to other members of his team. Moreover, as it is put forward in a general sense, it does overlap with the seventh "appealable issue" put forward which concerns the need for the Defence to examine the scope of the confidential information obtained by the Prosecution.

⁴⁷ See *supra* IV-A), para. 20.

⁴⁸ See the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on Urgent request for stay of proceedings", *supra* note 12, paras. 20-22.

⁴⁹ *Idem*, paras. 23-26.

⁵⁰ See the Defence Request, *supra* note 1, I-A).

28. Likewise, the Defence already challenged the Chamber's presumption that the majority of the Conversations has no direct materiality to the current proceedings,⁵¹ which is again presented by way of the second and third "appealable issues".⁵²

29. In its seventh "appealable issue", the Defence submits that the Chamber erred in not acknowledging the necessity to assess the scope of the Defence information in the possession of the Prosecutor.⁵³ Notwithstanding the fact that this purported "issue" has been largely discussed in the Defence's request for stay of proceedings filed on 20 March 2017,⁵⁴ which is still pending before the Chamber, it was in fact also an "issue" that the Defence considered appealable when seeking leave to appeal the oral decision on its first request for a stay of proceedings.⁵⁵ The Chamber largely contemplated this issue when adjudicating on this previous request for leave to appeal to stay of proceedings,⁵⁶ and again in its decision to the Defence's Request for Reconsideration of Decision Denying Adjournment.⁵⁷

30. In fact, the seven appealable issues identified by the Defence were already, on numerous discussed before and considered by the Chamber. These "issues" are actually recurring since November 2016, whether when requesting an immediate adjournment of the proceedings,⁵⁸ or when seeking leave to appeal the oral decision on "Urgent request for stay of proceedings",⁵⁹ when filing an "Urgent Request for

⁵¹ See the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on Urgent request for stay of proceedings", *supra* note 12, para. 27.

⁵² See the Defence Request, *supra* note 1, paras. 31-38.

⁵³ *Idem*, paras. 56-60.

⁵⁴ See the "Defence Request for stay of proceedings with prejudice to the Prosecutor", *supra* note 25.

⁵⁵ See the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on Urgent request for stay of proceedings", *supra* note 12, paras. 29-32.

⁵⁶ See the "Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-1677, 12 December 2016.

⁵⁷ See the transcript of the hearing held on 1st December 2016, No. ICC-01/04-02/06-T-169-CONF-ENG ET, pp. 3, line 2 to p. 7 line 8.

⁵⁸ See email from the Defence to the Chamber, Prosecution and Participants dated 14 November 2016 at 9:26, *supra* note 6.

⁵⁹ See the "Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on Urgent request for stay of proceedings", *supra* note 12.

Reconsideration of Decision Denying Adjournment”;⁶⁰ to some extent when filing 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”;⁶¹ or, more recently, when moving for new a stay of proceedings.⁶² Accordingly, instead of seeking leave to appeal, the Defence is rather requesting the Chamber to reconsider all its previous findings regarding these matters, thereby seeking a *de novo* review, which was specifically refused by the Chamber.⁶³ Be that as it may, in the present circumstances, the most appropriate means would have been to file a request for reconsideration. However, the Defence does not frame the Request as one for reconsideration, as it only too well knows that reconsideration can only be granted in exceptional circumstances when “*a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice*”.⁶⁴ Moreover, in the absence of new facts, or a change of circumstances, there are no reasons justifying a modification or amendment of the Chamber’s previous findings.

2. *The “issues” are mere disagreements and purely speculative*

31. The Chamber held that when seeking leave to appeal, the Defence needs to identify a “*clear error or specific issues arising from the Impugned Decision*”,⁶⁵ however simply stating its disagreement with the outcome of the Impugned Decision cannot be considered an “issue” justifying appellate review.

⁶⁰ See the “Urgent Request for Reconsideration of Decision Denying Adjournment”, *supra* note 14.

⁶¹ See 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”, *supra* note 16.

⁶² See the “Defence Request for stay of proceedings with prejudice to the Prosecutor”, *supra* note 25.

⁶³ See the “Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date”, *supra* note 31, para. 17.

⁶⁴ 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.

⁶⁵ See the “Decision on request for leave to appeal the Chamber’s decision rejecting the Defence request for a stay of proceedings”, *supra* note 13, para. 15.

32. First of all, the Defence fails to clearly delineate its purported “issues”. For example, the fourth and fifth “appealable issues”⁶⁶ which concern the Chamber’s finding that the accused is best placed to assist only show a disagreement with the Chamber on whether or not the assistance of the accused would reduce the time needed to prepare its case.⁶⁷

33. Likewise, the “second and third appealable issues” related to the materiality of the Conversations, whether it derives from the Prosecutor’s intended use of them⁶⁸ and the fact the Chamber has not pronounced any directions as to whether the Prosecution can use them or not, are both just mere disagreements.⁶⁹ The Defence fails to demonstrate that the Chamber may have used an erroneous approach when considering the matter. Rather, the Defence posits that the Conversations are material to the proceedings, and that therefore the Chamber’s finding that they are devoid of materiality is erroneous. This demonstrates that the Defence merely disagrees with the outcome of the decision. However, even *if* the Chamber were to grant leave to appeal in this regard, the Appeals Chamber is not a forum to obtain a *de novo* review simply because the appellant did not obtain the desired result from a Trial Chamber. The question must be one of the propriety of the process. This is not at issue in the Defence’s Request.

34. Moreover, when arguing that “*if the Prosecution is authorised to use the Conversations during the presentation of the case for the Defence, such use might have an effect on the conduct of Defence examinations, Prosecution cross-examinations and/or the Chamber’s assessment of the probative value which can be attributed to the testimony of Defence witnesses*”,⁷⁰ the Defence speculates on a possible impact of such use on the proceedings. It does not take into account the fact that the Chamber can rule on the issue when and if it arises on a case by case basis. The Chamber, in fact, already

⁶⁶ See the Defence Request, *supra* note 1, paras. 40-42 and 44-47.

⁶⁷ *Idem*, paras. 44-48.

⁶⁸ *Ibid.*, para 31.

⁶⁹ *Ibid.*, paras. 32-35 and 38.

⁷⁰ *Ibid.*, para. 38.

emphasised that it will not consider this material, stating that it “[...] *considers that the Material is not admissible through the ‘bar table’, as its probative value at this stage, due its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused*”.⁷¹ The Defence could also have requested clarification from the Chamber on the issue as to the extent to which it would or would not allow the use of the Conversations during this trial. It did not do so. It cannot now seek clarification through the channel of appellate review.

19. The Defence contends in its seventh “appealable issue” that it is necessary, at this stage, for the Defence to determine the scope of the confidential Defence information in the possession of the Prosecution. Against this background, it argues that the Chamber erred when considering it unnecessary. This, in itself, demonstrates that the purported “issue” constitutes a mere disagreement with the Chamber’s findings. Again, the Defence fails to identify how the alleged issue arises from the Chamber’s decision. The Defence also fails to take into account the Chamber recalling that “[it] *will remain attentive to any difficulties that the Defence may face during the course of its presentation of evidence, and, where necessary, retain a flexible approach to facilitate the Defence’s preparations, including by accommodating requests for changes in the order of witnesses or extended breaks between evidentiary blocks*”.⁷² The same applies to the sixth “appealable issue”,⁷³ as the Chamber, by foreseeing measures to facilitate the Defence’s preparations, is indeed considering the need for the Defence to have adequate time and facilities, when and if such *concrete* need arises. Indeed, as soon as the Defence raised this issue in November 2016,⁷⁴ the Chamber immediately advised the Defence to request for additional resources and assistance⁷⁵ which was subsequently obtained.⁷⁶ Thus the Chamber properly ruled that the Defence did not

⁷¹ See the “Decision on Prosecution’s request pursuant to Regulation 35 for an extension of time to submit evidence” (Trial Chamber VI), No. ICC-01/04-02/06-1799, 23 February 2017, para 6.

⁷² See the Impugned decision, *supra* note 2, para. 23.

⁷³ See the Defence Request, *supra* note 1, paras. 49-55.

⁷⁴ See email from the Defence to the Chamber, Prosecution and Participants, *supra* note 6.

⁷⁵ See the transcript of the hearing held on 16 November 2016, *supra* note 11, page 6, lines 12-15.

⁷⁶ See the “Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence”, *supra* note 22, paras. 10 and 29.

shown good cause in its initial request, and its determination is not manifestly unreasonable.⁷⁷

3. *The “issues” identified by the Defence do not affect the fair and expeditious conduct of the proceedings*

37. The issues identified by the Defence do not arise from the Impugned Decision, thus the Request must be dismissed on this basis alone. Nonetheless, if ever the said “issues” were considered to arise from the Decision, the Legal Representatives oppose the Defence’s contention that they significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial.

38. The Defence seems to consider that the alleged silence on the Chamber’s part on different matters, such as (i) the duty of Counsel to review and analyse the Conversations; (ii) the Defence’s argument related to the use of the intended use of the Conversations; or (iii) the silence on how the accused could assist in reviewing Mr Lubanga’s own conversations, renders these “issues” appealable.⁷⁸ However, while a Trial Chamber must provide reasoning in support of its findings on the relevant substantive considerations, it is not required to articulate every step of its reasoning and discuss each submission.⁷⁹ Moreover, the Chamber actually indicated

⁷⁷ *Idem*, para. 49, 53 and 55.

⁷⁸ *Ibid.*, paras. 22 *et seq.*

⁷⁹ See, *inter alia*, ICTY, *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.6, “Decision on interlocutory appeal against decision on Defence motion for a fair trial and the presumption of innocence”, 27 February 2017, para. 25. This decision is available at the following address: <http://www.icty.org/x/cases/mladic/acdec/en/170227.pdf>. See also ICTR, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, “Appeal Judgment”, 14 December 2015, para. 105 ; ICTR, *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-A, “Appeal Judgment”, 9 October 2012, para.65 ; ICTR, *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-A, “Appeal Judgment”, 18 March 2010, para 165 and ICTY, *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/I-A, “Appeal Judgment”, 28 February 2005, para. 23. These judgment are available, respectively, at the following addresses:

<http://www.unmict.unict.org/sites/unict.org/files/case-documents/ict-98-42/appeals-chamber-judgements/en/151214-judgement.pdf>;

<http://www.unmict.unict.org/sites/unict.org/files/case-documents/ict-00-61/appeals-chamber-judgements/en/121009.pdf>;

<http://www.unmict.unict.org/sites/unict.org/files/case-documents/ict-01-63/appeals-chamber-judgements/en/100318.pdf> and <http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf>.

that it had given consideration to such argument, by stating for instance that “*while recognising the amount of work that would be required to complete such review, the Chamber recalls that the Defence has been on notice [...] since prior to the commencement of the trial [...]*”.⁸⁰

39. The Defence submits that, because it was subject to stringent time limits which do not allow significant review of the Conversations before commencement of the trial, the Impugned Decision significantly affects the fairness of these proceedings.⁸¹

40. As indicated by the Chamber, the Defence already presented submissions in relation to a number of issues related to the conduct of the proceedings, including the schedule of disclosure and presentation of evidence by the Defence. The Chamber even emphasised early on that the Defence should be making ongoing preparations for any defence case it may wish to present.⁸²

41. On 30 January 2017, the Chamber issued the “Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence”.⁸³ It ruled that the Defence should provide the final version of its list of witnesses and material by 26 April 2017.⁸⁴ At said date, the Defence was fully aware of the exact extent of the confidential material that was in possession of the Prosecution,⁸⁵ and the Legal Representatives therefore fail to understand the Defence’s strategy as to why it did not seek to appeal the 30 January 2016 Decision, but rather to wait another two months before deciding that the schedule set out in said decision would affect the

⁸⁰ See the Impugned Decision, *supra* note 2, para. 17.

⁸¹ See the Defence Request, *supra* note 1, paras. 62-36.

⁸² See the Impugned Decision, *supra* note 2, para.15.

⁸³ See the “Decision supplementing the Decision on the Conduct of Proceedings and providing directions related to preparations for the presentation of evidence by the Defence”, *supra* note 21.

⁸⁴ *Idem*, paras. 11 and 14.

⁸⁵ See the email communication from Court Records to the parties and participants in this case dated 25 January 2017 granting access to the “Decision on the Prosecutor’s ‘Request for judicial assistance to obtain evidence for investigation under Article 70 (Pre-Trial Chamber I, Single Judge), No. ICC-04/04-279-Conf, 18 September 2015, reclassified as confidential by Pre-Trial Chamber I on 25 January 2017.

fairness of the proceedings against the accused; even more so that no new facts or circumstances occurred during this time.⁸⁶

42. Furthermore, the Chamber took preventive measures as early as December 2013 to provide the Defence with broad access to various recordings and lists regarding the Article 70 Investigation. Likewise, the Chamber adopted measures aimed at understanding the scope of the allegations against the accused and the evidence submitted to the Chamber.⁸⁷ In addition, stating that the Conversations are devoid of materiality to the proceedings, the Chamber demonstrates clearly that it will ensure that the right of the accused will be guaranteed.⁸⁸

43. Moreover, the Request fails to address the alleged impact of each purported “issue” on the expeditiousness of the proceedings despite the clear wording of Article 82(1)(d) of the Rome Statute which requires verifying that each of the issues affects both the fair and the expeditious conduct of the proceedings.⁸⁹ The Legal Representatives contend that the Defence’s submissions – sparse and without any supporting arguments on this requirement – do not explain how each of the alleged “issues” affects the fairness of the proceedings or the outcome of the trial. Therefore, the “issues” do not constitute sufficient basis for granting leave to appeal the Decision.

⁸⁶ The Chamber held that the Defence could have sought leave to appeal the “Further directions on Defence access to confidential material in the *Lubanga* case”, rather than seeking leave to appeal later on the “Decision regarding confidential material in the *Lubanga* case”. See the “Decision on Defence request seeking leave to appeal the ‘Decision regarding confidential material in the *Lubanga* case’” (Trial Chamber VI), No. ICC-01/04-02/06, 18 February 2016, para. 11.

⁸⁷ See for instance the Annex A to the “Defence Request for stay of proceedings with prejudice to the Prosecutor”, No. ICC-01/04-02/06-1830-Conf, 20 March 2017, paras. 12, 19, 33.

⁸⁸ The Chamber even repeated that it will remain attentive to the Defence’s difficulties. See the Impugned Decision, *supra* note 2, para. 23.

⁸⁹ 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. 21 and the “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’” (Pre-Trial Chamber II), No. ICC-01/05-01/08-532, 18 September 2009, para. 16.

44. Lastly, the Request is largely based on speculations regarding the use of the Conversations by the Prosecution and its hypothetical impact on the proceedings. The Chamber already explicitly refused to examine such hypothetical impact on future proceedings⁹⁰, in line with the jurisprudence of the Court according to which hypotheses and speculations regarding the application of a decision and future developments, cannot be the subject of an interlocutory appeal under article 82(1)(d) of the Rome Statute.⁹¹

45. In light of all these factors, the Defence cannot reasonably argue that the fairness of the proceedings is affected by the Impugned Decision.

C. The Appeals Chamber's immediate resolution of the issues identified by the Defence will not materially advance the proceedings

46. The Legal Representatives submit that, as demonstrated *supra*, since the "issues" identified by the Defence in its Request do not affect the fair and expeditious conduct of the proceedings, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber of the said issues may materially advance the proceedings.⁹²

47. However, if nevertheless, the Chamber were to find that the "issues" identified by the Defence arises from the Impugned Decision and affects the fair and

⁹⁰ In this request, the Defence speculated on the impact on the fairness and expeditiousness of the proceedings as to the content of the Conversations and its relevance to the conduct of cross-examinations. See the "Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings", *supra* note 12, para. 18.

⁹¹ See 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. 8; the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'"', *supra* note 73, para. 26 and the references contained therein; and the "Decision on 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'" (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6 and the references contained therein.

⁹² See *inter alia* 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.

expeditiousness of the proceedings or the outcome of the trial, the Legal Representatives posit that contrary to the Defence's assertions,⁹³ a resolution by the Appeals Chamber would not materially advance the proceedings. Indeed, the Legal Representatives deplore the fact that significant time and resources are being put into the recurring attempt to re-litigate matters already resolved, especially since these matters only occurred as a result of the accused's own conduct. The purported "issues" do not satisfy the applicable legal criteria, but on the contrary present repetitive arguments on matters already resolved by the Chamber – a resolution which also includes avenues made available for specific redress at later stages of these proceedings. For this reason alone, the "issues" cannot be said to affect the fair and expeditious conduct of the proceedings.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests that the Chamber dismiss the Request in its entirety.



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks



Sarah Pellet
Common Legal Representative of the
Former Child soldiers

Dated this 31st Day of March 2017

At The Hague, The Netherlands

⁹³ See the Defence Request, *supra* note 1, para. 65.