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Date: **24 April 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***

Public

Public redacted version of "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'", ICC-01/04-02/06-1836-Conf, 27 March 2017

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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Further to Trial Chamber VI (“Chamber”)’s “Decision on Defence request for extension of time to prepare for its presentation of evidence” dated 22 March 2017 (“Impugned Decision”)¹ rejecting the “Defence request for extension of time to prepare for its presentation of evidence” (“Defence Request for Extension of Time”),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

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”

“Defence Request Seeking Leave to Appeal”

INTRODUCTION

1. Without prejudice to the adjudication by the Chamber of the “Defence Request for stay of proceedings with prejudice to the Prosecutor” (“Defence Request for Stay”) submitted on 20 March 2017, leave is sought pursuant to Article 82(1)(d) of the Court’s Statute (“Statute”) to appeal the Impugned Decision.

2. The Impugned Decision directly and substantially impacts Mr Ntaganda’s rights to have adequate time and facilities for the preparation of his Defence and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The Impugned Decision thus significantly affects the fair and expeditious conduct of the proceedings and the outcome of Mr Ntaganda’s trial.

3. Seven distinct appealable issues arise from the Impugned Decision.

4. Immediate resolution of these issues by the Appeals Chamber is required as it would materially advance the proceedings.

¹ ICC-01/04-02/06-1832-Conf.

² ICC-01/04-02/06-1815-Conf.

PROCEDURAL BACKGROUND

5. On 30 January 2017, the Chamber issued directions and a schedule leading-up to the presentation of evidence by the Defence ('Chamber's Directions'),³ informing the parties, *inter alia*, that presentation of the case for the Defence was to begin no later than one month following the date set for the submission by the Defence of its final list of witnesses, *i.e.* 26 May 2017. In addition, the Chamber ordered the Defence to disclose by 31 March 2017 a further provisional list of witnesses and statements or summaries of the anticipated testimonies, together with a confidential redacted version of the list and to provide, by 26 April 2017, the final Defence list of witnesses, together with accompanying estimates for the length of examination and statements or summaries, and its final list of evidence.

6. On 6 March 2017, the Defence requested an extension of time, namely three months, for the preparation of the case for the Defence. Both the Office of the Prosecutor ("Prosecution") and the Legal Representatives of Victims ("LRVs") responded on 13 March 2017, opposing the Defence Request for Extension of Time.⁴

7. On 20 March 2017, the Defence filed the Defence Request for Stay.⁵

8. On 22 March 2017, the Chamber rendered the Impugned Decision, rejecting the Defence Request for Extension of Time.⁶

PRELIMINARY CONSIDERATION

9. As a preliminary matter, the Defence deems important and necessary to recall its Defence Request for Stay, in which the Defence respectfully requested the Chamber to order a stay of proceedings, with prejudice to the Prosecutor, as a result of ongoing violations of his fundamental rights, at least since August 2015.

³ ICC-01/04-02/06-1757.

⁴ ICC-01/04-02/06-1822-Conf [Prosecution] & ICC-01/04-02/06-1821-Conf [LRVs].

⁵ ICC-01/04-02/06-1830-Conf.

⁶ ICC-01/04-02/06-1832-Conf, p.13.

10. This Defence Request Seeking Leave to Appeal is submitted without prejudice to adjudication of the Defence Request for Stay. Indeed, the Defence maintains that the proceedings in this case should be terminated forthwith.

APPLICABLE LAW

11. 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.

12. 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.”⁷ ‘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.”⁸

13. 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.”⁹ 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”¹⁰ and “remove[] doubts about the correctness of the decision or map[] a course of action along the right lines.”¹¹ The purpose of such an appeal is to avoid the consequences

⁷ *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.

⁸ *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.

⁹ Leave to Appeal Judgment, para.14.

¹⁰ *Id.*, para.15.

¹¹ *Id.*, paras.14-15.

that would otherwise be embedded in the proceedings and which could “cloud or unravel the judicial process.”¹² The applicable threshold, importantly, is not that interlocutory resolution “*will* materially advance” the proceedings, but only that it “*may*” do so.

14. 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*.¹³ 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.

SUBMISSIONS

15. In the Impugned Decision, the Chamber considered that “neither the alleged necessity to review and analyse the Conversations, nor the time required to prepare for the testimony of the three victims, nor the factors and changes since 9 October 2014, either in isolation or in combination, warrant a conclusion that good cause has been shown to extend the time limits as established in the Chamber’s Directions”.¹⁴ On this basis, the Chamber denied the Defence Request for Extension of Time.

16. The Impugned Decision directly and substantially impacts Mr Ntaganda’s rights to have adequate time and facilities for the preparation of his Defence and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The Impugned Decision thus significantly affects the fair and expeditious conduct of the proceedings and the outcome of the Mr Ntaganda’s trial.

17. Immediate resolution by the Appeals Chamber is required, as it would move the proceedings forward by ensuring that the trial follows the right course, thereby

¹² *Id.*, para.16.

¹³ *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.

¹⁴ ICC-01/04-02/06-1832-Conf, para.22.

removing doubts as to the correctness of the Impugned Decision. Indeed, the Defence's purpose in appealing the Impugned Decision is to avoid irremediable consequences, should the Appeals Chamber later find that the time allocated to Mr Ntaganda to prepare his Defence was indeed not adequate and thus impacted the fairness of the proceedings or the outcome of the trial.

18. At the International Criminal Tribunal for the former Yugoslavia, Trial Chambers have certified Defence's requests for leave to appeal decisions regarding the scheduling of the Defence case. In the *Stanišić & Simatović* case for instance, the Trial Chamber stated that the time granted to the accused person to prepare his defence was an issue that "significantly affects the fair and expeditious conduct of proceedings or the outcome of the trial"¹⁵ and considered that "granting certification to appeal at this stage may materially advance the proceedings as any prejudice, if found by the Appeals Chamber, could more appropriately be remedied during the trial as opposed to during an appeals procedure".¹⁶

19. Seven distinct appealable issues arise from the Impugned Decision ("Appealable Issues"). Following this Chamber's approach in ruling upon previous Defence requests for leave to appeal, the Defence has first identified the Appealable Issues, before turning to the actual requirements set out in Article 82(1)(d), namely that (i) the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial; and (ii) an immediate resolution by the Appeals Chamber *may* materially advance the proceedings.

20. The Defence respectfully submits that whether an issue constitutes an 'appealable issue' is a legal determination, in and of itself subject to an interlocutory appeal. If the issue raised by a party meets the criteria set out by the Appeals

¹⁵ *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-T, Decision on Simatović Request for Certification to Appeal Against the Scheduling Order and Decision on Defence Requests for Adjustment of Scheduling Order of 16 February 2011 ("Decision on Simatović Request for Certification to Appeal"), 26 April 2011, para.7.

¹⁶ Decision on Simatović Request for Certification to Appeal, para.8.

Chamber, *ie* “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”,¹⁷ it is an appealable issue. The concept of ‘appealable issue’ is thus intrinsically related to the two-pronged-test in Article 82(1)(d) of the Statute. What matters is whether determination of the matter arising from the Impugned Decision is essential in light of the consequences associated with an erroneous judicial disposition. In this case, bearing in mind the potential irremediable consequences associated with the Impugned Decision – rejecting Mr Ntaganda’s request for adequate time to prepare his Defence – it is essential to have the Appeals Chamber determine the correctness of the Impugned Decision.

I. Appealable Issues

21. In the Impugned Decision, the Chamber held that the alleged necessity to review and analyse all non-privileged telephone conversations of Mr Ntaganda and Mr Lubanga from the Court’s Detention Centre from 22 March 2013 (“Conversations”), either in isolation or in combination with other alleged factors, did not warrant a conclusion that good cause has been shown to extend the time limits as established in the Chamber’s Directions. In relation thereto, the Chamber held that (i) the Defence has been on notice of allegations of the coaching of potential Defence witnesses since prior to the commencement of trial in the context of the restrictions litigation and must therefore be presumed to have discussed the issue with Mr Ntaganda and to have been conscious of it in conducting its investigations and preparations to date; (ii) given that the allegations are based on the Prosecution’s assessment of Mr Ntaganda’s own conduct, he is best placed to advise the Defence team in relation to the selection of witnesses to be called, evidence to be submitted, and lines of Defence; (iii) the Conversations must be considered in their appropriate context, noting that they do not relate directly to the charges and, are, for a large part, devoid of any direct materiality to these proceedings or relate to peripheral issues; (iv) the Defence has been afforded additional resources to conduct

¹⁷ Leave to Appeal Judgment, para.9.

its review of the Conversations; and (v) no extension of time is justified by the alleged Defence need to determine the scope, and assess the impact, of the alleged Prosecution's access to Defence strategy before the commencement of its case.¹⁸

22. Significantly, the Impugned Decision is silent in respect of the Defence argument that Counsel has a duty as well as an obligation to review and analyse the Conversations, which are not only in the possession of the Defence, but also on the Prosecution list of evidence. In addition, although the Chamber recalled that it rejected (i) the Prosecution's request to submitted transcriptions and translations of Conversations;¹⁹ and (ii) the Prosecution request for additional Defence disclosure obligations;²⁰ it is noteworthy that the Impugned Decision is also silent regarding the Defence argument related to the Prosecution's intended use of the Conversations.

23. The Chamber also did not address how Mr Ntaganda could assist in the review of Mr Lubanga's non-privileged conversations. The same applies to the Defence argument related to the lack of reliability of the summaries prepared by the Prosecution. In this case, the Chamber noted the argument, but did not pronounce on the impact thereof on the adequate time necessary to prepare the presentation of the case for the Defence.

24. Lastly, the Chamber did not address the Defence argument that the time allotted to prepare for the Defence pursuant to the Chamber's Directions does not allow Mr Ntaganda to obtain the attendance and examination of witnesses on his behalf under the same conditions as Prosecution witnesses.

25. The Defence posits that seven distinct appealable issues clearly arise from the Decision.

¹⁸ Impugned Decision, paras.17-18.

¹⁹ ICC-01/04-02/06-1799.

²⁰ ICC-01/04-02/06-1818.

A. First appealable issue – Whether Counsel assigned to represent an accused in criminal proceedings, being on notice of the Prosecution’s intention to use at trial material in its possession which has been disclosed, have a duty and/or obligation to review and analyse such material

26. Prior to taking office, Counsel before the Court undertake to perform their duties and exercise their mission “with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously”.²¹

27. This duty of diligence and conscientiousness requires that the Defence leave no stone unturned.²²

28. In the Impugned Decision, the Chamber was silent as to the Defence’s duty to review such material. While the Defence was on notice of allegations of coaching, the fact remains that the material to be reviewed, *i.e.* the Conversations, was only disclosed in November 2016.²³ Had the Chamber correctly considered the Defence’s duty of diligence and conscientiousness, it would have reached a different conclusion from that reached in the Impugned Decision. This is the very reason why the Appeals Chamber must pronounce on this issue.

29. It is established that (i) as of September 2015, the Prosecution obtained the non-privileged conversations of Mr Ntaganda and Mr Lubanga from the Detention Centre since March 2013; (ii) the Defence is on notice that the Prosecution intends to use this material at trial; (iii) this material has been disclosed to the Defence; (iv) significant parts of this material have been added to the Prosecution list of evidence; and (v) the material relates, at a minimum, to the selection of witnesses to be called, selection of evidence to be submitted, and choice of lines of Defence. It is also potentially related to the credibility of potential Defence witnesses.

30. In rejecting the Defence Request for Extension of Time on the basis that the Defence did not show good cause, the Chamber erred in not pronouncing on Counsel’s duty of diligence and conscientiousness and resulting obligation to review

²¹ Code of Professional Conduct for counsel, Resolution ICC-ASP/4/Res.1, Art. 5.

²² See ICC-01/04-02/06-919-Conf-Red, para.21; [REDACTED].

²³ [REDACTED].

the Conversations. This is an appealable issue on which the Appeals Chamber must pronounce.

B. Second appealable issue – Whether the Prosecution’s intended use of the Conversations has a bearing on the materiality of the Conversations in the present proceedings

31. In its Defence Request for Extension of Time, the Defence argued it was necessary to review the Conversations because of the Prosecution’s intended use of the Conversations at trial. In relation thereto, the Chamber noted that it had rejected two related Prosecution requests. The Chamber did not however pronounce on the impact of the Prosecution’s intended use of the Conversations at trial on the materiality of the Conversations. Nor did the Chamber set out in any way whether the Prosecution could use the Conversations at trial and, if so, how the Conversations could be used. In the absence of directions issued by the Chamber regarding the use that can or cannot be made of the Conversations, it must be presumed that the Prosecution’s intended use of the Conversations at trial significantly increases their materiality. The Chamber erred by relying on the lack of materiality of the Conversations to reach the Impugned Decision without pronouncing on the impact of the Prosecution’s intended use of the conversations or the materiality of the Conversations in this case. It is thus essential for the Appeals Chamber to pronounce on this issue in order to determine whether good cause has been shown by the Defence to obtain more time to prepare before the presentation of its case.

C. Third appealable issue – Whether the Conversations are, for a large part, devoid of any direct materiality to these proceedings

32. In its analysis of the arguments put forth in the Defence Request for Extension of Time, the Chamber held that the Conversations were, for a large part, devoid of any direct materiality to these proceedings.²⁴ The Chamber’s reliance on its holding regarding the lack of materiality of the Conversations is a material foundation of the

²⁴ Impugned Decision, para.17.

Impugned Decision, *i.e.*: that the Defence has not shown good cause justifying an extension of the existing time limits.

33. The Defence respectfully submits that the Chamber erred in its determination that the Conversations were, for a large part, devoid of any direct materiality to these proceedings.

34. First, this is not a mere disagreement with the Chamber. Whether the Conversations have direct materiality to these proceedings is a legal determination on which the Chamber erred in law. More importantly, the alleged error on the part of the Chamber significantly impacted the Impugned Decision.

35. The Defence has already taken the position that the Conversations are not admissible into evidence,²⁵ but the Chamber has not ruled on whether the Conversations could ultimately be used and, if so, how.

36. It is necessary for the Appeals Chamber to resolve this issue by determining whether or not the Conversations have direct materiality to the proceedings. The Appeals Chamber's pronouncement on this issue is crucial to determine whether the Defence has indeed shown good cause justifying an extension of time for the preparation of the Defence case and, if so, to avoid the far reaching consequences associated with the Impugned Decision.

37. Materiality refers to the quality of being relevant *or* significant, namely that what is important and that which is not merely of form but also of substance. In the context of a criminal trial, the question of materiality goes beyond the relevance of facts related to the charges and the probative value and admissibility of evidence.

38. The Defence submits that the Prosecution's intended use of the Conversations at trial and the absence of any directions from the Chamber as to whether the Prosecution can or cannot use them at trial and, if so, how, render the Conversations directly material to the proceedings. Indeed if the Prosecution is authorised to use

²⁵ ICC-01/04-02/06-1787-Conf, para.21-22.

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.

39. The Appeals Chamber itself needs to rule on whether the Conversations are material to the proceedings. If they are indeed found to be material to the proceedings, contrary to the holding of the Chamber, the Appeals chamber will be in a position to decide whether the Chamber erred in not extending the time limits as requested by the Defence.

D. Fourth appealable issue – Whether the Chamber erred in law in holding that the Accused can be considered best placed to advise the Defence in relation to the witnesses and evidence to be selected for the Defence's presentation of evidence

40. The Chamber held in the Impugned Decision that “the accused can be considered best placed to advise the Defence team in relation to the witnesses and evidence to be selected for the Defence's presentation of evidence, including whether any witnesses or lines of defence may be compromised or prejudiced by his prior conduct”.²⁶

41. In so holding, the Chamber erred in law by imposing a legal burden on Mr Ntaganda, which cannot be imposed on an accused person represented by Counsel. The Chamber also erred by relying on the legal burden imposed on Mr Ntaganda to determine that the Defence has not shown good cause justifying an extension of the time limits to prepare the case for the Defence.

42. While the Accused might be in a position to assist the Defence in relation to the general contents and context of his conversations – which of course does not apply to Mr Lubanga's conversations – it is incorrect to consider that the Accused is in a position to advise Counsel on legal matters. Although the accused persons will always be consulted, legal determinations very likely to impact the outcome of

²⁶ Impugned Decision, para.17.

proceedings must be made by Counsel. The role of Counsel is to advise the accused persons they represent and not the other way around. Information provided to Counsel by accused persons must always be verified and validated as well as discussed and analysed in detail with the client before acting upon it.

43. The Chamber's error in holding the Accused responsible for providing such far-reaching advice to the Defence – regarding the legal consequences of his prior conduct on the selection of witnesses to be called, evidence to be submitted, and choice of lines of Defence – significantly impacted the Impugned Decision. Indeed, as a result of this error, the Accused is prejudiced with respect to the time allotted for the preparation of his Defence. This is yet another important issue stemming from the Impugned Decision on which the Appeals Chamber must pronounce. As such, it is an appealable issue.

E. Fifth appealable issue – Whether in the present circumstances assistance provided by the Accused can significantly reduce the time required to review the conversations and prepare the case for the Defence

44. Even if the Chamber did not err in law in holding that “the accused can be considered best placed to advise the Defence team in relation to the witnesses and evidence to be selected for the Defence's presentation of evidence, including whether any witnesses or lines of defence may be compromised or prejudiced by his prior conduct”,²⁷ the Chamber nonetheless erred in relying on the Accused's assistance to rule that the Defence has not shown good cause justifying an extension of the time limit to prepare the case for the Defence.

45. Indeed, the Chamber omitted to address the Defence argument that it is “simply not possible for time to be saved by Mr Ntaganda expeditiously identifying telephone calls for priority review without him first listening to all of the Conversations”.²⁸

²⁷ Impugned Decision, para.17.

²⁸ Defence Request for Extension of Time, para.37, “taking into consideration i) the total number and duration of Mr Ntaganda's and Mr Lubanga's non-privileged communications; ii) the known number of Mr Ntaganda's and Mr Lubanga's non-privileged communications that the Prosecution has

46. The audio files of the Conversations have been uploaded onto TRIM in single entries, with titles which are not indicative of their contents. The manner in which the Conversations have been uploaded onto TRIM simply does not provide efficient means to quickly review specific Conversations that the Accused might remember having had with particular individuals. Each month, Mr Ntaganda made or received some 200 telephone calls, lasting up to 50 hours. In such circumstances, it cannot be reasonably expected that Mr Ntaganda's assistance would drastically cut down on the time necessary to review the Conversations. It is simply unreasonable to expect an accused person to remember the entire contents of all telephone communications he had since 2013 and to recall who he spoke to and when. For the exercise to be useful, Mr Ntaganda would have to listen, review, and analyse close to 900 hours of his Conversations, some of which date back to four years ago. He would then have to convey the results of his review to Counsel and the Defence team either in person or orally on the telephone.

47. Furthermore, the Chamber did not take into account the fact that over half of the telephone communications disclosed by the Prosecution were made by Mr Lubanga. Mr Ntaganda cannot be expected to know the contents, or the interlocutors, of these conversations. Therefore, Mr Ntaganda is not "best placed to advise the Defence team in relation to the witnesses and evidence to be selected" or even in relation to which Conversations to focus Defence resources on, when he has no knowledge of over half the Conversations.

48. The Defence posits that the Chamber erred in deciding that the Accused's participation in the review of the Conversations contributed to the Defence not having shown good cause justifying an extension of time for the preparation of the case for the Defence. In this regard, the Chamber failed to consider the amount of time also required by the Accused to conduct this review. Due to the omission of the Chamber to address these arguments, this constitutes an appealable issue.

actively reviewed, *i.e.* approximately 600; iii) the time elapsed since the bulk of these conversations took place; and iv) the high number of interlocutors and persons referred to in the Conversations".

F. Sixth appealable issue – Whether in the present circumstances the Chamber’s determination that the Defence has not shown good cause justifying an extension of the time limit to prepare the case for the Defence is manifestly unreasonable

49. Even if the Chamber has not committed errors of law in adjudicating the Defence Request for Extension of Time, its ruling that the Defence has not shown good cause justifying an extension of the time limits for the Defence case related preparations is manifestly unreasonable.

50. Pursuant to Article 67(1)(b) and (e) of the Statute, in the determination of the charges against him, Mr Ntaganda is entitled, at a minimum, to have adequate time and facilities for the preparation of his defence and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The fundamental nature of this right was recalled in *Katanga*, for instance.²⁹

51. The Defence recalls that in November 2016, it received all non-privileged telephone conversations of Mr Lubanga and Mr Ntaganda from the Court’s Detention Centre from 22 March 2013 onwards. 4,684 of these Conversations are those of Mr Ntaganda’s. The total time for Mr Ntaganda’s conversations alone is 893 hours.

52. The Chamber has acknowledged that the information in the Conversations may impact aspects of Defence strategy and in December 2016 considered that this “could also, for example, be factored into the time granted for preparation of the Defence case”.³⁰

53. It is evident from the Impugned Decision that the Chamber has not factored the Conversations at all in its calculations of the time limits imposed and in deciding to reject the Defence request for extension of the same. The time granted by the Chamber is manifestly unreasonable in light of the volume of the Conversations and

²⁹ ICC-01/04-01/07-3319-tENG/FRA, Dissenting opinion of Judge van den Wingeart, para.48.

³⁰ ICC-01/04-02/06-T-159-Red-ENG, p.5 ln.24 – p.6 ln.3.

with regard to all of the other preparations required before the presentation of the Defence case can commence.

54. In the Defence Request for Extension of Time, the Defence provided detailed information as to the time it would require for finalising its review and analysis of the Conversations, providing comparisons with the time spent by the Registry and the Prosecution in conducting the same exercise, as well as to the time it would need to incorporate the results of its analysis into its case preparations.³¹ The Chamber erred in failing to take *any* of these considerations into account in adjudicating on the Defence Request for extension of time. The finding of the Chamber at paragraph 17 of the Impugned Decision implies that with the help of the Accused, the additional resources, and the fact that it generally knew about the coaching allegations, the Defence should have been in a position to finish its review of the 4,684 Conversations. In so concluding, the Chamber failed to consider elements raised by the Defence in relation to the specific circumstances of the case and that a reasonable Trial Chamber should have reasonably been expected to consider.

55. The Chamber's omission to address material arguments raised by the Defence³² as well its failure to give adequate weight to the parameters put forth by the Defence in the Defence Request for Extension of Time have resulted in time limits imposed on the Defence which are grossly inappropriate, manifestly unreasonable, and which infringe on Mr Ntaganda's minimum rights under Article 67(1). This is an appealable issue.

G. Seventh appealable issue – Whether it is necessary at this stage for the Defence to determine the scope of the confidential Defence information in the possession of the Prosecution before the beginning of the case for the Defence

56. In the Impugned Decision, the Chamber found that it is not necessary for the Defence to review the Conversations prior to the commencement of the case for the Defence in order to assess the impact of the Prosecution's access to detailed

³¹ Request for extension of time, paras.47-54.

³² Request for extension of time, paras.35-54.

confidential Defence information.³³ At best, the Chamber refers to the Defence argument as “the alleged necessity to review and analyse the Conversations”.³⁴

57. The Defence submits that in so holding, the Chamber committed a legal error.

58. In its Defence Request for Stay, the Defence submitted that the Prosecution obtained confidential Defence information as early as September 2015, which it used during the presentation of its case without the Defence being informed.³⁵ Due process considerations require that, at a minimum, the Defence be given sufficient time to determine what information the Prosecution obtained, before the beginning of the presentation of the case for the Defence.

59. Since the Chamber relied on this erroneous pronouncement to determine that the Defence has not shown good cause justifying an extension of the time limit to prepare for the presentation of the case for the Defence, it constitutes an appealable issue.

60. It is necessary for the Appeals Chamber to determine whether it is indeed necessary for the Defence to identify the confidential Defence information in the possession of the Prosecution since September 2015 before the beginning of the presentation of the case for the Defence. The Appeals Chamber pronouncing on this issue is essential for the purpose of avoiding the far reaching consequences associated with the Impugned Decision, if the Defence is ordered to proceed with the presentation of its case without having had a genuine opportunity to conduct such assessment.

II. The Decision involves issues that significantly affect the fairness of the proceedings against Mr Ntaganda

61. By rejecting the Defence Request for Extension of Time, the Chamber is forcing the Defence to begin bringing witnesses and presenting evidence before it

³³ Impugned Decision, para.18.

³⁴ Impugned Decision, para.22.

³⁵ ICC-01/04-02/06-1830-Conf, para.55.

has had a genuine opportunity to assess the contents of the Conversations and the impact of the Prosecution's possession of this information for the duration of the case for the Prosecution. By rushing the start of the Defence case in order to have an expeditious trial, the Chamber has neglected the Accused's fundamental right to a fair trial and to the right to prepare his Defence adequately.

62. The Impugned Decision imposes on the Defence stringent time limits which prevent the Defence from adequately preparing the presentation of its case. The time granted by the Chamber does not allow for a sufficient review of the Conversations before the commencement of the presentation of the case for the Defence, let alone for integrating the results of such review into the selection of its witnesses and the preparations for its case, despite this being one of the very reasons as to why the Prosecution disclosed the Conversations in November 2016.

63. The Impugned Decision infringes on the Accused's rights pursuant to Article 67(1)(b) and (e) of the Statute and, as such, significantly affect the fairness of these proceedings as well as the outcome of the trial.

64. The first requirement under Article 82(1)(d) is thus met.

III. An immediate resolution by the Appeals Chamber may materially advance the proceedings against Mr Ntaganda

65. By forcing the Defence to start the presentation of its case when it is not fully prepared due to the colossal volume of Conversations to review beforehand, the entire Defence case will be flawed and will commence on a defective premise. If, during the appeal stage of the case, the Appeals Chamber were to find that the time given to the Defence for the preparations of its case was insufficient, a retrial would be necessary. Letting the Appeals Chamber decide on the issue now would materially advance the proceedings while not unduly impacting the expeditiousness of the trial.

66. The Impugned Decision prevents the Defence from adequately preparing for the presentation of its case and violates Mr Ntaganda's rights under Article 67(1) of

the Statute. Should the Decision be implemented and the time limits maintained, in effect, the fairness to the proceedings will be gravely affected. An immediate resolution by the Appeals Chamber is therefore warranted and this before the commencement of the case for the Defence.

CONCLUSION

67. Leave to appeal the Impugned Decision is requested pursuant to Article 82(1)(d) of the Statute. The issues as described above are essential to the correctness of the Decision and are, accordingly, appealable.

CONFIDENTIALITY

68. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court ("RoC"), this Defence Request is classified as confidential as it refers to confidential submissions and decisions.

RELIEF SOUGHT

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

GRANT the Defence leave to appeal the Impugned Decision on the basis of the above outlined Appealable Issues.

RESPECTFULLY SUBMITTED ON THIS 24TH DAY OF APRIL 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands