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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***

Public

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 “Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision on Defence request for stay of proceedings with prejudice to the Prosecution’”

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Common Legal Representative for the Victims of the Attacks and the Common Legal Representative for the Former Child Soldiers (jointly the “Legal Representatives”) hereby submit a joint response to the “Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision on Defence request for stay of proceedings with prejudice to the Prosecution’” (the “Defence Request” or the “Request”), filed on 4 May 2017.¹

2. It is submitted that the Defence Request does not meet the legal criteria under article 82(1)(d) of the Rome Statute. In particular, none of the eight purported “issues”, as identified by the Defence, constitutes “appealable issues” for which leave to appeal can be granted. Instead, they all demonstrate a mere disagreement with the Impugned Decision. Indeed, the Defence submit similar legal arguments which were already considered and dismissed by Trial Chamber VI (the “Chamber”). Accordingly, the Defence Request must be rejected.

II. PROCEDURAL BACKGROUND

3. On 8 December 2014, upon the Prosecution’s request,² the Chamber issued a decision on restrictions on Mr Ntaganda’s communications.³

4. On 13 August 2015, the Prosecutor filed its “Request for judicial assistance to obtain evidence for investigation under Article 70”.⁴ On 18 September 2015, the Single Judge ruled that the Prosecutor should be provided with non-privileged

¹ See the “Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision on Defence request for stay of proceedings with prejudice to the Prosecution’”, No. ICC-01/04-02/06-1888, 4 May 2017 (the “Defence Request”).

² See the “Request for restrictions on contact and the Defence request for access to logs”, No. ICC-01/04-02/06-349-Conf-Red, 8 August 2014.

³ See the “Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs” (Trial Chamber VI), No. ICC-01/04-02/06-410-Conf-Exp-Red, 8 December 2014.

⁴ See the “Request for judicial assistance to obtain evidence for investigation under Article 70”, No. ICC-01/04-638-Conf-Exp, 13 August 2015.

contact and visitor logs, as well as with recordings of telephone registrations pertaining to Mr Lubanga and Mr Ntaganda from 22 March 2013 onwards and on an on-going basis.⁵

5. On 7 November 2016, the Prosecution publicly filed the “Prosecution’s Communication of the Disclosure of Evidence obtained pursuant to Article 70”.⁶ The material included records of non-privileged conversations involving the accused and other persons (the “Conversations”).

6. On 14 November 2016, the Defence submitted an urgent request for stay of proceedings (the “First Request”), 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 so as to, *inter alia*, prevent on-going prejudice in respect of cross-examinations of Prosecution witnesses.⁷ It also sought the suspension of proceedings pending the Chamber’s decision thereon.⁸ The latter was opposed by the Prosecution and the Legal Representatives.⁹

7. The Chamber denied the request for suspension and directed that responses to the First Request be filed by 16:00 on 15 November 2016.¹⁰

8. On 16 November 2016, the Chamber, after receiving the responses from the Prosecution¹¹ and the Legal Representatives,¹² denied the Defence request for stay of

⁵ See the “Decision on the Prosecutor’s “request for judicial assistance to obtain evidence for investigation under Article 70” (Pre-Trial Chamber I), No. ICC-01/04-729-Conf, 18 September 2015.

⁶ See the “Prosecution’s Communication of Disclosure of Evidence obtained pursuant to Article 70”, No. ICC-01/04-02/06-1616, 7 November 2016.

⁷ 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.

⁸ 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.

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

¹⁰ *Ibid.*, p. 7, lines 22-25, p. 8, lines 1-5.

¹¹ 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.

the proceedings.¹³ 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”*.¹⁴ The Chamber directed the Prosecution to assist the Defence in disclosing the material it had gathered in an identified, categorised way.¹⁵ Following the decision, the Defence (i) gave notice that it would seek leave to appeal the decision,¹⁶ and (ii) made an application for suspensive effect of the Decision pending the filing of its request for leave to appeal.¹⁷ The latter was opposed by the Prosecution¹⁸ and the Legal Representatives¹⁹ and rejected by the Chamber on the same day.²⁰

9. 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”.²¹

10. 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’”.²²

11. On 24 November 2016, the Prosecution filed the “Prosecution’s Communication of the Disclosure of Evidence”.²³

¹² 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.

¹³ 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).

¹⁴ *Idem*, p. 2, line 13 to p. 7, line 24 (open session).

¹⁵ *Ibid.*, p. 7, lines 6-17.

¹⁶ *Ibid.*, p. 8, line 14 to p. 11, line 11.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, p. 11, line 14 to p. 12, line 19.

¹⁹ *Ibid.*, p. 12, line 22 to p. 13, line 20.

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

²¹ 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.

²² 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.

12. On 28 November 2016, the Defence filed an “Urgent Request for Reconsideration of Decision Denying Adjournment”²⁴ which was rejected by the Chamber on 1st December 2016.²⁵

13. On 12 December 2016, the Chamber denied the Defence’s request for leave to appeal.²⁶

14. 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”²⁷ which was rejected by the Chamber on 22 March 2017.²⁸ On 27 March 2017, the Defence filed a request seeking leave to appeal the Decision.²⁹

15. On 20 March 2017, the Defence filed the “[...] Request for stay of proceedings with prejudice to the Prosecutor”. (the “Defence Request for stay of proceedings”)³⁰

16. On 30 March 2017, the Prosecution submitted a response to the Defence Request for stay of proceedings.³¹ On 31 March 2017, the Legal Representatives submitted a joint response to said request.³²

²³ See the “Prosecution’s Communication of Disclosure of Evidence”, No. ICC-01/04-02/06-1649, 24 November 2016.

²⁴ See the “Urgent Request for Reconsideration of Decision Denying Adjournment”, No. ICC-01/04-02/06-1655-Conf, 28 November 2016.

²⁵ 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.

²⁶ 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.

²⁷ 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.

²⁸ 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.

²⁹ See the “Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision on Defence request for extension of time to prepare for its preparation of evidence’”, No. ICC-01/04-02/06-1836-Conf, 27 March 2017.

³⁰ See the “Defence Request for stay of proceedings with prejudice to the Prosecutor”, No. ICC-01/04-02/06-1830, 20 March 2017.

³¹ See the “Prosecution’s response to the “Defence Request for stay of proceedings with prejudice to the Prosecutor” (ICC-01/04-02/06-1830-Conf)”, No. ICC-01/04-02/06-1840-Conf, 30 March 2017.

17. On 28 April 2017, the Chamber issued the “Decision on Defence request for stay of proceedings with prejudice to the Prosecution” (the “Impugned Decision”)³³ whereby it rejected the Defence Request for stay of proceedings.³⁴

18. On 4 May 2017, the Defence submitted the “Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision on Defence request for stay of proceedings with prejudice to the Prosecution’” (the “Defence Request” or “Request”).

III. SUBMISSIONS

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

19. 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.

20. The jurisprudence of the Court clarified the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to establish their cumulative existence for leave to appeal to be granted.³⁵ In particular, the Appeals Chamber previously held 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*

³² See the “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 “Request for stay of proceedings with prejudice to the Prosecutor””, No. ICC-01/04-02/06-1841-Conf, 31 March 2017.

³³ See the “Decision on Defence request for stay of proceedings with prejudice to the Prosecution” (Trial Chamber VI), No. ICC-01/04-02/06-1883, 28 April 2017 (the “Impugned Decision”).

³⁴ *Idem.*

³⁵ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 21. See also “Judgment 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 OA 3, 13 July 2006, paras. 8 and 14.

state such an issue for consideration by the Appeals Chamber”.³⁶ It also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,³⁷ 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”.³⁸ Accordingly, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason to be granted leave to appeal.³⁹

21. 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’”.⁴⁰ 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”,⁴¹ and “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.⁴²

22. 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

³⁶ 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 35, para. 8.

³⁷ *Idem*, para. 9.

³⁸ *Ibid.*

³⁹ 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.

⁴⁰ 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 35, para. 10.

⁴¹ 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.

⁴² See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *supra* note 41, 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.

arguments may be more appropriately considered by the Appeals Chamber when and if leave to appeal is granted.⁴³

23. Moreover, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of “fairness” must be understood as referring to situations “*when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*”.⁴⁴ 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*”.⁴⁵

24. 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”.⁴⁶

⁴³ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 22.

⁴⁴ 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.

⁴⁵ *Idem*, para. 18.

⁴⁶ 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 35, para. 13.

2. The Defence Request does not meet the criteria of article 82(1)(d) of the Rome Statute

a. The Defence fails to identify an “issue” arising from the Impugned Decision

25. The Defence requests for leave to appeal the Impugned Decision with regard to eight issues.⁴⁷

26. The Legal Representatives submit that the arguments advanced in the Defence Request, although divided into the eight distinct “issues”, are exactly the same that those which were extensively developed in the Defence Request for stay of proceedings, and consequently addressed by the Chamber within four categories because of their “*a partly interrelated and overlapping*” character.⁴⁸

27. It is apparent from the very way in which the purported “issues” are phrased that the Defence simply does not agree with the Impugned Decision and aims at re-litigating the issues already settled by the Chamber.⁴⁹

28. Accordingly, it is submitted that the “issues” identified by the Defence simply reflect a mere disagreement with conclusions of the Chamber and, therefore, do not meet the requisite threshold for leave to appeal to be granted under article 82(1)(d) of the Rome Statute.

⁴⁷ See the Defence Request, *supra* note 1, pp. 11-13, 15, 17-20.

⁴⁸ See the Impugned Decision, *supra* note 33, para. 25.

⁴⁹ Indeed, the Defence arguments under “First Appealable Issue” were already presented in paras. 41-54 of the Defence Request for stay of proceedings (the “DRSP”). The Defence arguments under “Second Appealable Issue” were already presented in paras. 41, 46-50 and 55-57 of the DRSP. The Defence arguments under “Third Appealable Issue” were already presented in paras. 55-64 of the DRSP. The Defence arguments under “Fourth Appealable Issue” were already presented in paras. 58-64 of the DRSP. The Defence arguments under “Fifth Appealable Issue” were already presented in paras. 5, 45, 51-53, 66-67, 69, 80-81, 83-84 of the DRSP. The Defence arguments under “Sixth Appealable Issue” were already presented in paras. 43-44, 51-53, 66-67, 69, 70-72, 73-81 of the DRSP. The Defence arguments under “Seventh Appealable Issue” were already presented in paras. 41-92 of the DRSP. The Defence arguments under “Eighth Appealable Issue” were already presented in paras. 55-65 and 69 of the DRSP.

29. Insofar the Defence seeks, in essence, reconsideration of the Impugned Decision, the Chamber already 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”*.⁵⁰ It is submitted that reconsideration is, therefore, an exceptional remedy that can only be granted in limited circumstances and none of the requirements for granting such a request are met in the present instance.

30. The Legal Representatives submit that, as demonstrated *supra*, since the purported “issues” identified by the Defense clearly do not constitute appealable issues under article 82(1)(d) of the Rome Statute, and because of the cumulative nature of the applicable legal criteria, there is no need to further consider whether said “issues” affect the fair and expeditious conduct of the proceedings, and whether an immediate resolution by the Appeals Chamber on said issues may materially advance the proceedings.⁵¹

31. Nevertheless, the Legal Representatives would like to recall that stay of proceedings is a drastic remedy⁵² which can only be granted as a measure of last resort.⁵³

32. The Legal Representatives submit that although the Chamber rejected the Defence Request for stay of proceedings, it put in place necessary safeguards which

⁵⁰ See the “Decision on the Defense 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 Defense 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.

⁵¹ 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, para. 17. See also e.g. the “Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing” (Pre-Trial Chamber I), No. ICC-02/11-01/11-530, 8 October 2013, para. 42.

⁵² See the “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU” (Appeals Chamber), No. ICC-01/04-01/06-2582 OA18, 10 October 2010, para. 55.

⁵³ See the “Decision on Defence Application for a permanent stay of proceedings due to abuse of process” (Trial Chamber V(B)), No ICC-01/09-02/11-868-Red, 5 December 2013, para. 99.

were available to date and less intrusive than a stay of proceedings, in order to obviate eventual prejudice the Defence may suffer because of access by the Prosecution to the Conversations. In particular, the Chamber ruled, first, that the Prosecution shall not be allowed to use the material obtained in the context of the article 70 proceedings during the Defence's presentation of evidence unless specifically authorised by the Chamber;⁵⁴ and second, any further review of the Conversations shall be conducted by members of the Prosecution who are not part of the trial team in the present case.⁵⁵ Furthermore, the Chamber stressed that it may consider taking additional measures in order to address any "*concrete instances of prejudice*".⁵⁶

33. It is submitted in this regard that the Defence cannot reasonably argue in general terms and *in abstracto* that the Accused suffered from irreparable prejudice because of the Prosecution access to the Conversations.⁵⁷ Absent of any concrete examples or instances of prejudice, the Defence's general contentions and complaints are purely speculative, and in any event cannot form a basis for a stay of proceedings to be granted.

34. Accordingly, the Legal Representatives respectfully request the Chamber to reject the Defence Request.

⁵⁴ See the Impugned Decision, *supra* note 33, para. 61.

⁵⁵ *Idem*.

⁵⁶ *Ibid.*, para. 62.

⁵⁷ See the Defence Request, *supra* note 1, para. 7.

FOR THE FOREGOING REASONS the Legal Representatives respectfully request that the Chamber

REJECT the Defence Request in its entirety.



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Common Legal Representative of the
Victims of the Attacks



Sarah Pellet
Common Legal Representative of the
Former Child soldiers

Dated this 8th Day of May 2017

At The Hague, The Netherlands