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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

**Prosecution's application for reconsideration, and in the alternative leave to
appeal, the Chamber's Decision excluding certain Detention Centre
communications**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution seeks reconsideration of two issues arising from the Decision on the Prosecution request to use Detention Centre communications during the cross-examination of the Accused ("Decision")¹ of Trial Chamber VI ("Chamber"), in which it did not allow the Prosecution to use 131 communications in cross-examining the Accused. In the alternative, the Prosecution seeks leave to appeal.

2. In particular, the Prosecution seeks reconsideration of the two following issues:
 - (a) First, the Prosecution seeks reconsideration of the Chamber's ruling which prevents it from using in cross-examination of the Accused the summaries of key Detention Centre communications that it prepared, because it is a party to the proceeding, and to prevent the Prosecution from submitting the relevant transcripts and translations for those communications by the end of June 2017. The Prosecution respectfully asks the Chamber to reconsider this ruling because if the Prosecution cannot use these summaries to question the accused, the Chamber will be deprived of the following key aspects (a) the conversations engaged in by the Accused that explain the meaning of codes he and his associates used in the Detention Centre communications that the Prosecution has been allowed to use in cross-examining the Accused; and (b) other key conversations relevant to assessing issues in the case or the Accused's credibility concerning issues in the case. This will impede the Prosecution's ability to present its case during the Accused's cross-examination and the Chamber's determination of the truth, pursuant to article 69(3) of the Statute.

 - (b) Second, the Prosecution seeks reconsideration of the Chamber's ruling which prevents it from using in cross-examination of the Accused any Detention Centre communications in the KiHema language, even though the Defence has been

¹ ICC-01/04-02/06-T-209 ENG RT, p. 26, line 21 – p. 29, line 25.

provided with full transcripts and translations of the relevant conversations. The translations are prepared and produced by certified translators. Precluding the use of these conversations would impact upon the Prosecution's ability to properly cross-examine the Accused and thus will impede the Chamber's truth-seeking function.

3. In the alternative, the Prosecution requests that the following issues be certified for appeal:
 - (a) Whether the Trial Chamber erred in applying its discretion by excluding communications solely because summaries of the underlying digital voice recordings were prepared by the Prosecution, a party to the proceedings ("First Issue"); and
 - (b) Whether the Trial Chamber erred in applying its discretion by excluding fully translated and transcribed communications in the KiHema language solely because Defence counsel and team do not speak or understand the original language used by the Accused in the communications ("Second Issue").

Procedural Background

4. On 12 May 2017, the Defence requested a change to the second evidentiary block and announced its intention to call the Accused as a witness.²
5. On 28 April 2017, the Chamber denied the Defence request for stay of proceedings. In that decision the Chamber indicated that material obtained in the context of the article 70 proceedings could not be used during the Defence's presentation of evidence unless specifically authorised by the Chamber as necessary for the determination of truth pursuant to its duty under article 69(3) of

² ICC-01/04-02/06-1903, para.5.

the Statute, upon receipt of a substantiated request to be filed sufficiently in advance of the intended use.³

6. 26 May 2017, the Prosecution submitted a request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda.⁴
7. On 31 May 2017, the Prosecution submitted the Prosecution's supplemental request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda.⁵
8. On 6 June 2017, the Defence filed its Response.⁶
9. On 7 June 2017, the Prosecution requested leave to reply to the Defence Response.⁷
10. On 8 June 2017, the Chamber granted leave to reply in part to three issues found in paragraphs 8, 10, and 12 of ICC-01/04-02/06-1942-Conf.⁸
11. On 9 June 2017, the Prosecution filed its reply to the Defence Response.⁹
12. On 14 June 2017, the Chamber issued its Decision on the Prosecution request to use Detention Centre communications during the cross-examination of the Accused.¹⁰

Motion for reconsideration

13. A Chamber may reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory,¹¹ or when new or previously unavailable information requires the Chamber to reconsider its previous ruling.¹²

³ ICC-01/04-02/06-188, para.61.

⁴ ICC-01/04-02/06-1925-Conf.

⁵ ICC-01/04-02/06-1930-Conf.

⁶ ICC-01/04-02/06-1940-Conf.

⁷ ICC-01/04-02/06-1942-Conf.

⁸ Email from Trial Chamber VI Communications, Sent at 14:37, 8 June 2017.

⁹ ICC-01/04-02/06-1948-Conf.

¹⁰ ICC-01/04-02/06-T-209 ENG RT, p. 26, line 21 – p. 29, line 25.

14. The consequences of the two rulings in the Decision are manifestly unsatisfactory in that the Chamber will be severely impeded in its determination of the truth and the Prosecution will be prevented from properly putting forward its case when cross-examining the Accused. The Prosecution seeks reconsideration of, and in the alternative leave to appeal, the following two issues.

(a) Prohibition on use of summaries of conversations

15. First, the Chamber has disallowed the Prosecution to use 125 Detention Centre communications when cross-examining the Accused, because the Prosecution only provided summaries but not full transcriptions and translations of the conversations. The Chamber did so on the basis that the summaries were prepared by a Party to the proceedings and based on its understanding and translation of the conversations. In other words, the Chamber excluded the evidence because the Prosecution prepared the summaries and their translations and this may call into question their accuracy or reliability.

16. The Chamber also denied the Prosecution's request to submit relevant transcripts and translations for those summarised Detention Centre communications by the end of June 2017, before the Accused's cross-examination.

17. In its decision of 28 April 2017,¹³ the Chamber confirmed that material obtained during the article 70 investigation could only be used following a substantiated request in advance of a witness's testimony. The Defence only first indicated its intention to call the Accused as a witness to testify, and during the second evidentiary block, on 12 May 2017.

¹¹ Trial Chamber I has accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras.13-18. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, have concluded that there is no express statutory authority to reconsider rulings (see, e.g., ICC-02/04-01/05-60, para.18). The Prosecution notes that the Appeals Chamber has affirmed that this Court may exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule expressly provides for it (ICC-01/04-01/06-772 OA4, paras.36-39).

¹² ICC-01/05-01/08-1691-Red, para.17. An analogous application of Article 84 also supports this submission.

¹³ ICC-01/04-02/06-188.

18. As the Prosecution submitted on 26 May 2017, it had identified approximately 153 important Detention Centre communications of relevance to his testimony. Although the Prosecution has been reviewing the thousands of Detention Centre communications for some time, completion of transcription and translation for an individual call can take some weeks because of the lengthy quality control process that involves a number of Prosecution staff. Even without knowing what material it would be allowed to use, the Prosecution has been prioritising key calls. However, not all important calls—including key summaries of calls that reveal the meaning of codes—could be completed in advance of the Accused’s testimony.
19. The fact that the Accused decided to testify, and at at the start of the second evidentiary block, should not be a basis for the Chamber to prevent the use of such summaries (or transcripts and translations once available) of these key Detention Centre communications. Furthermore, the summaries are a valid basis for cross-examination of the Accused. They were produced on the basis of translations of the conversations completed by certified and professional translators.
20. In the *Ngudjolo* case a similar issue arose, in the form of Registry reports which summarised the accused Ngudjolo’s Detention Centre calls. In the *Ngudjolo* Appeals Judgement, the Appeals Chamber did not explicitly address the issue of the form of the communications which the Prosecution had wished to cross-examine the accused on. However, by implication the Appeals Chamber approved the use of such summaries as it found that Trial Chamber II’s prohibition on the use of the summarised information found in Registry Reports of Mr Ngudjolo’s Detention Centre communications was a legal error.¹⁴

¹⁴ ICC-01/04-02/12-271-Corr.

21. Further, the underlying audio-recording of each summarised conversation is available and interpreters of Swahili and Kinyarwanda, the languages used in the excluded communications, will be in the courtroom. To the extent the Defence or Chamber wishes to clarify a summary used by the Prosecution, it would be able to do so.
22. Moreover, the relevant transcripts and translations for those summaries can be made available by the end of June 2017 for use in cross-examination.

(b) Prohibition on use of relevant KiHema language communications

23. In relation to the second ruling, the Prosecution provided the Defence with full translations and transcriptions of the relevant KiHema language communications it wished to use. Despite full translations and transcriptions, the Chamber has disallowed the Prosecution from using in cross-examination of the Accused all of his KiHema communications because Defence counsel and team do not speak or understand KiHema, the language sometimes used by the Accused in his communications in order to conceal the communications. The Chamber excluded the KiHema communications “given the impact on the Defence’s ability to prepare” for the testimony of the Accused.
24. However, it is often the case that members of a Defence team do not speak or understand a language used in the evidence of a case, but for which translations have been provided by the Prosecution in a working language of the Court. If the Accused, through his Defence wishes to contest or raise an issue with translations provided by the Prosecution of a language, or if the Defence seeks a second assessment of the translation, it is incumbent upon the Defence to ensure its access to language resources to do so. Were the standard established by the Chamber to be an accepted practice, any Defence team could exclude relevant evidence simply by not preparing itself sufficiently. The Defence has been on notice that its client spoke KiHema in relevant communications since

communications since 19 December 2014.¹⁵ It is for the Defence team to request sufficient resources for its own preparation if it chooses to contest the Prosecution's translations.

25. In the alternative, the Prosecution seeks leave to appeal the two issues.

The issues for which leave to appeal is sought fulfil the criteria in Article 82(1)(d)

26. The Prosecution submits that all requirements under Article 82(1)(d) for granting leave to appeal are met in the present case.

27. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.¹⁶ Reference to any errors contained in the Decision will only be made when necessary to demonstrate that the Decision is appealable.

(a) The Issues arise from the Decision

28. First, the Issues arise out of the Decision for the purposes of Article 82(1)(d):¹⁷ they constitute “an identifiable subject or topic requiring a decision for its resolution”,¹⁸ whose resolution is “essential for the determination of matters arising under the judicial cause under examination”.¹⁹ In its Decision, the Chamber ruled that the use of summaries “will not be permitted, due to the fact that they have been prepared by a party to the proceedings, and are therefore

¹⁵ See “Preliminary report of the Registry on the post factum review of the non-privileged conversations made by Mr Ntaganda since December 2013”, 19 December 2014, ICC-01/04-02/06-417-Conf-Exp, para. 5(a); See also “Second Report on the post-factum review of the phone conversations made by Mr Ntaganda”, 22 May 2015, ICC-01/04-02/06-607-Conf-Exp-Red2, para. 8; “Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts”, 18 August 2015, ICC-01/04-02/06-785-Conf-Exp, para. 48, fn 108.

¹⁶ ICC-02/04-01/05-20-US-Exp, para. 22.

¹⁷ The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.” ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

¹⁸ ICC-01/04-168 OA3, para. 9.

¹⁹ ICC-01/04-168 OA3, para. 9.

based on an understanding and translation of the conversations by the same party.” The Chamber further precluded the Prosecution from using conversations for which no transcripts and translations had been provided by the date of filing of its supplemental request on 31 May 2017. Secondly, the Chamber disallowed the Prosecution from using in cross-examination of the Accused conversations for which the audio recording was partly or entirely in KiHema, based on the impact of the Defence’s ability to prepare.²⁰

29. The proposed issues are appealable issues within the meaning of article 82(1)(d) as they arise from the Decision and their resolution is essential to enable the Prosecution to properly cross-examine the Accused and in particular to enable the Chamber to: (a) understand codes used during Detention Centre communications that the Prosecution has been allowed by the Chamber to use ; and (b) have available key additional Detention Centre communications relevant to assessing the credibility of the Accused and Defence witnesses due to testify who are mentioned in those communications.

(b) The Issues affect the fair conduct of the proceedings

30. The Issues affect the fairness of the proceedings because they impact the Prosecution’s ability to properly exercise its powers and fulfil its duties in article 54,²¹ including its ability to present its case²² and to establish the truth. As a result of the Decision, the Prosecution will be unable to ask the Accused questions concerning important aspects of the Prosecution’s case.

31. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and

²⁰ ICC-01/04-02/06-T-209 ENG RT, p. 26, line 21 – p. 29, line 25.

substantive rights and obligations of all participants be respected.²³ In particular, that “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.²⁴ Fairness has also been linked to the ability of a party to present its case.²⁵

32. On the first Issue, the Chamber has prevented the Prosecution from using in cross-examination of the accused 125 Detention Centre communications for which the Prosecution provided summaries but not full transcriptions and translations. It so ruled because the summaries were prepared by a Party to the proceedings and based on its understanding and translation of the conversations. In other words, the Chamber excluded the evidence because the Prosecution completed the summaries and translation with the implication being that such work may not be accurate or reliable.

33. However, as mentioned above, the summaries were produced on the basis of translations of the original material by certified and professional translators.

34. Further, the underlying audio of each summary is available and, interpreters of Swahili and Kinyarwanda, the languages used in the excluded communications, will be in the courtroom. To the extent the Defence or Chamber would wish to clarify a summary used by the Prosecution, it would be able to do so.

35. Moreover, transcripts and translations for these Detention Centre communications can be available to the Defence by the end of June 2017, in advance of the cross-examination.

36. By excluding the use of summaries of the conversations, the Chamber is preventing the use of conversations that contain explanations of codes used in Detention centre communications which the Chamber has allowed the

Prosecution to use. This would prevent the Chamber from obtaining a meaningful understanding of the calls which it has allowed the Prosecution to use in cross-examining the accused. This affects the fairness of the proceedings.

37. On the second Issue, the Prosecution provided the Defence with full translations and transcriptions of the relevant KiHema language communications to wished to use. Despite full translations and transcriptions, the Chamber excluded all KiHema communications of the Accused because Defence counsel and team do not speak or understand KiHema, the language partially used by the Accused in the communications in order to conceal the communications. The Chamber excluded the KiHema communications “given the impact on the Defence’s ability to prepare” for the testimony of the Accused.

38. However, it is often the case that members of a Defence team do not speak or understand a language used in the evidence of a case, but for which translations have been provided by the Prosecution in a working language of the Court. Fairness is affected because if the Accused, through his Defence wishes to contest or raise an issue with translations provided by the Prosecution of a language, or if the Defence seeks a second assessment of the translation, it is incumbent upon the Defence to ensure its access to language resources to do so. Were the standard established by the Chamber to be an accepted practice, any Defence team could exclude relevant evidence simply by not preparing itself sufficiently. The Defence has been on notice that its client spoke KiHema in relevant communications since communications since 19 December 2014.²⁶ It is for the Defence team to request sufficient resources for its own preparation if it chooses to contest the Prosecution’s translations.

²⁶ See “Preliminary report of the Registry on the post factum review of the non-privileged conversations made by Mr Ntaganda since December 2013”, 19 December 2014, ICC-01/04-02/06-417-Conf-Exp, para. 5(a); See also “Second Report on the post-factum review of the phone conversations made by Mr Ntaganda”, 22 May 2015, ICC-01/04-02/06-607-Conf-Exp-Red2, para. 8; “Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts”, 18 August 2015, ICC-01/04-02/06-785-Conf-Exp, para. 48, fn 108.

(c) The Issues affect the expeditious conduct of the proceedings

39. Chambers of this Court have taken different approaches as to whether a party is also required to show that an issue affects the expeditious conduct of proceedings once it has been demonstrated that the issue affects the fairness of those proceedings. The Prosecution concurs with Trial Chamber II, which has granted leave to appeal after finding only that an issue “may significantly affect” or “clearly has a bearing on” the fairness of the proceedings and therefore “the first requirement of Article 82(1)(d) of the Statute is met”.²⁷ Hence, once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).²⁸ Nonetheless, the Prosecution submits that the Issues also affect the expeditious conduct of the proceedings.

40. Expeditious conduct means timely and efficient conduct of proceedings.²⁹ This principle requires that decisions at all stages do not unnecessarily delay the overall determination of responsibility.³⁰ Any decision which compromises the efficient conduct of the ongoing proceedings in the case or situation at hand, or

²⁷ ICC-01/04-01/07-2032, para. 28; ICC-01/04-01/07-1859, para. 18. Trial Chamber III has also granted leave to appeal finding that the issue affects the fairness of the proceedings – without making any independent finding on expeditiousness. See ICC-01/05-01/08-1169, para.35.

²⁸ This reflects the consistent position of the Prosecution: see in particular ICC-01/04-141, paras. 49-52; ICC-01/04-103, footnote 5; ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair or no longer expeditious, they are no longer “fair and expeditious”; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the “fair and expeditious conduct of the proceedings”. The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition (see authorities set out in ICC-01/04-141, paras. 49-52).

²⁹ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003 (“Norman Decision on Application for Stay”): “the Court’s obligation to do justice expeditiously and effectively, as well as fairly.” (para. 6); “we can only do justice that is expeditious, fair and efficient” (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue “will significantly affect the efficient and expeditious conduct of the proceedings”.

³⁰ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

which delays the investigation and prompt determination of responsibility for the crimes under investigation, affects the expeditious conduct of the proceedings.³¹

41. The Issues affect the expeditious conduct of the proceedings because by allowing the Prosecution to use the excluded communications in cross-examining the Accused, he will be able to answer the Prosecution's questions on the calls and thus obviate the need to inquire further into the matter with subsequent witnesses. Or, it may be clear that subsequent witnesses need not be called. Since the Accused is party to each of the conversations he may provide sufficient testimony to address the issues at stake. Additionally, resolution by the Appeals Chamber will also clarify whether the excluded communications may be used for subsequent witnesses, which will expedite cross-examination and avoid litigation.

(d) The Issue affects the outcome of the trial

42. An issue only needs to impact the fair and expeditious conduct of the proceedings or the outcome of the trial.³² Nevertheless, the Prosecution stresses that the Issues also affect the outcome of the trial. According to the Appeals Chamber, under this limb the 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."³³
43. The outcome of the trial is assumed to be affected "where the possibility of error in an interlocutory or intermediate decision may have a bearing" on the outcome of the trial.³⁴ This includes if it "directly relates with the amount and type of

³¹ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. Norman Decision on Application for Stay, para. 8; and Terrier, Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

³² ICC-01/05-01/08-75, para. 8; ICC-02/04-112, para. 17; ICC-01/04-01/06-1417, paras. 17-18; ICC-01/04-01/06-1473, paras. 21-22.

³³ ICC-01/04-168 OA3, para.13.

³⁴ ICC-01/09-01/11-912, para 65.

evidence that the Chamber will have to consider when making its final determination in accordance with Article 74".³⁵

44. The two Issues affect the testimony of the Accused and the Chamber's evaluation of that testimony for its article 74 judgment. His actions to interfere with and instruct witnesses relate to the credibility of the Accused's testimony and that of Defence witnesses who are due to be called, and thus also to issues at the heart of the case. Without sufficient inquiry into the witness interference on the credibility of Defence evidence the Chamber may not be in a position to evaluate the evidence fairly thereby affecting the outcome of the trial.

(e) Immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings

45. Immediate resolution of the Issue will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'move forward' by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings."³⁶ Otherwise, a wrong decision on an issue in the context of Article 82(1)(d), unless remedied on appeal, will entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.³⁷

46. The Appeals Chamber has also confirmed that proceedings are "not confined to the proceedings in hand but extends to the proceedings prior and subsequent

³⁵ ICC-01/05-01/08-1169, para. 35.

³⁶ ICC-01/04-168, paras. 14-15, 18.

³⁷ ICC-01/04-168 OA3, para. 16.

thereto.”³⁸ Witness interference issues have affected this Court and have been present in one way or another since the first case. The Prosecution has attempted in good faith to detect, disrupt, and deter witness interference by investigating and prosecuting offences and by using the material at trial. The Prosecution attempted, but was incorrectly not allowed to use witness interference information in the *Ngudjolo* case to challenge the credibility of the Accused and other witnesses.³⁹ There have been similar attempts to distort the truth in this case. Appellate review is necessary to ensure both that the Chamber’s resolution of the issue stands on solid legal ground and that future proceedings can unfold cognisant of the proper legal uses of such material at trial.

47. In addition to the direct impact on the present proceedings, the prompt resolution of this issue will also assist to advance other proceedings before this Court.⁴⁰

48. Trial Chambers have found that this prong has been met if “[t]he issue has a direct impact on the conduct of the trial proceedings. In particular, the mode of questioning witnesses by parties and participants [...]”.⁴¹ It has also been held that it is “crucial to have the matter immediately resolved in order for the Chamber, if applicable, to analyse the request using a different threshold and thereby ensuring that the proceedings will follow the right course.”⁴²

³⁸ ICC-01/04-168, para. 12; see also para. 17: “The term ‘proceedings’ in the second part of article 82(1)(d) of the Statute can have no different meaning from the one ascribed to it in the first part of the paragraph, encompassing the proceedings in their entirety.”

³⁹ See ICC-01/04-02/12-271-Corr, paras. 271 to 276. See also ICC-01/04-01/1718.

⁴⁰ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

⁴¹ ICC-01/05-01/08-1169, para. 36.

⁴² ICC-02/05-03/09-428, para. 19.

Relief sought

49. For the reasons set out above, the Prosecution requests that the Trial Chamber grant the request for reconsideration, or in the alternative leave to appeal pursuant to Article 82(1)(d). The Prosecution observes that if the Chamber grants the request for leave to appeal, the Accused may be recalled to testify subsequently pending the outcome of such an appeal.



Fatou Bensouda

Prosecutor

Dated this 20th day of June 2017

At The Hague, The Netherlands