

DISSENTING OPINION OF JUDGE ROBERT FREMR

1. I respectfully disagree with the Majority's rejection of the request ('Request')¹ by the defence team of Mr Ntaganda ('Defence') for leave to appeal the 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution' ('Impugned Decision').²
2. I agree with my esteemed colleagues that the first of the eight issues identified by the Defence does not arise from the Impugned Decision, while the other six issues do qualify as appealable issues. In addition, I consider the seventh issue to be an appealable issue. However, contrary to my colleagues, I consider that the aforementioned appealable issues clearly fulfil the other requirements of Article 82(1)(d) of the Statute.
3. To start, I consider that the nature of the Impugned Decision, namely one deciding whether or not to stay the proceedings, makes it akin to the type of decisions that may be appealed directly, without prior leave from the chamber having issued the decision concerned. A decision on a request for an (indefinite) stay of proceedings would, if the request is granted, effectively end the proceedings and result in the duty to release the accused. In case a chamber grants such a request by a defence team, it would be incongruous if this same chamber could deny the Office of the Prosecutor ('Prosecution') leave to appeal this 'final' decision. Moreover, as regards the requirements of Article 82(1)(d) of the Statute, any decision imposing a stay on the proceedings naturally has a significant effect on the outcome of the trial and a resolution by the Appeals Chamber would materially advance the proceedings, insofar as the Appeals

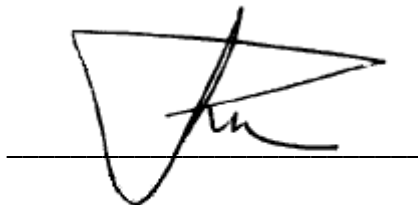
¹ Request on behalf of Mr Ntaganda seeking leave to appeal 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution', ICC-01/04-02/06-1888.

² 28 April 2017, ICC-01/04-02/06-1883.

Chamber should be permitted, if so requested, to pronounce on the correctness of the proceedings ending prematurely. It would be illogical that a finding to the contrary, namely the rejection of a request for a stay of proceedings would not be considered as also fulfilling the relevant conditions.

4. Whereas the consequences of a decision granting a request for stay of proceedings more clearly affect the outcome of the trial, it should be recalled that the Request was made on the basis of an alleged abuse of process that was argued to be so serious that it warranted a stay of proceedings. While the Chamber, in my view correctly, found that a stay was not warranted, it did find there to be prejudice to the accused and that the Prosecution had been placed in an unduly advantageous position vis-à-vis the Defence. Therefore, although the Chamber found that the threshold for a stay of proceedings was not reached and the prejudice to the accused may be remedied through alternative, less drastic measures than a stay of proceedings, the issues at hand must be seen as having the potential to significantly affect the fair and expeditious conduct of the proceedings. Furthermore, a resolution by the Appeals Chamber as to the correctness of the Impugned Decision and whether or not the Chamber erred by not taking into account certain information, would materially advance the proceedings. Indeed, should the Appeals Chamber determine that the Chamber erred and ought to have stayed the proceedings, the trial would not unnecessarily continue and by doing so place a significant burden on the accused, witnesses, as well as resources. In addition, while I am in full agreement with the Impugned Decision, resolution by the Appeals Chamber on a highly contentious issue such as stay or continuation of proceedings would enhance the integrity of the proceedings.
5. Consequently, I would have granted the Request and granted the Defence leave to appeal the Impugned Decision on Issues Two to Eight.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a cursive 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Dated this 13 June 2017

At The Hague, The Netherlands