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Date: **1 May 2015**

**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 Response to the Defence Application for Leave to Appeal the  
Chamber's decision on the Defence urgent request for postponement of the  
Prosecution's case**

**Source:** Office of the Prosecutor

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**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

Nicole Samson

**Counsel for the Defence**

Stéphane Bourgon

Luc Boutin

William St-Michel

**Legal Representatives of Victims**

Sarah Pellet

Dmytro Suprun

**REGISTRY**

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**Registrar**

Herman von Hebel

## Introduction

1. On 9 October 2014, after hearing the Parties and participants,<sup>1</sup> Trial Chamber VI set the commencement date for trial on 2 June 2015.<sup>2</sup> On 2 April 2015, the Ntaganda Defence (“Defence”) requested a postponement of the commencement until 2 November 2015 at the earliest.<sup>3</sup> On 22 April 2015, the Trial Chamber, “noting mainly the logistical difficulties presented by the Registry [to organise the opening statements in Bunia] and to a lesser extent the Defence submissions that it would not be in a position to commence trial as scheduled”, postponed the opening statements until 7 July 2015 and the start of the Prosecution’s case provisionally until the week of 17 August 2015.<sup>4</sup> The Defence was therefore granted approximately two and a half months of additional preparation time instead of the five months requested.<sup>5</sup> On 24 April 2015, the Defence sought leave to appeal the Decision.<sup>6</sup>
2. The Defence Application should be dismissed. None of the four issues identified by the Defence are appealable. The First and Third Issues mischaracterise the Decision, and the Second and Fourth Issues merely disagree with it.

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<sup>1</sup> ICC-01/04-02/06-352, paras.43-52; ICC-01/04-02/06-365-Red, para.42 and ICC-01/04-02/06-T-13-ENG-ET, p.55, lns.4-11 (Prosecution); ICC-01/04-02/06-T-13-ENG ET, p.55, ln.16 to p.56, ln.4 (Defence); ICC-01/04-02/06-351, paras.34-35 and ICC-01/04-02/06-T-13-ENG-ET, p.55, lns.1-5 (Legal Representatives).

<sup>2</sup> ICC-01/04-02/06-382-Corr, para.8.

<sup>3</sup> ICC-01/04-02/06-541-Conf-Exp-Red2 with public redacted version at ICC-01/04-02/06-541-Red, (“Defence Request”). The Prosecution responded on 14 April 2015: ICC-01/04-02/06-557-Conf-Exp with public redacted version at ICC-01/04-02/06-557-Red (“Prosecution’s Response to Defence Request”).

<sup>4</sup> ICC-01/04-02/06-T-19-ENG-ET, p.6, ln.20 to p.7, ln.18. The full text of the oral ruling addressing and dismissing the Defence Request is ICC-01/04-02/06-T-19-ENG-ET, p.3, ln.9 to p.7, ln.21 (“Decision”).

<sup>5</sup> Decision, p.7, lns.19-21.

<sup>6</sup> ICC-01/04-02/06-572 (“Application” or “Ntaganda Application”).

## Submissions

### A. The Four Issues are not appealable

3. Chambers of this Court have consistently held that mere disagreements or conflicting opinions cannot constitute appealable issues.<sup>7</sup> In addition, appealable issues do not arise when the applications are premised on misrepresentations of the Chamber's findings.<sup>8</sup> The Application should be dismissed on these two bases alone: the First<sup>9</sup> and Third Issues<sup>10</sup> misrepresent the Decision, and the Second<sup>11</sup> and Fourth Issues<sup>12</sup> simply disagree with it. Even if the Trial Chamber were to find that the Application identifies an appealable issue, the Defence's arguments do not demonstrate that the requirements pursuant to article 82(1)(d) are met.

#### (i) *The First and Third Issues misrepresent the Decision*

4. As its First Issue, the Defence argues that the Trial Chamber failed to provide a reasoned opinion in denying the requested postponement.<sup>13</sup> This is not correct. The Trial Chamber addressed the Defence's arguments,<sup>14</sup> explained why it

<sup>7</sup> See e.g., ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.25; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

<sup>8</sup> ICC-01/09-02/11-406, para.46; ICC-01/04-01/07-15, para.15; ICC-01/04-01/07-1732, paras.15,17-18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras.26-29; ICC-01/04-01/10-106, p.6; ICC-02/11-01/11-350, paras.42,44.

<sup>9</sup> Application, para.1(a): "The Chamber erred by failing to provide a reasoned opinion setting out the reasons why the Defence submissions do not justify a postponement of the Prosecution's case of the length requested ("First Issue")."

<sup>10</sup> Application, para.1(c): "The Chamber erred by conflating the right of the Accused to have adequate time for the preparation of the defence with the right of the Accused to know the case he has to meet ("Third Issue")."

<sup>11</sup> Application, para.1(b): "The Chamber erred by failing to take into account the significant change in circumstances during the period from 11 September 2014 to 2 April 2015 ("Second Issue")."

<sup>12</sup> Application, para.1(d): "The Chamber erred by holding that "the other difficulties described by the Defence [...] fall within the range of normal investigative difficulties that might be anticipated in a case of this nature" and/or by failing to take into consideration the impact of the investigative difficulties encountered on the ability of the Defence to be ready for trial ("Fourth Issue")."

<sup>13</sup> Application, paras.6-10.

<sup>14</sup> Decision, p.3, ln.20 to p.4, ln.6 where the Trial Chamber noted the Defence's arguments, in particular: "A number of grounds were submitted in support of the request, including: Firstly, the volume of material disclosed by the Prosecution since January 2015 which the Defence submits it could not have anticipated; secondly, the extent of redactions applied and the re-disclosure of material with lesser redactions; thirdly, the inability of the Defence to conduct adequate investigations within the scheduled time frame for reasons related to, amongst other things, (a) the timing and scope of disclosure; (b) difficulties in the conduct of investigations and in [...] securing the services of suitable investigators; (c) the impact of the change in composition of the Defence team; and finally (d) the parties having been unable yet to consider proposals for agreed facts or joint instruction of

disagreed and dismissed them<sup>15</sup> and concluded that an extension of five months was not merited. Instead, it effectively granted an extension of two and a half months.<sup>16</sup> Further, although the Chamber did not expressly refer to the alleged “impact of on-going *ex parte* proceedings on the Defence’s preparations for trial”,<sup>17</sup> it did state that “a number of [...] other difficulties described by the Defence [...] relate to matters which in the Chamber’s view do not legitimately justify the defence postponement request”.<sup>18</sup> In any event, failure to mention this factor does not render the Decision unreasoned: as the Appeals Chamber has held, a reasoned decision does not necessarily require a Chamber to recite and summarise each and every factor before it; a Chamber need only indicate with sufficient clarity the basis of its decisions.<sup>19</sup> The Trial Chamber did just that in the Decision. Accordingly, the First Issue is misconceived and does not arise from the Decision.

5. The Third Issue similarly misunderstands the Decision. The Trial Chamber did not “[misunderstand] the arguments of the Defence and conflate[] the right of the Accused to have adequate time to prepare for the defence with the right of the Accused to know the case he has to meet”.<sup>20</sup> The Trial Chamber understood the

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experts.” The Chamber also noted that “[t]he Defence further provided a detailed estimate of the work it considered remained to be completed before the commencement of trial”.

<sup>15</sup> Decision, p.5, ln.18 to p.6, ln.8, where the Chamber provided reasons as to why those arguments were dismissed: “The Chamber is not satisfied that the Defence submissions justify a postponement of the length requested. In particular, the Chamber considers that a significant number of the issues raised by the Defence were either already known to it at the time it made submissions on the schedule for preparation for trial, or should reasonably have been anticipated by it at that stage. This includes, for example, the status of Defence investigations at that time, the impact of changes in the composition of the Defence team and to some extent the potential volume of disclosure. The Chamber considers that a number of the other difficulties described by the Defence either fall within the range of normal investigative difficulties that might be anticipated in a case of this nature, or relate to matters which in the Chamber’s view do not legitimately justify the Defence postponement request. Regarding the Prosecution’s request for delayed disclosure and for non-standard redactions, the Chamber considers them to have been appropriately limited in number and scope. As already indicated in the Chamber’s decision on delayed disclosure, the Chamber does not find that the authorised delays are such as would justify an alteration of the trial commencement date.”

<sup>16</sup> Decision, p.6, ln.20 to p.7, ln.21.

<sup>17</sup> Application, para.8.

<sup>18</sup> Decision, p.5, ln.25 to p.6, ln. 3.

<sup>19</sup> ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

<sup>20</sup> *Contra* Application, para.18.

Defence's arguments<sup>21</sup> and noted that "the Chamber is mindful of its obligation to ensure full respect for the rights of the accused, including in particular *the right to have adequate time and facilities for preparation of the defence*".<sup>22</sup> The Chamber further recalled that "the obligation to ensure a fair and expeditious trial is a duty of the Chamber".<sup>23</sup>

6. The Defence had referred in its Request to the need for extra time to acquire "full knowledge and understanding of the Prosecution's Case,"<sup>24</sup> listing the "conduct[] [of] an overall analysis of the Prosecution's Case" as one of the remaining tasks to accomplish.<sup>25</sup> In this respect, the Chamber's reference to the Prosecution's pre-trial brief and the updated Document Containing the Charges as tools to provide the Defence with "a clear outline and understanding of the Prosecution's case," in addition to the confirmation decision,<sup>26</sup> was apposite. The evidence disclosed by the Prosecution supports the factual allegations underlying the charges. Hence, a proper understanding of the Prosecution's case - including its factual allegations - will indeed assist the Defence to understand and review the evidence disclosed.
7. The arguments advanced above show that the Chamber's reasoning fully apprehended and addressed the Defence's arguments. Hence, the alleged Third Issue does not arise.

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<sup>21</sup> Application, para.19. According to the Defence, "the essence of [its] arguments [...] is that additional time is required for the purpose of gaining a sufficient understanding of all material disclosed by the Prosecution [...] and investigating the same, in order to be able to challenge the evidence expected to be adduced at trial (which follows from the *right of the Accused to have adequate time to prepare for the defence*)." Emphasis added.

<sup>22</sup> Decision, p.5, lns.13-15. Emphasis added.

<sup>23</sup> Decision, p.5, lns.15-17.

<sup>24</sup> Defence Request, paras.4, 5, 15, 29 and 31.

<sup>25</sup> Defence Request, para.87.

<sup>26</sup> Decision, p.6, lns.9-12.

(ii) *The Second and Fourth Issues constitute disagreements with the Decision*

8. The Second Issue should be dismissed as it merely disagrees with the Chamber's Decision. The "significant change in circumstances" between 11 September 2014 and 2 April 2015 that the Trial Chamber supposedly failed to consider<sup>27</sup> rests on the same arguments already advanced in the Defence Request, namely, (1) the volume of material disclosed by the Prosecution since 15 January 2015, the addition of 29 new witnesses and the required analysis of this material; (2) the resources invested in addressing the on-going *ex parte* proceedings; and (3) the alleged additional investigations.<sup>28</sup>
9. The Trial Chamber has already considered and dismissed these arguments.<sup>29</sup> First, even though the Defence exaggerates the burden placed on it by the Prosecution's disclosures in 2015,<sup>30</sup> the Trial Chamber considered the arguments related to the volume of disclosure made since January 2015.<sup>31</sup> However, it concluded that the Defence could have anticipated such disclosure to some extent.<sup>32</sup> Indeed, the Prosecution disclosed a significant volume of evidence by 30 January 2015, *within* the disclosure deadline set by the Chamber.<sup>33</sup> In addition, the 2015 disclosures were made in accordance with disclosure deadlines proposed by the Defence.<sup>34</sup> Second, the Trial Chamber also considered the Defence's argument as to the difficulties in conducting investigations within the required timeframe,<sup>35</sup> but it also dismissed this argument. The Chamber found that the Defence already knew, or could have anticipated, the status of the Defence investigations when it

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<sup>27</sup> Application, para.14.

<sup>28</sup> Application, para.15. Compare with Defence Request, paras.15-31 (on the Prosecution's disclosure), paras.32-52 (on the inability of the Defence to adequately investigate), and paras.66-71 (on the purported impact of the *ex parte* proceedings).

<sup>29</sup> See above para.4.

<sup>30</sup> See Prosecution's Response to Defence Request, where the Prosecution addressed and corrected some of the inaccuracies of the Defence Request.

<sup>31</sup> Decision, p.3, lns.21-22.

<sup>32</sup> Decision, p.5, ln.24.

<sup>33</sup> Prosecution's Response to Defence Request, paras.8-16.

<sup>34</sup> Prosecution's Response to Defence Request, para.2.

<sup>35</sup> Decision, p.3, ln.23 to p.4, ln.2.

made its submissions on the schedule for preparation for trial,<sup>36</sup> and that some of the difficulties highlighted “fall within the range of normal investigative difficulties that might be anticipated in a case of this nature”.<sup>37</sup> Finally, although the Chamber did not expressly refer to the *ex parte* proceedings,<sup>38</sup> this fact does not raise an appealable issue. The Chamber need not list every single argument considered in issuing a decision. Further, the Chamber did indicate that “a number of the other difficulties described by the Defence [...] relate to matters which in the Chamber’s view do not legitimately justify the Defence postponement request”.<sup>39</sup>

10. As noted by other Chambers, “[i]t is insufficient to argue that the impugned decision was not correctly reasoned”<sup>40</sup> and “[a] mere reiteration of prior arguments and an expression of disagreement with the analysis and conclusion made by the Chamber are not sufficient to identify an ‘issue’.”<sup>41</sup> This Third Issue should fail on these grounds.

11. Finally, the Fourth Issue also constitutes a mere disagreement with the Chamber’s conclusion that the “investigative difficulties [described by the Defence] might be anticipated in a case of this nature”.<sup>42</sup> First, and contrary to the Defence’s submissions,<sup>43</sup> the Prosecution’s case has not changed since September 2014, nor has the Defence made such an argument before. As noted above, and developed in the Prosecution’s Response,<sup>44</sup> the Defence overstates the number, scope and impact of the Prosecution’s disclosures in 2015. Second, the Chamber referred to the investigative difficulties “described by the Defence” in concluding that such

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<sup>36</sup> Decision, p.5, lns.19-23.

<sup>37</sup> Decision, p.6, lns.1-2.

<sup>38</sup> See above, para. 4.

<sup>39</sup> Decision, p.5, ln.25 and p.6, lns.2-3

<sup>40</sup> See for example, ICC-02/11-01/15-42, para.14, ICC-01/04-168, para.9; ICC-01/09-01/11-817, para.12; ICTY, Trial Chamber, *Prosecutor v. Karadzic*, Decision on Accused’s Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 Bis, 18 July 2012, IT-95-5/18-T, para. 6.

<sup>41</sup> ICC-02/11-01/11-350, para.40.

<sup>42</sup> Application, paras.22-23 referring to Decision, p.5, ln.25 to p.6, ln.2.

<sup>43</sup> *Contra*, Application, para.23.

<sup>44</sup> See above, para. 9.

difficulties could have been anticipated.<sup>45</sup> The Decision is clear in this respect and the Chamber was not obliged to rehearse in full the purported difficulties listed in the Defence's Request.<sup>46</sup> Hence, the Fourth Issue should also be dismissed.

**B. The Issues would not significantly affect the fair or expeditious conduct of the proceedings, nor materially advance the proceedings**

12. In addition, the Issues would not significantly affect the fair or expeditious conduct of the proceedings or materially advance the proceedings.

13. The Defence's arguments on the impact of the purported Issues on the fairness of the proceedings are unsupported and speculative.<sup>47</sup> First, the Defence presumes that the accused's right under article 67(1)(b) to have adequate time and facilities to prepare his/her defence is automatically violated if the Defence simply argues that it does not have enough time to prepare. This is not correct. The Defence must support its submission.<sup>48</sup> The Trial Chamber considered that the Defence had failed to demonstrate that a five month postponement was necessary and instead concluded that an extension of two and a half months was sufficient. Second, the Trial Chamber emphasised in the Decision that "the obligation to ensure a fair and expeditious trial is a duty of the Chamber".<sup>49</sup> Hence, if the Defence were to face concrete and identifiable obstacles in, for example, its investigative activities, or regarding the cross-examination of a witness, and *supports* its assertions, it could at an appropriate time raise the matter with the Chamber which will decide on an adequate remedy if needed.

<sup>45</sup> Decision, p.5, ln.25 to p.6, ln.1. *Contra*, Application, para.23.

<sup>46</sup> *Contra*, Application, para.23. The Trial Chamber disregarded the Defence *ex parte*'s filing of 13 April 2015 providing more details of the investigative challenges: Decision, p.4, lns.7-10 and 22-25, p.5, lns.1-4.

<sup>47</sup> Application, paras.27-32.

<sup>48</sup> A purely general complaint does not suffice to affect the fairness of the proceedings: ICC-01/04-01/07-2463, para.31.

<sup>49</sup> Decision, p.5, lns.15-17.

14. The Defence's arguments regarding the expeditiousness of the proceedings are also speculative and premature: the Defence submits that its cross-examinations will necessarily be less focused and longer, and that requests for delays will be presented leading to time consuming litigation.<sup>50</sup> As noted above,<sup>51</sup> if such issues were to arise, the Trial Chamber could resolve them at the appropriate time. Raising such issues now before the Appeals Chamber would not significantly expedite the proceedings.
15. For the same reasons, resolution of the purported Issues by the Appeals Chamber would not materially advance the proceedings.<sup>52</sup> Arguing that "whether the Defence is right or wrong in submitting that the preparation time allotted [...] is insufficient [...] to be ready for trial"<sup>53</sup> is a topic of importance is insufficient to show that the intervention of the Appeals Chamber is required, more so when the Issues are largely based on a misreading of the Decision. Further, and as noted above,<sup>54</sup> the Application is premature and the Defence will have additional avenues to pursue before resorting to the Appeals Chamber. If and when concrete difficulties arise, the Defence may seek the intervention of the Trial Chamber. Thus, a resolution of these Issues by the Appeals Chamber at this stage will not provide significant guidance or assist the proceedings to "move forward".<sup>55</sup>

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<sup>50</sup> Application, para.33.

<sup>51</sup> See above, para.13.

<sup>52</sup> *Contra*, Application, paras.36-38.

<sup>53</sup> Application, para.38.

<sup>54</sup> See above, paras.13-14.

<sup>55</sup> ICC-01/04-168, paras.14-15,18.

## Conclusion

16. For the above reasons, the Application should be rejected.



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Fatou Bensouda, Prosecutor

Dated this 1<sup>st</sup> day of May 2015  
At The Hague, The Netherlands