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No.: **ICC-01/04-02/06**

Date: **30 June 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

Public redacted version of "Joint observations on the "Public redacted version of 'Corrected version of 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary condition are in place to ensure a fair trial', 26 June 2015, ICC-01/04-02/06-677-Conf-Exp''''"

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

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I. PROCEDURAL BACKGROUND

1. On 9 October 2014, Trial Chamber VI (the “Chamber”) set the commencement date for trial as 2 June 2015.¹

2. On 7 April 2015, the Defence filed an “Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest” (the “First Request”).² The First Request was opposed by both the Prosecution³ and the Common Legal Representatives.⁴

3. On 22 April 2015, in an oral decision, the Chamber postponed the opening statements until the second or third week of July 2015 and the hearing of evidence provisionally until the week of 17 August 2015 (the “Oral Decision”).⁵

4. On 24 April 2015, the Defence sought leave to appeal the Oral Decision.⁶ This request was rejected on 21 May 2015.⁷

5. On 2 June 2015, during a status conference, the Lead Counsel for the Defence informed the Chamber that “*although the Defence will be present on 24 August when the*

¹ See the “Corrigendum of ‘Order Scheduling a Status Conference and Setting the Commencement Date for the Trial’ (Trial Chamber VI), No. ICC-01/04-02/06-382-Corr, 9 October 2014, para.8.

² See the “Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest”, No. ICC-01/04-02/06-541-Red, 2 April 2015 (the “Urgent Request”).

³ See the “Prosecution’s Response to the ‘Urgent Defence Request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest’”, No. ICC-01/04-02/06-557-Red, 15 April 2015.

⁴ See the “Victims’ observations in response to the ‘Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest’”, No. ICC-01/04-02/06-556, 14 April 2015.

⁵ See the transcription of the status conference, No. ICC-01/04-02/06-T-19-ENG, 22 April 2015, pp. 3-8.

⁶ See the “Request on behalf of Mr Ntaganda seeking leave to appeal the Chamber’s decision on Defence urgent request for postponement of the Prosecution’s case”, No. ICC-01/04-02/06-572, 24 April 2015.

⁷ See the “Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date” (Trial Chamber VI), No. ICC-01/04-02/06-604, 21 May 2015.

*Prosecution will call its first witness [but] [...] will not be ready to begin”.*⁸ When asked by the Presiding Judge whether this statement was meant to constitute new submissions on the postponement issue,⁹ the Lead Counsel clearly established that the Defence *“tried and [...] used every recourse at [its] disposal to request postponement of this trial”* and *“do[es] not feel there is any other recourse available [...] at this time”*.¹⁰

6. On 29 June 2015, the Defence filed a “Public redacted version of ‘Corrected version of ‘Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary condition are in place to ensure a fair trial’, 26 June 2015, ICC-01/04-02/06-677-Conf-Exp’” (the “Urgent Request”).¹¹

7. On the same day, the Chamber, acting pursuant to regulation 34 of the Regulations of the Court, instructed the Prosecution and the Common Legal Representatives of Victims to file their responses to the Urgent Request, if any, by Tuesday 2 July 2015.¹²

8. On 30 June 2015, the Prosecution filed its “Public redacted version of “[its] Response to the ‘Confidential redacted version of ‘Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial’”.”.¹³

9. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Child soldiers (the “Common Legal

⁸ See the transcription of the status conference, No. ICC-01/04-02/06-T-20-ENG, 2 June 2015, p. 9.

⁹ *Idem*.

¹⁰ *Ibid.*, p. 10.

¹¹ See the “Public redacted version of ‘Corrected version of ‘Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary condition are in place to ensure a fair trial’, 26 June 2015, ICC-01/04-02/06-677-Conf-Exp’”, No. ICC-01/04-02/06-677-Corr-Red, 29 June 2015 (the “Urgent Request”).

¹² See e-mail from the legal officer of Trial Chamber VI dated 29 June 2015, at 13:26.

¹³ See the “Public redacted version of ‘Prosecution’s Response to the ‘Confidential redacted version of ‘Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial’”, 30 June 2015, ICC-01/04-02/06-685-Conf-Exp’”, No. ICC-01/04-02/06-685-Red, 30 June 2015.

Representatives”) hereby submit jointly their observations on behalf of the victims they represent.

10. These joint observations are classified confidential pursuant to regulation 23bis(2) of the Regulations of the Court since they related to confidential requests. A public redacted version is filed simultaneously.

II. JOINT OBSERVATIONS

11. The Common Legal Representatives question the attitude of the Defence obviously prompted to denounce “*endless redactions applied [REDACTED]*”¹⁴ as well as to criticise an attitude of the Prosecution leading the Defence to be deprived of a possibility to respond.¹⁵ However, the same Defence through the extensive redactions applied to the Urgent Request have hindered the possibility for the Common Legal Representatives to provide meaningful observations on the very same Urgent Request. The extent of the redactions makes it impossible for the victims to participate meaningfully in the current proceedings although the issues at stake touch upon their very personal interests.

1) On the excessive redactions

12. In its justification pursuant to regulation 23bis(1) of the Regulations of the Court, the Defence argues that the “*Urgent Motion is submitted on an ex parte basis – only available to the Chamber and the Defence – as it provides detailed confidential and sensitive information directly related to the conduct of investigations by the Defence*”.¹⁶ The Common Legal Representatives are placed in a situation where the extensiveness of the redactions applied by the Defence renders it impossible to evaluate the appropriateness and necessity of said classification. Therefore, the Common Legal Representatives request the Chamber to review the redactions applied by the

¹⁴ See the Urgent Request, *supra* note 11, para. 3.

¹⁵ *Idem*, para. 65.

¹⁶ *Ibid.*, para. 74.

Defence with a view to considering whether an unreacted (or a lesser redacted) version of the Urgent Request should be provided to them.

13. Indeed, to the best of the Common Legal Representatives' knowledge, some redactions are clearly not justified and incidentally note that the confidential version of the Urgent Request is alike in all respects to the public version thereof, except for 2 additional redactions applied to paragraph 42.

14. The most important information that is redacted throughout the Urgent Request concerns the duration of the adjournment.¹⁷ The Common Legal Representations strongly question the use of redactions with respect to such an important aspect of the Urgent Request and submit that the Defence could have, at least, given a general indication as to the length of the postponement requested. Absent this primordial information, the Common Legal Representatives contend that they are not in a position to provide meaningful observations on an issue that affects the core personal interests of the victims. Moreover, it *per se* annihilates the right of victims to participate in the proceedings as enshrined in the Rome Statute, and recognised by the Defence itself.¹⁸

15. Similarly, pursuant to the Decision on victims' participation in trial proceedings, "[...] the LRVs have a general right to access the case record by the terms of Rules 92(5) and 131(2) of the Rules. The Chamber considers that this access generally entitles the LRVs to access filings, transcripts and material, both public and confidential. Going forward, if the parties submitting filings/material are of the view that the LRVs ought not to access them, then they must indicate the factual and legal basis for the chosen classification".¹⁹ Accordingly, they were notified of the Pre-Trial Brief referred to in paragraph 43 of the Urgent Request and cannot comprehend the need for redacting footnote 14.

¹⁷ *Ibid.*, paras. 6, 16, 73 and 76.

¹⁸ See the transcription of the status conference, No. ICC-01/04-02/06-T-19-ENG, 22 April 2015, p. 52.

¹⁹ See the "Decision on victims' participation in trial proceedings" (Trial Chamber IV), No. ICC-01/04-02/06-449, 6 February 2015, para. 55.

16. Last but not least, the Common Legal Representatives believe that in fact far from being justified by the fact that they relate to “*detailed confidential and sensitive information directly related to the conduct of investigations by the Defence*”,²⁰ many of the redactions applied to the Urgent Request relate to other issues. In this regard, the Common Legal Representatives contend that at least one issue relates to the interests of their clients as will be demonstrated *infra*. Accordingly, the Common Legal Representatives respectfully request the Chamber to issue without further delay a decision [REDACTED]²¹ [REDACTED].²²

2) On the fact that excessive redactions have hindered the possibility for the Common Legal Representatives to provide meaningful observations on the Urgent Request and makes it impossible for victims to participate in the current proceedings

17. The excessive redactions applied by the Defence in its Urgent Request, not only violate the victims’ right to truth, but also “fair trial” guarantees strongly advocated by the Defence. In the circumstances, victims are *de facto* deprived of their right to participate in the current proceedings.

a) On the right to truth

18. The jurisprudence of the Court clearly recognises the victims’ fundamental right to know the truth about the crimes that they suffered. In the *Katanga & Ngudjolo* case, the Court stated that,

“empirical studies conducted amongst victims of serious violations of human rights, [...] show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body [...].

²⁰ See the Urgent Request, *supra* note 11, para. 3.

²¹ See e-mail from the Common Legal representatives dated 16 June 2015, at 9.22.

²² See e-mail from the legal officer of Trial Chamber VI dated 18 June 2015, at 17:57.

The victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right for the truth for the victims of serious violations of human rights.

[...] [W]hen the right to truth is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings: (i) bring clarity about what indeed happened; (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth".²³

19. Moreover, the meaningfulness of victims' participation in the proceedings rests partly on their ability to effectively assist the Court in the determination of the truth. In this regard, it was emphasised that "[t]he object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules is to provide victims with a meaningful role in the criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings".²⁴

20. Furthermore, it was held that "[t]he participation of victims in the proceedings is not limited to an interest to receiving reparations and their personal interests are self-evidently not limited to reparations issues".²⁵ Rather, victims have also other core interests "such as seeking determination of the truth concerning the events they experienced, or wishing to see the perpetrators of the crimes they suffered being brought to justice."²⁶ They also have the right to be heard on major issues which affect the conduct of the proceedings, such as the issue of the postponement of trial. Indeed, it was clarified that article 68 of the Rome Statute imposes a dual obligation on the Chamber "on the

²³ See the "Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of a Case" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, paras. 31, 32 and 34. See also "Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), No. ICC-02/05-01/09-62, 10 December 2009, para. 4.

²⁴ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 12, para. 157.

²⁵ See the "Decision on victims participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 98.

²⁶ See the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, par. 59.

one hand, to allow victims to present their views and concerns, and, on the other, to examine them".²⁷

21. Finally, the swift and expeditious conduct of the proceedings is at the core of the victims' interests. Any delay, especially in the context of this case, would affect their right to have those who victimised them prosecuted, tried, convicted, and subjected to a certain punishment. As previously highlighted, "*the interests of victims go beyond the determination of what happened and the identification of those responsible, and extend to securing a certain degree of punishment for those who are responsible for perpetrating the crimes for which they suffered harm*".²⁸

b) On the "fair trial" guarantees

22. The Common Legal Representatives submit that the "fair trial" guarantees shall apply throughout the proceedings not only to the defence,²⁹ but to all parties and participants, including victims.³⁰ In the same vein, the requirements for fair proceedings shall apply to all the parties and participants before the Court, and not

²⁷ See the "DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 71.

²⁸ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 13 May 2008, para. 38.

²⁹ See ICTY, *The Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, paras. 43-44 and 55; and *The Prosecutor v. Radoslav Brjdanin*, Case No. IT-00-36-T, Decision on the Defence « Objection to Intercept Evidence », 3 October 2003, para. 63. See also ICTR, *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nairorera and Mathieu Ngirumpatse, 2 November 2007, para. 25.

³⁰ In this regard, the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985 calls for enabling victims to access to Justice and to obtain redress and for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, UN Doc. A/RES/40/34, 29 November 1985, Principles 4 to 7. The document is available at the following address: <http://www.un.org/documents/ga/res/40/a40r034.htm>.

only to the suspect/accused,³¹ and shall furthermore prevail over the specific interests of the parties.³²

23. The Court is a unique international jurisdiction which has been established not only to investigate the most serious crimes of concern to the international community but also and particularly to render Justice to victims.³³ As far as victims' participation constitutes an integral part of the concept of fair and impartial proceedings before the Court, relevant Chambers have a duty to take into consideration the interests of the victims throughout the proceedings, and in particular when deciding on requests for postponement of proceedings.

24. In this regard, "[i]n the light of the core content of the right to be heard set out in article 68(3) of the Statute, [...] [said provision] imposes an obligation on the Court vis-à-vis victims. The use of the present tense in the French version of the text (*"la Cour permet"*) makes it quite clear that the victims' guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It

³¹ See the "Decision on the admission of material from the 'bar table'" (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009, para. 42. See also in the same sense TRAPP (K.), *Excluding Evidence: The Timing of a Remedy*, non-published manuscript (1998), Faculty of Law, McGill University, Canada, p. 21; quoted in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, Verlag C.H. Beck, Munich, 2008, p. 1335, footnote 139. See also the "DECISION ON THE PROSECUTION'S APPLICATION FOR LEAVE TO APPEAL THE CHAMBER'S DECISION OF 17 JANUARY 2006 ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-135-tEN, 20 April 2006 (dated 31 March 2006), para. 38.

³² See SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, Case No. SCSL-04-16-PT, 31 March 2004, para. 26.

³³ It was determined that the need to "ensure the effective implementation of victims' rights [...] constitute a cornerstone of the Rome Statute system". See ASP, Victims and affected communities, reparations and Trust Fund for Victims, Resolution No. ICC-ASP/12/Res.5, 27 November 2013, Preamble, para. 2. It was also emphasized that "[a] key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims". See the "Report of the Court on the strategy in relation to victims", Assembly of States Parties, Eighth session, No. ICC-ASP/8/45, 10 November 2009, para. 3.

follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them.”³⁴

25. Accordingly, the Common Legal Representatives submit that a balancing exercise between competing interests is required when considering the Urgent Request. Such a consideration simply entails that, in the circumstances of the present case, a further lengthy postponement of the trial cannot be granted because of the resulting prejudice to the victims’ right to have the truth be established and Justice be rendered with no delay.

FOR THESE REASONS, the Common Legal Representatives respectfully request the Chamber to dismiss the Urgent Request and take into account the present observations. They also respectfully reiterate [REDACTED] and accordingly that the Defence is ordered to provide a lesser redacted version of their Urgent Request before the status conference to be held on 2 July 2015.



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Dated this 30th day of June 2015

At The Hague, The Netherlands

³⁴ See the “DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6” *supra* note 27, para. 71.