

**Cour
Pénale
Internationale**



**International
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Court**

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Date: **15 July 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 “Prosecution’s Response to the Defence’s application for leave to appeal Trial Chamber’s VI oral decision on the new trial date (ICC-01/04-02/06-709-Conf-Exp)”, 15 July 2015

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 Ntaganda Defence application for leave to appeal Trial Chamber VI's oral ruling postponing the commencement of trial should be dismissed.¹ The Defence Application does not accurately present the Decision. Contrary to the Defence's submissions, the Trial Chamber considered and ruled on the Defence Request for Adjournment.² The Application merely disagrees with the Decision and seeks to re-litigate the same matters before the Appeals Chamber. Accordingly, the sole issue identified³ does not arise from the Decision and should be dismissed.

Confidentiality

2. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is classified as "Confidential, *EX PARTE* – only available to the Trial Chamber, Prosecution, VWU and Defence" consistent with the classification of the Defence Application. The Prosecution will file a public redacted version.

Submissions

(i) The Defence Application does not accurately present and disagrees with the Decision

3. The Defence Application does not accurately present the Decision. The Trial Chamber ruled on – and partially granted - the Defence Request for Adjournment and found that a two months adjournment was sufficient to permit the Defence to prepare for the start of trial, considering the rights of the Accused.⁴ The fact that the Trial Chamber did not grant the Defence Request in full does not mean that

¹ ICC-01/04-02/06-709-Conf-Exp ("Defence Application") filed on 10 July 2015 and ICC-01/04-02/06-T-22-CONF-ENG ET, p.3, ln.24 to p.5, ln.23 ("Decision") rendered on 3 July 2015. A public redacted version of the Defence Application was filed simultaneously: ICC-01/04-02/06-709-Red.

² ICC-01/04-02/06-677-Conf-Exp-Corr-Red3 ("Defence Request for Adjournment"). A public redacted version was filed: ICC-01/04-02/06-677-Corr-Red.

³ "As a result of the Impugned Decision setting a date for the commencement of trial rather than adjourning the proceedings as requested, the necessary conditions to ensure a fair trial in this case are not in place". See Defence Application, para.2. (the "Issue").

⁴ Decision, p.4, ln.25 to p.5, ln.14.

the Trial Chamber failed to rule upon it or that the proceedings are not fair.⁵ Indeed, the Defence asked for an indefinite suspension of the proceedings to respond to [REDACTED].⁶ The Trial Chamber, mindful of its obligation under article 64(2) of the Rome Statute to ensure the fairness of the trial and the rights of the Accused, agreed that the Defence's current situation affected its ability to prepare for the start of the trial and partially granted the Defence Request for Adjournment. As a result, the Trial Chamber postponed the start of the proceedings by two months to allow the Defence to address these issues and prepare for the start of the trial.⁷

4. Further, and as the Defence concedes,⁸ the Trial Chamber indicated in [REDACTED] earlier that day that it would rule on [REDACTED].⁹ [REDACTED].¹⁰ [REDACTED].¹¹
5. In addition, the Trial Chamber correctly noted that [REDACTED].¹²
6. Finally, the Defence has been provided with all relevant information concerning [REDACTED].¹³ Indeed, the Defence possesses more information than the Prosecution regarding this matter because unlike the Prosecution it has been provided with [REDACTED].¹⁴
7. In sum, the Application is premised on flawed arguments¹⁵ and simply disagrees with the Trial Chamber's disposal of the Defence Request for Adjournment and

⁵ *A contrario*, Defence Application, paras.33-34.

⁶ See Defence Request for Adjournment. See also para.31 of the Defence Application where the Defence summarises its requests.

⁷ Decision, p.4, ln.25 to p.5, ln.14.

⁸ Defence Application, para.32.

⁹ ICC-01/04-02/06-697-Conf-Exp-Red, para.11.

¹⁰ ICC-01/04-02/06-T-21-CONF-EXP-ENG ET, p.14, lns.3-16.

¹¹ *Ibid.*, p.15, lns.24-25.

¹² ICC-01/04-02/06-T-22-CONF-ENG ET, p.2, ln.23 to p.3, ln.3.

¹³ ICC-01/04-02/06-349-Conf-Red2, ICC-01/04-02/06-371-Conf-Red, ICC-01/04-02/06-635-Conf-Red, ICC-01/04-02/06-658-Conf-Red and disclosures made on 4 February and 3 and 10 July 2015.

¹⁴ ICC-01/04-02/06-504-Conf-Exp and ICC-01/04-02/06-607-Conf-Exp.

¹⁵ Appealable issues do not arise when the applications are premised on misrepresentations of the Chamber's findings. See e.g., ICC-01/09-02/11-406, para.46; ICC-01/04-01/07-15, para.15; ICC-01/04-01/07-1732,

the new date to start the trial.¹⁶ As a result, the Issue does not arise from the Decision.

8. In addition, the requirements under article 82(1)(d) are not met: as explained below, the purported Issue would not significantly affect the fairness or expeditiousness of the proceedings, nor would its resolution by the Appeals Chamber materially advance the proceedings.

(ii) The resolution of the Issue by the Appeals Chamber would not significantly affect the fairness or expeditiousness of the proceedings nor would it materially advance the proceedings

9. The Defence's arguments regarding fairness are similarly premised on its disagreement with and misapprehension of the Decision. First, the Defence repeats the submissions set forth in its Request for Adjournment¹⁷ and argues in the abstract that the necessary conditions to ensure a fair trial have not been met.¹⁸ However, the Defence ignores the fact that the Trial Chamber's Decision was expressly guided by its duty to ensure the fairness of the trial and the rights of the Accused,¹⁹ and fails to identify a specific link between the Issue and a significant impact on the fair and expeditious conduct of the proceedings.²⁰
10. Second, the Defence disregards the Trial Chamber's trial management powers and the range of measures available to assist the Defence should concrete difficulties actually arise.²¹ From the date of the Decision, the Defence will have two months to adjust its opening statements and its cross-examination of the first

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.

¹⁶ Chambers of this Court have consistently held that mere disagreements or conflicting opinions cannot constitute appealable issues. *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.

¹⁷ Defence Application, paras.37-42.

¹⁸ Defence Application, para.43.

¹⁹ Decision, p.5, lns.2-4.

²⁰ ICC-02/11-01/15-117, para.23.

²¹ ICC-02/11-01/15-117, para.25; ICC-01/04-02/06-604, paras.19-20.

three witnesses. In addition, and after two years of investigations, the Defence [REDACTED].²² If concrete problems do arise, the Defence can raise them with the Trial Chamber. However, arguing that the trial will be unfair, at this stage and in the context of this case, is speculative and incorrect.

11. The Defence arguments on expeditiousness are similarly speculative and unsupported.²³ If the Defence were to face difficulties in cross-examining particular witnesses, it could then raise the matter with the Trial Chamber and explain and support the difficulties allegedly encountered. Once again, the existence of a possible problem in the future is mere speculation at this stage.
12. Finally, the Defence's arguments on whether the intervention of the Appeals Chamber would materially advance the proceedings are similarly misplaced.²⁴ First and as developed above, the Trial Chamber ruled on the Defence Request for Adjournment and found that two months are sufficient for the Defence to address the issues considering the rights of the Accused. The fact that the Trial Chamber did not fully grant the Defence Request does not mean that the Trial Chamber failed to rule upon it.²⁵
13. Second, the immediate resolution of the Issue would not materially advance the proceedings in light of the Trial Chamber's trial management powers, and the range of remedies available should the Defence encounter concrete difficulties in the future.²⁶ The Trial Chamber indicated its flexibility in the Decision to allow modifications to the first three witnesses and the order of their testimony if requested by the Parties.²⁷ Although it did not consider it useful to make any further changes to the trial schedule at that stage,²⁸ the Trial Chamber did not

²² ICC-01/04-02/06-634-Conf-Exp, para.4; meetings with the Prosecution on 11 and 27 March 2015.

²³ Defence Application, paras.44-46.

²⁴ Defence Application, paras.48-53.

²⁵ *A contrario*, Defence Application, para.50.

²⁶ ICC-01/04-02/06-604, para.20.

²⁷ Decision, p.5, lns.17-20.

²⁸ Decision, p.5, lns.15-16.

exclude the possibility for additional modifications if the Parties raise and substantiate concrete concerns.

14. Finally, even if leave were to be granted, by the time the Appeals Chamber would be seized with the Issue, the Defence's situation would have changed substantially. Indeed, if the Defence proceeded to address the issues before it as it became aware of them – [REDACTED], its situation would logically evolve and the Appeals Chamber would be asked to rule upon a past situation not reflecting the current reality. Hence, the intervention of the Appeals Chamber would not materially advance the proceedings and only further delay the start of the trial.

Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 15th day of July 2015
At The Hague, The Netherlands