

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 15 January 2016

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 Response to the "Request on behalf of Mr Ntaganda seeking a variation of time limit to file the Defence consolidated response on the requested restrictions on Mr Ntaganda's communications with non-privileged contacts"", 15 July 2015,
ICC-01/04-02/06-724-Conf-Exp

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence filed an urgent motion to adjourn the start of trial until Trial Chamber VI (“Chamber”) ruled on various issues, including the Prosecution’s application to further restrict the Accused’s communications from the Detention Centre.¹ The Chamber extended the deadline for the Defence response once, and then ordered the Prosecution and the Defence to file final observations on any restrictions sought on the Accused’s communication by 21 July 2015 and 30 July 2015 respectively.² The Defence now seeks an extension until 24 August 2015 to file its observations and a minimum of 21 days after the filing of the Prosecution’s observations (“Defence Request”).³
2. The Prosecution opposes any extension of the 30 July 2015 deadline since the Defence Request fails to establish any “good cause” as required by regulation 35(2) of the Regulations of the Court (“RoC”).
3. First, the Defence has had the Prosecution request for further restrictions to the Accused’s communications⁴ since 10 June 2015.⁵ By extending the deadline to respond to the request from 2 July 2015 to 30 July 2015, the Chamber has already granted the Defence 41 days between the Prosecution’s request and its response. Second, the Defence has had access to the relevant material underlying the Prosecution’s request for months,⁶ and had ample time to analyse it for the purpose of its observations. Third, the extension is inconsistent with the Defence’s

¹ ICC-01/04-02/06-677-Conf-Corr-Red2, ICC-01/04-02/06-677-Conf-Exp-Corr-Red3 with public redacted version at ICC-01/04-02/06-677-Corr-Red.

² The Chamber stated that these observations shall include any observations the parties may have on the Victims and Witnesses Unit report on potential interferences with some Prosecution witnesses and other individuals and on the Second Registry Report as well as any response to the Prosecution Request for Further Restrictions, ICC-01/04-02/06-697-Conf-Exp-Red, para.11 (“Order”).

³ ICC-01/04-02/06-707-Conf-Exp.

⁴ ICC-01/04-02/06-635-Conf-Exp with confidential redacted version at ICC-01/04-02/06-635-Conf-Red.

⁵ A courtesy copy of this filing was provided to the Defence by email on 10 June 2015. It was formally notified the following day.

⁶ The Defence has had the First Registry Report since 10 March 2015 and its Addendum since 20 April 2015, see ICC-01/04-02/06-578-Conf-Exp, paras.3, 5.

request for the Chamber to decide whether the Accused's communication will be further restricted before the start of trial. It is also inconsistent with the need to start trial expeditiously.

Confidentiality

4. This response is classified as "Confidential, *EX PARTE* – only available to the Prosecution, Defence and Registry" pursuant to regulation 23*bis*(2) of the RoC, consistent with the classification of the Defence Request. The Prosecution submits that it is appropriate to file a public redacted version of the Defence Request and this filing.

Procedural History⁷

5. On 8 December 2014, the Chamber issued its "Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs" in which it, *inter alia*, imposed the first restrictions on the Accused's communication.⁸
6. On 10 March 2015, the Registry filed, *ex parte*, Defence and Chamber only, its first report on the *post-factum* review of the phone conversations made by the Accused ("First Report").⁹
7. On 13 March 2015, on the basis of information contained in the First Report, the Chamber ordered the Registry to put in place further restrictions to the Accused's contact regime.¹⁰
8. On 20 April 2015, the Registry filed an addendum to the First Report.¹¹

⁷ For a more detailed procedural history see ICC-01/04-02/06-635-Conf-Red, paras.8-27.

⁸ ICC-01/04-02/06-410-Conf-Exp, para.57 and p.27.

⁹ ICC-01/04-02/06-504-Conf-Exp.

¹⁰ ICC-01/04-02/06-508-Conf-Exp.

¹¹ ICC-01/04-02/06-563-Conf-Exp, ICC-01/04-02/06-563-Conf-Exp-Corr.

9. On 9 June 2015, the Prosecution requested further restrictions to the Accused's communication.¹²
10. On 29 June 2015, *via* email, the Chamber suspended the deadline for the response to the Prosecution's 9 June 2015 request in order to allow the Defence to make consolidated submissions on the litigation regarding restrictions to the Accused's communication.¹³
11. On 3 July 2015, the Chamber, *inter alia*, directed the Prosecution and the Defence to submit final observations on any restrictions to be imposed on the Accused's communications by 21 July and 30 July 2015 respectively.¹⁴
12. On 9 July 2015, the Defence filed the Defence Request.¹⁵

Prosecution's Submissions

13. The Defence fails to show "good cause"¹⁶ as required by regulation 35(2) of the RoC for an extension of the 30 July 2015 deadline set by the Chamber.

The Defence has had ample opportunity to prepare its observations

14. The Defence refers to a number of factors which it argues show "good cause" for an extension of the 30 July 2015 deadline, including, *inter alia*, the scope of the litigation record leading to the Order, the nature and extent of the Prosecution allegations, and the voluminous material in the Registry's Reports.¹⁷

¹² ICC-01/04-02/06-635-Conf-Exp with confidential redacted version at ICC-01/04-02/06-635-Conf-Red.

¹³ Email from Trial Chamber VI dated 29 June 2015 at 19:34 p.m.

¹⁴ Order.

¹⁵ Defence Request.

¹⁶ The Appeals Chamber has held that "[s]uch reasons as may found a good cause are necessarily associated with a party's duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations", ICC-01/04-01/06-834, para.7.

¹⁷ Defence Request, para.21.

15. Pursuant to the Order, the Defence's observations can be based solely on: (i) the Second Registry Report,¹⁸ which the Defence has had access to since 22 May 2015;¹⁹ (ii) the Victims and Witnesses Unit report on potential interferences with some Prosecution witnesses and other individuals ("VWU Report"),²⁰ which has been available to the Defence since 19 June 2015;²¹ and (iii) the Prosecution Request for Further Restrictions, to which the Defence has had access since 10 June 2015.²² The Defence has had access to the First Registry Report and its addendum, on which the Prosecution Request for Further Restrictions is based, since 10 March and 20 April 2015 respectively.²³
16. On 29 June 2015, the Chamber, *via* email, suspended the deadline for the response to the Prosecution Request for Further Restrictions. As noted in that email, the Defence's response was due by 2 July 2015. The 30 July 2015 extended deadline therefore already constituted a generous extension of almost one month for the response, and a deadline of 41 days from the date of the Prosecution Request.
17. As for the VWU Report, it is four pages long and primarily contains information on individuals whom the VWU has identified as [REDACTED], including [REDACTED].²⁴
18. The Defence has had the Second Registry Report since 22 May 2015. Further, the Defence reviewed this report thoroughly enough to be able to propose extensive redactions on 4 June 2015.²⁵

¹⁸ ICC-01/04-02/06-607-Conf-Exp.

¹⁹ Order, para.6.

²⁰ ICC-01/04-02/06-634-Conf-Exp-Anx.

²¹ Order, para.7, fn.13.

²² ICC-01/04-02/06-635-Conf-Red. A courtesy copy of this filing was provided to the Defence by email on 10 June 2015. It was formally notified the following day.

²³ See ICC-01/04-02/06-578-Conf-Exp, paras.3, 5.

²⁴ ICC-01/04-02/06-634-Conf-Exp-Anx.

²⁵ Order, para.6, fn.10.

19. The above also indicates that while the Defence's new Counsel and legal assistant may require some time to review this material, other members of the Defence team are already well-acquainted with the two reports and one Prosecution filing on which the Chamber requested observations.
20. Finally, the Defence's attempt to rely on Prosecution statements regarding the time required to decipher and understand codes used by the Accused in support of its request for an extension²⁶ is unconvincing. The Defence is not in a situation comparable to that which the Prosecution was in when conducting its analysis of the First Report. Unlike the Defence, the Prosecution was not able to consult with the main interlocutor of the recorded conversations, their client, who could explain the coded language and the content of the conversations.

The Defence has sufficient material on which to base its observations

21. Contrary to the Defence assertion,²⁷ it has been provided with sufficient material on which to base its observations. The redactions are limited to protecting the identity of certain witnesses. These redactions do not impede the Defence's ability to respond, because the factual allegations of witness interference are available, unredacted. Moreover, the Defence fails to explain how the redactions or lack of material supposedly increases the time required for it to submit its observations.
22. The Prosecution also notes that it provided lesser redacted versions of certain submissions,²⁸ made supporting material available to the Defence,²⁹ and agreed, at the Defence's request, to provide a version of the redacted supporting material to the Defence with extensive pseudonyms in place to assist the Defence in understanding the information without undermining the redactions.

²⁶ Defence Request, paras.14, 21 citing ICC-01/04-02/06-635-Conf-Red.

²⁷ Defence request, para.21(vii).

²⁸ ICC-01/04-02/06-410-Conf-Exp-Corr, para.48.

²⁹ See e.g. ICC-01/04-02/06-349-Conf-Red2.

23. Finally, the Defence had the opportunity to raise concerns regarding the provision of the Kinyarwanda transcripts of conversations before filing the Defence Request.³⁰ Indeed, the Defence has previously contested the transcription of monitored calls included in the First Report which led the Registry to check the contested excerpts and even transmit the Kinyarwanda transcription to the Defence.³¹

No justification for a 21-day interval between Prosecution and Defence observations

24. The Defence first states that its request for a minimum 21-day interval after the Prosecution files its observations is made “in the event the initial submission date of 21 July 2015 is modified”³² but later makes no such caveat in requesting the 21-day lapse, stating that this is required “taking into consideration the nature of the inferences which have already been drawn by the Prosecution on the basis of the First Registry’s Report”.³³

25. The Prosecution will file its final observations on 21 July 2015, as ordered by the Chamber, even though it has yet to receive the Second Registry Report.³⁴ The Defence has had the Second Registry Report since 22 May 2015, has assessed it for redactions, and must be in a position to provide its observations in order to respond to the Prosecution’s Request.

An extension of time is inconsistent with the need to proceed to trial expeditiously

26. An extension of the time limit is not consistent with the need to proceed to trial expeditiously, which, [REDACTED], is also in the interests of the Accused.³⁵

³⁰ See Defence Request, para.21.

³¹ See ICC-01/04-02/06-563-Conf-Exp-Corr, paras.2-4; ICC-01/04-02/06-563-Conf-Exp-Anx3-Red2.

³² Defence Request, para.2.

³³ Defence Request, para.22.

³⁴ At the time of filing, the Prosecution received only two of twenty annexes to the Second Registry Report.

³⁵ [REDACTED].

27. In its 29 June 2015 request for postponement,³⁶ and again during [REDACTED],³⁷ the Defence stated that a decision on the restrictions on the Accused's communication is required in order for the Defence to be able to move on to trial. The Chamber has also cited Defence submissions stating that the Prosecution request for restrictive measures is "ripe for adjudication".³⁸
28. Granting an extension of time would only delay adjudication on this matter, with the invariable result that the Defence will once again insist that it is unable to proceed to trial.

Conclusion

29. Based on the foregoing, the Prosecution asks that the Chamber reject the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 15th day of January 2016
At The Hague, The Netherlands

³⁶ ICC-01/04-02/06-677-Conf-Exp-Corr-Red3, paras.3, 55, 57.

³⁷ [REDACTED].

³⁸ Order, para.10 citing ICC-01/04-02/06-625-Conf-Exp, para.19.