

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-02/06
Date: **19 January 2017**

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Christine Van Den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmánski
Judge Raul C. Pangalangan

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF *THE PROSECUTOR V. BOSCO NTAGANDA***

Public

**Prosecution's response to Mr Ntaganda's application
for variation of time limit for the filing of the document in support of the Appeal**

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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**Victims Participation and Reparations Other
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Introduction

1. The Prosecution opposes the *Ntaganda* Defence's Request¹ to extend its 26 January deadline to file the document in support of its appeal ("DSA") against the Second Jurisdiction Decision² until 3 February 2017. The Defence fails to show good cause for this extension of time.
2. If, however, the Appeals Chamber is minded to grant the Defence a limited extension of time, the Prosecution requests a similar extension of time for its response.

Submissions

3. Regulation 35 of the Regulations of the Court allows the Chamber to extend the time limit, if good cause is shown. A cause is good when it is based on "sound reasons [that] would objectively provide justification for the inability of a party to comply with his/her obligations."³
4. The Defence has failed to meet this standard and to show sound reasons objectively justifying its alleged inability to file its DSA within the ordinary 21 day deadline. To the contrary, the procedural history of this case shows that the Defence has already had a very long time to develop its arguments on the issues under appeal.
5. First, the Defence has researched, developed and made submissions on law pertinent to the appeal—*i.e.* the jurisdiction of the Court regarding Counts 6 and 9—on at least five occasions over the past three years:
 - On 13 February 2014, in its oral submissions before Pre-Trial Chamber II, during the confirmation hearing;⁴
 - On 14 April 2014, in its written submissions before Pre-Trial Chamber II;⁵
 - On 1 September 2015, in its jurisdictional challenge before Trial Chamber VI;⁶

¹ ICC-01/04-02/06-1720-Corr OA5 ("Request").

² ICC-01/04-02/06-1707 ("Second Jurisdiction Decision").

³ ICC-01/04-01/07-653 OA7, para. 5.

⁴ ICC-01/04-02/06-T-10-RED-ENG, Transcript of Hearing of 13 February 2014, p. 27, lines 5-25.

⁵ ICC-01/04-02/06-292-Red2, Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges, paras. 250-263.

- On 19 October 2015, in its appeal against Trial Chamber VI's decision on the jurisdictional challenge;⁷ and
- On 7 April 2016, in its renewed and consolidated submissions on its jurisdictional challenge filed before Trial Chamber VI.⁸

6. The Defence highlights that the appealed Second Jurisdiction Decision involves *one* issue—the Court's jurisdiction on Count 6 and 9 in the context of an international armed conflict—that “has not previously been addressed by the parties.”⁹ By doing so, the Defence is implicitly acknowledging that it has already addressed *all the other issues* in the Second Jurisdiction Decision. It is difficult to see how good cause for an extension of time could arise in these circumstances. Moreover, the discussion of international armed conflict in the Second Jurisdiction Decision appears to be of relatively minor significance to its *ratio decidendi*, given the express recognition that the case presently proceeds on the assumption that the conflict is *non*-international.¹⁰

7. Second, the Defence has been on notice for almost one year—since the Appeals Chamber remitted the merits of the issue to the Trial Chamber on 22 March 2016¹¹—that there would likely be a second appeal on these legal issues.

8. Ordinarily, an appellant challenging a jurisdiction decision must master its arguments and file its DSA within 21 days from the decision. When an appellant brings a jurisdictional challenge a second time at trial, then by its nature, that interlocutory appeal will occur while trial proceedings are ongoing.¹² In this case,

⁶ ICC-01/04-02/06-804, Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges.

⁷ ICC-01/04-02/06-909, “Appeal on behalf of Mr Ntaganda against Trial Chamber VI's ‘Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892”.

⁸ ICC-01/04-02/06-1256, Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges.

⁹ Request, para. 8. The Defence also states that it will have to address “additional scholarship that has arisen in recent months” (Request, para. 1). However it fails to indicate which scholarship it refers to and also fails to acknowledge that is not exceptional for a party to address scholarship published between the time of an appealed decision and the deadline for filing a DSA.

¹⁰ See Second Jurisdiction Decision, para. 34 (recalling that “the classification of the conflict *could* be *changed* from non-international to international *if* it were to appear to the Chamber that such a legal re-characterisation would be justified on the basis of the facts”, emphasis added).

¹¹ ICC-01/04-02/06-1225, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9”.

¹² See Request, paras. 1, 9. The Prosecution notes that the Defence elected not to appeal the matter when decided the first time by the Pre-Trial Chamber. See Second Jurisdiction Decision, para. 24 (recalling “that the Defence

the Defence is in the privileged position of having extensively reviewed and litigated the same issues several times over the course of three years, and has had the benefit of knowing for almost one year that the issue would likely be appealed again. As such, he fails to show good cause justifying his alleged inability to comply with the Court's deadlines.

9. Nevertheless, if the Appeals Chamber were to grant the Defence's Request, the Prosecution requests a similar extension for its response, as a matter of parity.

Relief Requested

10. For the reasons above:

- The Defence's Request should be dismissed or, alternatively,
- If the request were to be granted, the Prosecution should be granted a similar extension for its response.

Word count: 1,214¹³



Fatou Bensouda, Prosecutor

neither sought leave to appeal the Confirmation Decision on this issue, nor directly appealed the confirmation of Counts 6 and 9 under Article 82(1)(a) of the Statute").

¹³ As of 6 December 2016, the Regulations of the Court were amended to modify *inter alia* regulations 36 and 38. Page limits are no longer calculated on the basis of "300 words per page average". On this basis, the word count/compliance with regulation 36 certification may no longer be necessary. Notwithstanding and pending the Appeals Chamber's directions, the Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.

Dated this 19th day of January 2017

At The Hague, Netherlands