

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/04-02/06
Date: **23 February 2017**

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

**Decision on Prosecution's request pursuant to Regulation 35 for an extension of
time to submit evidence**

Decision 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 Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67 of the Rome Statute ('Statute') and Regulation 35 of the Regulations of the Court ('Regulations'), issues this 'Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence'.

I. Procedural history and submissions

1. On 19 October 2016, the Chamber set 3 February 2017 as the deadline for the submission of any Prosecution requests for admission of evidence as part of the Prosecution case, other than through the then remaining Prosecution witnesses.¹
2. On 3 February 2017, the Office of the Prosecutor ('Prosecution') requested a variation of the aforementioned deadline to 28 February 2017 for the submission 'from the bar table' of ten items of evidence ('Request'), namely, transcripts and translations of calls made from the Detention Centre between the accused and 'prospective Defence witnesses' from 22 March 2013 to date ('Material').² The Prosecution submits that 'good cause' exists to extend the deadline because 'the process of the identifying and then transcribing and translating the calls' is 'laborious',³ and further indicates that the identified ten communications 'were sent to the for priority transcription and translation on 1 November 2016' and '[d]ue to the amount of time required to prepare and finalise translations and transcriptions, they cannot be completed by 3 February 2017'.⁴ It further submits that granting an extension would not cause undue prejudice to the accused

¹ Corrigendum of 'Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution', 19 October 2016, ICC-01/04-02/06-1588, 12 December 2016, ICC-01/04-02/06-1588-Corr ('Order'), para. 5. The 3 February 2017 deadline was already correctly reflected in the original version of the order, made on 19 October 2016.

² Prosecution's request pursuant to regulation 35 to submit evidence, ICC-01/04-02/06-1769-Conf, para.1.

³ Request, ICC-01/04-02/06-1769-Conf, para. 17.

⁴ Request, ICC-01/04-02/06-1769-Conf, paras 2, and 18-19.

since summaries and audio copies of the communications are already in the possession of the defence team for Mr Ntaganda ('Defence').⁵ The Prosecution avers that the Material is admissible as evidence because it is relevant to the Chamber's evaluation of the evidence, as well as possible defences raised by the accused,⁶ and undertakes to 'provide a detailed justification of the admissibility of the proffered evidence in its application on 28 February 2017'.⁷

3. On 16 February 2017, the Defence opposed the Request ('Response').⁸ According to the Defence, because the Prosecution submitted its Request on the day of the deadline, Regulation 35(2) is applicable. It argues that the Prosecution fails to show good cause or exceptional circumstances outside the Prosecution's control that would justify a variation of the time limit,⁹ and admitting these documents from the 'bar table' is not in the interests of justice.¹⁰

II. Analysis

4. Pursuant to Regulation 35 of the Regulations, good cause has to be shown for an extension of a time limit if requested prior to the lapse of the initial time limit, while after the lapse, the requesting party or participant has to demonstrate that it was 'unable to file the application within the time limit for reasons outside [its] control'.¹¹ The Chamber observes that the Request was filed in the afternoon of the day of the original deadline, less than two hours before the filing deadline of

⁵ Request, ICC-01/04-02/06-1769-Conf, para. 20.

⁶ Request, ICC-01/04-02/06-1769-Conf, paras 21-23.

⁷ Request, ICC-01/04-02/06-1769-Conf, para. 24.

⁸ Response on behalf of Mr Ntaganda to Prosecution's request pursuant to regulation 35 to submit evidence, ICC-01/04-02/06-1787-Conf.

⁹ Response, ICC-01/04-02/06-1787-Conf, paras 8-15.

¹⁰ Response, ICC-01/04-02/06-1787-Conf, paras 16-24.

¹¹ The Chamber recalls that the Appeals Chamber considered this to involve the existence of 'exceptional circumstances'. Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007, 21 February 2007, ICC-01/04-01/06-834 OA8, paras 9-10.

16:00, which resulted in the Request being notified after the deadline.¹² By filing the Request so late, it must have been obvious to the Prosecution that the Defence could not respond to, and the Chamber could not assess and rule on, the Request prior to the lapse of the relevant time limit. In these circumstances, the Prosecution should have demonstrated that it was unable to make its filing earlier, due to reasons outside its control.

5. On the basis of the information before it, the Chamber considers that the reasons underlying the Prosecution's failure to submit its request significantly before the lapse of the deadline do not demonstrate good cause, nor would they qualify as exceptional circumstances or reasons outside the Prosecution's control. The Chamber acknowledges that the reviewing of a large number of communications in languages that require translation may be a time-consuming and resource-intensive exercise, but considers that the Prosecution's request for an extension of time is unrelated to the scope of the communications. The Request concerns only ten communications, which had been identified by the Prosecution and submitted for 'priority transcription and transcription' to its own translation unit, more than three months before the 3 February 2017 deadline;¹³ while already being informed of the said deadline.¹⁴ In these circumstances, the Chamber finds that the Prosecution has failed to show good cause for the extension sought.
6. Notwithstanding, even where the formal requirements of Regulation 35 are not met, the Chamber may assess whether it is in the interests of justice to grant the Request, by making a case-by-case assessment which balances the justification for the addition of new evidence against the potential prejudice which may be caused to the other party.¹⁵ In this context, a broad variety of factors may be

¹² The Request was notified at 16:12.

¹³ See Request, ICC-01/04-02/06-1769-Conf, para. 19.

¹⁴ Order, ICC-01/04-02/06-1588-Corr, para.5.

¹⁵ See Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, ICC-01/04-02/06-1733 ('Witness P-0551 Decision'),

considered.¹⁶ However, the Chamber observes that these factors mostly concern the addition of evidence related to the core of the Prosecution case and where admission is sought to prove the charges against the accused.¹⁷ In the present situation, the Prosecution seeks admission of the Material because it allegedly relates to attempts to influence the accounts of ‘potential’ Defence witnesses, to allow the Chamber to properly assess matters that would only possibly come before the Chamber during the Defence case. The Chamber therefore considers that the Material is not admissible through the ‘bar table’, as its probative value at this stage, due its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused. In this connection, noting the nature of the material sought to be admitted, the Chamber does not consider that the fact that the Defence has audio-recordings and summaries of the communications in question to mitigate the prejudice it may face by the late admission of the Materials.

7. In light of the foregoing, the Chamber finds that the Prosecution has not justified why it should be granted an extension for admission of the Material through the ‘bar table’.

para. 8; and Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, ICC-01/09-02/11-832 (‘*Kenyatta Decision*’), para. 11.

¹⁶ Including: (i) the time elapsed since the original deadline and the stage of the proceedings at which admission of new evidence is sought; (ii) the reasons provided for not seeking addition of the new evidence at an earlier stage; (iii) the evidence already before the Chamber; (iv) the relevance and significance of the additional evidence to matters for determination by the Chamber; (v) whether the new evidence would bring to light a previously unknown fact which has a significant bearing upon the case; and (vi) the impact of the addition of the new evidence on the fairness and expeditiousness of the trial and rights of the accused. See, for example, Witness P-0551 Decision, para. 8; and *Kenyatta Decision*, ICC-01/09-02/11-832, para. 11.

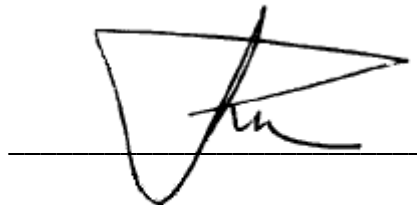
¹⁷ See, for example, the requests underlying the Witness P-0551 Decision and *Kenyatta Decision*: Prosecution’s application under rule 68(2)(b) and regulation 35 to admit the prior recorded testimony of Witness P-0551, 2 November 2016, ICC-01/04-02/06-1601-Conf; and Prosecution’s request to add two witnesses to its witness list, 13 September 2013, ICC-01/09-02/11-805-Red2, respectively.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

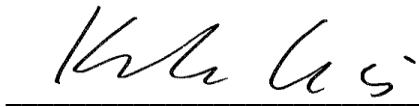
REJECTS the Request; and

ORDERS public redacted versions of the Request (ICC-01/04-02/06-1769-Conf) and the Response (ICC-01/04-02/06-1787-Conf) to be filed within two weeks of the issuance of the present decision.

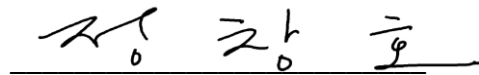
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 23 February 2017

At The Hague, The Netherlands