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Pénale
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**International
Criminal
Court**

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

Date: **24 May 2018**

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

**Prosecution response to the “Request for Extension of Time”,
21 May 2018, ICC-01/04-02/06-2287**

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. Four weeks before its filing deadline, the Defence requests three extra weeks to prepare its closing brief.¹ The extension is over a third of its entire time limit and 60% of the *total* amount of time given to the Prosecution. The Request should be rejected because the Defence has not shown good cause warranting more time.²

2. None of the seven reasons advanced by the Defence – taken individually or together – amount to “good cause” or justify additional time. The Request should be rejected for several reasons: it fails to identify concretely how any of the issues affects its ongoing work; speculates about potential issues that may, or may not, arise in the future; attempts to circumvent procedural time limits applicable to requests for reconsideration; and miscalculates the proposed deadline for the Prosecution’s response. Further, the Defence makes generalised complaints – without elaboration – that its workload in presenting its case has impacted its ability to prepare the closing brief, that it finds it difficult to respond to the closing briefs of the Prosecution and Legal Representatives of Victims (“LRVs”) while at the same time presenting its case, and that it has a few less team resources. These vague and general assertions cannot properly ground a request for an extension of time, and these are issues faced by all Parties and participants during the course of trial.

Submissions

3. Regulation 35 of the Regulations of the Court allows the Chamber to extend a 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

¹ ICC-01/04-02/06-2287 (“Request”).

² As required by regulation 35(2) of the Regulations of the Court.

³ ICC-01/04-01/07-653 OA7, para. 5.

4. Since at least 28 December 2017 when the Chamber issued the scheduling order, the Defence has been on notice that it would have three months from the end of the evidentiary phase of the case to file its brief. The Defence did not challenge the Chamber's scheduling order, and, as noted by one Judge of the Chamber it was possible for substantial work to be carried out on the closing briefs before the formal close of the evidentiary phase of the case.⁴
5. At the status conference held on 5 December 2017, the Defence argued that it should have "eight to ten weeks" after the Prosecution filed its brief to submit its final closing brief.⁵ The Chamber duly granted the Defence the eight weeks it sought. The Defence also stated at this status conference that "there's no reason that we cannot argue this case in 250 pages" and make the briefs "more focused".⁶ Generalised arguments advanced now that more time is needed in order to focus arguments run counter to the Defence's own statements.
6. Moreover, the Defence has been fully informed of the Prosecution's case for over three years; the Prosecution's closing brief does not deviate from its Pre-Trial Brief in the main. The Defence is in a position to complete its closing brief within the twelve weeks allotted to it from the close of the evidentiary phase and the four weeks it has left.
7. The Prosecution addresses the seven Defence arguments in turn, below.

Transcript corrections

8. *First*, while, as acknowledged by the Chamber, reviewing transcript corrections is a "time-consuming exercise",⁷ the Defence fails to show concretely how this issue has impacted its ongoing work. Indeed, the Defence merely refers to the

⁴ ICC-01/04-02/06-2272-Anx, para. 6.

⁵ ICC-01/04-02/06-T-258, p. 14, lns. 22-23.

⁶ ICC-01/04-02/06-T-258, p. 15, lns. 22-25.

⁷ ICC-01/04-02/06-2272, para. 14.

notification of 72 corrected transcripts since 20 April 2018, arguing that such corrections “are likely to continue throughout the period of the drafting”.⁸

9. However, the Defence cannot reasonably claim that it could not have absorbed material transcript corrections in the last 4 weeks, or that the 4 weeks it has left – the total time the Prosecution was originally given to prepare its *entire* closing brief – is not sufficient to thoroughly review and incorporate any changes made to these 72 transcripts. By comparison, the Prosecution reviewed no less than 164 corrected transcripts in under 5 weeks, including 68 corrected transcripts between 13 and 20 April 2018 alone, in the days prior to the Prosecution’s deadline. The Prosecution obtained only a brief four-day extension of its deadline to incorporate these transcript corrections.⁹ In light of the comparatively limited number of corrected transcripts notified since 20 April 2018, the Defence should not be granted any additional time.
10. Moreover, to the extent that the Defence bases its request for an extension on the “likely” notification of corrections in the future, its request is speculative. It should, accordingly, be rejected as premature.
11. The Prosecution’s experience has shown that an extension of time does not, in fact, constitute an appropriate solution for dealing with transcript corrections, given that it may result in the notification of additional transcript corrections – in the Prosecution’s case a significant amount – during the additional time granted. The increase in the Defence’s workload that could result from an extension of time would run against the very logic for granting any additional time.

⁸ Request, para. 2.

⁹ ICC-01/04-02/06-2272.

List of admitted evidence

12. *Second*, the Defence's reference to its "likely" need to address unspecified "modifications or errors" related to the final list of admitted evidence¹⁰ should be dismissed, as it is impermissibly vague. The Defence fails to identify any concrete issue that has resulted from the recent finalisation of the list of admitted evidence, let alone establish that this has created any significant burden for the Defence.
13. In fact, while the final list of admitted evidence was formally promulgated by the Registry on 17 May 2018, this list hardly differs from the list of evidence agreed upon by both Parties on 12 April 2018, well before the Prosecution filed its closing brief and well before 17 May 2018. Indeed, the final list of admitted evidence, which comprises 1789 items, only differs from the Parties' list of 12 April 2018 in respect of 10 items, 7 of which were added¹¹ to and 3 removed¹² from the list by the Registry. None of these changes is material in any way. The Defence should be able to absorb this minor difference during the four weeks it has left to complete its closing brief. In any event, the Defence failed to point to any concrete issue that might affect its ongoing work and merely speculates about issues that may arise in the future. It follows that its claim should be dismissed.

Kinyarwanda translation

14. *Third*, the Defence's claim that it requires three additional weeks because of *potential* delays with the translation of the Prosecution's closing brief into Kinyarwanda¹³ is unsubstantiated and premature.
15. Indeed, the Chamber held that "*the accused does not have an absolute right to have all documents in the case translated into a language that he or she fully speaks or*

¹⁰ Request, para. 3.

¹¹ DRC-D01-0003-4868, DRC-D18-0001-5290, DRC-D18-0001-6611, DRC-D18-0001-6704, DRC-D18-0001-6710, DRC-OTP-0065-0006 and DRC-REG-0200-0001.

¹² DRC-D18-0001-5540, DRC-D18-0001-5609 and DRC-PCV-0001-0090.

¹³ Request, para. 4.

understands", although *"the Prosecution's closing brief may contain information that the accused should receive translation of into Kinyarwanda"*. The Chamber also urged the Defence to communicate to the Registry any parts of the closing brief for which it did not require translation.¹⁴

16. The Defence should have anticipated, contrary to its claim,¹⁵ that the Registry would not be able to translate the entire closing brief, even in draft form. However, the Defence chose to request the translation of 361 of the closing brief's 409 pages, which represents nearly 90 percent of the brief. The Defence should have been more selective and pragmatic in its approach. Indeed, not all information in the closing brief requires translation. Instead of requesting the translation of the near totality of the brief, the Defence should have focused its request on those portions actually necessary for the Accused, who has received simultaneous Kinyarwanda interpretation of all evidence heard at trial, to assist the Defence in the preparation of its closing brief, such as portions addressing the Accused's or other Defence witnesses' evidence.

17. The Defence's claim is also premature because the Registry was instructed to provide the Defence with a translation of the portions it required a translation of *within six weeks* of its filing.¹⁶ Accordingly, while the Prosecution is unaware of the state of progress of the draft translation, the Registry still has two weeks to complete its work. Moreover, before requesting additional time, the Defence first ought to have explored whether alternative measures, such as sight interpretation by a competent Registry interpreter, could assist the Accused in his review of the closing brief. The Defence has not provided any information as to the steps it may have undertaken to find a pragmatic solution to this issue. However, the Prosecution notes that, at the current pace of translation – approximately 20 pages per week – even 3 additional weeks would not suffice to complete the translation

¹⁴ ICC-01/04-02/06-2170, para. 11.

¹⁵ Request, para. 4.

¹⁶ ICC-01/04-02/06-2170, para. 12.

requested by the Defence. That the Defence requested 3 additional weeks knowing that it would not, if granted this time, receive a translation of the 361 pages it requested, further confirms that the Defence, in fact, does not need translation of the entire closing brief and should have made a more focused request.

18. Critically, knowing the amount of time it takes to translate material, the Defence did not challenge the Chamber's decision regarding the two month drafting period at any time, on the basis of translations, or on any other basis.

Need to "consolidate and streamline" the Defence submissions

19. *Fourth*, by arguing that an extension of time would assist the Defence "in consolidating and streamlining its submissions, taking into account the extensive submissions of the parties and participants",¹⁷ the Defence essentially claims – in more words – that the mere need to respond to the Prosecution and the LRVs justifies granting additional time. The Defence cannot reasonably argue that doing what it has been required to do all along constitutes good cause for a delay.

20. In fact, the Defence's fourth argument effectively constitutes an impermissibly late request for reconsideration of the Chamber's 28 December 2017 order providing directions related to the closing briefs and statements.¹⁸ The Defence was aware since this date that the filing of the closing briefs would be consecutive (not simultaneous) and, as a result, the Defence would have the opportunity to respond to the Prosecution's and LRVs' briefs. This was, in fact, exactly what the Defence had requested at the 5 December 2017 status conference on issues related to the closing briefs.¹⁹ The Defence has also been aware since 28 December 2017 that it would have eight weeks to do so.²⁰ It cannot, now, generally claim that

¹⁷ Request, para. 5.

¹⁸ ICC-01/04-02/06-2170.

¹⁹ ICC-01/04-02/06-T-258-ENG, p. 12, ln. 17 to p. 14, ln. 17.

²⁰ ICC-01/04-02/06-2170, para. 13.

responding to submissions by the Prosecution and two participants “imposes a different and heavier burden than would arise in respect of simultaneous briefs” and request more time to do so, given that it failed to take any of the available procedural steps available to it – requesting leave to appeal or reconsideration – when the Chamber issued its order. The Defence’s attempt at circumventing the applicable time limits should therefore be dismissed.

21. Nothing justifies granting the Defence any additional time. To the contrary, the Defence was given three months to prepare its brief from the end of the evidentiary phase of the case, as compared to the one month initially granted to the Prosecution—the Party that bears the burden of proof. The Defence, as the Party presenting its case last, knew best when to shift its resources from its ending case to the preparation of its closing brief. Thus, it should have been able to start preparing its closing brief even well before the Prosecution and the LRVs filed their briefs.
22. The Defence has known all the details of Prosecution’s positions and evidence since at least 2015, when it received full disclosure of the Prosecution’s evidence and the Prosecution’s Pre-Trial Brief. The Prosecution’s closing brief closely follows its Pre-Trial Brief, with only limited changes to refer to the evidence admitted at trial and to address Defence evidence. To a large extent, the Pre-Trial Brief is mirrored in its core to the Prosecution’s closing brief. The Prosecution’s case, which the Defence has been fully aware of since at least March 2015, has not changed. The Defence must also be presumed to have been aware of its own position well before the filing of the Prosecution’s and LRVs’ briefs, particularly since the extensive preparation with Counsel in advance of the Accused’s testimony. Lastly, the Prosecution’s characterisation of the Accused’s evidence had to be evident to the Defence through its thorough cross-examination of the Accused.

Court calendar

23. *Fifth*, the Defence incorrectly claims that an extension of three weeks, until 9 July 2018, would not require any party or participant to work during the judicial recess.²¹ In fact, were the Defence to file its closing brief on 9 July 2018, the Prosecution's response would not be due on "Monday, 22 July 2018", as argued by the Defence, since 22 July is a Sunday. It would in fact be due on Tuesday, 24 July 2018. This is four days into the judicial recess, which starts on Friday 20 July 2018 at 17:30.

24. In any event, the Defence's calendar-based argument is irrelevant to the Chamber's determination whether the Defence has shown good cause warranting a delay. It is a factor that has nothing to do with "good cause". It could at best constitute a balancing factor for the Chamber to consider in the event it finds that good cause exists; yet, even then, the Chamber should carefully weigh this factor against other valid considerations, such as the impact any delay would have on the Prosecution, which has organised its available resources on the basis of the schedule set by the Chamber, legitimately assuming it would not significantly change.

Defence's "back-loaded" workload due to the presentation of its case

25. *Sixth*, the Defence half-heartedly and unconvincingly claims that presenting the Defence case constituted such a burden that it was unable make progress on the drafting of its closing brief.²² This claim simply cannot be taken seriously. Except for the prolonged testimony of the Accused, between June and September 2017, the Defence has presented a relatively limited case compared to all other defence cases at the ICC.

²¹ Request, para. 6.

²² Request, para. 7.

26. Taking, for instance, the first four months of 2018 before the Prosecution filed its closing brief, the Defence called one witness²³ who testified for approximately three hours on issues remotely relevant to the case and requested the admission of twenty items from the bar table.²⁴ Surely, the Defence could have diverted some of its resources to its closing brief during these four months. This is especially the case given that, as the Party presenting its case, the Defence was uniquely positioned to know how long its case would last and how best to assign its resources. That the Defence chose not to do so, or failed to raise any issue with the Chamber before filing its Request, cannot contribute to the existence of good cause for granting additional time. The Chamber previously rejected a Prosecution argument that extensive litigation since December 2017 caused it to divert significant resources from its closing brief and warranted an extension of time, finding that “*such litigation forms part of the regular course of a trial*” and does not “*contribute to the existence of good cause*”.²⁵ The Chamber should reject the Defence’s argument for the same reasons.

Defence “staff attrition”

27. *Seventh*, the Defence fails to substantiate its claim that staff attrition contributes to the existence of good cause. As a preliminary matter, the Defence’s self-portrayal as a “relatively small [...] team” appears incorrect.²⁶ Although its exact composition has shifted over time, the Defence team has, throughout trial, comprised up to 12 members or more, a size which is comparable to that of the Prosecution team. More importantly, while the Defence refers to “the unexpected permanent departure of one individual and the temporary unavailability of

²³ D-207.

²⁴ ICC-01/04-02/06-2208-Conf.

²⁵ ICC-01/04-02/06-2272, para. 14.

²⁶ Request, para. 6.

another key staff member",²⁷ it fails to indicate concretely how these internal staffing issues affect its ongoing work.

28. Furthermore, staffing issues are not unique to the Defence. The Prosecution notes that some of its team members have had unexpected family emergencies at critical times during the drafting of its closing brief. This resulted in the temporary absence of important members of its team and forced it to adjust its work accordingly.

Conclusion

29. For the foregoing reasons, the Chamber should reject the Request.



Fatou Bensouda
Prosecutor

Dated this 24th day of May 2018
At The Hague, The Netherlands

²⁷ Request, para. 8.