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**International  
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Date: 14 April 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 Document**

**Victims' observations in response to the "Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest"**

**Source:** Office of Public Counsel for Victims

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

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**Victims Participation and Reparations  
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## I. INTRODUCTION

1. On behalf of the victims, the Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Child soldiers (the “Legal Representatives”) hereby submit these joint observations in response to the “Submissions on behalf of Mr Ntaganda on the conduct of proceedings and on modalities of victims’ participation at trial” (the “Request”), dated 7 April 2015.

2. An adjournment of the trial will inevitably have adverse consequences for the victims participating in the proceedings. It would further delay the realisation of their right to truth, to have those responsible for those crimes held accountable and to receive just reparations for the harm suffered.<sup>1</sup> Victims have already suffered from extremely long periods of judicial inactivity, waiting as to date for more than 12 years in the hope that Justice would one day be done.

3. The Defence Request must also be considered and placed in the current specific context. In the instant case, proceedings have been plagued by disruptive and lengthy delays as a result of the accused’s conduct and in particular his escape from Justice for over five years, until his surrender to the Court in March 2013.

4. Mindful of the adage that “justice too long delayed is justice denied”, the Legal Representatives submit that the Defence Request must be denied. Far from providing valid reasons as to why a further postponement of the trial date would be necessary as a matter of principle, the Request fails to articulate any “compelling reason” justifying the grant of an additional time period of five months.

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<sup>1</sup> See the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 98; the “Decision on the Set of Procedural Rights Attached to the Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 13 May 2008, para. 32; the “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007” (Appeals Chamber), No. ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 97.

5. The “fair trial” guarantees shall not be considered from the Defence standpoint only. This concept covers, in addition to the right of the Defence, the right for the victims to expeditious proceedings, right to truth and just reparations for the harm suffered. Such a consideration simply means that, in the circumstance, a lengthy postponement of the trial cannot be granted because of the resulting prejudice to the victims’ interests and the corresponding absence of appreciable benefits for the Defence.

6. Moreover, the Defence’s proposal to have the opening statements made in June 2015 with a subsequent break until November for the start of the Prosecution’s case is unpractical and plainly unsound, in particular in light of the Chamber’s intention to have the opening statements made *in situ*. Indeed, to bring the Court closer to the victims for few days and to subsequently pronounce a further five-month delay in the proceedings will inevitably frustrate the victims and is very likely to negate the very objective of the *in situ* exercise.

7. The Legal Representatives also observe that the extensive redactions applied to certain portions of the Defence Request have hindered their possibility to provide meaningful observations on the relevant sections.

## II. PROCEDURAL BACKGROUND

8. On 7 April 2015, the Defence filed an “Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest” (the “Request”).<sup>2</sup>

9. On the same day, Trial Chamber VI (the “Chamber”), acting pursuant to regulation 34 of the Regulations of the Court, instructed the parties and participants to file their responses to the Request, if any, by Tuesday 14 April 2015.<sup>3</sup>

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<sup>2</sup> See the “Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest”, No. ICC-01/04-02/06-541-Red, 2 April 2015 (the “Request”).

### III. JOINT OBSERVATIONS

#### 1) The timing and scope of the disclosure by the Prosecution

10. The Defence argues that “[d]ue to the exceptional volume of materials disclosed by the Prosecution since 15 January 2015 [...] the Defence is unable to acquire the minimum required understanding of the Case against the Accused”.<sup>4</sup> The Legal Representatives observe that in addressing the notion of “understanding of the case”, the Defence seems to confuse two legally distinct and separate rights. The first, concerns the Defence’s right pursuant to article 67(1)(a) of the Rome Statute to “be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks”. The second, relates to the right “[t]o have adequate time and facilities for the preparation of the defence” provided for in article 67(1)(b) of the Rome Statute.

11. The Defence requests additional time to review incriminating, exculpatory evidence and other “relevant materials”<sup>5</sup> and to analyse videos excerpts and transcripts.<sup>6</sup> The Legal Representatives note that these issues are incorrectly associated with the right of the accused to be properly informed of the case brought against him, as they mainly pertain to the sufficiency of time and the adequateness of the facilities accorded for the preparation of the defence. They do not *per se* affect the accused’s understanding of the nature and scope of the charges, nor do they affect or otherwise limit the Defence’s “overall knowledge and understanding of the evidence the Prosecution intends to rely upon at trial”.<sup>7</sup> This conclusion is even more compelling given the fact that recent disclosure comprises a significant number of re-disclosures,

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<sup>3</sup> See e-mail from the legal officer of the Trial Chamber, dated 7 April 2015, at 16:09.

<sup>4</sup> See the Request, *supra* note 2, para. 15.

<sup>5</sup> *Idem*, para. 16.

<sup>6</sup> *Ibid.*, para. 26.

<sup>7</sup> *Ibid.*, para. 16.

*i.e.* items re-disclosed in a less redacted form or material filed with a different categorisation.<sup>8</sup>

12. The Request also impermissibly seeks to re-litigate issues previously settled by the Chamber. Contrary to the Defence assertions, the timing and volume of disclosure is not exceptional and was performed in accordance with the schedule and procedure established by the previous decisions of the Chamber in accordance with the legal texts of the Court. Likewise, standard and non-standard redactions applied to certain items of evidence are in line with the Chamber's directions and the Decision on the Protocol establishing a redaction regime.<sup>9</sup>

13. Moreover, the Defence fails to take into consideration the significant measures taken by the Chamber to facilitate its preparation for trial. In the present case, both the accused and the Defence team have had ample opportunities to fully acquaint themselves with the most detailed aspects of the case-file. Indeed, in addition to the Confirmation Decision, which sets out the charges along with the underlying facts and circumstances, the Prosecution filed an updated Document Containing the Charges designed to provide "*the accused with the clearest and fairest notice of the nature, cause and content of the charges*".<sup>10</sup> The provision of a Pre-Trial Brief was also deemed necessary in order to assist the Defence in understanding the Prosecution's theory of the case and in particular, to facilitate the linkage between the charges and corresponding items of evidence.<sup>11</sup> Other documents have also been provided to assist the Defence to duly prepare for trial, in particular the in-depth analysis chart

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<sup>8</sup> *Ibid.*, para. 21.

<sup>9</sup> See the "Decision on the Protocol establishing a redaction regime" (Trial Chamber VI), No. ICC-01/04-02/06-411, 12 December 2014.

<sup>10</sup> See the "Decision on the updated document containing the charges" (Trial Chamber VI), No. ICC-01/04-02/06-450, para. 18.

<sup>11</sup> *Idem.*

filed before the Pre-Trial Chamber,<sup>12</sup> as well as the lists and summaries of witness statements and evidence.<sup>13</sup>

## 2) The inability to adequately investigate

14. The Defence's second ground essentially repeats the arguments made in relation to the previous ground, mainly addressing the impact of the scope and format of the disclosure on the Defence right to a fair trial. As explained *supra*, the Request fails to identify compelling reasons justifying the grant of a lengthy extension of time.

15. Moreover, the Legal Representatives find it significant that the Defence refers to the filing of the Pre-Trial Brief – a document primarily meant to facilitate and streamline the preparation process, but not mandatory as per the Rome Statute<sup>14</sup> – as a ground for extending its preparation phase. The length and the extensive use of reference and footnotes appear entirely justified in light of the purpose and function of the document. As previously clarified by the Chamber, the Pre-Trial Brief is intended to compile the relevant evidence upon which the Prosecution intends to rely at trial.<sup>15</sup> It must also be recalled in this respect that the Defence did not oppose the Prosecution request for extension of page limit for the Pre-Trial Brief.<sup>16</sup> Further, while it is true that the Defence has previously objected to a one-week extension of

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<sup>12</sup> See the "Prosecution's Communication of the Disclosure of Evidence and Submission of a Consolidated In-depth Analysis Chart of Incriminating Evidence", No. ICC-01/04-02/06-217, 17 January 2014.

<sup>13</sup> See the "Prosecution's Lists of Witnesses, Summaries, and Evidence", No. ICC-01/04-02/06-491-Conf, 2 March 2015.

<sup>14</sup> See the "Joint Response to the "Request on Behalf of Mr Ntaganda Seeking Reconsideration and Clarification of Decision on Pre-Trial Brief", No. ICC-01/04-02/06-482, 27 February 2015, paras. 11-13.

<sup>15</sup> See the "Decision on the Prosecution request for an extension of page limit for the Pre-Trial Brief" (Trial Chamber VI), No. ICC-01/04-02/06-500, 6 March 2015, para. 9.

<sup>16</sup> See the "Response on behalf of Mr Ntaganda to Prosecution's request for extension of page limit for the Pre-Trial Brief 'Defence Response'", No. ICC-01/04-02/06-499, 5 March 2015, para. 1.

time for the filing of the Pre-Trial Brief,<sup>17</sup> this does not in any way justify the postponement of the commencement of the trial by five months.

16. The Defence's contention that the Prosecution applications for non-standard redactions and delayed disclosure have impeded the preparation of the Defence is clearly unfounded.<sup>18</sup> Redactions applied to certain items of evidence is a fundamental protective measure for the benefit of the persons exposed to an "*objectively justifiable risk*",<sup>19</sup> and whose security and safety may be undermined as a result the Court's activities. In proceedings of such magnitude, an appropriate balance will have to be struck between the Court's obligations to protect witnesses and victims pursuant to article 68(1) of the Rome Statute, and its duty to afford reasonable time and facilities for the Defence to prepare for trial. This inevitably results in some information/material being withheld from the Defence. The mere existence of standard or non-standard redactions is not dispositive of the issue of whether due process has been violated. The 13 applications for non-standard redactions and/or delayed disclosure referred to in the Request<sup>20</sup> represent a minor proportion of the overall disclosure in this case. Each of these applications is subject to a strict case-by-case review by the Chamber, conducted on the basis of the information and justifications provided by the Prosecution. Moreover, the fact that a number of applications have been filed by the Prosecution shortly after the 16 February 2015 deadline had a very limited impact, if at all, on the preparation of the Defence. Likewise, the Prosecution's failure to disclose materials related to six witnesses until 12 March 2015, instead of 16 February 2015,<sup>21</sup> clearly does not justify a five-month postponement of the trial.

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<sup>17</sup> See the "Request on Behalf of Mr Ntaganda Seeking Reconsideration and Clarification of Decision on Pre-Trial Brief", No. ICC-01/04-02/06-471, 24 February 2015.

<sup>18</sup> See the Request, *supra* note 2, paras. 43-44.

<sup>19</sup> See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" (Appeals Chamber), No. ICC-01/04-01/07-475 OA, 13 May 2008, para. 71.

<sup>20</sup> See the Request, *supra* note 2, para. 43.

<sup>21</sup> See the "Order on the disclosure of material related to Witnesses P-0871, P-0876, P-0882, P-0013, P-0816 and P-0901" (Trial Chamber VI), 12 March 2015, paras. 12-14.



17. The Legal Representatives further note that granting the Defence a lengthy extension would frustrate the rationale behind the implementation of protective measures, especially in the case of delayed disclosure. Indeed, authorising the Prosecution to delay the disclosure of certain information would serve no purpose if the Defence were entitled to request an extension of time for the very same reason.

18. With regard to the Defence's arguments concerning the difficulties encountered in the conduct of the Defence investigations,<sup>22</sup> the Legal Representatives submit that, given the extensive redactions applied, they are not in a position to make meaningful observations on the merits of this portion of the Request. However, the Legal Representatives submit that, in principle, Defence investigations must be conceived of as an ongoing process taking place throughout the duration of the trial. Accordingly, minor challenges or short-term difficulties do not constitute a proper basis for granting the Request.

### **3) The new composition of the Defence team hindered its ability to prepare for trial**

19. The Defence further states that "*the difficulties encountered by the Defence [...] have been severely compounded by the new composition of the Defence team*" which, in the Defence view, "*cannot be discounted*" by the Chamber.<sup>23</sup> The Legal Representatives submit that this argument constitutes an improper invitation to the Chamber to consider irrelevant factors when deciding on the Request.

20. Indeed, the composition and distribution of work within a defence team are primarily internal matters which should be addressed and resolved by Lead Counsel. Pursuant to article 67(1)(b) of the Rome Statute, the Court shall ensure that the Defence has "*adequate time and facilities*" for the preparation of trial. This fundamental right does not however imply that the Defence is entitled to prepare for trial at its own pace. Whether the accused and the Defence team have effectively made full use

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<sup>22</sup> See the Request, *supra* note 2, paras. 47-52.

<sup>23</sup> *Idem*, para. 54.

of the facilities and time allotted by the Chamber does not affect the accused's due process rights. Rather, what is material to such a determination is whether the time afforded by the Court is reasonably sufficient for the preparation of the defence. In the circumstances of the present case, a seven-month preparation period is both reasonable and appropriate. The change in the composition of the Defence team cannot therefore be used as a justification to delay the start of the trial. In fact, the Defence has previously indicated that the restructuring of the team was precisely aimed to ensure that the Defence is able *"to meet the Trial Chamber's expectations with respect to the beginning of trial at the beginning of June 2015"*.<sup>24</sup>

21. Moreover, the Legal Representatives submit that the composition of the Defence team is immaterial to the issue of postponement since, as pointed out in the Request,<sup>25</sup> a significant part of the disclosure in this case took place after the withdrawal of former Defence Counsel.

#### **4) Proposals for agreed facts and instructions of joint experts**

22. The Defense argues that in deciding the Request, *"it is important to bear in mind that to this day the schedule set by the Chamber has not allowed the Parties to consider any proposal for agreed facts or to select and instruct joint experts"*.<sup>26</sup> The Defence further contends that in the circumstances, *"it is very unlikely that the Parties will be in a position to jointly select and instruct joint experts"*.<sup>27</sup> In this respect, the Legal Representatives submit that this argument is based, to a large extent, on mere speculation. Whether or not the parties will be able to reach any agreement pursuant to rule 69 of the Rules of Procedure and Evidence, or resolve unsettled issues related to the joint instruction of expert witnesses, is highly uncertain. The Request also fails

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<sup>24</sup> In particular, the Defence submitted as follows: *"All this to say, Mr President, that we have -- it is our intention and we are in the process of having a full working team in place by mid-November, and that this will allow us, of course, to meet the Trial Chamber's expectations with respect to the beginning of trial at the beginning of June 2015"*. See the Transcripts of the proceedings, No. ICC-01/04-02/06-T-15-ENG ET WT, 17 October 2014, p. 20 lines 15-18.

<sup>25</sup> See the Request, *supra* note 2, paras. 18-27.

<sup>26</sup> *Idem*, para. 72.

<sup>27</sup> *Ibid.*, para. 80.

to state the reason why a postponement of trial proceedings is necessary for such an agreement to be reached. The two processes may be adequately carried out concurrently.

23. Moreover, setting a date for the commencement of the trial should not be dependent on the outcome of *inter partes* consultations. The Legal Representatives wish to highlight that, in principle, parties are entitled to agree on facts at any stage of the proceedings, including at the pre-trial phase. Failure to do so for such a prolonged period of time is simply inconsistent with the Defence's proclaimed "*willingness to address the issue of agreed facts*".<sup>28</sup>

**5) Postponement of the Prosecution's Case for a minimum of 5 months is required**

24. Given the scope of redactions applied, the Legal Representatives are regrettably unable to make submissions in relation to this part of the Defence Request.

**6) Postponing the Prosecution's Case is in the interest of Justice**

25. Lastly, the Defence submit that the extension of time sought will be in the interest of justice, stating that the "*Accused is also entitled to preparation time proportional to that of the Prosecution*".<sup>29</sup> However, the Request does not specify the relevant time during which the Prosecution has prepared for its case. Similarly, the Request does not specify whether the five-year period during which the accused was at large despite the issuance of the first warrant of arrest should be taken into account in deciding the reasonable time to be granted to the Defence to prepare for trial.

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<sup>28</sup> *Ibid.*, para. 73.

<sup>29</sup> *Ibid.*, para. 99.

26. Moreover, the Legal Representatives submit that the “fair trial” guarantees shall apply throughout the proceedings not only to the defence,<sup>30</sup> but in respect to all the parties and participants, including victims.<sup>31</sup> In the same vein, the requirements of fair proceedings shall apply to all the parties and participants before the Court, and not only to the suspect/accused,<sup>32</sup> and shall furthermore prevail over the specific interests of the parties.<sup>33</sup>

27. The Court is a unique international jurisdiction which has been established not only to investigate on the most serious crimes of concern to the international community but also and particularly to render Justice to victims.<sup>34</sup> As far as victims’

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<sup>30</sup> See ICTY, *The Prosecutor v. Zejnir Delalić*, Case No. IT-96-21-T, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, 2 September 1997, paras. 43-44 and 55; and *The Prosecutor v. Radoslav Brjdanin*, Case No. IT-00-36-T, Decision on the Defence « Objection to Intercept Evidence », 3 October 2003, para. 63. See also ICTR, *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nairorera and Mathieu Ngirumpatse, 2 November 2007, para. 25.

<sup>31</sup> In this regard, the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985 calls for enabling victims to access to Justice and to obtain redress and for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, UN Doc. A/RES/40/34, 29 November 1985, Principles 4 to 7. The document is available at the following address: <http://www.un.org/documents/ga/res/40/a40r034.htm>.

<sup>32</sup> See the “Decision on the admission of material from the ‘bar table’” (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009, para. 42. See also in the same sense TRAPP (K.), *Excluding Evidence: The Timing of a Remedy*, non-published manuscript (1998), Faculty of Law, McGill University, Canada, p. 21; quoted in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, Verlag C.H Beck, Munich, 2008, p. 1335, footnote 139. See also the “DECISION ON THE PROSECUTION’S APPLICATION FOR LEAVE TO APPEAL THE CHAMBER’S DECISION OF 17 JANUARY 2006 ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-135-tEN, 20 April 2006 (dated 31 March 2006), para. 38.

<sup>33</sup> See SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, Case No. SCSL-04-16-PT, 31 March 2004, para. 26.

<sup>34</sup> It was determined that the need to “ensure the effective implementation of victims’ rights [...] constitute a cornerstone of the Rome Statute system”. See ASP, Victims and affected communities, reparations and Trust Fund for Victims, Resolution No. ICC-ASP/12/Res.5, 27 November 2013, Preamble, para. 2. It was also emphasized that “[a] key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims”. See the “Report of the Court on the strategy in relation to victims”, Assembly of States Parties, Eighth session, No. ICC-ASP/8/45, 10 November 2009, para. 3.

participation constitutes an integral part of the concept of fair and impartial proceedings before the Court, relevant Chambers have a duty to take into consideration the interests of the victims throughout the proceedings, and in particular when deciding on any requests for postponement of proceedings.

28. In this regard, “[i]n the light of the core content of the right to be heard set out in article 68(3) of the Statute, [...] [said provision] imposes an obligation on the Court vis-à-vis victims. The use of the present tense in the French version of the text (“la Cour permet”) makes it quite clear that the victims’ guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them.”<sup>35</sup>

29. Accordingly, the Legal Representatives submit that a balancing exercise between competing interests is required when considering the Defence Request. Such a consideration simply entails that, in the circumstances of the present case, a further lengthy postponement of the trial cannot be granted because of the resulting prejudice to the victims’ right to have the truth be established and Justice be rendered with no delay.

30. In this regard, the Legal Representatives submit that the practice in other cases and the average time between the confirmation decision and the start of the trial are inapposite, given the particular circumstances of the case, and in particular in light of the fact that the victims have been waiting for Justice for more than 12 years.

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<sup>35</sup> See the “DECISION ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6” (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 71.

**FOR THESE REASONS**, the Legal Representatives respectfully request the Chamber to dismiss the Defence Request.



Dmytro Suprun  
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Victims of the Attacks



Sarah Pellet  
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Dated this 14<sup>th</sup> Day of April 2015

At The Hague (The Netherlands) and Bunia (DRC)