

**Cour
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**International
Criminal
Court**

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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

**Joint Response of the Common Legal Representatives of Victims to the Defence
"Request for Extension of Time"**

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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Other

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representative of the Victims of the Attacks (jointly the “Legal Representatives”) hereby submit a joint response to the Defence “Request for Extension of Time” (the “Request”).¹

I. INTRODUCTION

2. The Legal Representatives oppose the Request. The Defence fails to provide reasons capable of amounting to ‘good cause’ within the meaning of regulation 35(2) of the Regulations of the Court (the “Regulations”). The applicable criteria are hence not fulfilled, and the Request should be rejected. It is also not in the interests of justice to grant any kind of extension for the reasons set out *infra*.

3. The Defence has, *de facto*, already been granted an extension of time.² By Majority, Trial Chamber VI (the “Chamber”) granted a four-day extension to the Prosecution, the Legal Representatives, and the Defence, so as to compensate for the late and continuous notification of corrected transcripts during the last days of the filing deadline applicable to both the Prosecution and the Legal Representatives. No further extension is either fair or warranted.

II. PROCEDURAL BACKGROUND

4. On 5 December 2017, the Chamber held a status conference during which it heard submissions of the parties and participants on the modalities of the closing briefs and statements.³

¹ See the “Request for Extension of Time”, No. ICC-01/04-02/06-2287, 21 May 2018 (the “Defence Request”).

² See the “Decision providing further directions on the closing briefs” (Trial Chamber VI), No. ICC-01/04-02/06-2272, 13 April 2018 (the “13 April 2018 Decision”), para 15.

³ See the transcript of the hearing held on 5 December 2017, No. ICC-01/04-02/06-T-258-ENG-ET WT (the “Transcript of the Status Conference”).

5. On 12 December 2017, the Defence provided further submissions on the issue, requesting that parts of the Prosecution Closing Brief be translated into Kinyarwanda to assist the Accused prior to submission of the Defence Closing Brief.⁴

6. On 14 December 2017, both the Prosecution and the Legal Representatives filed responses opposing the Defence request for Kinyarwanda translation.⁵

7. On 22 December 2017, the Chamber issued an order, whereby it provided directions related to the closure of the presentation of evidence in the case.⁶

8. On 28 December 2017, the Chamber provided further directions in relation to the closing brief.⁷ It set the filing deadlines for the Prosecution and Legal Representatives at four weeks from the date at which the Presiding Judge would declare the presentation of evidence closed.⁸ It also, *inter alia*, ordered that discrete parts of the Prosecution's Closing Brief be translated into Kinyarwanda within six weeks of the date of its filing, and that the Defence Closing Brief be filed within eight weeks of the notification of the Prosecution and Legal Representatives' respective briefs.⁹

9. On 16 March 2018, the Chamber closed the presentation of evidence in the case.¹⁰

⁴ See the Email correspondence from the Defence to the Chamber, Prosecution and Participants of 12 December 2017 at 20:36.

⁵ See the "Prosecution response to the Defence request for the Prosecution final trial brief to be provided in Kinyarwanda before the submission of the Defence final trial brief", No. ICC-01/04-02/06-2156, 14 December 2017 and the "Joint Response of the Common Legal Representatives of Victims to the Defence submissions on the final trial briefs", No. ICC-01/04-02/06-2158, 14 December 2017.

⁶ See the "Order providing directions related to the closure of the presentation of evidence" (Trial Chamber VI), No. ICC-01/04-02/06-2166, 22 December 2017.

⁷ See the "Order providing directions related to the closing briefs and statements" (Trial Chamber VI), No. ICC-01/04-02/06-2170, 28 December 2017.

⁸ *Idem*, para. 8.

⁹ *Ibidem*, paras. 12-13.

¹⁰ See the "Decision closing the presentation of evidence and providing further directions", No. ICC-01/04-02/06-2259, 16 March 2018.

10. On 13 April 2018, the Chamber, by Majority and upon request from the Prosecution, extended the filing deadlines applicable to the parties and participants by four days, respectively.¹¹ By the same decision, the Chamber extended the page limits for the parties' Closing Briefs to 450 each, and those of the Legal Representatives' Closing Briefs to 170 and 115, respectively.¹²

11. The Legal Representatives and the Prosecution filed their respective Closing Briefs on 20 April 2018.¹³

12. On 4 May 2018, The Chamber, partly granting a request from the Defence, extended the page limit previously set for the Defence Closing Brief to 500 pages in total.¹⁴

13. On 21 May 2018, the Defence filed its Request whereby it seeks an extension of the filing deadline for its Closing Brief by an additional three weeks.¹⁵

14. On 22 May 2018, the Chamber shortened the response deadline to the Defence Request to 24 May 2018.¹⁶

III. SUBMISSIONS

15. The Defence argues that several factors warrant a three-week extension of time for the filing of its Closing Brief, namely (i) the continued notification of transcript corrections; (ii) the finalisation of the list of admitted exhibits on

¹¹ See the 13 April 2018 Decision, *supra* note 2, para. 15.

¹² *Idem*, para. 15.

¹³ See the "Closing Brief of the Common Legal Representative of the Victims of the Attacks", No. ICC-01/04-02/06-2275-Conf, 20 April 2018; the "Closing Brief on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2276-Conf, 20 April 2018; and the "Prosecution's Final Closing Brief", No. ICC-01/04-02/06-2277, 20 April 2018.

¹⁴ See the "Decision on Defence request for an extension of page limit for its closing brief" (Trial Chamber VI), No. ICC-01/04-02/06-2283, 4 May 2018, para. 11.

¹⁵ See the Defence Request, *supra* note 1, paras. 1 and 6.

¹⁶ See the Email correspondence from the Chamber to the Parties and Participants of 22 May 2018 at 10:16.

17 May 2018; (iii) the translation into Kinyarwanda that *“will likely proceed more slowly than anticipated”*; (iv) the successive filing of briefs; and (v) staff attrition.¹⁷ In addition, the Defence contends that it *“under-estimated the extent”* to which its *“workload was back-loaded in a manner that made progress on drafting of the closing brief difficult”*.¹⁸ It further asserts that *“a three-week extension would not delay closing arguments nor require any other party or participant to work during the judicial recess”*.¹⁹ It is submitted that none of the factors invoked and other arguments presented are capable of constituting ‘good cause’ within the meaning of regulation 35(2) of the Regulations in the circumstances of this case.

16. The Defence further submits that *“[t]he total time accorded to respond to the parties and participants would come to eleven weeks”*.²⁰ Yet, it is submitted that the total time – including the previously granted four-day extension – comes to nearly 12 weeks, which in fact amounts to almost three times the deadline applicable to the Prosecution and the Legal Representatives. This in itself is excessively disproportionate in the absence of ‘good cause’ being shown and no further extension should be granted.

17. As regards the individual factors listed by the Defence, the Legal Representatives submit that not a single one of them can reasonably be invoked as constituting ‘good cause’. The issue of late and on-going notification of corrected transcripts has already been addressed and dealt with adequately by the Chamber when it, by Majority, granted a limited extension of time to both parties as well as to the Legal Representatives. This issue should neither be revisited, nor should the Defence be treated any more favourably in this regard. The Legal Representatives had to absorb all additional workload caused by the late and ongoing notification of corrected transcripts within the already very limited resources available to them.

¹⁷ See the Defence Request, *supra* note 1, paras. 2-6 and 8.

¹⁸ *Idem*, para. 7.

¹⁹ *Ibidem*, para. 6.

²⁰ *Ibid.*, para. 1.

They still submitted timely briefs with updated references, even though transcript corrections were notified well into the last days of the applicable deadline.²¹ Furthermore, the Defence benefits from being able to respond – in large part – to submissions that already refer to the updated, corrected transcripts, which significantly lessens the impact of further transcript corrections – if any – on their work.²² Finally, as of the date of the filing of its Request, the Defence has just short of four weeks left to complete their Closing Brief – time that accounts for almost the entire timeline applicable to the Prosecution and Legal Representatives in the first place. As noted by Judge Ozaki in her recent dissenting opinion, it was possible for the Prosecution and Legal Representatives “to carry out substantial amounts of work on their respective closing briefs already before the presentation of evidence in this case was declared closed on 16 March 2018”.²³ The same holds true for the Defence.

18. As regards the final list of admitted exhibits, the Legal Representatives acknowledge that the fact that no certified case record existed at the time of the closure of the presentation of evidence is indeed regrettable. Nevertheless, the final list was communicated by the Registry on 26 April 2018, only a few days after the Prosecution and the Legal Representatives filed their respective briefs.²⁴ If anyone would have been prejudiced by the late finalisation of the list, it was rather the Prosecution and the Legal Representatives. In any event, as the parties have kept a record of admitted items throughout the proceedings, and as only the evidential status of several items was uncertain up until 17 May 2018, the impact of this factor on the on-going drafting of the Closing Brief is marginal at best.

19. With respect to the translation of selected portions of the Prosecution Brief into Kinyarwanda, the Legal Representatives submit that the reference to the

²¹ See the “Closing Brief on behalf of the Former Child Soldiers”, *supra* note 13, footnote 2.

²² It is noted that the Defence submits that transcript corrections are *likely* to continue throughout the period of the drafting of its brief. See Defence Request, *supra* note 1, para. 2.

²³ See the “Dissenting Opinion of Judge Kuniko Ozaki” to the 13 April 2018 Decision, para. 6.

²⁴ See the Email correspondence from the Court Officer to the Chamber, the Parties and the Participants of 26 April 2018 at 14:32.

translation in the *Bemba* case is misleading.²⁵ Indeed, the Prosecution closing brief in said case was translated by in-house translators from one working languages into the other. In the present case, Kinyarwanda is not a working language of the Court and the in-house resources are definitely not comparable. Accordingly, the analogy made by the Defence has no standing. Furthermore, the Defence submissions are both speculative and premature in that they contend that the translation “*will likely proceed more slowly than anticipated*”.²⁶ No concrete information on actual delays is presented in this regard. Moreover, translation issues are only relevant as regards the part of the Defence Closing Brief that seeks to respond to the Prosecution Closing Brief which, according to the Defence, only constitutes a part of its anticipated Brief.²⁷ Again, the Defence has almost half of its eight-week timeline left at this stage.

20. As regards the successive filing of Closing Briefs, the Defence was the only team to argue for the successive approach of filing Closing Briefs in this case.²⁸ It should not now be allowed to use the sequential filing approach as a reason for obtaining an extension of time because “*successive filing [...] requires the Defence to both set out its position and to do so in a manner that is responsive to more than 650 of submissions [...] [which] imposes a heavier burden than would arise in respect of simultaneous briefs*”.²⁹ At the time of the status conference on 5 December 2017, the Defence was fully aware of what a successive filing approach would entail. Moreover, the Defence – at the very minimum – had time available to draft the part of the Closing Brief “*set[ting] out its position*”³⁰ during the time the Prosecution and Legal Representatives were drafting their respective briefs. In theory, the Defence then had an additional eight weeks plus four days available to them purely for *responding* to the other briefs, also noting that the Legal Representatives submissions

²⁵ See the Defence Request, *supra* note 1, para. 4.

²⁶ *Idem*.

²⁷ See the “Request on behalf of Mr Ntaganda seeking an extension of page limit for the submission of the Defence Closing Brief”, No. ICC-01/04-02/06-2280, 26 April 2018, paras. 3, 10, 13-14.

²⁸ See the Transcript of the Status Conference, *supra* note 3, p. 12, lines 4-11. See also p. 14, lines 8-10 and p. 16, lines 11-12.

²⁹ See the Defence Request, *supra* note 1, para. 5.

³⁰ *Idem*.

cover matters and arguments put forward in the Prosecution Closing Brief³¹ and are neither distinct nor new as such.

21. In relation to staff attrition, the Legal Representatives are not in a position to comment upon any concrete departures or unavailability of members of the Defence team. Suffice it to note that fluctuations in the level of staffing in any team at any given point in the case are entirely common and usually occur at more or less inconvenient times. It is not entirely unforeseeable. The Legal Representatives themselves – whose teams consist of effectively only counsel and one legal assistant³² – have themselves faced prolonged and unforeseen absences of one of their respective team members at equally busy and demanding stages of the proceedings – including during the drafting of one team’s closing brief – that had to be compensated by placing a heavier burden on counsel in meeting their obligations towards the Chamber and their respective clients, and resort to additional short-term staffing solutions where possible and available.

22. Counsel practicing before this Court are under the obligation to organise their work schedules in order to meet their obligations to respect the time limits.³³ An extension of time is not an adequate response to staff attrition, unless of an

³¹ See the “Decision on Defence request for an extension of page limit for its closing brief”, No. ICC-01/04-02/06-2283, 4 May 2018, paras. 10-11.

³² Assisted by Field Counsel in the field.

³³ See ICTY, *The Prosecutor v. Rasim Delić*, Case No. [IT-04-83-AR72](#), “Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal” (Appeals Chamber), 8 December 2005, para. 3. “‘Good cause’ [...] imports the existence of valid reasons for non-compliance with the procedural obligations of a party to the litigation. [...] Such 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”. See also the “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” (Appeals Chamber), No. ICC-01/04-01/06-834 OA8, 21 February 2007, para. 7; and the “Reasons for the ‘Decision on the ‘Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor’s Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation” (Appeals Chamber), No. ICC-01/04-01/07-653 OA7, 27 June 2008, para. 5.

exceptionally large and unforeseeable scale. This does not appear to be the case in the present circumstances.

23. The Defence's argument about 'back-loading' of its workload is not entirely clear. However, the Legal Representatives understand the Defence to refer, yet again, to the under-estimation of the workload resulting from the successive filing of Closing Briefs. Accordingly, the Legal Representatives refer to their arguments in this respect as set out *supra*.³⁴

24. Finally, the suggestion that a three-week extension of time would not delay closing arguments has no merit. First, even if *arguendo*, the extension would have no impact on the scheduling of the closing arguments, as a matter of principle alone the Defence should not be accorded three times as much time to prepare its Closing Brief as the Prosecution and the Legal Representatives. Second, any variation of the deadline necessarily has a knock-on effect on the work and preparation time afforded to the Prosecution and the Legal Representatives. The extended deadline would fall on the fourth day, 24 July 2018, of the judicial summer recess. Even if the Defence pledges to work through the judicial recess, their response would be due on 8 August 2018, thereby significantly shortening the overall preparation time for all parties and participants that was rightly intended to lie between the Defence Reply and the Closing Arguments.

25. In sum, the Legal Representatives oppose the Request as it fails to meet the legal requirement of showing 'good cause' warranting an extension of time under regulation 35(2) of the Regulations and it is not in compliance with the interests of justice. None of the factors listed by the Defence, either individually or cumulatively, is capable of meeting the threshold and the Request should therefore be rejected in its entirety.

³⁴ See *supra* para. 20.

RESPECTFULLY SUBMITTED



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Dated this 24th Day of May 2018

At The Hague, The Netherlands