

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **8 June 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
With Confidential Annex A**

Public Redacted version of “Prosecution request to change the order of appearance of the first witnesses”, 5 June 2015, ICC-01/04-02/06-630-Conf-Exp

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. The Office of the Prosecutor ("Prosecution") requests authorisation from Trial Chamber VI ("Chamber") to change the order of the first group of witnesses that the Prosecution intends to call, as previously listed on 10 April 2015 ("First List"),¹ under articles 64(6)(e) and (f) and 68(1) of the Rome Statute ("Statute"), rule 134(1) of the Rules and Procedure of Evidence ("Rules"), and regulations 35 and 54 of the Regulations of the Court ("RoC").
2. In particular, the Prosecution asks that crime-base Witness [REDACTED] be called as its first witness, that [REDACTED] and [REDACTED] move down to second and third place, respectively and that [REDACTED] - be called earlier, in place of [REDACTED]. Witnesses [REDACTED] remain in the list in the same order as before. The Prosecution attaches a proposed revised version of the First List, as Annex A to the filing.²
3. The Prosecution requests that crime-base victim Witness [REDACTED] be moved up in the list. Allowing an alleged victim, [REDACTED], to testify first would enable the proceedings to be brought closer to the affected communities. The local communities will relate to the proceedings more immediately through a victim witness's testimony. There is no prejudice to the Accused Bosco NTAGANDA ("NTAGANDA") from this change in order of the first witness because [REDACTED] was amongst the original first group of witnesses and his statement and related materials are brief.
4. The Prosecution asks that the [REDACTED] be called in the first group of witnesses because they have heightened security problems. The Prosecution became aware of additional issues after it submitted the First List. The

¹ ICC-01/04-02/06-552-Conf-AnxA. The previous proposed order of witnesses was: [REDACTED].

² The Prosecution proposes the following revised order of witnesses: [REDACTED].

Prosecution has received new information regarding alleged attempts [REDACTED], and from its analysis of the [REDACTED].

5. There is no material prejudice to the Accused in changing the order to bring forward the testimony of the [REDACTED] witnesses. Nor does any potential prejudice outweigh the need to protect their security.
6. Whilst the [REDACTED] do require more preparation than the previously listed [REDACTED] witnesses, there is still sufficient time for the Defence to prepare. If the Prosecution's request is granted, the Defence will receive notice of the revised First List more than two and a half months before the start of presentation of evidence - which is more time than it originally requested. The Prosecution provided the proposed First List to the Defence on 4 June 2015. The Defence has already had time to review the [REDACTED] witnesses' materials and to commence investigations. Moreover, the Defence indicated that the witnesses interviewed [REDACTED] were their priority.
7. Finally, [REDACTED].

Confidentiality

8. This filing is classified as "Confidential *EX PARTE* - only available to the Prosecution and Victims and Witnesses Unit", because it contains confidential information related to security concerns of Prosecution witnesses. Annex A is classified as confidential because it lists a proposed order of witnesses, which is still to be decided upon. The Prosecution will file a confidential redacted version of this filing.

Procedural History

9. On 28 November 2014, the Chamber ordered the trial to begin on 2 June 2015.³
10. On 12 March 2015, the Chamber directed the Prosecution to provide, by 7 April 2015, a list indicating, in order, the witnesses it intends to call until 16 July 2015 ("First List").⁴
11. On 2 April 2015, the Defence filed a request to postpone the date of trial until 2 November 2015 at the earliest ("Defence Request").⁵ On 7 April 2015, the Prosecution requested authorisation to file its First List after the Chamber decided on the Defence Request and, at the earliest, two months before any new date for the commencement of trial ("Prosecution's Request").⁶ On 8 April 2015, the Defence filed its "Response on behalf of Mr Ntaganda to Prosecution's request for variation of the Chamber's direction to provide the order of the Prosecution's first witnesses".⁷
12. On 10 April 2015, by email, the Chamber rejected the Prosecution's Request and ordered the Prosecution to immediately submit the list of witnesses it intends to call until 16 July 2015.
13. On the same day, the Prosecution filed the First List of witnesses, but indicated that the order might change if the Chamber decided to postpone the presentation of the Prosecution's case as witnesses' availability might vary depending on the start date of trial.⁸

³ ICC-01/04-02/06-382-Corr, para.8.

⁴ ICC-01/04-02/06-507, para.6(ii), p.5 ("Order").

⁵ ICC-01/04-02/06-541-Conf-Exp-Red2 with public redacted version at ICC-01/04-02/06-541-Red. The Chamber provided the Prosecution with a courtesy copy of the filing on 2 April 2015 and the filing was notified on 7 April 2015.

⁶ ICC-01/04-02/06-544-Red.

⁷ ICC-01/04-02/06-551-Red.

⁸ ICC-01/04-02/06-552, para.3.

14. During the status conference on 22 April 2015, the Chamber rejected the Prosecution's request for disclosure deadlines to be revised in conformity with any changes to the trial commencement date. However, the Chamber stated that this was "without prejudice to the potential needs to reconsider or reset discrete deadlines relating, for example, to the order of witnesses to be called – which, it is noted, formed part of the submissions on conduct of proceedings."⁹
15. On 2 June 2015, the Chamber provided oral reasons for its decision to deny the Prosecution's Request to extend the deadline to communicate the First List of witnesses.¹⁰

Prosecution's Submissions

16. The Chamber has general powers to rule on any relevant matters under article 64(6)(f); it may rule on any issue concerning the conduct of the proceedings under rule 134; and, it may issue any order in the interests of justice under regulation 54 of the RoC.¹¹ In addition, the Chamber can take appropriate measures to protect the safety, physical and psychological well-being of witnesses, and their family members,¹² pursuant to articles 64(3)(e) and 68(1).
17. Accordingly, regulation 35 is not the only basis upon which the Chamber may grant its request to change the order of witnesses. Nonetheless, there is good cause to extend the time limit under regulation 35. The Prosecution was unable to file the application within the time limit because the Prosecution was only aware of all the new information concerning the [REDACTED] heightened security situation after it submitted the First List. [REDACTED]. While the [REDACTED] and the [REDACTED] were provided to the Prosecution before the First List was

⁹ ICC-01/04-02/06-T-19-ENG ET, p.7, l.22 – p.8, l.3.

¹⁰ ICC-01/04-02/06-T-20-Conf-ENG-ET, p.2, l.19 – p.4, l.7.

¹¹ See e.g. ICC-01/04-01/06-T-104-ENG, p.4, l.6-p.6, l.20.

¹² See e.g. rule 81(3) and (4) that acknowledges the obligation, in accordance with article 68, "to protect the safety of witnesses and victims *and members of their families*" (emphasis added).

submitted, the Prosecution was unable to [REDACTED] until after that date because the [REDACTED] and the [REDACTED].

18. The request to change the order of the first witness, from [REDACTED] does not comply with the requirements of regulation 35(2) because it is not a change that the Prosecution was prevented from requesting earlier. However, the Chamber may still grant the request to start the Prosecution's case with [REDACTED], on the alternative bases for doing so, as set out below.¹³

(a) Changing the first witness to a victim witness enables proceedings to be brought closer to the affected communities

19. The Chamber may grant the request to call [REDACTED] earlier because it is in the interests of justice to do so, pursuant to article 64(6)(f), rule 134, and, regulation 54.

20. The Prosecution asks that the first witness be changed to crime-base victim Witness [REDACTED], rather than military insider [REDACTED], because of the need for the Chamber and Parties to hear from the outset from one of the alleged members of the affected victim communities. The Chamber has consistently sought to bring proceedings closer to the affected communities by assessing the feasibility of holding opening statements *in situ*.¹⁴ As it is not possible to hold the substantive trial in the Democratic Republic of the Congo ("DRC"), at the very least, having an alleged victim testify first would immediately allow the local victim communities to relate to the proceedings, in a way a military insider's testimony might not.¹⁵

¹³ Compare e.g. ICC-01/04-01/07-2325, para.15: Trial Chamber II acknowledged that there are exceptions allowed even where regulation 35(2) had not been met. Trial Chamber II considered that there may be circumstances where incriminating evidence can be admitted late even if regulation 35(2) requirements are not met, pursuant to its powers under articles 64(6)(d) and 69(3).

¹⁴ ICC-01/04-02/06-T-15-ENG ET, p.19, lns.3-15; ICC-01/04-02/06-T-17-Conf-ENG ET, p.20, l.15-p.29, l.11; ICC-01/04-02/06-T-18-Conf-ENG, p.29, l.1-p.34, l.24; ICC-01/04-02/06-536, paras.10, 21-23.

¹⁵ Compare e.g. ICC-01/04-01/06-1586, para.3; ICC-01/04-01/06-T-104-ENG, p.4, l.6-p.6, l.20.

21. There is no material prejudice or unfairness to the Accused from this change in order of the first witness, because [REDACTED] was originally number six in the First List;¹⁶ and, as a crime-base witness, his testimony will require more limited preparation.

(b) Need to call [REDACTED] earlier to protect their safety and well-being and safety of their families

22. The Chamber may grant the request to call [REDACTED] to testify earlier because of the obligation to protect their safety, and physical and psychological well-being, and safety of their families, under articles 64(6)(e) and 68(1). In addition or alternatively, the Chamber may decide to grant the request under articles 64(6)(f), rule 134 and regulations 35 and 54.

23. [REDACTED].¹⁷

24. However, the Prosecution has received additional information regarding security risks posed [REDACTED]. First, the [REDACTED] indicate that [REDACTED]. Second, [REDACTED]. Third, [REDACTED]. These heightened security risks warrant calling [REDACTED] earlier to testify.

25. The Prosecution is separately filing [REDACTED]. Accordingly, the present filing is not intended to be a comprehensive analysis or summary of all the newly received security information, but includes key examples regarding [REDACTED].

i. [REDACTED]

26. First, the [REDACTED],¹⁸ [REDACTED]. In particular, the [REDACTED] show that the [REDACTED].

¹⁶ ICC-01/04-02/06-552-Conf-AnxA.

¹⁷ ICC-01/04-02/06-349-Conf-Exp; ICC-01/04-02/06-371-Conf-Exp.

27. [REDACTED]¹⁹ [REDACTED].²⁰

28. However, [REDACTED] reveal that [REDACTED].²¹ [REDACTED]²²
[REDACTED]²³ [REDACTED]²⁴ [REDACTED].²⁵

29. [REDACTED].²⁶

30. [REDACTED]²⁷ [REDACTED]²⁸ [REDACTED].²⁹ [REDACTED].

31. [REDACTED]³⁰ [REDACTED].³¹ [REDACTED].³² [REDACTED].

32. [REDACTED]³³ [REDACTED]³⁴ [REDACTED].³⁵

33. [REDACTED]³⁶ [REDACTED]³⁷ [REDACTED]³⁸ [REDACTED].³⁹

34. [REDACTED]⁴⁰.

35. The following is an [REDACTED] that the Prosecution submits [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

[REDACTED]

36. [REDACTED]⁴¹ [REDACTED].⁴² [REDACTED]⁴³ [REDACTED].⁴⁴ [REDACTED]⁴⁵
[REDACTED].⁴⁶ [REDACTED]⁴⁷ [REDACTED].

37. [REDACTED]⁴⁸ [REDACTED].⁴⁹

[REDACTED]

38. [REDACTED].⁵⁰

39. [REDACTED]⁵¹ [REDACTED].

40. [REDACTED]⁵² [REDACTED].⁵³ [REDACTED].⁵⁴ [REDACTED].⁵⁵

41. [REDACTED]⁵⁶ [REDACTED].⁵⁷ [REDACTED]⁵⁸ [REDACTED]⁵⁹ [REDACTED].⁶⁰

[REDACTED]

42. [REDACTED].

43. [REDACTED].⁶¹ [REDACTED].⁶² [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ See fn. 36 above; [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

44. [REDACTED]⁶³ [REDACTED]⁶⁴ [REDACTED]⁶⁵ [REDACTED]⁶⁶ [REDACTED].⁶⁷
[REDACTED].

ii. [REDACTED]

45. [REDACTED].

iii. [REDACTED]

46. Since the Prosecution submitted its First List of witnesses, [REDACTED].

47. [REDACTED].

48. [REDACTED].

49. [REDACTED].

(c) No material prejudice to the Defence by calling [REDACTED] earlier

50. There is no material prejudice to the Accused in changing the order of the first group of witnesses. In any event, any prejudice to the Accused must be balanced against the need and obligation to protect the witnesses' security, under articles 64(6)(e) and 68(1).

51. [REDACTED] require more preparation than the previously listed crime-base witnesses. However, the Defence has sufficient time to prepare for them.

52. The Prosecution informally provided its revised proposed First List to the Defence on 4 June 2015. If the Chamber grants the Prosecution's request, the Defence will receive notice of the revised First List almost two and a half months before the start of presentation of evidence, now scheduled to start 24 August

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

2015.⁶⁸ This is more time than the Defence itself requested as notice for the First List. The Defence asked that if the trial began on 2 June 2015 as previously scheduled, that it receive the first witnesses to be called two months in advance, and for those called after the recess – only one month notice in advance.⁶⁹

53. The Defence has already had time to review the [REDACTED] witnesses' materials and to conduct necessary investigations. The Defence indicated from the outset [REDACTED].⁷⁰ These [REDACTED] witnesses must have been a priority [REDACTED].

54. Moreover, [REDACTED].

Relief Sought

55. For all of the foregoing reasons, the Prosecution requests authorisation to submit a revised First List of witnesses, in accordance with appended Annex A to this filing.



Fatou Bensouda, Prosecutor

Dated this 8th day of June 2015
At The Hague, The Netherlands

⁶⁸ ICC-01/04-02/06-T-20-Conf-ENG ET, p.4, lns.19-24.

⁶⁹ ICC-01/04-02/06-T-18-Conf-ENG ET, p.13, ln.19-p.14, ln.6.

⁷⁰ ICC-01/04-02/06-T-13-ENG, p.12, lns.12-18.