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

Date: 15 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

Public redacted version of “Response on behalf of Mr Ntaganda opposing the Prosecution’s request to change the order of appearance of its witnesses and Request in the alternative for a delay following the hearing of the first three witnesses”

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the confidential redacted version of the “*Prosecution request to change the order of appearance of its first witnesses*” submitted by the Office of the Prosecutor (“Prosecution”) on 8 June 2015 (“Prosecution Request”);¹ and Trial Chamber VI’s (“Chamber”) order to shorten the deadline for any response to the Prosecution Request to 15 June 2015, conveyed by way of an email on 9 June 2015, Counsel representing Mr Ntaganda (“Defence”) hereby file this:

Response on behalf of Mr Ntaganda opposing the Prosecution’s request to change the order of appearance of its witnesses and Request in the alternative for a delay following the hearing of the first three witnesses

“Defence Response” and “Defence Request in the Alternative”

INTRODUCTION

1. In essence, the Prosecution Request seeks to modify the list of the first witnesses the Prosecution intends to call (“First List”)² in order to bring forward the testimony of [REDACTED] so-called [REDACTED] – namely Witnesses [REDACTED]– who (allegedly) must testify immediately, at the beginning of the trial, due to purported security concerns.
2. For the reasons expressed below, the Defence opposes the Prosecution Request, which would render the proceedings against the Accused wholly unfair while undermining the Court’s truth-seeking function.
3. At a time when the Defence has not had sufficient time to prepare for trial, the reasons advanced by the Prosecution in support of its Request – even if they

¹ ICC-01/04-02/06-630-Conf-Red. The Defence was notified of the Prosecution Request on 9 June 2015. The information contained in Annex A to the Prosecution Request (ICC-01/04-02/06-630-Conf-AnxA) (“Proposed Revised List”) was communicated by the Prosecution to the Defence by way of an email dated 4 June 2015.

² ICC-01/04-02/06-552-Conf-AnxA.

were considered to be objectively founded – do not justify calling six major witnesses³ amongst the first nine witnesses to be heard in this case.

4. In the alternative, should the Chamber be inclined to grant the Prosecution Request, the Defence respectfully requests a minimum delay of two months between the hearing of the first three witnesses on the Prosecution's Proposed Revised List⁴ and the [REDACTED] following witnesses,⁵ as well as a minimum of one week preparation time between each of these [REDACTED] witnesses.

DEFENCE RESPONSE

SUBMISSIONS

5. The Defence takes the view that a party is entitled to lead its case as it sees fit and that a trial chamber should only intervene if the manner in which a party intends to lead its case impedes on the fairness of the proceedings.
6. To the extent that Witnesses [REDACTED] were already included in the First List – on the basis of which the Defence has focussed its preparations for the Prosecution's case so far – the Defence does not object to these witnesses being heard as the first three witnesses. The Defence underscores, however, that Witnesses [REDACTED] and [REDACTED] are major witnesses who, in and of themselves, require exceptional preparation time in comparison with most other Prosecution witnesses.
7. The Defence posits that the Prosecution Request is a patent example of a proposed change to a list of witnesses, which adversely impacts the Defence and impedes the fairness of the proceedings, to such an extent that the Chamber's intervention is required.

³ It is essential to note that the Proposed Revised List includes two other major witnesses, namely Witness [REDACTED] – [REDACTED] – and Witness [REDACTED] – [REDACTED] – who both require an exceptional preparation time.

⁴ Namely, Witnesses [REDACTED].

⁵ Namely, Witnesses [REDACTED].

- I. **Bringing forward the testimony of [REDACTED] major witnesses at the very beginning of the trial would render the proceedings wholly unfair**
8. At the outset, it must be said that while the Prosecution argues that there will be no prejudice to the Defence – given that it is informed of the identity of the first witnesses more than two months in advance –⁶ this was necessarily contingent upon the Defence being ready for trial, which is clearly not the case.
9. Indeed, at the last status conference, the Defence made it clear – in all due respect for the Chamber’s holding to the contrary – that although the beginning of the Prosecution’s case is now scheduled for 24 August 2015, it will not be ready for trial.⁷ The Defence added that it would nonetheless comply with the schedule set by the Chamber, meaning that it would do its best to be able to cross-examine the first witnesses on the First List, despite the lack of time to adequately prepare for trial.
10. In these circumstances, imposing on the Defence the burden to prepare for [REDACTED] additional major witnesses at this stage, will necessarily result in the Defence not being ready to cross-examine these witnesses, thereby depriving the Chamber of properly tested evidence.
11. As recognized by the Prosecution, [REDACTED] require “more preparation” than [REDACTED] witnesses.⁸ Indeed, [REDACTED] witnesses such as Witnesses [REDACTED] – who have been [REDACTED] and/or [REDACTED]; and/or have been [REDACTED]; and/or who [REDACTED] – require a detailed cross-examination focussing not only on the evidence they are expected to provide, but also on their motivation and credibility.
12. In order to conduct effective and meaningful cross-examination of such witnesses, the Defence cannot analyse the material disclosed in relation to

⁶ Prosecution Request, para.52.

⁷ ICC-01/04-02/06-T-20-Conf-ENG, p.8, ll.18-25, p.9, ll.1-5; p.10, ll.7-13.

⁸ Prosecution Request, paras.6, 51.

these witnesses in isolation. In fact, [REDACTED]. This requires substantial time and resources.⁹

13. Having to prepare for these [REDACTED] witnesses, in addition to the work already undertaken and which is far from being completed concerning Witnesses [REDACTED] and [REDACTED], is simply asking for too much in order for the proceedings against Mr Ntaganda to even have an appearance of fairness.
14. Without taking a stance on the importance of Witnesses [REDACTED] for the Prosecution's case, it is evident that the Prosecution intends to rely heavily on their evidence. Suffice it to note that in the 1854 footnotes contained in the Prosecution's pre-trial brief ("Pre-Trial Brief"),¹⁰ there are 1069 references to these [REDACTED] witnesses alone.¹¹
15. In light of the above, the Prosecution's argument that the Defence has had "time to review the [REDACTED] witnesses' material and to conduct necessary investigations"¹² must be disregarded. While the Defence has been in possession of most of the material related to Witnesses [REDACTED] at least since the 2 March 2015 disclosure deadline, it must be borne in mind that there is a major difference between examining witnesses' material with a view to shaping the case for the Defence and analysing the same for the preparation of cross-examination. Indeed, while the former only necessitates gaining acquaintance with the main topics discussed by the witnesses, the latter is a completely different exercise, which requires much deeper analysis and attention to details.
16. As for the conduct of the necessary investigations, the Defence respectfully refers the Chamber to its submissions in the Defence Request for

⁹ For example, [REDACTED].

¹⁰ ICC-01/04-02/06-503-Conf-AnxA.

¹¹ [REDACTED]. In comparison, the first witness who would appear according to the Proposed Revised List, Witness [REDACTED], is cited [REDACTED] times.

¹² Prosecution Request, para.53.

Postponement of the Prosecution's Case,¹³ where the Defence highlighted [REDACTED].¹⁴ As the presentation of the Prosecution's case is scheduled to begin on 24 August 2015, it will not be possible to [REDACTED] before the testimony of the first Prosecution witness. As a result, the Defence would be prevented from [REDACTED] in identifying contradictions and/or lies in the narrative of Witnesses [REDACTED].

17. For all these reasons, the Defence submits that calling Witnesses [REDACTED] at the very beginning of the trial, as proposed by the Prosecution, would seriously prejudice the Defence, which would not be in a position to meaningfully challenge and test the evidence of [REDACTED] major witnesses, thereby violating the fundamental rights of the Accused to have adequate time to prepare for the defence and to effectively examine, or have examined, the witnesses against him.
18. In addition, it is important to emphasise that the inability of the Defence to adequately prepare for the cross-examination of Witnesses [REDACTED], if they are called at this time, would undermine the Court's truth seeking function as the Chamber would be presented with improperly untested evidence of limited probative value.

II. The security concerns put forward by the Prosecution do not justify calling Witnesses [REDACTED] at the very beginning of the trial

19. The Defence fully recognizes the need to ensure the protection of witnesses.
20. Nonetheless, the Court's legal framework makes it clear that any measures put in place to protect witnesses "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".¹⁵

¹³ "Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest with Public Annex A", ICC-01/04-02/06-541-Conf-Exp ("Defence Request for Postponement of the Prosecution's Case"). A public redacted version of the Defence Request for Postponement of the Prosecution's Case was filed on 7 April 2015.

¹⁴ [REDACTED].

¹⁵ In particular, *see* Article 68(1) of the Statute.

21. The Prosecution is thus incorrect in contending that the need to protect the security of witnesses outweighs any potential prejudice to the Accused.¹⁶
22. Indeed, in accordance with the principle of proportionality, if other measures causing lesser prejudice to the Accused suffice in meeting the aim of protecting witnesses, they must be applied.
23. Hence, even if the security concerns put forward by the Prosecution in respect of Witnesses [REDACTED] were considered to be objectively founded, the Defence submits that there are measures, other than calling them at the very beginning of the trial, that can achieve the Prosecution's aim, while being consistent with the rights of the Accused to a fair trial.
24. The Defence underscores in this regard that it is not in a position to assess the merits of the purported security incidents against the [REDACTED] witnesses and their families recently reported to the Prosecution, as the information concerning these incidents is entirely redacted.
25. Nevertheless, the Defence deems it necessary to bring the following matters to the attention of the Chamber.
26. First, it is significant that the Defence is informed for the first time that Witnesses [REDACTED] have allegedly been the object of [REDACTED].
27. Second, the Prosecution impermissibly relies on ongoing litigation as a basis to argue that Witnesses [REDACTED] must be called at the beginning of the trial due to security concerns. Indeed, in support of its Request, the Prosecution incorrectly provides the Chamber with [REDACTED]¹⁷ [REDACTED].

¹⁶ Prosecution Request, para.5.

¹⁷ [REDACTED].

28. In this regard, the Defence notes that to this day, it has refrained from [REDACTED]. The prejudice to the Accused resulting from [REDACTED]¹⁸ is immense.
29. Significantly, the Prosecution Request is but one example of the Prosecution's incorrect use of [REDACTED].
30. Third, in any event, [REDACTED].
31. Fourth, [REDACTED],¹⁹ [REDACTED]²⁰ and [REDACTED].²¹
32. [REDACTED],²² [REDACTED].
33. Accordingly, with the caveat that it possesses no information whatsoever regarding the recent purported security incidents, the Defence submits that establishing a link between Mr Ntaganda and these recent incidents – as the Prosecution attempts to do – is a major leap. In these circumstances – notwithstanding the fact that witnesses must be protected regardless of the source of their security concerns – it is that much more important to ensure that Mr Ntaganda is not prejudiced by these measures.
34. Lastly, although the Defence possesses very little information regarding the alleged [REDACTED] of Witnesses [REDACTED], the following observations appear both relevant and important in determining whether a need for calling these witnesses at the beginning of the trial (as a protective measure) exists.

A. Witness [REDACTED]

35. This witness is [REDACTED]. [REDACTED] is [REDACTED]. Significantly, based on information obtained [REDACTED], it appears that it is widely known [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

36. More importantly, [REDACTED].
37. In these circumstances, the Prosecution's submission that Witness [REDACTED] must be called at the beginning of the trial due to security concerns, is surprising.

B. Witness [REDACTED]

38. The Defence possesses no information about the whereabouts of this witness today. It is known, however, that he testified in the *Lubanga* case, during which he benefited from in-court protective measures. The Prosecution recently requested the same in-court protective measures for his testimony in this case.²³ To the best of the Defence's knowledge, this witness is not the object of other protective measures.²⁴

C. Witnesses [REDACTED]

39. [REDACTED].
40. In light of the above, even if the security concerns put forward by the Prosecution in respect of Witnesses [REDACTED] were considered to be objectively founded, the Defence respectfully submits that the Prosecution has failed to establish the urgent necessity – as a security/protective measure – to call these [REDACTED] witnesses at the very beginning of the trial.

CONCLUSION

41. Taking into consideration:
- a. the serious prejudice and violation of the fundamental right of Mr Ntaganda to a fair trial, resulting from calling Witnesses [REDACTED] at the very beginning of the trial;

²³ [REDACTED].

²⁴ [REDACTED].

- b. that the Prosecution has failed to show good cause within the meaning of Regulation 35 of the Regulations of the Court ("RoC"); and
- c. that the Prosecution has failed to establish that calling these [REDACTED] witnesses to testify at the very beginning of trial, is an urgent measure required with a view to ensuring their protection in accordance with Article 68(1) of the Statute;

the Defence respectfully submits that the Prosecution Request must be denied.

DEFENCE REQUEST IN THE ALTERNATIVE

SUBMISSIONS

- 42. Should the Chamber be inclined to grant the Prosecution Request, notwithstanding the Defence Response, the Defence respectfully requests a minimum delay of two months between the testimony of the first three witnesses appearing in the Prosecution's Proposed Revised List²⁵ and the testimony of Witnesses [REDACTED], as well as a minimum of one week preparation time between each of these [REDACTED] witnesses.
- 43. At paragraphs 8 to 18 above, the Defence established the major prejudice to Mr Ntaganda if the Prosecution is permitted to call Witnesses [REDACTED] at the very beginning of the trial, as proposed in the Prosecution Request.
- 44. Firstly, the Defence will not be in a position to effectively challenge the evidence provided by Witnesses [REDACTED] due to the lack of time: [REDACTED].
- 45. In light of the evidence expected to be adduced by these [REDACTED] witnesses – which the Defence submits will be shown to be self-serving narratives based on lies and false in many respects – the imperative necessity

²⁵ Namely, Witnesses [REDACTED].

- of being able to effectively cross-examine these witnesses, cannot be downplayed. In these circumstances where the Defence is unable to perform this essential task due to the lack of adequate time to prepare for trial, this constitutes not only a violation of the right of the Mr Ntaganda to examine the witnesses against him, but also a violation of Mr Ntaganda's right to a fair trial.
46. Secondly, the Court's truth seeking function will be undermined unless the evidence provided by Witnesses [REDACTED] can be thoroughly tested through effective cross-examination. Otherwise, the Chamber would be presented with one-sided evidence provided by witnesses who not only have an interest in providing false evidence, but who also [REDACTED]. Evidence elicited from such witnesses must be treated with the utmost vigilance, which is only possible if the conditions in place allow the Defence to properly test their evidence.
47. At the last status conference, the Defence made it clear – in all due respect for the Chamber's holding to the contrary – that although the beginning of the Prosecution's case is now scheduled for 24 August 2015, it will not be ready for trial.²⁶ The Defence added that it would nonetheless comply with the schedule set by the Chamber, meaning that it would do its best to be able to cross-examine the first witnesses on the Prosecution's list, despite the lack of time to prepare for trial.
48. In these circumstances, bearing in mind: (i) the work involved in preparing for the testimony of two major witnesses, namely Witnesses [REDACTED]; and (ii) the extent to which the Prosecution intends to rely on the evidence of Witnesses [REDACTED];²⁷ it is simply not possible for the Defence to be ready to cross-examine these witnesses by the time the presentation of the

²⁶ ICC-01/04-02/06-T-20-Conf-ENG, p.8, ll.18-25, p.9, ll.1-5; p.10,ll.7-13.

²⁷ [REDACTED]. In comparison, the first witness who would appear according to the Proposed Revised List, Witness [REDACTED], is cited [REDACTED] times.

Prosecution's case begins. What is more, considering that it is crucial [REDACTED], the Defence cannot be in a position to effectively cross-examine Witnesses [REDACTED] *immediately* following the testimony of Witnesses [REDACTED].

49. The Defence requires a minimum delay of two months between the first three witnesses and Witnesses [REDACTED] for the following purposes:
 - a. [REDACTED];
 - b. [REDACTED];
 - c. [REDACTED];
 - d. [REDACTED]; and
 - e. [REDACTED].
50. It is significant that these tasks, which would have to be performed as a matter of priority, would be accomplished simultaneously to the preparation of the cross-examination of all other Prosecution witnesses, as well as to all tasks the Defence did not have time to accomplish before trial, as set out in [REDACTED].²⁸
51. Consequently, the Defence additionally requests a one-week delay between the testimony of Witnesses [REDACTED], which is the minimum period of time necessary to take stock of the evidence adduced by one major witness with a view to adjusting the cross-examination of the next major witness.
52. In sum, taking into consideration the work to be performed to be ready to cross-examine Witnesses [REDACTED] at the beginning of the trial without compromising the Defence's overall and ongoing preparations for trial, the Defence respectfully submits that it is acting responsibly in requesting a

²⁸ [REDACTED].

minimum delay of two months, which is very reasonable in the circumstances.

CONFIDENTIALITY

53. Pursuant to Regulations 23*bis* (1) and (2) RoC, the Defence Response and Defence Request in the Alternative (“Defence Submissions”) are submitted on an *ex parte* basis – only available to the Chamber and Defence – as they provide [REDACTED].
54. As the Defence Submissions also refer to [REDACTED], the Defence will file a confidential *ex parte* version, only available to the Chamber, Prosecution and Defence.
55. A public redacted version will be filed separately.

RELIEF SOUGHT

56. In light of the above observations and arguments, the Defence respectfully requests the Chamber to:
 - a. **DENY** the Prosecution Request;
 - b. **ORDER** the Prosecution to proceed with the presentation of its case in accordance with the First List; or,

IN THE ALTERNATIVE,

 - c. **GRANT** the Defence Request in the Alternative;
 - d. **ORDER** that Witnesses [REDACTED] shall not testify before two months following the testimony of Witnesses [REDACTED]; and

- e. **ORDER** that the testimony of Witnesses [REDACTED] shall be separated by a one-week delay.

RESPECTFULLY SUBMITTED ON THIS 15TH DAY OF JUNE 2015

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands