

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 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 redacted, version of

**Decision on Prosecution request to change the order of appearance of the first
witnesses**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(6)(e) and (f), 67(1)(b) and 68(1) of the Rome Statute ('Statute'), Rule 134(1) of the Rules of Procedure and Evidence, and Regulation 43 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution request to change the order of appearance of the first witnesses'.

I. Procedural history and submissions

1. On 10 April 2015, as directed by the Chamber,¹ the Office of the Prosecutor ('Prosecution') filed a list indicating, in order, the first nine witnesses it intended to call ('First List').²
2. On 5 June 2015, the Prosecution filed a motion requesting the Chamber to authorise changes to the First List ('Request').³ In particular, the Prosecution seeks authorisation for [REDACTED] to be moved up to first place on the list, for [REDACTED] to be moved down to second and third place, and for [REDACTED] ('Witnesses') to be added to the list in place of crime-based witnesses [REDACTED].
3. On 15 June 2015, the Legal Representatives of Victims filed a joint response indicating they do not oppose the Request.⁴
4. Also on 15 June 2015, the defence team for Mr Ntaganda ('Defence') filed its response ('Response')⁵ whereby it requested that the Chamber reject the

¹ Order requesting submissions on the conduct of proceedings pursuant to Rule 140 of the Rules and on modalities of victims' participation at trial, 12 March 2015, ICC-01/04-02/06-507, para. 6(ii). *See also*, Email from Legal Officer of Chamber to Prosecution on 10 April 2015 at 10:23; and Transcript of Hearing on 2 June 2015, ICC-01/04-02/06-T-20-CONF-ENG, page 3, line 10 to page 4, line 7.

² Annex A to Prosecution's provision of the list of witnesses it intends to call until 16 July 2015, ICC-01/04-02/06-552.

³ Prosecution request to change the order of appearance of the first witnesses, ICC-01/04-02/06-630-Conf-Exp and confidential Annex A. A confidential redacted version (ICC-01/04-02/06-Conf-Red) and a public redacted version (ICC-01/04-02/06-630-Red2) were also filed on 8 June 2015.

⁴ Joint observations on the "Prosecution request to change the order of appearance of the first witnesses" (ICC-01/04-02/06-630-Red2), ICC-01/04-02/06-643-Conf. A public redacted version (ICC-01/04-02/06-643-Red) was filed on the same day.

Request or, in the alternative, order that a 2-month break shall precede the appearance of the Witnesses, each of whose testimony should be separated by a minimum of one week.⁶

5. Having been invited to do so by the Chamber,⁷ the Victims and Witnesses Unit ('VWU') filed its observations on the Request on 16 June 2015 ('VWU Observations').⁸
6. On 17 June 2015, the Prosecution filed further submissions ('Prosecution Further Submissions')⁹ whereby it opposed the alternative relief sought in the Response or, in the alternative, sought leave to reply to it.

II. Analysis

Preliminary remarks

7. As the Chamber has previously noted, in certain cases, when a responding party raises 'new and distinct issues of law', or the relief requested lies outside the normal scope of a response, the response may be treated as a request, entitling the other party to a full response pursuant to Regulation 24(1) of the Regulations.¹⁰ However, in the case at hand, the Chamber considers that the issues raised by the Defence are within the normal scope of a response to a request relating to the presentation of evidence, and therefore finds that the Prosecution was not entitled to a response, as of right. Moreover, the Chamber

⁵ 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, ICC-01/04-02/06-644-Conf-Exp, only available to the Chamber and the Defence. A confidential *ex parte* redacted version, available to the Chamber, Defence, Prosecution and VWU, (ICC-01/04-02/06-644-Conf-Exp-Red) and a public redacted version (ICC-01/04-02/06-644-Red2) were filed on the same day.

⁶ Response, ICC-01/04-02/06-644-Conf-Exp-Red, paras 2, 4 and 56.

⁷ Email from Legal Officer of Chamber to VWU on 12 June 2015 at 17:46.

⁸ Victims and Witnesses Unit's observations on the "Prosecution request to change the order of appearance of the first witnesses", ICC-01/04-02/06-630-Conf-Exp, notified on 17 June 2015, ICC-01/04-02/06-653-Conf-Exp. A confidential redacted version was filed on 17 June 2015 (ICC-01/04-02/06-653-Conf-Red). A corrigendum was filed on 18 June 2015 (ICC-01/04-02/06-653-Conf-Exp-Corr).

⁹ Prosecution's response to the Defence request in "Response on behalf of Mr Ntaganda opposing the Prosecution's request to change the order of appearance of its witnesses and Requests in the alternative for a delay following the hearing of the first three witnesses" or, in the alternative, leave to reply, ICC-01/04-02/06-655.

¹⁰ Decision on Prosecution request for authorisation of non-disclosure of five documents, ICC-01/04-02/06-637, para. 5.

does not find that it would be assisted by a reply to the Response and hence rejects the Prosecution's alternative request. The submissions made in the Prosecution Further Submissions are therefore dismissed.

Decision on the Request

8. Turning now to the merits of the Request, the Chamber has taken into consideration the parties' submissions, VWU Observations, as well as other information placed before the Chamber related to witness' security.¹¹ The Chamber is satisfied that potential security concerns exist in relation to the Witnesses and therefore considers that it is warranted to modify the order of witnesses, as well as the schedule for the presentation of evidence.¹² However, mindful of the protective measures already in place, as well as the ongoing assessment and monitoring of their security situation, the Chamber considers that a partial granting of the relief sought by the Prosecution is sufficient to assist in addressing these concerns.
9. The Chamber has taken note of the cumulative circumstances of the Defence, as well as its submissions as to the time needed for it to 'be in a position to effectively challenge the evidence provided by' the Witnesses.¹³ In particular, the Chamber has taken note of the concrete preparatory steps set out in the Defence's submissions, including the required four investigative missions.¹⁴
10. As to the order in which the witnesses are to be called, the Chamber notes that the Defence did not object to [REDACTED] being heard as the first three witnesses.¹⁵ The Chamber finds it appropriate that they be called, in that order, during the first evidentiary block scheduled to start on 24 August 2015. Based

¹¹ See *e.g.* Victims and Witnesses Unit's report on potential interferences with some Prosecution witnesses and other individuals, 9 June 2015, ICC-01/04-02/06-634-Conf-Exp with *ex parte* annexes; and [REDACTED].

¹² The Chamber scheduled the first evidentiary block for 24 August to 25 September 2015 and the second evidentiary block for 5 October to 6 November 2015 (Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 15).

¹³ Response, ICC-01/04-02/06-644-Conf-Exp, paras 44 and 52.

¹⁴ Response, ICC-01/04-02/06-644-Conf-Exp, para. 49 (a) and (b).

¹⁵ Response, ICC-01/04-02/06-644-Conf-Exp, para. 6.

on the time-estimate provided by the Prosecution,¹⁶ the Chamber expects these three examinations to be completed at the latest by 8 September 2015. The Chamber, to facilitate additional preparation time for the Defence, in particular, in advance of the Witnesses, decides to shorten the first block and that it shall end after the testimony of [REDACTED].

11. Having noted the Defence's submissions that it would need a minimum of two months to prepare for the examination of the four Witnesses after the testimony of [REDACTED],¹⁷ the Chamber finds it appropriate to postpone the second evidentiary block, initially scheduled for 5 October 2015, to 19 October 2015, which shall then run for five weeks until 20 November 2015. The Chamber notes that this schedule provides the Defence with considerably more notice of the witnesses the Prosecution intends to call for the second block than will ordinarily be the case.¹⁸ Moreover, it creates an approximate six-week break between the end of the first evidentiary block and the start of the rescheduled second block. In the Chamber's view, this break will provide the Defence with adequate time to prepare for the appearance of two of the Witnesses during the second block.
12. The Chamber therefore authorises the addition of any two of the Witnesses to the list of witnesses the Prosecution intends to call first. The Prosecution is instructed to file an amended list of witnesses to be called during the first two evidentiary blocks, providing for the appearance of: 1) [REDACTED]; and 2) any two of the Witnesses plus a selected number of other witnesses from those who had been included on the First List.

¹⁶ Annex B to Prosecution's Lists of Witnesses, Summaries, and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf-AnxB-Red.

¹⁷ Response, ICC-01/04-02/06-644-Conf-Exp, paras 52 and 56 (d).

¹⁸ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 16. It is additionally noted that the Defence will have had notice of seven of the first nine witnesses since 10 April 2015, ICC-01/04-02/06-552-Conf-AnxA.

13. As for the remaining two Witnesses, the Chamber considers that the period between the second block and the third block (20 November 2015 – 4 January 2016) allows the Defence sufficient time to adequately prepare for their testimony. Therefore, in order to ensure the fairness of the proceedings against Mr Ntaganda, the Chamber decides that the other two Witnesses may only be called after the winter recess.
14. In the Chamber's view, this schedule strikes the right balance between, on the one hand, the right of the accused to have adequate time to prepare for trial¹⁹ and, on the other hand, the protection of the safety and well-being of witnesses.²⁰

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the Prosecution Further Submissions and **REJECTS** the alternative request therein;

DIRECTS modifications to the order of appearance of witnesses in accordance with paragraphs 10 and 12;

AMENDS the initial schedule for the first and second evidentiary block as provided for in paragraphs 10 and 11;

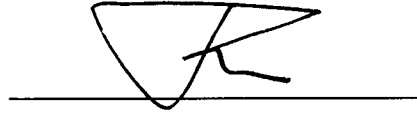
ORDERS the Prosecution to file an amended list of the witnesses to be called during the first and second evidentiary blocks, in accordance with paragraph 12, by 24 June 2015; and

REJECTS all other requests.

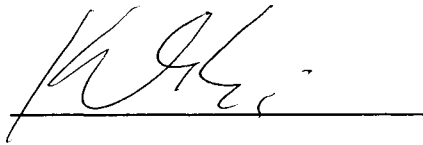
¹⁹ Article 67(1)(b) of the Statute.

²⁰ Article 68(1) of the Statute.

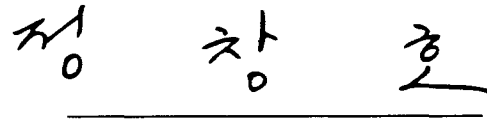
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 22 June 2015

At The Hague, The Netherlands