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

Date: **29 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 "Corrected version of 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial', 26 June 2015, ICC-01/04-02/06-677-Conf-Exp"

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: (i) the “*Order scheduling the opening statements*” issued by Trial Chamber VI (“Chamber”) on 16 June 2015 (“Scheduling Order”),¹ and (ii) the confidential redacted version of the “*Decision on Prosecution request to change the order of appearance of the first witnesses*” rendered by the Chamber on 22 June 2015 (“Decision on the Order of Appearance of the First Witnesses”),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial

“Defence Urgent Motion”

OVERVIEW

1. Prevailing circumstances make it impossible to ensure that the trial proceedings against Mr Ntaganda – which are scheduled to open on 7 July 2015 – will be fair and conducted with full respect for his fundamental rights.
2. Firstly, [REDACTED] the Defence is no longer in a position to make an opening statement setting out at this time the case for the defence. Nor is the Defence able to be ready to effectively cross-examine the first witnesses the Prosecution intends to call as of 24 August 2015.
3. Secondly, [REDACTED]³ have now reached the threshold where they place the Defence in an untenable position, as: (i) the Defence does not have the necessary resources and plainly lacks the necessary time to effectively address [REDACTED] as well as to prepare for opening statements and the presentation of the Prosecution’s case; (ii) the endless redactions applied to [REDACTED]; (iii) likewise, [REDACTED] impedes the ability of the Defence to articulate the case for the defence during opening statements, including taking a position on the probative value to be attached to the testimony of

¹ ICC-01/04-02/06-649.

² ICC-01/04-02/06-661-Conf-Red.

³ [REDACTED].

Prosecution witnesses; (iv) [REDACTED] similarly makes it impossible for the Defence to prepare for the cross-examination of the first witnesses the Prosecution intends to call; and (v) the Defence is unable to adopt and implement a defence theory unless [REDACTED] before the beginning of trial.

4. Lastly, in addition to the prevailing circumstances described above, the combined effect of which makes it impossible to ensure that the trial proceedings against Mr Ntaganda will be fair, proceeding with the hearing of opening statements on 7 and 8 July 2015 and the testimony of the first Prosecution witness on 24 August 2015 [REDACTED] violates the right of Mr Ntaganda to a fair hearing conducted impartially.
5. Indeed, [REDACTED], starting the trial in these conditions would lead a reasonable observer, properly informed, to reasonably apprehend bias on the part of the Chamber.
6. This makes it imperative for the Chamber to adjourn the proceedings until [REDACTED].

SUBMISSIONS

I. The drastic impact of [REDACTED]

7. [REDACTED].⁴ [REDACTED].⁵

8. [REDACTED].

A. The impact of [REDACTED]

9. [REDACTED].

10. [REDACTED].

⁴ [REDACTED].

⁵ [REDACTED].

11. [REDACTED].
12. [REDACTED].
13. [REDACTED].
14. Consequently, it is evident that the Defence is no longer in a position to make an opening statement on 7 and 8 July 2015, taking into consideration: (i) [REDACTED]; and more importantly (ii) the impossibility for the Defence to respond to the Prosecution's opening statement and to articulate the case for the defence on [REDACTED].
15. Likewise, it is plainly not possible for the Defence – [REDACTED] – to prepare for and to conduct the cross-examination of the first witnesses the Prosecution intends to call, starting 24 August 2015. Indeed, preparing for cross-examination involves not only analysing the material disclosed by the Prosecution, but also – and more importantly – comparing the same with the result of Defence investigations.
16. In such circumstances, it is inevitable to adjourn the proceedings until [REDACTED].

B. The impact of the Defence [REDACTED]

17. [REDACTED].
18. [REDACTED],⁶ [REDACTED].⁷
19. [REDACTED].
20. [REDACTED].
21. [REDACTED].
22. [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

23. Based on past experience, [REDACTED].
24. In these circumstances, maintaining the current schedule – opening statements on 7 and 8 July 2015 and beginning of the Prosecution’s case on 24 August 2015 – would clearly violate the rights of Mr Ntaganda to have adequate time and facilities for the preparation of his defence. Consequently, it is inevitable to adjourn the proceedings at least until [REDACTED].

II. The dire consequences of [REDACTED]

25. [REDACTED].
26. [REDACTED].
27. [REDACTED].
28. [REDACTED],⁸ [REDACTED].
29. [REDACTED].⁹
- A. The serious prejudice resulting from the Defence’s critical lack of time and resources to [REDACTED]**
30. [REDACTED].¹⁰
31. [REDACTED],¹¹ [REDACTED].
32. [REDACTED].¹²
33. [REDACTED].
34. [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

35. Evidently, the Defence is severely prejudiced, having to simultaneously prepare for opening statements and the beginning of the Prosecution's case, [REDACTED].

36. In these circumstances – which highlight a violation of the right of Mr Ntaganda to have the adequate time and facilities to prepare for trial – it is necessary to adjourn the proceedings, at least [REDACTED].

B. The serious prejudice resulting from [REDACTED]

37. [REDACTED].¹³

38. [REDACTED].

39. [REDACTED].

40. [REDACTED].

41. [REDACTED].

C. The serious prejudice resulting from [REDACTED] which hampers the Defence's ability to articulate the case for the defence during opening statements

42. A direct link exists between [REDACTED] and both the narrative and the credibility of at least [REDACTED] witnesses the Prosecution intends to rely upon extensively in support of its case, namely, [REDACTED].

43. As evidenced by its Pre-Trial Brief,¹⁴ the Prosecution will necessarily highlight as part of its opening statement the evidence expected to be provided by these witnesses as well as the importance it attaches to the same.

44. However, due to [REDACTED] – which has precluded the Defence from assessing the credibility of these witnesses – the Defence is not able to take a position on the probative value, if any, which can be attached to the testimony

¹³ [REDACTED].

¹⁴ [REDACTED].

of these witnesses, with the view to responding to the Prosecution's opening statement and alerting the Chamber on the details of these witnesses' narrative, on which the Defence believes it should focus.

D. The serious prejudice resulting from [REDACTED] which impedes the Defence's ability to prepare for cross-examination of the Prosecution witnesses

45. [REDACTED].

46. [REDACTED].

47. [REDACTED], the Defence is unable to effectively prepare for the cross-examination of these witnesses.

48. [REDACTED]. Such a position would be inconsistent with the right of the Accused to a fair trial. [REDACTED].

49. [REDACTED].

50. To provide but one hypothetical example, any and all information which could be of assistance in demonstrating that [REDACTED]¹⁵ [REDACTED], must be disclosed to the Defence for the purpose of preparing its cross-examination of this witness.

51. Requesting the Defence to proceed with the cross-examination of Prosecution witnesses without [REDACTED] would amount to a violation of Mr Ntaganda's right to examine or have examined witnesses against him.

52. This is particularly the position in which the Defence finds itself today, whereas the Defence has not been provided with [REDACTED] necessary to prepare for cross-examination of [REDACTED].

53. [REDACTED].

¹⁵ [REDACTED].

E. The inability of the Defence to adopt and implement a defence theory unless [REDACTED]

54. Defence preparations for trial have been plagued by [REDACTED].

55. [REDACTED].

56. [REDACTED].

57. [REDACTED]¹⁶ – the Defence is unable to finalise the shaping of the case for the defence.

58. Consequently, in addition to being able to respond to the Prosecution's opening statement, as explained above, the Defence is no longer in a position to deliver an opening statement highlighting for the benefit of the Chamber the case for the defence, as well as to cross-examine the first witnesses the Prosecution intends to call on 24 August 2015.

59. In these circumstances, it would be unfair to proceed with opening statements and the commencement of the Prosecution's case. [REDACTED].

III. Starting the trial without [REDACTED] would lead to a reasonable apprehension of bias

60. [REDACTED],¹⁷ the Chamber held that [REDACTED] could not call into question the fairness or impartiality of the proceedings, as the Chamber will, "at the appropriate juncture of proceedings, evaluate relevant evidence in support of the charges brought against the accused and is capable of disregarding any irrelevant information".¹⁸

61. The present situation is wholly different from the matters raised by the Defence at the time, [REDACTED].

62. [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

63. While most of the information [REDACTED] has not been disclosed to the Defence, it was however communicated to the Chamber.
64. On this basis, the Chamber found [REDACTED].
65. [REDACTED] despite the *quasi* absence of [REDACTED] information disclosed to the Defence and, more importantly, without providing an opportunity to respond [REDACTED].
66. [REDACTED].
67. While the Chamber will evaluate the probative value of the evidence provided [REDACTED] at the appropriate juncture of the proceedings, it will nonetheless have to assess the credibility [REDACTED].
68. Consequently, proceeding with [REDACTED], would lead a reasonable observer, properly informed, to reasonably apprehend bias.
69. ‘Bias’ has been helpfully defined as being: “an attitude of mind which prevents the judge from making an objective determination of the issues he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. [...] Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge toward a particular view of the evidence or issues before him”.¹⁹
70. The European Court of Human Rights has made it clear in respect of the repercussions for the judicial process that “what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings”.²⁰

¹⁹ *In re Medicaments and Related Classes of Goods* (En. Court of Appeal), [2001] 1 W.L.R. 700, 711.

²⁰ *Daktaras v Lithuania*, App No 42095/98, 10 October 2000, para.32.

71. In this regard, the Defence is mindful that a reasonable observer is an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold.
72. Nevertheless, considering: [REDACTED], the Defence respectfully submits that the decision to proceed with opening statements and the Prosecution's case [REDACTED], would lead a reasonable informed observer to reasonably apprehend bias on the part of the Chamber.
73. Consequently, it is imperative for the Chamber to adjourn the proceedings until [REDACTED].

CONFIDENTIALITY

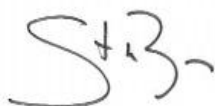
74. Pursuant to Regulation 23bis (1) RoC, this Defence Urgent Motion is submitted on an *ex parte* basis – only available to the Chamber and the Defence – as it provides detailed confidential and sensitive information directly related to the conduct of investigations by the Defence. Although the Defence Urgent Motion is submitted *via* the Registry, it is not to be communicated to the Victims and Witnesses Unit ("VWU").
75. The Defence will separately file: (i) an *ex parte* confidential redacted version of this Defence Urgent Motion – only available to the Chamber, Prosecution and Defence; and (ii) a confidential redacted version of the same.

RELIEF SOUGHT

76. In light of the above submissions, and pursuant to Article 64(6)(f) of the Statute, the Defence respectfully requests the Chamber to:

IMMEDIATELY ADJOURN the proceedings until [REDACTED].

RESPECTFULLY SUBMITTED ON THIS 29TH DAY OF JUNE 2015

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands