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No.: ICC-01/04-02/06
Date: **1 February 2016**

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 “Application on behalf of Mr Ntaganda seeking reconsideration of ‘Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks’”

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 *“Request on behalf of Mr Ntaganda seeking Trial Chamber VI to modify the schedule for evidentiary blocks 3 and 4”* submitted by Counsel representing Mr Ntaganda (“Defence”) on 25 January 2016 (“Defence Request for Schedule Modifications”);¹ (ii) the *“Prosecution’s response to the ‘Request on behalf of Mr Ntaganda seeking Trial Chamber VI to modify the schedule for evidentiary blocks 3 and 4’* submitted by the Office of the Prosecutor (“Prosecution”) on 27 January 2016 (“Prosecution Response”);² and (iii) the *“Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks”* issued by Trial Chamber VI (“Chamber”) on 28 January 2016 (“Impugned Decision”),³ the Defence hereby submits this:

Application on behalf of Mr Ntaganda seeking reconsideration of “Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks”

“Defence Application”

INTRODUCTION

1. The Defence respectfully submits that the Chamber made a clear error of reasoning in adjudicating the Defence Request for Schedule Modifications without the benefit of Defence submissions on: (i) its preparations for cross-examination of forthcoming Prosecution witnesses, in particular Witnesses [REDACTED] and [REDACTED]; and (ii) the impact of the Registry’s decision granting limited additional resources to replace Associate Counsel in his absence, two issues which were identified in the *“Defence request seeking leave to reply to Prosecution’s response to Defence request seeking modifications to evidentiary blocks 3 and 4”* (“Defence Request to Reply”).⁴

¹ ICC-01/04-02/06-1102-Conf. A public redacted version of the Defence Request for Schedule Modifications was submitted on the same day: ICC-01/04-02/06-1102-Red.

² ICC-01/04-02/06-1112-Conf-Exp. The Defence was notified of a confidential redacted version of the Prosecution Response on the same day: ICC-01/04-02/06-1112-Conf-Red.

³ ICC-01/04-02/06-1115-Conf. A public redacted version of the Impugned Decision was issued on the same day: ICC-01/04-02/06-1115-Red.

⁴ Email from Me Stéphane Bourgon to the Chamber, 27 January 2016, 22:47.

2. The Defence further respectfully submits that the Chamber's decision to proceed with the testimony of Witness [REDACTED] only two calendar days after completion of the testimony of Witness [REDACTED] is unreasonable and, as such, amounts to an abuse of the Chamber's discretion.
3. Given the nature of the interests at stake – namely, the fundamental rights of the Accused to have adequate time and facilities to prepare for his defence as well as to benefit from effective representation – the Defence submits that reconsideration of the Impugned Decision, insofar as it: (i) maintains the testimony of either Witness [REDACTED] or Witness [REDACTED] during the current evidentiary block; and (ii) provides for no more than two calendar days between the testimony of Witness [REDACTED] and that of Witness P-[REDACTED], is the only available avenue to prevent an injustice in the present exceptional circumstances.

BACKGROUND

4. The Defence incorporates by reference the procedural background as set out in paragraphs 1 to 6 of the Impugned Decision.

SUBMISSIONS

5. As previously held by the Chamber, “reconsideration is ‘exceptional’, and ‘should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice’”.⁵
- I. **The Chamber's decision to maintain the testimony of either Witness [REDACTED] or Witness [REDACTED] in the current evidentiary block results from a clear error of reasoning**
6. The Chamber granted the Defence Request for Schedule Modifications in part, allowing for pauses between the testimony of Witnesses [REDACTED], [REDACTED] and [REDACTED], as requested by the Defence, but declined to

⁵ “Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039”, 10 December 2015, ICC-01/04-02/06-1049-Conf, para.11.

- postpone the testimony of both Witnesses [REDACTED] and [REDACTED] until the fourth evidentiary block.
7. The Defence respectfully submits that the Chamber's decision to maintain the testimony of either [REDACTED] or [REDACTED] in the current evidentiary block rests on a clear error of reasoning.
 8. The Defence observes that the Chamber's refusal to postpone the testimony of both Witnesses [REDACTED] and [REDACTED] until the following evidentiary block is based on: (i) the Chamber's finding that the Defence has not 'adequately explained' why the absence of Associate Counsel would necessitate the requested postponement;⁶ and (ii) the Chamber's assessment of the extent of Defence preparations for examination of these two witnesses.⁷
 9. Significantly, in its Request to Reply, the Defence sought leave to provide further submissions *in particular* on the state of its preparations for cross-examination "if only to ensure that the Chamber possesses all relevant information when adjudicating the [Defence Request for Schedule Modifications]".⁸
 10. The Defence acknowledges that under the Court's legal framework, a party is not entitled as of right to reply to submissions made in response to its initial request. However, the Defence submits that there are circumstances which

⁶ Impugned Decision, para.9.

⁷ Impugned Decision, para.10. With respect to Witness [REDACTED], the Chamber found that "any additional preparation required for examination of Witness [REDACTED] should be extremely limited, given that this witness was originally scheduled to testify during the second evidentiary block and that [REDACTED]. Both parties should therefore be at a very advanced stage of their preparations. The Chamber additionally understands that it was Lead Counsel for the Defence who had prepared for the examination of Witness [REDACTED]." As regards Witness [REDACTED], the Chamber considered that "the Defence would potentially have a full five days for final preparations after the conclusion of Witness [REDACTED]'s testimony, and before it would be necessary to start Witness [REDACTED]'s testimony. While the Chamber has had due regard to the voluminous materials associated with this witness, it considers that this should nonetheless provide adequate time for detailed preparations by Lead Counsel, noting, in particular, the preparations which should have already been conducted and the support which should be available from other members of the Defence team."

⁸ Defence Request to Reply.

- strongly militate in favour of the Chamber seeking further submissions from the moving party before rendering its decision, especially when the decision to be rendered is likely to have an impact on the fundamental rights of the Accused, the respect of which the Chamber has the statutory duty to ensure.⁹
11. In rejecting the Defence Request to Reply,¹⁰ the Chamber deprived itself of necessary submissions on the key issue of the extent of Defence preparations for cross-examination of upcoming Prosecution witnesses, which ultimately formed the basis for denying the postponement of both Witnesses [REDACTED] and [REDACTED] until the fourth evidentiary block. Whether the Defence is able, in the absence of Associate Counsel, to effectively cross-examine either Witness [REDACTED] or Witness [REDACTED] as scheduled, is an issue that squarely falls within the ambit of Mr Ntaganda's fundamental rights to have examined witnesses against him and to have adequate time and facilities to prepare his defence.
 12. Even if there was no automatic right to reply to the Prosecution Response, the Chamber's rejection of the Defence Request to Reply amounts to a clear error of reasoning when contrasting it with the approach followed by the Chamber in *inter alia* two previous decisions, where the Chamber sought *proprio motu* further submissions on matters falling within its statutory duties, despite failure on the part of the Prosecution to adequately substantiate its claims.
 13. In its "*Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103*",¹¹ the Chamber found 'appropriate', in spite of the Defence's submission that Witness P-0103's death was not satisfactorily established, to invite the

⁹ Article 64(2) of the Statute.

¹⁰ Impugned Decision, para.6, referring to T-58-ENG RT, p.5, ll.7-10.

¹¹ 20 November 2015, ICC-01/04-02/06-1029 ("*Decision on Admission of Prior Recorded Testimony of Witnesses P-0022, P-0041 and P-0103*").

Prosecution to further substantiate its allegation that Witness P-0103 died subsequent to providing a witness statement.¹²

14. Likewise, in its “[REDACTED]”,¹³ the Chamber – acting *proprio motu* pursuant to its ‘affirmative’ duty to protect the safety of witnesses and their family – has allowed the Prosecution to cure its failure to adequately substantiate its submission that [REDACTED], by providing the Prosecution with a ‘further opportunity’ to submit information in support of its claim.¹⁴
15. Even assuming *arguendo* that the Defence has not ‘adequately explained’ why the absence of Associate Counsel would require postponing the testimony of both Witnesses [REDACTED] and [REDACTED], no compelling reasons justify why the Chamber did not seek further submissions from the Defence on the fundamental issue of preparations for trial whereas it did so from the Prosecution in respect of matters related to the protection of witnesses.
16. In the instant case, had leave to reply been granted, the Defence would have underscored that:
 - a. Contrary to the Prosecution’s contention, Lead Counsel was not prepared as early as [REDACTED] to cross-examine Witness [REDACTED], as evidenced by the fact that the Defence requested [REDACTED],¹⁵ which the Chamber rejected. In fact, it does not necessarily follow from mere presence in the courtroom that Counsel is ‘ready’ to cross-examine a witness in the sense of effectively examining the witness on behalf of the Accused;

¹² Decision on Admission of Prior Recorded Testimony of Witnesses P-0022, P-0041 and P-0103, paras.41-43.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

- b. Further to material recently disclosed by the Prosecution in relation to Witness [REDACTED]'s purported [REDACTED],¹⁶ new and significant investigation leads have been identified, one of which in particular [REDACTED].¹⁷ Proceeding immediately with the testimony of Witnesses [REDACTED] following the testimonies of Witnesses [REDACTED], [REDACTED] and [REDACTED] – even assuming a four-day pause, including two week-end days – would simply not allow Lead Counsel to pursue the newly identified investigation leads; and
- c. Associate Counsel's preparations for Witness [REDACTED] cannot simply be transferred over the phone or by email, as suggested by the Prosecution.¹⁸ Preparing for cross-examination of a witness requires the cross-examining Counsel to read *himself* all the witness-related material. While Lead Counsel may rely on assistance and support from other members of the Defence team who have been assisting Associate Counsel in preparing for Witness [REDACTED], such support cannot replace the minimum necessary preparations which must be accomplished by the cross-examining lawyer. Proceeding immediately with the testimony of Witnesses [REDACTED] following the testimonies of Witnesses [REDACTED], [REDACTED] and [REDACTED] – even assuming a four-day pause, including two week-end days – would simply not allow Lead Counsel to properly prepare for cross-examination of this witness.

- 17. Had leave to reply been granted, the Defence would also have brought to the Chamber's attention the related issue of resources.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ Prosecution Response, para.17.

18. It would have informed the Chamber that on 27 January 2016 – *i.e.* after the submission of the Defence Request for Schedule Modification – the Registry declined to allocate to the Defence the necessary funds to secure the full-time services of an Associate Counsel during the absence of Me Boutin to: (i) perform the work normally accomplished by legal assistants for the specific purpose of reassigning them solely to the preparation of Witnesses [REDACTED] and [REDACTED]; and (ii) to familiarize himself or herself with the facts of the case with a view to being able to represent the interests of Mr Ntaganda at the beginning of the fourth evidentiary block in the event that Me Boutin is not able to resume his duties as Associate Counsel as a result of [REDACTED].¹⁹
19. The Registry rather granted additional resources for one month at the amount of *half* of the monthly fees at the Associate Counsel level. The Defence would thus have underscored that the insufficiency of the additional resources allocated by the Registry results in an additional burden put on Lead Counsel and the other members of the Defence team, a burden which would be compounded by proceeding with the testimony of both Witnesses [REDACTED] and [REDACTED].
20. Provided with these further submissions, no reasonable trier of fact could conclude that “any additional preparation required for examination of Witness [REDACTED] should be extremely limited”²⁰ or that a potential of five full days after the conclusion of Witness [REDACTED]’s testimony “should nonetheless provide adequate time for detailed preparations by Lead Counsel [for Witness [REDACTED]], noting, in particular, the preparations

¹⁹ As mentioned in the Defence Request for Schedule Modifications (para.16), new Associate Counsel would require [REDACTED] to be ready to represent the Accused during the testimony of any Prosecution witnesses. In these circumstances, the Defence notes the likelihood, in the event that Me Boutin does not come back and that the Registry’s decision on additional resources is upheld, that seeking a further delay for the fourth evidentiary block might be necessary.

²⁰ Impugned Decision, para.10.

which should have already been conducted and the support which should be available from other members of the Defence team”.²¹

II. The Chamber’s decision to provide for only two calendar days between the testimony of Witness [REDACTED] and that of Witness [REDACTED] is unreasonable and, as such, amounts to an abuse of the Chamber’s discretion

21. The Defence acknowledges that the revised schedule adopted by the Chamber in the Impugned Decision for the testimony of Witnesses [REDACTED] (starting on 8 February 2016, until approximately 12 February 2016) and [REDACTED] (commencing on 15 February 2016, until approximately 17 February 2016) mirrors that proposed by the Defence in its Request for Schedule Modifications.²²
22. However, had leave to reply been granted, the Defence would have explained that the proposed two-day break between the respective testimonies of Witnesses [REDACTED] and [REDACTED] results from an oversight. It would have submitted that a minimum of three working days is required between the testimony of these two witnesses to enable Lead Counsel to adequately prepare for cross-examination.
23. In this regard, it is noteworthy that the Defence stressed in its Request for Schedule Modifications that Lead Counsel is unable to proceed with all the witnesses scheduled to testify in the third evidentiary block “without the benefit of *significant* delays between each witness”.²³ The two days provided for in the Impugned Decision – which, in fact, correspond to a week-end – can certainly not be regarded as a ‘significant’ delay enabling Lead Counsel to prepare adequately for cross-examination of Witness [REDACTED].
24. The Defence emphasises that resting days are an integral part of an adequate preparation for examination of witnesses and that the schedule as set out in

²¹ Impugned Decision, para.10.

²² Defence Request for Schedule Modifications, paras.23, 27.

²³ Defence Request for Schedule Modifications, para.13 (emphasis added).

the Impugned Decision will result in the Defence team members working on a continuous basis for more than thirty days, which, it is respectfully submitted, is unreasonable in the context of a trial of this magnitude and expected duration.

25. In such circumstances, the Defence respectfully submits that proceeding with the testimonies of Witnesses [REDACTED] and [REDACTED] as scheduled in the Impugned Decision, is unreasonable and, as such, amounts to an abuse of the Chamber's discretion.

III. As alternative solution in the interests of justice, the Defence proposes that the testimony of Witness [REDACTED] be postponed until the fourth evidentiary block

26. The Defence notes that the revised schedule set out in the Impugned Decision further fails to provide for any flexibility should any unforeseen circumstances arise or should the Prosecution request additional time for examination-in-chief, unless breaks between the testimony of scheduled witnesses are reduced, which would further adversely impact the Defence's ability to prepare for cross-examination in the present circumstances.
27. Taking into consideration: (i) the fact that Witnesses [REDACTED] and [REDACTED] have already arrived in The Hague;²⁴ and (ii) the Prosecution's proposal to postpone the testimony of Witness [REDACTED] until the fourth evidentiary block,²⁵ and bearing in mind the need to provide the Defence with significant delays (of at least three working days) between the testimony of each witness while ensuring that the schedule provides for enough flexibility should unforeseen circumstances arise, the Defence respectfully proposes that the schedule for the third evidentiary block be modified as follows:

²⁴ Prosecution Response, para.3.

²⁵ Prosecution Response, para.6.

- a. Testimony of Witness [REDACTED], commencing on 9 February 2016 until approximately 15 February 2016;²⁶ and
- b. Testimony of either Witness [REDACTED] or Witness [REDACTED], commencing on 19 February 2016 until approximately until 25 February 2016.

28. This proposed schedule would allow Lead Counsel to *inter alia* [REDACTED].

CONFIDENTIALITY

29. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Application is submitted as confidential, as it addresses matters related to the scheduling of witnesses, the strategy of the Defence and [REDACTED] raised by a witness. The Defence will submit a public redacted version of its Application separately.

RELIEF SOUGHT

30. In light of the above submissions, the Defence respectfully requests the Chamber to:

RECONSIDER the Impugned Decision; and

REVISE the schedule for the remaining of the third evidentiary block as follows:

- a. Testimony of Witness [REDACTED], commencing on 9 February 2016 until approximately 15 February 2016; and
- b. Testimony of either Witness [REDACTED] or Witness [REDACTED], commencing on 19 February 2016 until approximately until 25 February 2016.

²⁶ This proposed schedule must not be understood as an acknowledgement of the Defence being ready to proceed with Witness [REDACTED]. It simply acknowledges that Witness [REDACTED] is already in The Hague.

RESPECTFULLY SUBMITTED ON THIS 1ST DAY OF FEBRUARY 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands