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

Date: 17 March 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 “Request on behalf of Mr Ntaganda seeking Trial Chamber VI to order the Prosecution to modify its ‘Forthcoming Witness List’ for the 4th evidentiary block”, 7 March 2016, ICC-01/04-02/06-1197-Conf

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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**Unrepresented Applicants
(Participation / Reparation)**

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Section**

Further to consultations and exchange of electronic correspondence between the Prosecution and the Defence, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Request on behalf of Mr Ntaganda seeking Trial Chamber VI to order the Prosecution to modify its ‘Forthcoming Witness List’ for the 4th evidentiary block

“Defence Request”

INTRODUCTION

1. Further to consultations and exchange of correspondence between the Prosecution and the Defence, the Prosecution has agreed to replace one of the witnesses it intended to call during the 4th evidentiary block, namely Prosecution Witness [REDACTED], by another witness whose examination in chief is expected to require the same amount of time (i.e. 10 hours), namely Prosecution Witness [REDACTED].
2. However, the Parties have been unable to reach an agreement concerning the other witnesses the Prosecution intends to call during the 4th evidentiary block and the Prosecution has now submitted its ‘Forthcoming Witness List’ for the 4th evidentiary block pursuant to paragraph 16 of the Decision on the conduct of proceedings.¹
3. For the reasons set out below and with a view to ensuring full respect for Mr Ntaganda’s rights to have adequate time and facilities for the preparation of his defence and to effectively have examined the witnesses against him, the Defence respectfully submits that it is necessary for the Trial Chamber (“Chamber”) to order the Prosecution to: (i) call one witness less than the number of witnesses it intends to call; and (ii) modify the order in which it intends to call its witnesses to ensure that Prosecution witnesses [REDACTED] and [REDACTED] do not testify one after the other.

¹ ICC-01/04-02/06-619.

4. The Defence underscores that the modifications sought are requested on an exceptional basis as a result of the unexpected requirement to secure the services of a new Defence Associate Counsel and that all measures are being taken to ensure that the situation returns to normal for the next evidentiary block.
5. In this regard, the Defence takes this opportunity to submit a joint proposal, Prosecution and Defence, regarding the scheduling of the upcoming 5th and 6th evidentiary blocks.

BACKGROUND

6. On 25 February 2016, the Defence confirmed by way of electronic correspondence addressed to the Chamber that Defence Associate Counsel, Me Luc Boutin, would be leaving the Defence team of Mr Ntaganda.
7. In the same correspondence the Defence mentioned the possibility for the Defence Associate Counsel to be employed on a part time basis until the end of the 4th evidentiary block, which could possibly allow him to cross-examine one or two witnesses during that block.
8. The Defence also mentioned that a new Associate Defence Counsel would be selected as soon as possible with a view to ensuring that he/she could be able to cross-examine Prosecution witnesses at the beginning of the 5th evidentiary block. In this regard, the Defence underscored that a minimum period of three months was required to allow the new Defence Associate Counsel who will be selected to familiarize himself / herself sufficiently with the facts of the case to be able cross-examine Prosecution witnesses. Accordingly, the Defence suggested that the next evidentiary block should begin on 30 May 2016 at the earliest.
9. On 4 March 2016, the Prosecution submitted its 'Forthcoming Witness List' for the 4th evidentiary block ("Prosecution List of Witnesses"). Pursuant to the

Prosecution List of Witnesses, seven witnesses are expected to testify during the 4th evidentiary block, including two so-called insiders whose examination in chief is expected to last ten hours and one expert witness who is expected to testify by video link during four 'two-hour' evenings from 18 to 21 April 2016, while Prosecution Witness [REDACTED] would be testifying simultaneously during morning sessions.

10. The 4th evidentiary block is scheduled from 4 April to 6 May 2016. Based on the information communicated by the Chamber, the 4th evidentiary block includes 20.5 hearing days or 92 hours and 15 minutes of Court time.

SUBMISSIONS

- I. **The number of witnesses the Prosecution intends to call during the 4th evidentiary block is too high.**
11. Based on past experience, the time used by the Defence to cross-examine Prosecution witnesses is at least the same as the time used by the Prosecution to conduct its examination in chief. Court time is also required for other purposes such as procedural issues and other matters related to the Chamber's management of the proceedings, which can easily add up to 10%, if not more, of the time required for examination in chief and cross examination.
12. Accordingly, a Prosecution witness whose examination in chief is expected to last four (4) hours will usually require two days of Court time. As for Prosecution 'six-hour' and 'ten-hour' witnesses, they will usually require respectively three or five days of Court time.
13. Applying this calculation to the Prosecution List of Witnesses reveals that 22 days of Court time will likely be required whereas the 4th evidentiary block comprises 20.5 days of Court time.

14. While the Prosecution suggests that the number of hearing hours should be considered and not the number of days of Court time, using this parameter does not reveal any better result.
15. Indeed, considering that the witnesses the Prosecution intends to call will require 88 hours for examination in chief and cross-examination purposes (44 hours multiplied by two), it is likely that 96.5 hearing hours will be required (88 hours plus 10%) whereas the 4th evidentiary block comprises 92 hours and 15 minutes of hearing time.
16. Consequently, in the best of circumstances, the number of witnesses the Prosecution intends to call during the 4th evidentiary block is too high.
17. While it might be possible to complete the testimony of all seven witnesses the Prosecution intends to call during the 4th evidentiary block by having recourse to extended sessions, the Defence respectfully submits that the scheduling of extended sessions on a regular basis is not in the interest of justice if only because of the burden imposed on the Parties, Participants and Court staff.
18. In addition, the Defence posits that the number of witnesses the Prosecution intends to call during the 4th evidentiary block is too high as it removes any flexibility in the management of the proceedings to handle unexpected events such as additional time being required for examination-in-chief or cross-examination, a witness requiring additional rest and/or, inter alia, technical problems in the Court room.
19. More importantly, even if it was considered 'possible' for all seven witnesses the Prosecution intends to call to testify during the 4th evidentiary block under normal circumstances - by having recourse to extended sessions or other similar mechanisms – this ignores the prevailing circumstances which impact

- the ability of the Defence to be in a position to effectively cross-examine all seven witnesses during the number of days in Court / hearing hours available.
20. In fact, the Prosecution List of Witnesses ignores that even though the Defence Associate Counsel might be able to cross-examine one or two Prosecution witnesses, all other witnesses will have to be cross-examined by the Defence Lead Counsel who will require, at a minimum, some preparation time between the testimony of Prosecution witnesses testifying consecutively.
 21. In these circumstances, the Defence respectfully submits that it is necessary for the Chamber to order the Prosecution to remove at least one witness from the list of witnesses it intends to call during the 4th evidentiary block, preferably a 'six-hour' witness.
 22. In sum, removing three days of Court time or 13.5 hearing hours is not only an effective way to ensure full respect for Mr Ntaganda's rights, it is also the best way to ensure the fairness of the proceedings while minimizing the impact on the expeditious conduct of the proceedings.
- II. Prosecution Witnesses [REDACTED] and [REDACTED] cannot be called to testify consecutively**
23. As previously mentioned, Prosecution Witness [REDACTED] who was originally on the Prosecution List of Witnesses has been replaced by Prosecution Witness [REDACTED] at the request of the Defence. The Defence has already had the opportunity to express its appreciation to the Prosecution for this change.
 24. Nonetheless, pursuant to the Prosecution List of Witnesses, Prosecution Witnesses [REDACTED] and [REDACTED] - the two so-called insiders whose examination-in-chief is expected to last ten hours – are now scheduled to testify consecutively (second and third witnesses), which the Defence respectfully submits is not possible in the present circumstances.

25. Indeed, considering that Prosecution Witnesses [REDACTED] and [REDACTED] both require extensive preparation time - if only because of the quantity of material available – and that both will be cross-examined by the Defence Lead Counsel, it is imperative that their testimony be separated by at least one witness.
26. It is also necessary, depending on the order in which Prosecution witnesses are called during the 4th evidentiary block, that the Defence Lead Counsel be allocated some preparation time before the testimony of both of these witnesses.
27. Consequently, the Defence respectfully submits that it is necessary for the Chamber to order the Prosecution to modify the order in which Prosecution witnesses will be called during the 4th evidentiary block to ensure that the testimony of Prosecution Witnesses [REDACTED] and [REDACTED] is separated by at least one witness and that the Defence Lead Counsel has sufficient time to prepare with a view to be in a position to effectively cross-examine both witnesses.

III. Joint proposal concerning the 5th and 6th evidentiary blocks

28. Even though the Parties have not been able to agree on the list of Prosecution witnesses to be called during the 4th evidentiary block, they have nonetheless agreed on a joint proposal regarding the scheduling of the next evidentiary blocks before the summer recess scheduled to begin on 22 July 2016.
29. In this regard, the Parties jointly submit that the interest of justice would best be served by scheduling two evidentiary blocks before the upcoming summer judicial recess, the first (5th block) from 30 May until 17 June 2016 and the second (sixth block) from 4 to 22 July 2016.

30. The Parties agree that the two proposed evidentiary blocks favour the expeditious conduct of the proceedings while ensuring the fairness of the proceedings.

CONFIDENTIALITY

31. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Request is classified as confidential, as it refers to confidential correspondence between the Prosecution and the Defence as well as to information related to the scheduling of Prosecution Witnesses for whom the implementation of protective measures has or will be requested by the Prosecution. A public redacted version of the Defence Request will be submitted separately

RELIEF SOUGHT

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

ORDER the Prosecution to call one less witness for the 4th evidentiary block, preferably a six-hour witness;

ORDER the Prosecution to modify the order in which Prosecution witnesses will be called during the 4th evidentiary block to ensure that the testimony of Prosecution Witnesses [REDACTED] and [REDACTED] is separated by at least one witness and that the Defence Lead Counsel has sufficient time to prepare for their cross-examination; and

SCHEDULE the 5th and 6th evidentiary blocks from 30 May to 17 June 2016 and from 4 to 22 July 2016 respectively.

RESPECTFULLY SUBMITTED ON THIS 17TH DAY OF MARCH 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda