

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **16 May 2017**

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

Prosecution's response to the "Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary blocks", ICC-01/04-02/06-1903

Source: Office of the Prosecutor

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

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Introduction

1. The Defence provided notice to Trial Chamber VI, the Prosecution and the Legal Representatives of Victims on Friday, 12 May 2017 at 16:53 - for the first time in these proceedings - that the Accused wishes to testify.¹ The Defence seeks to call the Accused on 12 June 2017, exactly one month from notification of its filing, and requests that the Chamber urgently vary the schedule of the first two evidentiary blocks to accommodate this request *“considering the preparation time involved for both the Defence and the Prosecution”*.²
2. In particular, the Defence proposes to shorten the length of the first block to one week and call three witnesses and to increase the length of the second block to six weeks for the Accused’s testimony. The Defence asserts that breaks will be needed to give the Accused time to rest, without further explanation, and that there is a *“need for inter partes consultations, involving the Chamber, for the purpose of adopting a workable calendar”*.³
3. The Defence notice of its intention to call the Accused is provided very late. It runs afoul of the deadlines set by the Chamber for provision of its list of witnesses and statements or summaries of anticipated evidence.⁴ The Defence acknowledges the preparation time necessary for the Parties and participants to prepare for an examination of the Accused, yet allows for virtually no preparation time if the Accused is to testify in (now) less than one month’s time and after a first set of witnesses will testify, further lessening preparation time. There can be no doubt that preparing for the examination of an Accused – the central figure in the trial – necessitates very careful and thorough planning which will take significantly more time than that contemplated by the Defence.

¹ ICC-01/04-02/06-1903 (“Defence Request”).

² Defence Request, para. 9.

³ Defence Request, para. 8.

⁴ ICC-01/04-02/06-1757, requiring disclosure of lists of witnesses and statements or summaries of anticipated evidence by 31 March 2017 and 26 April 2017.

The Chamber must ensure procedural fairness for both Parties and participants,⁵ which its orders to date on disclosure deadlines and notice of the Defence case have considered. The current Defence Request ignores these decisions and the important fairness considerations that these decisions uphold and puts undue pressure on the Chamber to issue decisions on an urgent basis.

4. The Defence Request and proposed date for the Accused's testimony equally fails to consider the myriad of issues that must be canvassed, litigated and decided by the Chamber in advance, including but not limited to: (i) disclosure of an appropriate statement or summary of anticipated evidence *immediately* (it was due by 26 April 2017); (ii) the application of the Protocol on witness preparation; (iii) the non-applicability of rule 74 assurances; (iv) limits on discussions with Counsel on the substance of testimony once testimony commences; (v) the inability of Counsel to discuss the documents the Prosecution seeks to use during cross-examination with the Accused; (vi) a request by the Prosecution to meet with the Accused in advance of testimony; (vii) requests by the participants to question the Accused; (viii) requests to use the Detention Centre calls during cross-examination of the Accused; and (ix) the

⁵ Pre-Trial Chamber II recognised "that the requirement of fairness exists for all participants in the proceedings and therefore also operates to the benefit of the Prosecutor", ICC-02/04-01/05-20, para. 31; Pre-Trial Chamber I noted that "In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes", ICC-01/04-135-tEn, para. 38; The Appeals Chamber, when assessing an issue of fairness at trial, acknowledged that it is relevant to consider the core functions of both the Prosecutor and the Trial Chamber to establish the truth, envisaged by articles 54(1)(a) and 69(3) of the Rome Statute, ICC-01/04-02/12-271-Corr, para. 256; In *Martić*, the ICTY Appeals Chamber rejected "the Appellant's claim that the fairness of a trial is uniquely predicated on the fairness accorded to the Accused" and recalled that the Appeals Chamber has previously observed that the "application of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community) [...] Seen in this way, it is difficult to see how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections", *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 13 citing *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 25; In *Tadić*, the ICTY Appeals Chamber found that "[i]t can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case", *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, para.48.

duration of the examinations, the need for any breaks during testimony and any such modified schedule.

5. Critically, the Chamber set the schedule for the two first evidentiary blocks on 28 April 2017. Two other trials will proceed during the currently scheduled break between the evidentiary blocks set in this case and it may not be possible to make adjustments to those court schedules. In the meantime, Prosecution team members have scheduled other commitments during the weeks between the first two blocks. In particular, Senior Trial Counsel for the Prosecution who will cross-examine the Accused is unavailable during the week of 12 June 2017 due to planned commitments in another country.
6. With proper planning, appropriate advance notice, *inter partes* consultations, discussions with the participants and the Chamber, disclosure in accordance with the Chamber's orders, further decisions by the Chamber on important matters regulating the Accused's testimony, and appropriate preparation time, the Accused can testify as early as possible during this trial. The Prosecution submits, however, that this will not be possible during the week of 12 June 2017 or by the start of the second evidentiary block on 27 June 2017. The Prosecution requests that the Chamber deny the Defence Request and order the Defence to proceed with its other witnesses for the second evidentiary block, with the Accused commencing testimony in the third evidentiary block at the earliest.

Background

7. On 30 January 2017, the Chamber set deadlines and procedures for the presentation of evidence by the Defence.⁶ It ordered the Defence to provide a further provisional list of witnesses to the Chamber, Prosecution and participants by 31 March 2017 with statements or summaries of anticipated evidence and disclosure of all material in its possession which falls under its disclosure obligations. It ordered the Defence to disclose, by 26 April 2017, all remaining material upon which it intends to rely, with the final version of its list of witnesses, final statements or summaries and final list of evidence, including an indication of any intention to raise an alibi or grounds for excluding criminal liability.
8. The Defence did not include the Accused on its list of trial witnesses, either on 31 March 2017 or on 26 April 2017. Nor did the Defence file a statement or summary of anticipated evidence for the Accused. The Defence has never advised of its intention to raise an alibi or other grounds for excluding criminal liability.
9. On 28 April 2017, the Chamber set the schedule for the first two evidentiary blocks: 29 May to 9 June 2017 and 27 June to 21 July 2017.⁷
10. On 12 May 2017, the Defence filed an urgent request to modify the first and second evidentiary blocks and to call the Accused to testify for six weeks starting on 12 June 2017.

⁶ ICC-01/04-02/06-1757.

⁷ Email from Trial Chamber VI to the Parties and participants dated 28 April 2017 at 18:04 with a correction provided on 1 May 2017 at 15:28.

Prosecution's Submissions

The Request to urgently vary the schedule of the first two blocks should be dismissed

11. The Defence did not include the Accused on its list of witnesses either on 31 March or 26 April 2017, the date by which it was ordered to disclose its final list of witnesses, final list of evidence and final statements or summaries of anticipated evidence. Nor had the Defence ever indicated during *inter partes* discussions that the Accused may testify during the trial, or that he would do so as one of the first witnesses. The Accused twice refused the Prosecution's request to interview him in relation to the current charges, requests that were transmitted once before the confirmation hearing and once before trial; the Prosecution has no advance notice in the form of a summary of anticipated evidence or statement from the Accused, which it must have for all Defence witnesses. The Accused is no exception. Once he chooses to testify, he is in virtually the same position as any other witness; the Defence must provide information on "*the key elements that each witness will address during his or her testimony, including at a minimum: (i) a description, as exhaustive as possible, of the facts upon which the witness will testify, including any relevant information on their personal history and background, which is available to the Defence; and (ii) the relevance of the anticipated testimony of the witness to the case*" [footnotes omitted].⁸

12. The Chamber recently held in relation to the Defence's disclosure that it "*does not consider summaries of a provisional nature to be appropriate or sufficient in the context of the Defence's filing of its Final List*" and "*finds the existence of provisional summaries to be inconsistent with the Chamber's Directions and Directions on Summaries, and orders the Defence to finalise these summaries as expeditiously as*

⁸ ICC-01/04-02/06-1862, para. 12.

possible".⁹ In addition, the Chamber set further strict deadlines for the Defence to remedy this non-compliance with the provision of finalised summaries in advance of the first three evidentiary blocks.¹⁰ Trial Chamber I recently upheld the need for disclosure from the Defence, even during the Prosecution case, pursuant to articles 64(6)(d) and 69(3) of the Statute.¹¹ Yet, for the Accused, the Defence has provided no summary whatsoever and is, accordingly, not in compliance with the Chamber's decisions. The Accused is waiving his right to silence by choosing to testify – and he should not be permitted to bypass important disclosure obligations under the guise of his right to silence. Having chosen to testify, he cannot proceed to ambush the Prosecution, participants or the Chamber with his testimony: he must set out what he intends to testify about as comprehensively as possible *now*. He must abide by decisions on early disclosure. The current disclosure failures need to be remedied as soon as possible and the Prosecution and participants must have meaningful time to prepare after disclosure.

13. It is plainly evident that the Chamber, the Prosecution and the participants need adequate time to prepare for the testimony of the Accused. He is the central figure in this trial and can testify about events over an extended period of time, all charges, contextual operation, persons, places and events. Notwithstanding overall case knowledge, the Chamber will appreciate from its own experience in both national and international trials that preparation for the testimony of an accused can take a considerable amount of time where the time period relevant to the charges spans several years. The Defence itself acknowledges the preparation time needed.¹² Sufficient preparation time with proper early disclosure will ensure a focused and efficient cross-examination. It will limit or

⁹ ICC-01/04-02/06-1900, para. 21.

¹⁰ ICC-01/04-02/06-1900, para. 21.

¹¹ ICC-02/11-01/15-921, para. 19.

¹² ICC-01/04-02/06-1903, para. 8.

avoid requests for adjournments to deal with unexpected evidence that was not duly notified.

14. It is difficult to accept that the Defence was unable to comply with the Chamber's orders and provide adequate advance notice on 26 April 2017 that the Accused would testify, or that it was unable to anticipate the importance of his early testimony to its case or to its presentation of evidence.¹³ But the result of these failures on the part of the Defence cannot be that the Chamber, Prosecution and participants are left with fundamentally insufficient time to prepare for the Accused's testimony.

15. Nor does the Defence Request allow adequate or sufficient time for full submissions, deliberations and adjudication by the Chamber on issues critical to the Accused's testimony. The Prosecution provides advance notice that it will soon submit written requests for the Chamber to:

- (i) preclude discussions between Counsel and the Accused on substantive matters related to the testimony once the testimony commences;
- (ii) preclude Defence Counsel from communicating the list of documents that the Prosecution may use during cross-examination to the Accused or to discuss those documents with him;
- (iii) issue strict instructions to the Accused not to discuss his testimony with anyone;
- (iv) find that the Prosecution may cross-examine the Accused on the appropriateness of any discussions between Counsel and the Accused that took place during witness preparation or during testimony;

¹³ ICC-01/04-02/06-1903, para. 6: "The Defence notes in this regard that allowing Mr Ntaganda to testify at this time might result in the presentation of a shorter case of the Defence".

- (v) find that rule 74 assurances are inapplicable when the Accused testifies and that he must answer all questions put to him or risk that the Chamber draws adverse inferences, and that the answers may be used against him in the trial;
- (vi) find that the Protocol on Witness Preparation applies to all discussions to prepare the Accused for testimony;
- (vii) order the immediate disclosure of a statement or summary of anticipated evidence in compliance with the Chamber's two orders;
- (viii) hear submissions and decide on the need for gaps during the Accused's testimony, which the Prosecution may oppose;
- (ix) order early production of the list of documents that the Defence may wish to use with the Accused during its examination in chief, since that list may include hundreds of documents, videos, photographs or other items that will need careful review and consideration;
- (x) decide how much of the Accused's testimony may be heard in private session since he will testify before other Defence witnesses; and
- (xi) decide on a Prosecution request to use the Accused's Detention Centre calls during his cross-examination. The Prosecution needs time to prepare these requests, the Defence and participants need time to respond, and the Chamber needs time to consider the arguments and to issue decisions.

16. Moreover, the Legal Representatives for Victims may make requests to examine the Accused which need to be heard and decided. Other issues may arise as the Parties, participants and the Chamber have more time to consider further what

issues need to be resolved in advance of the Accused's testimony, as notice that the Accused will testify was only made a few days ago.

17. The Parties, participants and the Chamber need a firmer understanding of the Defence's statement that "it will not be possible to sit every day" when the Accused testifies.¹⁴ No explanation or reasons are provided to support a Defence request (since that is what it must be) to vary the sitting hours during the Accused's testimony or to provide breaks during his evidence. The Prosecution may oppose any such request once it has considered the justification for it.

18. Lastly, the Chamber set the schedule for the first two evidentiary blocks on 28 April 2017. The Chamber has been setting the evidentiary blocks in advance since the start of trial, taking into account the sitting schedules for the other two running trials and Court resources. Once set, while certain adjustments can always be made, other commitments cannot easily be changed. In this case, Prosecution team members have relied on the current Court schedule and made important commitments abroad, including Senior Trial Counsel who will cross-examine the Accused and who is now unavailable during the week of 12 June 2017.

19. There is also too little time left even before 27 June 2017 to prepare meaningfully for the Accused's testimony. Nor would it be effective to start the Accused's testimony in the second evidentiary block and split it over the Court recess into the third evidentiary block.

¹⁴ ICC-01/04-02/06-1903, para. 8.

Conclusion

20. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request and order the Defence to call the Accused during the third evidentiary block, at the earliest.



Fatou Bensouda
Prosecutor

Dated this 16th day of May 2017
At The Hague, The Netherlands