

**Cour
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**International
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Court**

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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

Joint Response by the Common Legal Representative of the Former Child Soldiers and the Common Legal Representative of the Victims of the Attacks to the “Defence’s request seeking Trial Chamber VI to take measures allowing for the testimony of Mr Ntaganda to take place in conditions which best favour the Chamber’s truth seeking function”

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representative of the Victims of the Attacks (jointly the “Legal Representatives”) hereby submit a joint response to the “Defence’s request seeking Trial Chamber VI to take measures allowing for the testimony of Mr Ntaganda to take place in conditions which best favour the Chamber’s truth seeking function” (the “Defence Request” or the “Request”) filed on 19 May 2017.¹

2. Further to its “Urgent [...] Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary blocks”,² the Defence requests that Trial Chamber VI (the “Chamber”) takes new measures regarding the testimony of Mr Ntaganda which is scheduled to start on 14 June 2017.

3. Despite the fact that the Chamber, upon the Defence’s request,³ already amended the schedule and gave directions,⁴ the Defence is in fact asking the Chamber to modify the said schedule.

4. In essence, the Defence argues that the schedule should be once again amended in order to favour the Chamber’s truth seeking function, and to allow the Accused to provide the best possible evidence. The Request is nothing but a request for reconsideration, and because it does not fulfil the criteria, it must be rejected in its entirety.

¹ See the “Defence’s request seeking Trial Chamber VI to take measures allowing for the testimony of Mr Ntaganda to take place in conditions which best favour the Chamber’s truth seeking function”, No. ICC-01/04-02/06-1915, 19 May 2017 (the “Defence Request”).

² See the “Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary blocks”, No. ICC-01/04-02/06-1903, 12 May 2017 (the “Urgent Request”).

³ *Idem*.

⁴ See the “Decision on Defence request to modify the schedule for the first two evidentiary blocks” (Trial Chamber VI), No. ICC-01/04-02/06-1914, 19 May 2017.

II. PROCEDURAL BACKGROUND

5. On 16 December 2016, the Defence filed its “Preliminary list of Defence Witnesses”, on an *ex parte*, Chamber only, basis.⁵

6. On 30 January 2017, the Chamber issued directions and a schedule to be followed by the Defence, in which the latter was to provide a further provisional list of witnesses by 31 March 2017. The Chamber further ordered that, by 26 April 2017, the Defence was to provide its final list of witnesses and evidence, and indicate whether there existed any intention to raise an alibi.⁶

7. On 31 March 2017, the Defence filed its “Further Provisional List of Defence Witnesses and Summaries” with one *ex parte* version to the Chamber only.⁷

8. On 13 April 2017, the Chamber, following the Prosecution’s request and oral submissions, provided further directions on the key elements that should be included in the summaries of the anticipated evidence of the Defence witnesses (the “Summaries”).⁸

9. On 26 April 2017, the Defence filed its final list of witnesses and evidence, and the related Summaries.⁹

⁵ See the “Preliminary list of Defence Witnesses”, No. ICC-01/04-02/06-1690-Conf-Exp, 16 December 2016.

⁶ See the “Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to presentation of evidence by the Defence” (Trial Chamber VI), No. ICC-01/04-02/06-1757, 30 January 2017.

⁷ See “Further Provisional List of Defence Witnesses and Summaries”, No. ICC-01/04-02/06-1843-Conf-Red, 31 March 2017.

⁸ See the “Decision on Prosecution request related to the Defence ‘Further Provisional List of Witnesses and Summaries’” (Trial Chamber VI), No. ICC-01/04-02/06-1862, 13 April 2017.

⁹ See the “Corrected version of ‘Defence Final Lists of Witnesses and Evidence’”, No. ICC-01/04-02-1881-Conf, 26 April 2017 (the corrected version was filed on 2 May 2017); Annex to the Corrected version of “Defence Final Lists of Witnesses and Evidence”, No. ICC-01/04-02/06-1881-Conf-Corr-Anx, 26 April 2017 (the corrected version was filed on 2 May 2017); “Annex A to the Defence Final Lists of Witnesses and Evidence”, No. ICC-01/04-02/06-1881-Conf-AnxA, 26 April 2017; “Annex B to the Defence Final Lists of Witnesses and Evidence”, No. ICC-01/04-02/06-1881-Conf-AnxB; “Annex C to

10. On the same day, a “Forthcoming Witness List” for the first evidentiary block was sent.¹⁰ Said list was later updated.¹¹

11. A Status Conference was held on 4 May 2017, further to the Prosecution’s request, during which the Defence’s lack of compliance with its disclosure obligations was discussed.¹²

12. On 11 May 2017, the Chamber issued a decision providing further directions on *inter alia* (i) the Summaries; (ii) the length of the presentation of evidence by the Defence and expert witnesses; (iii) LRV requests to question a witness; (iv) the scheduling of witnesses; and (v) the schedule for the first two evidentiary blocks.¹³

13. On 12 May 2017, the Defence filed an urgent request in order to seek modification of the schedule for the first two evidentiary blocks, to allow Mr Ntaganda to testify (the “Urgent Request”).¹⁴

14. The Prosecution filed its response on 16 May 2017,¹⁵ to which the Defence replied, without the Chamber’s permission, on the same day. The Defence requested an urgent status conference to be convened to discuss issues related to the Request and Response.¹⁶

the Corrected version of ‘Defence Final Lists of Witnesses and Evidence’’, No. ICC-01/04-02/06-1881-Conf, 26 April 2017 (the corrected version was filed on 2 May 2017).

¹⁰ See email correspondence from the Defence to the Chamber, the Prosecution and the Legal Representatives dated 26 April 2017 at 17:51.

¹¹ See email correspondence from the Defence to the Chamber, the Prosecution and the Legal Representatives dated 10 May 2017 at 14:50.

¹² See the transcript of the hearing held on 4 May 2017, No. ICC-01/04-02/06-T-204-CONF-ENG ET.

¹³ See the “Decision on further matters related to the presentation of evidence by the Defence” (Trial Chamber VI), No. ICC-01/04-02/06, 11 May 2017.

¹⁴ See the Urgent Request, *supra* note 2.

¹⁵ See the “Prosecution’s response to the ‘Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary blocks’”, No. ICC-01/04-02/06-1909, 16 May 2017.

¹⁶ See email correspondence from the Defence to the Chamber, the Prosecution and the Legal Representatives dated 16 May 2017 at 17:55.

15. On 17 May 2017, the Chamber indicated that the testimony of Mr Ntaganda should take place during the second evidentiary block from 14 to 16 of June 2017, and thereafter from 27 June to 21 July 2017.¹⁷

16. On 19 May 2017, the Trial Chamber issued a decision whereby confirming the updated schedule and providing further directions.¹⁸

17. On the same day, the Defence filed its Request.¹⁹ In its request, the Defence offered two options to allow the Accused to provide the “*best possible evidence*”: (i) add three additional court days to the present schedule of the Accused’s testimony, to be taken from the weeks of 12 to 16 June or 19 to 23 June 2017; or (ii) schedule the re-examination, Prosecution additional questions (if allowed) and questions from the Chamber, after the summer judicial recess, starting either on 14 August or 28 August 2017.²⁰

IV. JOINT SUBMISSIONS

A. The Defence Request is inadmissible

18. In its Urgent Request, the Defence, for the first time, let the Chamber, the parties and participants know that the Accused intended to testify. For this purpose, the Defence asked that the second evidentiary block be entirely devoted to the Accused’s testimony, and therefore be held from 12 June 2017 to 21 July 2017,²¹ instead of 27 June to 21 July 2017.²²

¹⁷ See email correspondence from the Chamber to the Defence, the Prosecution and the Legal Representatives dated 17 May 2017 at 15:05.

¹⁸ See the “Decision on Defence request to modify the schedule for the first two evidentiary blocks”, *supra* note 4.

¹⁹ See the Defence Request, *supra* note 1.

²⁰ *Idem*, paras. 3 and 8-11.

²¹ See the Urgent Request, *supra* note 2, para.1.

²² As initially decided by the Chamber. See email correspondence from the Chamber to the Defence, the Prosecution and the Legal Representatives dated 28 April 2017 at 18:04.

19. The Legal Representatives take this opportunity to recall that, notwithstanding the fact that several occasions were available to the Defence,²³ it chose not to reveal its intention to call the Accused as a witness to the Prosecution and the Legal Representatives. It is hardly plausible that, at the time that the status conference was held, the Defence had not even foreseen this possibility, especially given the fact that such a testimony is not to be decided upon lightly. As a result, it deprives the Chamber, the Prosecution and the Legal Representatives of the opportunity to prepare effectively to such testimony, but this avenue also has a negative impact on the truth seeking function of the Chamber.

20. The Chamber on two occasions provided an amended schedule of the second evidentiary block on the ground that the Accused had a right to testify deriving from article 67 of the Rome Statute,²⁴ and this schedule was considered both appropriate and in the interests of the expeditiousness of the proceedings.²⁵ Accordingly, the Chamber already considered all issues contained in the Defence Request.

21. However, it seems that the Defence was not satisfied with the outcome of the Chamber's decision and instead of moving for reconsideration of said decision or seeking leave to appeal in accordance with article 82 of the Statute and Rule 155 of the Rules of Procedure and Evidence (the "Rules"), the Defence decided, on the very same day of the issuance of the disputed decision, to make a new filing whereby seeking yet again an amendment of the second evidentiary block's schedule. Accordingly, no matter how the Defence decides to name its Request, it is *de facto* a request for reconsideration, since it aims at having the Chamber reconsider its own decision.

²³ The Defence submitted its preliminary list of witnesses in December 2016, with further filings afterwards, and even a status conference held on 4 May 2017, *i.e.* only eight days before the Urgent request. See *supra* paras. 5-12.

²⁴ See email correspondence, *supra* note 15 and the "Decision on Defence request to modify the schedule for the first two evidentiary blocks", *supra* note 4.

²⁵ See the "Decision on Defence request to modify the schedule for the first two evidentiary blocks", *supra* note 4, para. 17.

22. Although not expressly provided for in the legal framework of the International Criminal Court, a Chamber has the power to reconsider its own decision when it is “*manifestly unsound*” and its consequences are “*manifestly unsatisfactory*” in the sense that its decision rests on a clear error of reasoning and would result in an injustice. A Chamber also has the power to reconsider its own decision in the presence of particular circumstances, including new facts and new arguments, which render the consequences of its decision manifestly unsatisfactory.²⁶

23. Furthermore, the Chamber previously established that “*while properly covered by the powers of a chamber, reconsideration of its own decisions is an exceptional measure which will only be taken when a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice*”.²⁷

24. The Legal Representatives submit that no new facts arose between 17 May – when the Chamber has sent an email communication to modify the schedule –²⁸ and 19 May – when the Defence filed its Request.²⁹

25. Moreover, the only arguments raised by the Defence to ground its Request are the “*truth seeking function*”³⁰ of the Court, and in particular the “*best and most humane circumstances*”³¹ in which the Accused should testify. The Defence fails to

²⁶ See the “Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010” (Trial Chamber I), No. ICC-01/04-01/06-2705, 2 April 2011, para. 18. See also the “Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial” (Trial Chamber V(B)), No. ICC-01/09-02/11-863, 26 November 2013, para. 11.

²⁷ See the “Decision on the Defence request for reconsideration and clarification”, (Trial Chamber VI), No. ICC-01/04-02/06-483, 27 February 2015, para. 13. See also, *inter alia*, the “Decision on Defence request for reconsideration of oral ruling on admission of a document for impeachment purposes” (Trial Chamber VI), No. ICC-01/04-02/06-1473, 3 August 2016, para. 7.

²⁸ See email correspondence, *supra* note 15.

²⁹ Incidentally, it is even more appalling to note that the reasons for such a modification were notified on 19 May at 19.30 by way of notification of the “Decision on Defence request to modify the schedule for the first two evidentiary blocks”, while the Request was filed on the very same day, before said notification, *i.e.* at 15.59.

³⁰ See the Defence Request, *supra* note 1, para. 1

³¹ *Idem*, paras. 2; 8.

demonstrate that an exceptional measure is called for in the circumstances. It is indeed not enough to use these arguments in an abstract manner to obtain reconsideration of a judicial decision.

26. If the goal of this Request were not to obtain a reconsideration of the disputed Decision, but rather to favour the truth seeking function of the Court, the Legal Representatives posit that, in fact, the Chamber is best placed to assess the circumstances and to provide the directions to ensure that the proceedings serve the purpose of seeking – and establishing – the truth, in conformity with article 64-2 of the Rome Statute. Accordingly, the Request, as formulated, serves no purpose.

27. In the alternative, if the Defence considers these issues to be fundamental, it should have sought leave to appeal. The fact that the Defence did not use this existing means demonstrates that it does not consider the current schedule to “significantly affect”, i.e. “in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.³² Thus there is no reason for the schedule, as ordered by the Chamber, to be modified once again.

28. In any case, the Trial Chamber should not rule on a request that has no statutory ground and that is not expressly a request for reconsideration. The Request is inadmissible and shall be dismissed.

B. None of the options suggested by the Defence is acceptable

29. In the alternative, should the Chamber decide to examine the options submitted by the Defence, the Legal Representatives posit that none of the options suggested by the Defence is acceptable.

³² See the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 10.

30. The Defence submits two different options that would allegedly allow the testimony of Mr Ntaganda to take place without facing time constraints so as to allow him to provide the best possible evidence.³³

31. However, before even detailing the two options, the Defence goes with explaining first that, because testifying five days in a row during three weeks is too demanding, the Accused should be able to rest every third day. It thus requests that no hearing takes place on 5, 12 and 19 July.³⁴ The Defence proceeds by requesting three additional court days to be taken from the weeks of 12 to 16 June, or 19 to 23 June.³⁵ In other words, the Defence suggests that the Accused would be able to rest better if three days without hearing would be arranged, but, by the same token, requests for three additional court days to be added to the second evidentiary block. Accordingly, the Accused will testify the same number of days, and the request is therefore of no benefit to the Accused, and certainly has no impact on the fair and expeditious conduct of the proceedings.

32. Said request is even more unfounded since initially the Defence asked for the testimony to be held within six full weeks in a row *i.e.* from Monday 12 June to Friday 21 July 2017. One week prior to the filing of the Request, the Defence did not find that the same burden will be placed on the Accused. To the contrary, the Defence's Urgent Request provided with a tighter schedule than the one subsequently ordered by the Chamber.³⁶

33. Moreover, the Chamber has already ruled on the way to conduct the testimony of Mr Ntaganda in "*the best and most humane circumstances*", as it is within its prerogatives to do so. Indeed, the Chamber already indicated that the Accused

³³ See the Defence Request, *supra* note 1, para. 2.

³⁴ *Idem*, para. 7.

³⁵ *Ibid.*, paras. 8-10.

³⁶ See the Urgent Request, *supra* note 2, para.4.

shall testify for four hours per day and with a five-day interruption from 19 to 23 June 2017.³⁷

34. The Legal Representatives further point out the schedule, as envisaged, *i.e.* four hours a day allotted to the Accused's testimony, provides for a largely sufficient time to recover, and properly rest. Given that the Accused will take the stand for reduced hearing hours, there is no reason to presume that he will not give the best evidence possible. Furthermore, the Defence has yet to demonstrate that these half-days do not constitute the best way to hear the Accused in a manner that respects his fundamental rights.

35. In addition, no reason justifies that Mr Ntaganda be treated differently than the other witnesses. Not only did the Chamber clarify that the Accused is subject to the same rules applicable to other witnesses,³⁸ but for what is more, none of the arguments advanced by the Defence indicates that the Accused is not fit medically to testify during the scheduled hours; which might not have been the case of other witnesses who already testified five hours daily, several days in a row.

36. Likewise, the second option is not more acceptable and is even less justified. The Defence suggests the scheduling of the re-examination, and questions of the Chamber, after the summer judicial recess either on 14 August or 28 August 2017.³⁹ The re-examination, the Chamber's questions and **also the LRV's questions, as the case may be**, will take place at the minimum three weeks later, or even five weeks later. The Legal Representatives submit that this suggestion, if applied, will in fact frustrate the Chamber's truth seeking function, as the prerogatives to question the Accused will be divided timewise from the examination-in-chief. This option will only result in impeding the cohesion of the Accused's testimony.

³⁷ See email correspondence, *supra* note 15.

³⁸ See the "Decision on Defence request to modify the schedule for the first two evidentiary blocks", *supra* note 4, para. 18.

³⁹ See the Defence Request, *supra* note 1, paras. 8 and 11.

37. The Legal Representatives thus posit that none of the options conveyed by the Defence is acceptable. These options do not serve the purposes brought forward by the Defence which are, mainly, ensuring the humane conditions of the testimony, and the truth seeking function of the Chamber. Nonetheless, in the event that the Chamber were to consider one of the options, the Legal Representatives find that the first option remains the least damaging one, as it will, at least, prevent the severance of the testimony and would allow the victims to participate in a more efficient and effective manner.

C. The victims are entitled to meaningfully participate in the proceedings

38. The Legal Representatives find imperative to recall that the victims they represent have a statutory right to meaningfully participate in the proceedings, pursuant to article 68(3) of the Rome Statute⁴⁰ and rule 91(3)(a) of the Rules.⁴¹ Moreover, they wish to stress that in contrast to other international criminal tribunals wherein, as argued by the Defence, the Accused is “*the central figure of the trial*”⁴², the Court was established not only “*to exercise its criminal jurisdiction over those responsible for international crimes*” but also to render Justice to “*victims of unimaginable atrocities that deeply shock the conscience of humanity*”.⁴³

⁴⁰ Article 68(3) of the Rome Statute reads as follows: “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”.

⁴¹ Rule 91(3)(a) of the Rules of Procedure and Evidence reads as follows: “When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber” (emphasis added).

⁴² See the Defence Request, *supra* note 1, para. 12.

⁴³ See the Preamble to the Rome Statute.

39. It is unfortunate that at this stage of the proceedings, the Defence still fails to consider the victims as participants.⁴⁴ Given the experience of the Defence team, it is clear that it is in the position to know that the Accused might be subject to questions by the Prosecutor and the Chamber, but also by the Legal Representatives who are entitled to request authorisation to question the Accused, like any other witness, if need be.

40. The Defence is clearly aware of this fact, even more so as the Chamber gave directions to the Defence to transmit to the LRV the summaries and other evidence by 24 May.⁴⁵ Upon this transmission, the Legal Representatives may decide to question the witness, and in the event that the summary is insufficient, which is clearly the case for other Defence witnesses, the Legal Representatives might even have to recourse to the possibility of oral requests provided for in the “Decision on further matters related to the presentation of evidence by the Defence”.⁴⁶ All of these directions issued by the Chamber aim at ensuring that the victims participate meaningfully in the Defence’s case.

41. This being said, the Chamber clearly took this possibility into account when deciding on the modification of the schedule for the first two evidentiary blocks. Accordingly, there is no need to further modify the established schedule.

⁴⁴ See the Defence Request, *supra* note 1, paras. 5, 8, 10 and 11.

⁴⁵ See the “Decision on Defence request to modify the schedule for the first two evidentiary blocks”, *supra* note 4, para. 19.

⁴⁶ See the “Decision on further matters related to the presentation of evidence by the Defence”, *supra* note 11, para. 44.

FOR THE FOREGOING REASONS the Legal Representatives respectfully request that the Chamber dismiss the Request as inadmissible. In the alternative, should the Chamber consider the Request to be admissible, the Legal Representatives respectfully request that the Chamber rule in favour of the first option.



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Dated this 24th Day of May 2017

At The Hague, The Netherlands