

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 22 March 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***

**Confidential
with confidential Annex**

**Decision on Defence request for extension of time to prepare for its
presentation of evidence**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Legal Representatives of Victims

Ms Sarah Pellet
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Legal Representatives of Applicants

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**Unrepresented Applicants for
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**The Office of Public Counsel for
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Defence**

States' Representatives

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**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67 of the Rome Statute ('Statute'), Rules 78-80 of the Rules of Procedure and Evidence ('Rules'), and Regulations 34(c) and 35 of the Regulations of the Court ('Regulations'), issues this 'Decision on Defence request for extension of time to prepare for its presentation of evidence'.

I. BACKGROUND

1. On 30 January 2017, the Chamber issued directions and a schedule leading-up to the presentation of evidence by the Defence ('Chamber's Directions').¹ Specifically, the Chamber ordered that by 31 March 2017, the Defence team for Mr Ntaganda ('Defence'): (i) provide a further provisional list of witnesses and statements or summaries of the anticipated testimonies, together with a confidential redacted version of the list;² and (ii) disclose all material in its possession which falls under its disclosure obligations.³ The Chamber further ordered that by 26 April 2017, the Defence: (i) provide the final list of witnesses together with accompanying estimates for length of examination and statements or summaries, and its final list of evidence;⁴ (ii) disclose all remaining materials it intends to rely upon during the presentation of its evidence;⁵ and (iii) indicate any intention to raise an alibi or grounds for excluding criminal liability in accordance with Rule 79 of the Rules.⁶ In addition, the Chamber 'indicate[d] its intention that the presentation of evidence by the Defence should commence within one month following the final Defence disclosure deadline'.⁷

¹ Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence, ICC-01/04-02/06-1757.

² Chamber's Directions, ICC-01/04-02/06-1757, para. 10.

³ Chamber's Directions, ICC-01/04-02/06-1757, para. 13.

⁴ Chamber's Directions, ICC-01/04-02/06-1757, para. 11.

⁵ Chamber's Directions, ICC-01/04-02/06-1757, para. 14.

⁶ Chamber's Directions, ICC-01/04-02/06-1757, para. 11.

⁷ Chamber's Directions, ICC-01/04-02/06-1757, para. 16.

2. On 6 March 2017, the Defence filed a request seeking an extension of time for the preparation of its presentation of evidence ('Request').⁸ The Defence requests the Chamber to: (i) '[grant] an extension of three months to the current time limits imposed for the preparation of the case for the Defence; and (ii) '[delay] the submission of the further list of witnesses and initial disclosure until 30 June 2017, the submission of the final list of witnesses and final disclosure until 31 July 2017, and the presentation of evidence until 4 September 2017.'⁹
3. On 13 March 2017, in line with the time limit set by the Chamber,¹⁰ the Office of the Prosecutor ('Prosecution') and the Legal Representatives of Victims ('LRVs') filed their respective responses (respectively 'Prosecution Response' and 'LRVs Response'), all opposing the Request.¹¹
4. On 14 March 2017, the Defence sought leave to reply to four issues raised in the Prosecution Response ('Request for Leave to Reply'). This request was submitted via email, which is annexed to the present decision.¹²

⁸ Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence, ICC-01/04-02/06-1815-Conf.

⁹ Request, ICC-01/04-02/06-1815-Conf, page 22.

¹⁰ Email from the Chamber to the parties and participants on 6 March 2017 at 10:37.

¹¹ Prosecution's response to the "Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence", 6 March 2017, ICC-01/04-02/06-1815-Conf, ICC-01/04-02/06-1822-Conf; Joint response by the Common Legal Representative of the Attacks and the Common Legal Representative of the Former Child Soldiers to the "Request on behalf of Mr Ntaganda seeking an extension of time for the preparation of the case for the Defence", ICC-01/04-02/06-1821-Conf.

¹² Email from Defence to the Chamber, Prosecution and LRVs at 17:04.

II. Submissions and analysis

Preliminary matters

5. As a first preliminary matter, concerning the Request for Leave to Reply, the Chamber recalls that pursuant to Regulation 24(5) of the Regulations, participants may only reply to a response with the leave of the Chamber. In the present case, the Chamber does not consider that it would be assisted by further submissions on any of the four identified issues. The Chamber therefore rejects the Request for Leave to Reply.
6. As a second preliminary matter, the Chamber notes that the LRVs 'incidentally' note, in relation to the Defence's reference to the submission of its witnesses list to the Chamber and the Prosecution,¹³ that they should be provided with said list by the same deadline as the Chamber and the Prosecution 'to enable effective participation of victims'.¹⁴ In accordance with its previous finding that by the terms of Rules 92(5) and 131(2) of the Rules the LRVs are generally entitled to access filings, transcripts and material, both public and confidential,¹⁵ and absent any indication by the Defence that the LRVs ought not to access said list,¹⁶ the Chamber considers that the incidental request is premature, and does not require any further consideration at this stage.

Defence's submissions

7. The Defence seeks an extension of time, pursuant to Regulation 35 of the Regulations, in order to have adequate time and facilities to complete the 'imperative, necessary and reasonable tasks to be performed before the beginning

¹³ Request, ICC-01/04-02/06-1815-Conf, para. 44.

¹⁴ LRVs Response, ICC-01/04-02/06-1821-Conf, para. 25.

¹⁵ Decision on victims' participation in trial proceedings, 6 February 2015, ICC-01/04-02/06-449, para. 55.

¹⁶ See ICC-01/04-02/06-449, para. 55: Going forward, if the parties submitting filings/material are of the view that the LRVs ought not to access them, then they must indicate the factual and legal basis for the chosen classification.

of the presentation of the case for the Defence'.¹⁷ According to the Defence, the requested extension is necessary to enable the Defence to review and analyse all non-privileged conversations of Mr Lubanga and Mr Ntaganda from the Court's Detention Centre ('Detention Centre') from 22 March 2013 ('Conversations'). The Defence submits that this exercise is 'essential' before it can start calling its first witness, in particular in light of the Prosecution's intended use at trial of the Conversations and summaries thereof, and the alleged 'troubling deficiencies and inherent unreliability' of the summaries prepared by the Prosecution.¹⁸ Relatedly, the Defence contends that the Prosecution having had 'the benefit since September 2015 of having an insight into the Defence strategy, names or descriptions of potential witnesses, information concerning material documents, and details of Mr Ntaganda's own recollection of events', the Defence needs to determine the scope, and assess the impact of, this access before the commencement of its case.¹⁹ As such, the Defence argues that '[s]ufficient time for an adequate review of the Conversations by the Defence is imperative to safeguard due process and the rights of the Accused'.²⁰

8. The Defence further submits that the requested extension is necessary to prepare for the cross-examination of the three victims who have been authorised to present evidence, contending that their expected testimonies relate to events that are not cumulative of evidence presented by the Prosecution, are not part of the charges against the accused, and must therefore be investigated.²¹
9. Moreover, the Defence urges the Chamber to take into consideration a series of 'factors and changes in circumstances' since 9 October 2014,²² which have 'significantly affected the ability of the Defence to fulfil its duties and obligations

¹⁷ Request, ICC-01/04-02/06-1815-Conf, paras 1, 3 and 7.

¹⁸ Request, ICC-01/04-02/06-1815-Conf, paras 10-13 and 30-54.

¹⁹ Request, ICC-01/04-02/06-1815-Conf, paras 45-46.

²⁰ Request, ICC-01/04-02/06-1815-Conf, page 13.

²¹ Request, ICC-01/04-02/06-1815-Conf, paras 55-69.

²² The Defence refers to Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, 9 October 2014, ICC-01/04-02/06-382.

for the purpose of representing Mr Ntaganda'.²³ In the Defence's submission, these include: (i) the restrictions on Mr Ntaganda's non-privileged communication rights and the ensuing 'complex and time-consuming litigation'; (ii) factors related to the composition of the Defence team; (iii) the number of witnesses and exhibits added by the Prosecution in January 2015; (iv) the suspension of two Defence resource persons in June 2015; (v) the Defence's inability to 'effectively investigate the Prosecution's case until January 2016'; (vi) the litigation related to the obtaining of additional resources; and (vii) the 'unparalleled tempo' of the proceedings since June 2016.²⁴ According to the Defence, as a result of these 'and other events beyond its control', it was not ready to start the trial on 2 August 2015 and 'has been struggling to meet its obligations ever since', warranting the Request to be assessed 'in light of these extraordinary circumstances'.²⁵

10. Finally, while arguing that the Request should not be adjudicated according to the standard of reconsideration,²⁶ the Defence argues that the requirements for reconsideration are met, since the Request arises from new facts, and is necessary to prevent an injustice.²⁷

Prosecution's submissions

11. The Prosecution submits that the disclosure of - and alleged resulting need to review and analyse - the Conversations constitute no justification to vary the disclosure deadlines or grant a three month delay. In this regard, the Prosecution argues that: (i) the accused, by his personal participation in the Conversations, is 'fully aware of their content' and can 'guide the Defence team through these conversations with ease and efficiency', or, if he intends to argue that none of the

²³ Request, ICC-01/04-02/06-1815-Conf, para. 70.

²⁴ Request, ICC-01/04-02/06-1815-Conf, para. 71.

²⁵ Request, ICC-01/04-02/06-1815-Conf, para. 72.

²⁶ Request, ICC-01/04-02/06-1815-Conf, para. 9.

²⁷ Request, ICC-01/04-02/06-1815-Conf, paras 9 and 73-75.

allegations are true, he need not fear calling his current list of witnesses; (ii) the Defence, while having been on notice of the allegations for nearly three years, failed to provide any indication of the measures implemented 'in the face of such clear information' or to explain why it only started to review the Conversations in January 2017; (iii) the accused does not have to defend against Article 70 charges, and the review of the allegations and supporting material should be proportionate to the issues he must address at trial; and (iv) the Defence's suggestion that the Prosecution's summaries are 'inherently unreliable' is unfounded.²⁸

12. The Prosecution further avers that the evidence of three victims who will testify to confined events does not justify a delay, noting that the Defence has had 'substantial notice' of this testimony and relevant material.²⁹ Finally, the Prosecution claims that repeating previous, unsuccessful submissions does not justify a delay in the start of the Defence case, and that the accused 'should not benefit from a delay of proceedings as the result of his own alleged misconduct'.³⁰

LRVs' submissions

13. According to the LRVs, the Defence fails to demonstrate prejudice arising from the deadlines set by the Chamber.³¹ In this regard, it is argued that: (i) the review process of the Conversations does not constitute good cause requiring an extension of the applicable deadlines, since the Defence team has been granted new resources to assist with this process, Mr Ntaganda himself remains the best placed to assist in this process, and the Defence's submissions as to the unreliability of the summaries are unsupported;³² and (ii) the Defence repeats

²⁸ Prosecution Response, ICC-01/04-02/06-1822-Conf, paras 48-56.

²⁹ Prosecution Response, ICC-01/04-02/06-1822-Conf, para. 57.

³⁰ Prosecution Response, ICC-01/04-02/06-1822-Conf, paras 58-59.

³¹ LRVs Response, ICC-01/04-02/06-1821-Conf, page 8.

³² LRVs Response, ICC-01/04-02/06-1821-Conf, paras 25-33.

arguments that were previously adjudicated and are 'irrelevant' to the present Request.³³

14. The LRVs further posit that the threshold warranting reconsideration of the Chamber's Directions is not met, noting that: (i) the Defence does not explain how the alleged new facts arising from two Prosecution filings have a direct impact on the preparation of its case;³⁴ and (ii) the cross-examination of the victims authorised to present evidence does not significantly impact the ability of the Defence to provide its lists of witnesses and evidence.³⁵ Finally, the LRVs claim that the extension of time would be prejudicial to the rights of the victims and the interests of justice, as it would negatively impact upon the victims' interest in the truth being established as well as achieving justice without delay.³⁶

Analysis

15. At the outset, the Chamber notes the Defence's argument that the Request should not be adjudicated according to the standard of reconsideration, 'if only because the Defence has never been heard on these issues'.³⁷ In this regard, the Chamber recalls that before the commencement of the trial, the parties and participants were consulted and made submissions in relation to a number of issues related to the conduct of the proceedings, including the schedule of disclosure and presentation of evidence by the Defence,³⁸ whereupon the Chamber clarified that should the Defence indicate an intention to call evidence, the Chamber would subsequently issue a decision setting out the procedure for any applicable

³³ LRVs Response, ICC-01/04-02/06-1821-Conf, para. 34.

³⁴ LRVs Response, ICC-01/04-02/06-1821-Conf, paras 35-37.

³⁵ LRVs Response, ICC-01/04-02/06-1821-Conf, paras 38-39.

³⁶ LRVs Response, ICC-01/04-02/06-1821-Conf, paras 48-49.

³⁷ Request, ICC-01/04-02/06-1815-Conf, para. 9.

³⁸ Order requesting submissions on the conduct of proceedings pursuant to Rule 140 of the Rules and on modalities of victims' participation at trial, 12 March 2015, ICC-01/04-02/06-507; Prosecution submissions on the conduct of proceedings and the modalities of victim participation at trial, 7 April 2015, ICC-01/04-02/06-547; Submissions on behalf of Mr Ntaganda on the conduct of proceedings and on modalities of victims' participation at trial, 7 April 2015, ICC-01/04-02/06-548; Joint submissions on the conduct of proceedings, ICC-01/04-02/06-543; Transcript of hearing on 22 April 2015, ICC-01/04-02/06-T-19-ENG ET.

disclosure.³⁹ On 15 July 2016, the Chamber emphasised that the Defence should be making ongoing preparations for any defence case it may wish to present,⁴⁰ and on 19 October 2016, the Chamber issued an order directing, amongst other things, that the Defence file by 16 December 2016 a notice as to whether it intends to call evidence and, relatedly, to provide the Chamber, on an *ex parte* basis, with a preliminary non-binding list of the witnesses it intended to call.⁴¹ It was against this background and without seeking any further specific submissions on the schedule that the Chamber issued the Chamber's Directions. Considering that the Request seeks a variation of the schedule for disclosure, the submission of the lists of witnesses and list of evidence, and, as a result, the beginning of the presentation of evidence by the Defence, the Chamber understands the Request to be a request for extension of time and will treat it as such.

16. Accordingly, pursuant to Regulation 35 of the Regulations, the Chamber will assess, on the basis of the Defence's submissions, whether *good cause* has been shown to extend the time limits in the Chamber's Directions.

17. For that purpose, the Chamber notes, firstly, the Defence's contention that the requested extension is necessary to review and analyse all Conversations. In this regard, while recognising the amount of work that would be required to complete such review, the Chamber recalls that the Defence has been on notice of allegations of the coaching of potential Defence witnesses since prior to the commencement of the trial in the context of the litigation on restrictions on Mr Ntaganda's contacts. In these circumstances, the Chamber previously emphasised⁴² that the Defence must be presumed to have discussed the issue with Mr Ntaganda and to have been conscious of it in conducting its investigations and preparations to date. Further, the allegations at issue are based

³⁹ Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 18.

⁴⁰ Transcript of Hearing on 15 July 2016, ICC-01/04-02/06-T-122-CONF-ENG, pages 65-66.

⁴¹ Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution, ICC-01/04-02/06-1588.

⁴² See Transcript of hearing on 16 November 2016, ICC-01/04-02/06-T-159-Red-ENG, pages 2-7.

on the Prosecution's assessment of the accused's own conduct - or the conduct of a person who is alleged to have acted on the accused's behalf - and, as such, the accused can be considered best placed to advise the Defence team in relation to the witnesses and evidence to be selected for the Defence's presentation of evidence, including whether any witnesses or lines of defence may be compromised or prejudiced by his prior conduct. Should the coaching allegations be inaccurate, the Chamber considers that the accused is equally well-placed to assure the Defence team accordingly, and the Defence's choice of witnesses and evidence would not be affected by these issues. Moreover, the Chamber recalls that the Conversations must be considered in their appropriate context, noting that they do not relate directly to the charges and, are, for a large part, devoid of any direct materiality to these proceedings or relate to peripheral issues. In addition, the Chamber recalls that the Defence has been afforded additional resources to conduct its review of the Conversations.

18. Finally, the Chamber notes the Defence's argument that the extension of time is needed to determine the scope and assess the impact of the alleged Prosecution's access to defence strategy before the commencement of its case.⁴³ The Chamber, for the reasons outlined above, considers that this argument does not justify, at this stage, an extension of time for the Defence's preparations, as sought in the present Request.⁴⁴

19. Regarding the alleged 'new facts' arising from (i) the filing of the Prosecution's request to submit transcriptions and translations of Conversations;⁴⁵ and (ii) the

⁴³ Request, ICC-01/04-02/06-1815-Conf, paras 45-46.

⁴⁴ The Chamber is mindful of the pending Defence request for stay of proceedings, filed on 20 March 2017: Request for stay of proceedings with prejudice to the Prosecutor, ICC-01/04-02/06-1830-Conf and Conf Anxs A and C, Conf-Exp-AnxB and C and ICC-01/04-02/06-1830-Red.

⁴⁵ Prosecution's request pursuant to regulation 35 to submit evidence, 3 February 2017, ICC-01/04-02/06-1769-Conf.

filing of the Prosecution's request for additional Defence disclosure,⁴⁶ the Chamber recalls that it rejected both requests.⁴⁷

20. With reference to the argument that the extension of time is required to prepare for the cross-examination of the three victims authorised to present evidence, the Chamber considers that the Defence has had sufficient notice of these testimonies and related material.⁴⁸ In addition, contrary to the Defence's assertion, and as confirmed in the LRVs Response, the expected testimony of the three victims will not relate to any events that are not part of the charges against the accused.

21. Finally, as for the purported 'factors and changes in circumstances' since 9 October 2014, the Chamber considers that they have been raised⁴⁹ and addressed on previous occasions⁵⁰ and do not contain any new substantiated arguments warranting an extension of the deadlines during the lead up to the presentation of evidence by the Defence.

⁴⁶ Prosecution's request for additional Defence disclosure, ICC-01/04-02/06-1783-Conf and public Annex A and confidential Annexes 1-10. A corrected and a public redacted version were filed on 15 February 2017, ICC-01/04-02/06-1783-Conf-Corr+Conf-Corr-Anx and ICC-01/04-02/06-1783-Red.

⁴⁷ Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence, 23 February 2017, ICC-01/04-02/06-1799; and Decision on Prosecution request for additional Defence disclosure, 10 March 2017, ICC-01/04-02/06-1818.

⁴⁸ Order relating to the deadline for any requests by the Legal Representatives of Victims to present evidence or views and concerns of victims, 11 January 2017, ICC-01/04-02/06-1711; Confidential Redacted Version of Request by the Common Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns, 23 January 2017, ICC-01/04-02/06-1739-Conf-Red; Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns, 10 February 2017, ICC-01/04-02/06-1780-Conf. A public redacted version was filed on 15 February 2017, ICC-01/04-02/06-1780-Red, paras 50-51, and page 20.

⁴⁹ See for example Request on behalf of Mr Ntaganda seeking Trial Chamber VI to modify the schedule for evidentiary blocks 3 and 4, 25 January 2016, ICC-01/04-02/06-1102-Conf with confidential, *ex parte*, Annex A (a public redacted version of the Request was filed on the same day, ICC-01/04-02/06-1102-Red); Transcript of hearing on 10 February 2016, ICC-01/04-02/06-T-65-Red-ENG WT, pp. 5-7; Request on behalf of Mr Ntaganda seeking Trial Chamber VI to recall Witness P-0290, 24 January 2017, ICC-01/04-02/06-1751-Conf-Exp (a confidential redacted version was filed on 25 January 2017, ICC-01/04-02/06-1751-Conf-Red and a public redacted version was filed on 3 March 2017, ICC-01/04-02/06-1751-Red2); Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on "Urgent request for stay of proceedings", 22 November 2016, ICC-01/04-02/06-1645.

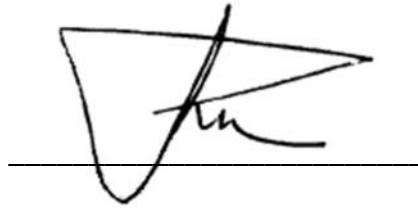
⁵⁰ Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks', 28 January 2016, ICC-01/04-02/06-1115-Conf and ICC-01/04-02/06-1115-Red; Decision on Defence request for reconsideration of the decision on the schedule for the third and fourth evidentiary blocks, 3 February 2016, ICC-01/04-02/06-1143-Conf and ICC-01/04-02/06-1143-Red; Transcript of hearing on 16 November 2016, ICC-01/04-02/06-T-159-Red-ENG, pages 2-7; Decision on request for leave to appeal the Chamber's decision rejecting the Defence request for a stay of proceedings, 12 December 2016, ICC-01/04-02/06-1677; Decision on Defence request for recall of Witness P-0290, 17 February 2017, ICC-01/04-02/06-1791-Conf and ICC-01/04-02/06-1791-Red.

22. In view of the above, the Chamber considers that neither the alleged necessity to review and analyse the Conversations, nor the time required to prepare for the testimony of the three victims, nor the factors and changes since 9 October 2014, either in isolation or in combination, warrant a conclusion that good cause has been shown to extend the time limits as established in the Chamber's Directions.
23. That notwithstanding, the Chamber will remain attentive to any difficulties the Defence may face during the course of its presentation of evidence, and, where necessary, retain a flexible approach to facilitate the Defence's preparations, including by accommodating requests for changes in the order of witnesses or extended breaks between evidentiary blocks.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

- (i) **REJECTS** the Request; and
- (ii) **DIRECTS** the parties and LRVs to file public redacted versions of their submissions within two weeks of issuance of this decision.

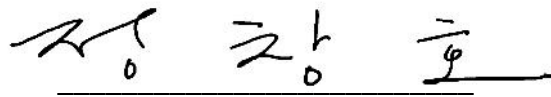
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 22 March 2017

At The Hague, The Netherlands