

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **19 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

Decision on Defence request to modify the schedule for the first two evidentiary blocks

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**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, issues this 'Decision on Defence request to modify the schedule for the first two evidentiary blocks'.

I. Procedural history and submissions

1. On 26 April 2017, the defence team for Mr Ntaganda ('Defence') transmitted its 'Forthcoming Witness List for the First Defence Evidentiary Block', which contained a total of six witnesses.¹
2. On 28 April 2017, the parties and participants were informed *via* email of the dates for the first two evidentiary blocks for the Defence presentation of evidence (respectively, 'First Block' and 'Second Block').²
3. On 9 May 2017, having heard submissions from the Defence on scheduling difficulties related to witnesses listed to testify in the First Block,³ including in relation to passports and other logistical requirements, the Chamber directed the Defence to provide an updated forthcoming witness list ('Updated Forthcoming Witness List') by 10 May 2017.⁴
4. Accordingly, on 10 May 2017, the Defence filed its Updated Forthcoming Witness List, containing a total of four witnesses.⁵
5. On 12 May 2017, the Defence filed the 'Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary

¹ See email communication from the Defence on 26 April 2017 at 15:43.

² See email communication from the Chamber to the parties and participants on 28 April 2017 at 18:04, indicating that the dates for the first two evidentiary blocks would be 29 May – 6 June 2017 and 27 June – 21 July 2017. A further email was sent on 1 May 2017 at 15:28 correcting the dates for the first block to 29 May to 9 June 2017.

³ See Transcript of hearing on 4 May 2017, ICC-01/04-02/06-T-204-CONF-ENG, page 26, line 10 to page 29, line 13; See *generally* Transcript of *ex parte* hearing on 4 May 2017, ICC-01/04-02/06-T-205-CONF-EXP-ENG.

⁴ See email communication from the Chamber to the parties and participants on 9 May 2017 at 08:40.

⁵ See email communication from the Defence on 10 May 2017 at 14:50.

blocks' ('Request').⁶ In the Request, the Defence seeks modification of the dates of the First Block to 29 May until 2 June 2017, and the dates of the Second Block to 12 June until 21 July 2017, to allow Mr Ntaganda to testify 'at the earliest opportunity during the presentation of the case for the Defence'.⁷ The Defence indicates that the First Block would consist of the Defence's further opening statement and the testimony of three witnesses, being Witnesses D-0054, D-0052 and D-0210, and that Mr Ntaganda's testimony would be able to be completed during the Second Block.⁸ The Defence submits that allowing Mr Ntaganda to testify at this stage might result in the presentation of a shorter Defence case. It also avers that short breaks will be required during Mr Ntaganda's testimony to allow him to rest ('Breaks').⁹

6. On 16 May 2017, in accordance with the Chamber's directions,¹⁰ the Office of the Prosecutor ('Prosecution') filed a response ('Response').¹¹ The Prosecution argues that the Request should be rejected and that Mr Ntaganda should be authorised to testify at the start of the third evidentiary block ('Third Block') at the earliest,¹² on the basis that: (i) the Defence's notice of its intention to call Mr Ntaganda 'runs afoul of the deadlines set by the Chamber for provision of its list of witnesses and statements or summaries of anticipated evidence';¹³ (ii) the preparation time required will be wholly insufficient on the basis of the Defence's proposed schedule;¹⁴ (iii) there is 'a myriad of issues' that need to be litigated and decided upon prior to the testimony of the accused;¹⁵

⁶ ICC-01/04-02/06-1903. A courtesy copy was transmitted to the Chamber *via* email on 12 May 2017 at 16:26.

⁷ Request, ICC-01/04-02/06-1903, paras 1-2.

⁸ Request, ICC-01/04-02/06-1903, paras 3-4.

⁹ Request, ICC-01/04-02/06-1903, paras 6-7.

¹⁰ *See* email communication from the Chamber to the parties and participants on 12 May 2017 at 17:31, directing that any responses to the Request be filed by 16 May 2017.

¹¹ 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, ICC-01/04-02/06-1909.

¹² Response, ICC-01/04-02/06-1909, paras 6 and 20.

¹³ Response, ICC-01/04-02/06-1909, para. 3. *See also* paras 11-12 and 14.

¹⁴ Response, ICC-01/04-02/06-1909, paras 3, 13-14 and 19.

¹⁵ Response, ICC-01/04-02/06-1909, para. 4. *See also* paras 15-16.

- (iv) Prosecution team members have made commitments during the weeks between the first two blocks;¹⁶ and (v) no explanation has been provided by the Defence as to its request for Breaks, and the Prosecution may oppose any such request once it has considered the reasons presented therefor.¹⁷
7. The Prosecution indicates in its Response that it will shortly submit various written requests to the Chamber containing submissions on the procedural matters related to the expected testimony of Mr Ntaganda.¹⁸
 8. Also on 16 May 2017, the Defence made a further request, *via* email, for: (i) an urgent status conference to be convened to discuss certain issues related to the Request and Response ('Status Conference Request'); and, in the alternative, (ii) leave to submit a reply in relation to these issues ('Request for Leave to Reply').¹⁹
 9. On 17 May 2017, the Chamber communicated to the parties and participants, *via* email, the amended schedule for the First and Second Blocks, indicating that reasons therefor would follow.²⁰ The Chamber indicated that the relevant schedule shall be as follows: (i) the First Block shall run from 29 May until 2 June 2017, in order to hear the testimony of Witnesses D-0054, D-0052 and D-0210; and (ii) the Second Block shall run from 14 June until 16 June 2017 (inclusive), to commence the testimony of Mr Ntaganda, and thereafter from 27 June to 21 July 2017 to complete the testimony of Mr Ntaganda. The Chamber also indicated that it anticipates that Mr Ntaganda shall testify for four hours per day ('Amended Schedule').

¹⁶ Response, ICC-01/04-02/06-1909, paras 5 and 18.

¹⁷ Response, ICC-01/04-02/06-1909, para. 17.

¹⁸ Response, ICC-01/04-02/06-1909, para. 15.

¹⁹ See email communication from the Defence on 16 May 2017 at 17:55 ('Defence Email').

²⁰ See email communication from the Chamber to the parties and participants on 17 May 2017 at 15:05.

II. Analysis

10. Having decided upon and communicated the Amended Schedule to the parties and participants, the Chamber hereby places the reasons for its decision on the record, and shall proceed to issue further directions as necessary at this stage.

i. Preliminary matter

11. As a preliminary matter, the Chamber shall address the Defence's Status Conference Request and Request for Leave to Reply. Noting current issues around scheduling, as well as the fact that the matters upon which the Defence seeks to make further submissions are not clearly defined,²¹ the Chamber does not consider that it would promote the expeditiousness of proceedings or be in the interests of justice to convene a status conference at this time. Further, with regard to the Request for Leave to Reply, the Chamber did not consider that it would be assisted, at this stage, by any further submissions in ordering the Amended Schedule or deciding upon the limited further directions required for the purposes of the present decision. Accordingly, the Status Conference Request and Request for Leave to Reply are rejected.

ii. Reasons for decision on Amended Schedule

12. At the outset, the Chamber notes that a calling party may, in principle, call its witnesses in the order of its choosing. The Chamber nonetheless considers that it would have been preferable for the Defence to indicate at an earlier moment its intention to call Mr Ntaganda to testify, particularly in light of the Chamber's directions requiring the Defence to furnish, by 26 April 2017: (i) its final list of witnesses ('List of Witnesses'); (ii) final list of evidence; and (iii) to disclose all

²¹ The Defence indicates, *inter alia*, that 'certain issues need to be addressed and in some cases adjudicated upon by the Chamber, with celerity and prior the beginning of the Accused's testimony', without enumerating these - *see* Defence Email.

remaining materials it intends to rely upon during the presentation of its evidence ('Deadline of 26 April 2017').²²

13. Notwithstanding, the Chamber notes the Defence submission that it has faced a series of scheduling difficulties in securing the attendance of witnesses for the First and Second Blocks, in particular due to issues related to obtaining passports and other logistical hurdles, as well as due to the unexpected unavailability of at least one witness.²³ The Chamber recalls that it directed the Defence at an early point to liaise with the Victims and Witnesses Unit ('VWU') in order to 'ensure full clarity and cooperation regarding necessary procedures for the making of any witness referrals, for the purposes of, *inter alia*, protection assessments, necessary travel arrangements and for the smooth scheduling of witness testimony',²⁴ and expects the Defence to comply with this direction. However, the Chamber has noted the Defence submission that it has taken active steps to do so, including by assigning 'two members of the Defence team and more to liaise on a permanent basis with the [VWU]',²⁵ and considers this to be a positive indication.
14. In light of these ongoing difficulties, and noting the Defence submission that allowing Mr Ntaganda to testify at this stage might result in the presentation of a shorter Defence case, the Chamber considers it appropriate to allow Mr Ntaganda to testify during the Second Block. The Chamber also considers relevant its earlier indication that it shall '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,

²² See '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, 30 January 2017, ICC-01/04-02/06-1757 ('Decision of 30 January 2017'), paras 11 and 13-14.

²³ ICC-01/04-02/06-T-204-CONF-ENG, page 26, line 19 to page 27, line 1.

²⁴ Decision of 30 January 2017, ICC-01/04-02/06-1757, para. 12.

²⁵ ICC-01/04-02/06-T-204-CONF-ENG, page 26, lines 5-6.

including by accommodating requests for changes in the order of witnesses [...].²⁶

15. In so deciding, the Chamber also considers that Mr Ntaganda may be distinguished from other witnesses appearing before the Chamber on the basis that, while the statutory scheme does not address the possibility of an accused giving a sworn statement and testifying under solemn undertaking, he has a right to do deriving from Article 67 of the Statute.²⁷ Secondly, and critically, Mr Ntaganda, as the accused person in this case, is well-known to the Prosecution. Thus, while the requisite preparations for his cross-examination can be expected to be extensive, the Chamber considers the Prosecution ought to already be aware of the potential directions that his examination-in-chief and cross-examination may take. The Chamber did not therefore consider that procedural fairness to the Prosecution would be vitiated in authorising the Amended Schedule to allow for Mr Ntaganda to testify during the Second Block.
16. In deciding upon the Amended Schedule, the Chamber was also cognisant of the submission in the Response regarding the commitments made by certain members of the Prosecution team, including Senior Trial Counsel. However, at this stage and in light of the scheduling issues faced, and the fact that the Prosecution commitments identified are at a point at which Mr Ntaganda commences examination-in-chief, and noting that there are other members of the Prosecution team who must be available to follow Mr Ntaganda's testimony during this period, the Chamber was not persuaded that sitting on these dates would be problematic.

²⁶ Decision on Defence request for extension of time to prepare for its presentation of evidence, 22 March 2017, ICC-01/04-02/06-1832, para. 23.

²⁷ See in this regard, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr ('*Katanga and Ngudjolo Rule 140 Decision*'), para. 51.

17. In light of the foregoing, the Chamber is not of the view that the existence of the 26 April 2017 Deadline constitutes a barrier to the scheduling of the testimony of Mr Ntaganda during the Second Block, given the unique position he occupies as the accused person in this case. Accordingly, the Chamber shall not require any amendment to the List of Witnesses²⁸ and emphasises that, in light of the prevailing circumstances, authorising Mr Ntaganda to testify in the Second Block, as reflected in the Amended Schedule, is both appropriate and in the interests of expeditiousness.
18. The Chamber notes that it has not thus far made any directions addressing the event that Mr Ntaganda chooses to testify²⁹ and considers that Mr Ntaganda shall, in principle, be subject to the same rules that are applicable to other witnesses.³⁰ Further, as detailed below, the Defence shall be required, forthwith, to provide a summary of the anticipated testimony of the accused, and to effect any further related disclosure associated with his anticipated testimony. Accordingly, and while noting that the Prosecution indicated that it will make a request on a number of issues associated with the modalities for Mr Ntaganda's testimony, the Chamber already at this stage sets out certain limited directions.

iii. Further Directions

19. Firstly, the Defence is directed to transmit to the Chamber, Prosecution and LRVs, forthwith and in any event no later than **24 May 2017**,³¹ a summary of Mr Ntaganda's anticipated testimony in accordance with the Chamber's directions contained in the 'Decision on Prosecution request related to the

²⁸ See, in contrast, Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, ICC-01/04-02/06-1733.

²⁹ See, however, Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 19.

³⁰ See, similarly, *Katanga* and *Ngudjolo* Rule 140 Decision, ICC-01/04-01/07-1665-Corr, para. 51.

³¹ The Chamber considers this to displace the direction that all summaries shall be finalised and transmitted to the Chamber, Prosecution and LRVs by the filing deadline on 29 May 2017, contained in its Decision on further matters related to the presentation of evidence by the Defence, 11 May 2017, ICC-01/04-02/06-1900, para. 21.

Defence “Further Provisional List of Witnesses and Summaries” (“Directions on Summaries”).³²

20. Secondly, the Defence is directed to effect disclosure of any undisclosed items related to Mr Ntaganda’s anticipated testimony, forthwith, and in any event by no later than **24 May 2017**.
21. Thirdly, in relation to the Prosecution indication that it shall make further written submissions on various topics,³³ the Chamber notes that certain of these may have been dealt with by way of the present decision.³⁴ Notwithstanding, the Chamber invites the Prosecution to file any further submissions related to Mr Ntaganda’s upcoming testimony forthwith, and in any event no later than **26 May 2017**, with any responses due by **31 May 2017**.
22. Thirdly, the Defence is directed to liaise with the VWU to identify a minimum of two reserve witnesses available to testify at the end of the Second Block, should Mr Ntaganda finish his testimony earlier than anticipated, or should any other issue arise to affect the schedule. The identities of these individuals are to be communicated to the Chamber, Prosecution and Legal Representatives of Victims (‘LRVs’) no later than **29 May 2017**.
23. Finally, the Chamber emphasises that any gaps in the Amended Schedule are to be minimised and expects the Defence to be adequately prepared to guard against all foreseeable scheduling difficulties. In this connection, noting that the testimony of Mr Ntaganda for the duration of the Second Block provides the Defence with a significant amount of additional time to schedule the testimonies

³² 13 April 2017, ICC-01/04-02/06-1862, para. 12 and Decision of 30 January 2017, ICC-01/04-02/06-1757, para. 10. *See also* the procedure outlined in the email communication of the Chamber to parties and participants on 4 May 2017 at 19:08 for resolving any disputes as to the sufficiency of summaries.

³³ Response, ICC-01/04-02/06-1909, para. 15.

³⁴ *See, for example*, Response, ICC-01/04-02/06-1909, para. 15, issue (vii). The Chamber notes that, while no formal order has been made in relation to the Breaks, it has indicated that ‘[i]t is anticipated that Mr Ntaganda shall testify for four hours per day’. Should the parties seek to make further submissions on the Breaks, the Chamber shall entertain and pronounce upon any such further issues in making its further ruling on modalities.

of the witnesses it intends to call during the following block, the Chamber expects the Defence to be adequately prepared and to have sufficient witnesses available to testify during the Third Block.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADOPTS the Amended Schedule outlined above;

DIRECTS the Defence to transmit to the Chamber, Prosecution and LRVs, forthwith and in any event no later than **24 May 2017**, a summary of Mr Ntaganda's anticipated testimony in accordance with the Directions on Summaries;

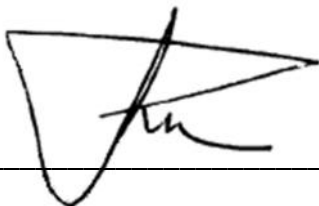
DIRECTS the Defence to effect all relevant disclosure in relation to Mr Ntaganda's testimony forthwith, and in any event by no later than **24 May 2017**;

INVITES the Prosecution to file any request related to modalities forthwith, and in any event no later than **26 May 2017**, with any responses due by **31 May 2017**;

DIRECTS the Defence to liaise with the VWU to identify two reserve witnesses available to testify during the Second Block, and to communicate the identities of these individuals to the Chamber, Prosecution and LRVs by **29 May 2017**; and

REJECTS all other requests.


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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 19 May 2017

At The Hague, The Netherlands