

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **8 June 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 further matters related to the testimony of Mr Ntaganda**

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 Bosco Ntaganda**

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**

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**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 ('Statute'), Rule 140 of the Rules of Procedure and Evidence ('Rules') and Regulation 43 of the Regulations of the Court ('Regulations'), issues the following 'Decision on further matters related to the testimony of Mr Ntaganda'.

## I. BACKGROUND

1. On 2 June 2015, the Chamber issued its 'Decision on the conduct of proceedings' ('Conduct of Proceedings Decision').<sup>1</sup>
2. On 16 June 2015, the Chamber adopted the 'Witness Preparation Protocol',<sup>2</sup> and on the following day, the 'Protocol on the practices to be used to familiarise witnesses for giving testimony at trial' ('Familiarisation Protocol').<sup>3</sup>
3. On 27 May 2016, the Chamber issued its 'Supplemental decision on matters related to the conduct of proceedings' ('Supplemental Conduct of Proceedings Decision'), wherein it supplemented, or amended, certain parts of the Conduct of Proceedings Decision, and provided further directions.<sup>4</sup>
4. On 17 May 2017, the Chamber informed the parties and participants that, following a request from the defence team for Mr Ntaganda ('Defence'),<sup>5</sup> the upcoming schedule for the presentation of Defence evidence would be amended, and that, *inter alia*, the second evidentiary block would run from 14 June until 16 June 2017 (inclusive), to commence the testimony of Mr Ntaganda,

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<sup>1</sup> ICC-01/04-02/06-619 and Annex.

<sup>2</sup> See ICC-01/04-02/06-652-AnxA to Decision on witness preparation, ICC-01/04-02/06-652.

<sup>3</sup> See ICC-01/04-02/06-656-AnxA to Decision on the protocol on witness familiarisation, 17 June 2015, ICC-01/04-02/06-656.

<sup>4</sup> ICC-01/04-02/06-1342.

<sup>5</sup> Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary blocks', 12 May 2017, ICC-01/04-02/06-1903.

and thereafter from 27 June to 21 July 2017, to complete the testimony of Mr Ntaganda ('Notification of Amended Schedule').<sup>6</sup>

5. On 19 May 2017, the Chamber issued the 'Decision on Defence request to modify the schedule for the first two evidentiary blocks',<sup>7</sup> wherein it provided certain limited directions in relation to Mr Ntaganda's testimony (together with Notification of Amended Schedule, 'Decision on Amended Schedule').
6. Also on 19 May 2017, the Defence filed the 'Defence 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' ('Defence Request'),<sup>8</sup> in which it made further submissions on the timing and scheduling of Mr Ntaganda's testimony, arguing that his examination ought not to be 'conducted under time constraints or in conditions which would not allow the Accused to provide the best possible evidence'.<sup>9</sup>
7. On 24 May 2017, in accordance with the Chamber's instructions,<sup>10</sup> the Office of the Prosecutor ('Prosecution') filed a response ('Prosecution Response'),<sup>11</sup> as did the Legal Representatives for Victims ('LRVs' and 'LRVs Response').<sup>12</sup> The Prosecution and LRVs oppose the Defence Request on the basis that it constitutes a request for reconsideration of the Decision on Amended Schedule for which the Defence has failed to demonstrate either a clear error of reasoning or that an injustice would result if the current schedule is maintained.<sup>13</sup>

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<sup>6</sup> Email communication from the Chamber to the parties and participants on 17 May 2017 at 15:05.

<sup>7</sup> ICC-01/04-02/06-1914.

<sup>8</sup> ICC-01/04-02/06-1915.

<sup>9</sup> Defence Request, ICC-01/04-02/06-1915, para. 2.

<sup>10</sup> Email communication from the Chamber to the parties and participants on 22 May 2017 at 11:05.

<sup>11</sup> Prosecution's response to the "Defence 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", ICC-01/04-02/06-1915, ICC-01/04-02/06-1921.

<sup>12</sup> 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", ICC-01/04-02/06-1922.

<sup>13</sup> Prosecution Response, ICC-01/04-02/06-1921, paras 1 and 9-10; LRVs Response, ICC-01/04-02/06-1922, paras 4, 21-24 and 28. On 24 May 2017, the Defence sought leave to file a reply (email communication from the

8. On 26 May 2017, in accordance with the Chamber's instructions,<sup>14</sup> the Prosecution filed a request for orders concerning Mr Ntaganda's testimony ('Prosecution Request'),<sup>15</sup> seeking that the Chamber:

(i) rule that the Witness Preparation Protocol applies to the Accused as a witness; (ii) prohibit the Accused and his Defence team from communicating for the duration of the Accused's testimony; (iii) prohibit the Accused from discussing his testimony with any non-privileged contacts at any time during his testimony; (iv) find that the assurances set out in [A]rticle 93(2) of the Statute and [R]ule 74 of the Rules are inapplicable to the Accused, as his answers may be used against him during the trial, and order the Accused to answer all questions put to him once he commences his testimony and draw adverse inferences, as appropriate, should the Accused decline to answer any such questions; (v) order the Defence to provide the list of items that it intends to use with the Accused during its examination-in-chief 10 days before the start of the Accused's testimony; and (vi) order the Defence to instruct Defence witnesses appearing after the Accused has testified not to follow the Accused's testimony in any manner.<sup>16</sup>

9. The Prosecution also provides notice that, should the need arise, it will make requests to hear certain parts of Mr Ntaganda's testimony in private session, 'in order not to allow him to further attempt to influence the testimony of Defence witnesses as he has been doing from the Detention Centre'.<sup>17</sup>

10. On 31 May 2017, the Chamber convened a hearing to discuss issues pertaining to Mr Ntaganda's upcoming testimony, including those arising from the Defence Request and Prosecution Request ('Hearing of 31 May 2017').<sup>18</sup>

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Defence to the parties at participants on 24 May 2017 at 15:21), which the Prosecution opposed (email communication from the Prosecution to the parties and participants on 24 May 2017 at 16:12). During the hearing on 29 May 2017, the Chamber indicated that it would hear submissions on those issues orally, to ensure that all submissions are properly placed on the record (*See, inter alia*, transcript of hearing on 29 May 2017, ICC-01/04-02/06-T-206-CONF-ENG ET, page 4, lines 4-25).

<sup>14</sup> See Decision on Amended Schedule, ICC-01/04-02/06-1914, para. 21.

<sup>15</sup> Prosecution's request for orders concerning the Accused's testimony, ICC-01/04-02/06-1924-Conf, with one public annex. A public redacted version was filed on the same day (ICC-01/04-02/06-1924-Red).

<sup>16</sup> See Prosecution Request, ICC-01/04-02/06-1924-Conf, para. 2.

<sup>17</sup> Prosecution Request, ICC-01/04-02/06-1924-Conf, para. 3. *See also* paras 42-43.

<sup>18</sup> See Transcript of hearing on 31 May 2017, ICC-01/04-02/06-T-208-CONF-ENG ET.

## II. SUBMISSIONS, ANALYSIS AND DIRECTIONS

11. Having considered: (i) the Defence Request and responses thereto; (ii) the Prosecution Request; and (iii) the submissions made at the Hearing of 31 May 2017, including the jurisprudence referred to therein, and bearing in mind its responsibility to ensure that the trial is conducted in a fair and expeditious manner in accordance with Article 64(2) of the Statute, the Chamber provides the following further directions on matters related to the testimony of Mr Ntaganda.

### i. Applicability of the Witness Preparation Protocol to Mr Ntaganda

12. On the basis of the Chamber's ruling that Mr Ntaganda, upon electing to testify, 'shall, in principle, be subject to the same rules that are applicable to other witnesses', the Prosecution argues that the Witness Preparation Protocol ought to apply in full to Mr Ntaganda, including that any witness preparation session should be recorded, and that a witness preparation log and note should be disclosed. In the alternative, the Prosecution requests that the Chamber make an order specifically prohibiting the conduct described at paragraphs 28 and 29 of the Witness Preparation Protocol in any discussions carried out between Mr Ntaganda and his defence team prior to the start of his testimony ('Alternative Request').<sup>19</sup>

13. The Defence opposes this limb of the Prosecution Request, averring, *inter alia*, that consultations between Mr Ntaganda and counsel are protected by counsel-client privilege and that it would not be appropriate to require the recording or disclosure of the content of any such discussions.<sup>20</sup>

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<sup>19</sup> Prosecution Request, ICC-01/04-02/06-1924-Conf, paras 12-14, referring to Decision on Amended Schedule, ICC-01/04-02/06-1914, para. 18.

<sup>20</sup> See ICC-01/04-02/06-T-208-CONF-ENG ET, page 3, line 4 to page 6, line 1.

14. The Chamber recalls that, in the Decision on Amended Schedule, it indicated that Mr Ntaganda shall indeed, in principle, be subject to the same rules that are applicable to other witnesses. However, in the same decision, the Chamber also noted the ‘unique position [Mr Ntaganda] occupies as the accused person in this case’.<sup>21</sup> Accordingly, the Chamber does not consider that the Witness Preparation Protocol, a purpose of which is to allow the calling party to ‘assess and clarify the witness’s evidence’,<sup>22</sup> applies to the testimony of an accused person, compared to a witness who may have had limited contact with the calling party. Further, in light of the fact Mr Ntaganda’s consultations with his own counsel are subject to counsel-client privilege, the Chamber does not consider it would be appropriate to require the application of the Witness Preparation Protocol to meetings with his defence team in the lead-up to his testimony.
15. Moreover, the Chamber considers that the dictates of the Code of Professional Conduct for counsel (‘Code of Conduct’) militate against any need for the Alternative Request, given that the provisions of the Code of Conduct require counsel to maintain the integrity of the evidence and to refrain from any kind of misconduct,<sup>23</sup> including from that referred to in paragraphs 28 and 29 of the Witness Preparation Protocol.<sup>24</sup>
16. On the basis of the foregoing, this limb of the Prosecution Request is rejected.

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<sup>21</sup> Decision on Amended Schedule, ICC-01/04-02/06-1914, para. 17.

<sup>22</sup> Witness Preparation Protocol, ICC-01/04-02/06-652-AnxA, para. 1.

<sup>23</sup> Code of Conduct – *see in particular* Articles 25 and 31.

<sup>24</sup> *See similarly, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (‘Katanga and Ngudjolo case’), *Décision relative à la « Requête urgente de l’Accusation aux fins de prohibition des contacts entre les accusés Mathieu Ngudjolo et Germain Katanga et avec leur équipe de Défense pendant la durée de leur témoignage sous serment »*, 23 September 2011, ICC-01/04-01/07-3171, (‘Katanga and Ngudjolo Decision’), para. 16.

**ii. Communication between Mr Ntaganda and the Defence for the duration of Mr Ntaganda's testimony**

17. The Prosecution requests that the Chamber issue an order prohibiting Mr Ntaganda and the Defence from communicating from the moment that he is under oath until the completion of his testimony, unless specifically authorised. In the alternative, the Prosecution requests that the Chamber issue an order prohibiting communication between Mr Ntaganda and the Defence regarding his testimony while the testimony is ongoing, allow it to cross-examine Mr Ntaganda on discussions he has had with the Defence, and prohibit disclosure of and discussions with Mr Ntaganda about the Prosecution's list of items that it seeks to use during cross-examination ('List of Items').<sup>25</sup>
18. The Defence opposes these requests. Referring to the jurisprudence of Trial Chamber II in the *Katanga and Ngudjolo* case, and, *inter alia*, to that of the *ad hoc* tribunals, it argues that it is a fundamental right of an accused to have access to counsel at any stage of the proceedings, and notes that if the Prosecution is concerned that counsel will coach the accused in order to tailor his testimony, then it is reminded that it has the opportunity to carefully cross-examine the accused on any such interactions.<sup>26</sup> The Defence does not oppose the non-provision to Mr Ntaganda of the List of Items, subject to two exceptions, arguing that it should be able to consult with Mr Ntaganda on: (i) any newly-disclosed items on this list; and (ii) any of Mr Ntaganda's non-privileged conversations from the Detention Centre that the Chamber authorises the Prosecution to use during cross-examination of Mr Ntaganda ('Proposed Exceptions').<sup>27</sup>

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<sup>25</sup> Prosecution Request, ICC-01/04-02/06-1924-Conf, paras 15-27.

<sup>26</sup> See, *inter alia*, ICC-01/04-02/06-T-208-CONF-ENG ET, page 13, lines 19-22, referring to International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Prli et al.*, Decision on Prosecution's Appeal against Trial Chamber's Order on Contact between the Accused and Counsel during an Accused's Testimony pursuant to Rule 85(C), 5 September 2008, IT-04-74-AR73.10 ('Prli Appeals Decision'), para. 17.

<sup>27</sup> See ICC-01/04-02/06-T-208-CONF-ENG ET, page 16, line 25 to page 18, line 25.



19. The Chamber considers that, as noted in the *Prlić* Appeals Decision, any decision on the degree of contact between an accused who chooses to testify and his or her counsel falls within a trial chamber's discretion.<sup>28</sup> Accordingly, in light of Articles 64 and 67(1)(d) of the Statute, and noting the approach taken by Trial Chamber II in the *Katanga and Ngudjolo* case, the Chamber is of the view that it would encroach upon the fundamental rights of Mr Ntaganda to deny him all contact with counsel throughout his testimony, and does not consider this to be a proportionate measure to the aim of avoiding that his testimony is unduly influenced.
20. The Chamber therefore finds that communication between the accused and the Defence may be maintained during the entirety of his testimony, noting that any such communication should always be appropriate, in the sense that counsel is not permitted to advise Mr Ntaganda as to how he ought to respond to a question or line of questioning.<sup>29</sup> In so finding, the Chamber recalls the provisions of the Code of Conduct referred to above, which require counsel to maintain the integrity of the evidence and to refrain from any kind of misconduct,<sup>30</sup> which the Chamber considers sufficient to address the concerns raised by the Prosecution. Further, the Chamber considers that the Prosecution will have the opportunity to seek to explore any instructions or preparation that may have taken place during its cross-examination of Mr Ntaganda, should the Prosecution have reason to believe that such communications may have been inappropriate.
21. The Chamber notes that the Defence does not object to the non-provision to Mr Ntaganda of the List of Items, subject to the Proposed Exceptions.<sup>31</sup> Noting

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<sup>28</sup> *Prlić* Appeals Decision, IT-04-74-AR73.10, para. 15.

<sup>29</sup> See also in this regard, *Katanga and Ngudjolo* Decision, ICC-01/04-01/07-3171, para. 15 and ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.10, Joint Declaration of Judge Shahabuddeen and Judge Vaz.

<sup>30</sup> Code of Conduct – see in particular Articles 25 and 31.

<sup>31</sup> See ICC-01/04-02/06-T-208-CONF-ENG ET, page 16, line 25 to page 18, line 25.

the approach in the *Katanga and Ngudjolo* case,<sup>32</sup> the Chamber considers that Mr Ntaganda shall not be provided with the List of Items. It follows that the Defence shall also not be permitted to discuss any material on the List of Items with the accused, save by leave of the Chamber. This is with the exception of the items already referred to in the ‘Prosecution’s request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda’, which the Defence has had knowledge of since 26 May 2017, and which will be the subject of a discrete decision of the Chamber.<sup>33</sup> Noting the further Defence submissions on the Proposed Exceptions, should the Prosecution intend to use material it has not yet disclosed as of the start of Mr Ntaganda’s testimony, it must clearly indicate this on its List of Items, including the date of disclosure. The Chamber will address at that stage whether such items may be used during cross-examination and/or whether it is appropriate to permit the Defence to provide any such items to the accused, or to discuss them with him.

**iii. Discussion of Mr Ntaganda’s testimony between Mr Ntaganda any other persons during the period in which he testifies**

22. The Prosecution requests that the Chamber issue an order prohibiting Mr Ntaganda from discussing his testimony with any non-privileged contacts,<sup>34</sup> to which the Defence does not object.<sup>35</sup> Noting the agreement of the parties on this issue, and in light of the instruction given by the Chamber to all previous witnesses that they must not communicate about their testimony with any other persons,<sup>36</sup> the Chamber considers that Mr Ntaganda shall be similarly

<sup>32</sup> *Katanga and Ngudjolo* Decision, ICC-01/04-01/07-3171, para. 15.

<sup>33</sup> 26 May 2017, ICC-01/04-02/06-1925-Conf. *See also* Prosecution’s supplemental request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda, 31 May 2017, ICC-01/04-02/06-1930-Conf; Response to “Prosecution’s request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda” (ICC-01/04-02/06-1925-Conf) and “Prosecution’s supplemental request to use non-privileged Detention Centre communications during the testimony of Bosco Ntaganda” (ICC-01/04-02/06-1930-Conf), 6 June 2017, ICC-01/04-02/06-1940-Conf.

<sup>34</sup> Prosecution Request, ICC-01/04-02/06-1924-Conf, paras 33-35.

<sup>35</sup> *See* ICC-01/04-02/06-T-208-CONF-ENG ET, page 23, lines 5-15.

<sup>36</sup> *See, for the first time*, Transcript of hearing on 15 September 2015, ICC-01/04-02/06-T-25Bis-CONF-ENG, page 42, lines 9-10.

precluded from discussing his testimony with his non-privileged contacts. The Chamber shall remind Mr Ntaganda of this obligation at the end of each day of his testimony. Therefore, no additional order is required at this stage.

**iv. Applicability of Rule 74 assurances to Mr Ntaganda**

23. The Prosecution requests that the Chamber: (i) find that the assurances set out in Article 93(2) of the Statute and Rule 74 of the Rules are inapplicable to Mr Ntaganda; (ii) order Mr Ntaganda to answer all questions put to him once he commences his testimony and draw adverse inferences, as appropriate, should he decline to answer any questions put to him; and (iii) rule that Mr Ntaganda's answers may be used against him during the trial.<sup>37</sup> This is not objected to by the Defence.<sup>38</sup>
24. Noting the parties' agreement on this issue, and in light of the approach taken by Trial Chamber II in the *Katanga and Ngudjolo* case that 'providing such assurances would be irreconcilable with the status of the accused',<sup>39</sup> the Chamber does not consider that Rule 74 assurances, if sought, would be applicable to Mr Ntaganda, insofar as they concern the charges in the present case. As acknowledged by the Defence, once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all questions put to him or her.<sup>40</sup> The Chamber thus confirms that the answers provided by Mr Ntaganda may be used against him in the present case, and if he declines to respond to a permissible question, the Chamber may draw adverse inferences, as appropriate.<sup>41</sup>

<sup>37</sup> Prosecution Request, ICC-01/04-02/06-1924-Conf, paras 36-38.

<sup>38</sup> See ICC-01/04-02/06-T-208-CONF-ENG ET, page 23, line 25 to page 24, line 6.

<sup>39</sup> See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused, 13 September 2011, ICC-01/04-01/07-3153 ('Rule 74 Decision on Mr Ngudjolo'), para. 6.

<sup>40</sup> See *Defence submission at ICC-01/04-02/06-T-208-CONF-ENG ET*, page 24, lines 1-6.

<sup>41</sup> See Rule 74 Decision on Mr Ngudjolo, ICC-01/04-01/07-3153, paras 7 and 8.

**v. Timing of the provision of the list of items sought to be used with Mr Ntaganda in examination-in-chief**

25. The Prosecution requests that the Chamber order that the list of items the Defence seeks to use in examination-in-chief with Mr Ntaganda be transmitted no later than ten days prior to the start of his testimony, given the likelihood that the Defence is anticipated to seek to use an unprecedented number of items with the accused.<sup>42</sup> The Defence opposes this request, averring, *inter alia*, that the examination-in-chief of Mr Ntaganda will be of significant duration and that the Prosecution will have adequate time during this period to address these exhibits.<sup>43</sup>
26. The Chamber notes that, according to its Conduct of Proceedings Decision, the calling party shall submit its list of items sought to be used with a witness during examination-in-chief 'no later than five days prior to the start of the witness's testimony'.<sup>44</sup> It is observed that, as of the time of issuance of the present decision, the Prosecution request on this point has become moot. However, the Chamber emphasises that, in light of: (i) its previous indication that 'Mr Ntaganda shall, in principle, be subject to the same rules that are applicable to other witnesses';<sup>45</sup> and (ii) the timing of the second evidentiary block, which includes a significant break after the first three days of the examination-in-chief, the Chamber considers that provision of the Defence's list five days in advance of Mr Ntaganda's testimony, as per the usual rule, will allow sufficient time for the Prosecution to prepare for his testimony, despite the anticipated length of this list, and notwithstanding any remaining

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<sup>42</sup> Prosecution Request, ICC-01/04-02/06-1924-Conf, paras 39-40.

<sup>43</sup> See, *inter alia*, ICC-01/04-02/06-T-208-CONF-ENG ET, page 26, lines 8-13.

<sup>44</sup> ICC-01/04-02/06-619, para. 32.

<sup>45</sup> Decision on Amended Schedule, ICC-01/04-02/06-1914, para. 18.

disclosure issues referred to during the Hearing of 31 May 2017.<sup>46</sup> Therefore, the Chamber has decided not to grant this limb of the Prosecution Request.

**vi. Request for an order instructing Defence witnesses appearing after Mr Ntaganda not to follow his testimony**

27. The Prosecution requests that the Chamber order the Defence to instruct the Defence witnesses who will appear after the accused has testified not to listen to, watch, attend or in any other manner follow part or all of Mr Ntaganda's testimony until they have completed their testimony.<sup>47</sup> The Defence opposes this request on the basis that it is not practicable.<sup>48</sup>

28. The Chamber finds that, in light of the enforcement issues associated with this limb of the Prosecution Request, it does not consider it appropriate or feasible to make such an order. The Chamber considers it sufficient that the Prosecution has an opportunity to cross-examine Defence witnesses as to what extent they are aware of the accused's testimony. Moreover, the requirements of Rule 140(3) of the Rules provide an additional safeguard on this matter. Accordingly, this part of the Prosecution Request is rejected.

**vii. Use of private session during Mr Ntaganda's testimony**

29. The Prosecution provides notice that it may request certain portions of Mr Ntaganda's testimony to be heard in private session in order to avoid that he is 'provided with a platform through which to circumvent the restrictions which have been placed upon him by coaching, through his own testimony, the witnesses scheduled to appear after him'.<sup>49</sup> The Defence opposes this, arguing that Mr Ntaganda wishes to testify publicly and that, apart from two particular

<sup>46</sup> See, for example, ICC-01/04-02/06-T-208-CONF-ENG ET, page 24, line 20 to page 26, line 23, referring to Prosecution Request, ICC-01/04-02/06-1924-Conf, para. 11.

<sup>47</sup> Prosecution Request, ICC-01/04-02/06-1924-Conf, para. 41.

<sup>48</sup> See ICC-01/04-02/06-T-208-CONF-ENG ET, page 28, line 25 to page 30, line 15.

<sup>49</sup> Prosecution Request, ICC-01/04-02/06-1924-Conf, paras 42-43.

subject areas, it 'will endeavour to have all of Mr Ntaganda's testimony in public session'.<sup>50</sup>

30. The Chamber recalls that, in its Conduct of Proceedings Decision, it held that '[w]itness testimony should, as far as possible, be given in public' and that the use of private session is, in principle, largely resorted to as a measure to ensure the effectiveness of protective measures, and that the need to use private session shall be decided on a case-by-case basis.<sup>51</sup> The Chamber considers that there is no compelling reason to depart from this approach in relation to the testimony of Mr Ntaganda, and will thus: (i) adjudicate any request to move into private session during the course of his testimony; and (ii) take any further measures it considers necessary on the publicity of the proceedings.

**viii. Further matters relating to timing and modalities of Mr Ntaganda's testimony**

31. During the hearing on 29 May 2017, the Chamber indicated that, in relation to the Defence Request, with regard to the schedule for the second block, the Chamber would accommodate 'to the extent feasible and appropriate, the conditions favoured by the Defence to present the testimony of the accused', but that, due to scheduling issues, no additional sitting days could be accommodated in the second evidentiary block. The Chamber also indicated that the need for breaks or amendments to sitting hours would be assessed and determined on case-by-case basis, and confirmed that Mr Ntaganda would not be required to sit for more than four hours per day.<sup>52</sup>

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<sup>50</sup> See ICC-01/04-02/06-T-208-CONF-ENG ET, page 30, line 22 to page 31, line 15.

<sup>51</sup> ICC-01/04-02/06-619, paras 58-59.

<sup>52</sup> See Transcript of hearing on 29 May 2017, ICC-01/04-02/06-T-206-CONF-ENG ET, page 2, line 23 to page 4, line 3. See also in this regard Email communication from the Chamber to the parties and participants on 17 May 2017 at 15:05.

32. Having considered the submissions in the Defence Request and of the parties and participants at the Hearing of 31 May 2017, the Chamber considers it appropriate to adopt the following further directions in relation to the timing, scheduling and modalities of Mr Ntaganda's testimony.
33. Firstly, in relation to the timing of Mr Ntaganda's testimony, the Chamber notes at the outset that the Defence indicated that it will complete its examination-in-chief of Mr Ntaganda within **40 hours**. As per the usual practice, the cross-examining party shall be entitled, in principle, to the same time in cross-examination as used in examination-in-chief. In accordance with its Conduct of Proceedings Decision, the Chamber will decide on a case-by-case basis, and only after having heard the examination-in-chief, whether any additional time for cross-examination may be warranted, and may authorise re-examination on 'limited and specific issues' where appropriate.<sup>53</sup>
34. Therefore, while the Chamber is of the view that it would indeed be preferable to complete the entire testimony of Mr Ntaganda before the summer recess, and encourages the Defence to exercise maximum effort in this regard, the Chamber shall retain a degree of flexibility on scheduling, noting: (i) the Defence indication that Mr Ntaganda's testimony may result in a shorter presentation of evidence by the Defence, which militates against adopting a restrictive approach to the time in which he is permitted to testify;<sup>54</sup> (ii) that it is not yet appropriate to determine the amount of time that may be required for re-examination, or for questioning of Mr Ntaganda by the Judges; and (iii) that, as already indicated, the need for breaks or amendments to sitting hours will be assessed and determined on a case-by-case basis.<sup>55</sup>

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<sup>53</sup> ICC-01/04-02/06-619, paras 29-30.

<sup>54</sup> ICC-01/04-02/06-T-208-CONF-ENG ET, page 41, lines 10-12.

<sup>55</sup> See Transcript of hearing on 29 May 2017, ICC-01/04-02/06-T-206-CONF-ENG ET, page 2, line 23 to page 4, line 3. See also in this regard Email communication from the Chamber to the parties and participants on 17 May 2017 at 15:05.

35. Secondly, and due to scheduling issues, the Chamber indicates already at this stage that it shall not sit on **5 July 2017**. It also confirms that its sitting hours for the duration of Mr Ntaganda's testimony shall be, unless otherwise indicated, from **9:30 until 11am, 11:30am until 1pm, and 2:30pm until 4:30pm**, during which Mr Ntaganda shall be expected to testify for approximately four hours. As indicated in the Notification of Amended Schedule, the Chamber may use one hour daily to deal with any other legal or procedural issues, as necessary.<sup>56</sup> The Chamber further notes that the Defence has identified two reserve witnesses<sup>57</sup> who are expected to be ready to testify during the second evidentiary block.
36. Thirdly, the Chamber recalls its other directions on the scope, order and mode of questioning outlined in the Conduct of Proceedings Decision<sup>58</sup> and indicates at this stage that it considers such directions to be equally applicable to the testimony of Mr Ntaganda.
37. Finally, the Chamber notes that, given Mr Ntaganda's familiarity with the courtroom, including its layout, formalities and its participants, the provisions of the Familiarisation Protocol may be largely inapplicable in the case of his testimony. In the absence of any submissions from the parties and participants on this issue, the Chamber defers to the expertise of the staff of the Victims and Witnesses Unit, and expects it to liaise with the parties, participants and required sections of the Registry to conduct any pre-testimony familiarisation it deems necessary to ensure the smooth commencement of Mr Ntaganda's testimony.

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<sup>56</sup> Email communication from the Chamber to the parties and participants on 17 May 2017 at 15:05.

<sup>57</sup> See email communication from the Defence to the parties and participants on 2 June 2017 at 12:17.

<sup>58</sup> ICC-01/04-02/06-619, paras 21-30. Any directions therein are as amended by subsequent decisions, such as the Supplemental Conduct of Proceedings Decision, ICC-01/04-02/06-1342.

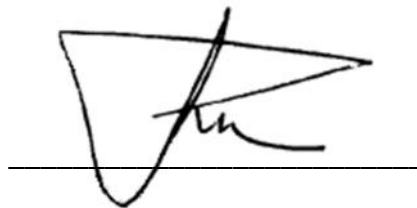


**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**NOTES** the submissions of the parties and participants on the various issues associated with Mr Ntaganda's testimony; and

**ORDERS** the parties, participants and the Registry to proceed in accordance with the directions set out herein.

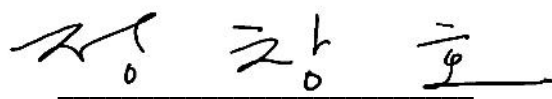
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

**Judge Robert Fremr, Presiding Judge**

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', written over a horizontal line.

**Judge Kuniko Ozaki**

A handwritten signature in black ink, consisting of Korean characters '정창호', written over a horizontal line.

**Judge Chang-ho Chung**

Dated 8 June 2017

At The Hague, The Netherlands