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

Date: **24 May 2017**

**TRIAL CHAMBER VI**

**Before:** Judge Robert Fremr, Presiding Judge  
Judge Kuniko Ozaki  
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public**

**Prosecution's response to the "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**

**Source:** Office of the Prosecutor

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

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## Introduction

1. Trial Chamber VI ("Chamber") should reject the Defence request for a longer second evidentiary block to further accommodate breaks for the Accused during his cross-examination ("Defence Request") and the request to increase the time allotted for the Accused's testimony.<sup>1</sup> The Defence Request amounts to a request for reconsideration of the Chamber's decision to sit from 14-16 June and from 27 June to 21 July to complete the Accused's testimony during shorter sitting periods each day.<sup>2</sup> The Defence Request fails to demonstrate either a clear error of reasoning or that an injustice would result if the current schedule is maintained.
2. Further, the Defence's assertion that rest days are necessary for the Accused is effectively a request for special measures under rule 88. This rule expressly provides that requests for special measures are to be made after having consulted with the Victims and Witnesses Unit in order "*to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2*". This does not apply to the Accused, nor has the Defence advanced any medical reasons requiring additional rest periods during testimony beyond the generous breaks already set in the current schedule.
3. Should the Chamber nonetheless decide that additional breaks are necessary to facilitate the Accused's testimony, the Prosecution sets out an alternative proposal for a short break between examination-in-chief and cross-examination, while ensuring that the Accused's testimony is completed by 21 July 2017 for the efficiency of the proceedings and the anticipated 113 witnesses yet to testify.<sup>3</sup>

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<sup>1</sup> ICC-01/04-02/06-1915.

<sup>2</sup> Trial Chamber VI decision on the Defence request to modify the first and second evidentiary blocks, communicated *via* email on 17 May 2017 at 15:05. Full reasons for the decision were notified on 19 May 2017, ICC-01/04-02/06-1914.

<sup>3</sup> 109 fact witnesses still to testify after the Accused and 4 expert witnesses.

## Background

4. On 12 May 2017, the Defence filed an urgent request to modify the schedule for the first two evidentiary blocks to accommodate the Accused's testimony.<sup>4</sup> The Defence requested that the Chamber schedule the second evidentiary block for six weeks and stated that "short breaks will be needed to allow Mr Ntaganda to rest".<sup>5</sup> The Chamber shortened the deadline for responses to 16 May 2017.<sup>6</sup>
5. The Prosecution opposed the request on 16 May 2017.<sup>7</sup> On 17 May 2017, the Chamber amended the first and second evidentiary blocks to allow the Accused to testify.<sup>8</sup> The Chamber considered the Defence submissions and modified the sitting schedule to: 14-16 June 2017 and 27 June to 21 July 2017, sitting only four hours per day<sup>9</sup> instead of five hours per day.<sup>10</sup>
6. On 19 May 2017, the Defence filed the present request seeking further modification to the Chamber's decided schedule, including 'rest' days for the Accused and additional days for the Accused's testimony.<sup>11</sup>
7. On 22 May 2017, the Chamber shortened the deadline for responses to the Defence Request to 24 May 2017.<sup>12</sup>

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<sup>4</sup> ICC-01/04-02/06-1903.

<sup>5</sup> ICC-01/04-02/06-1903, para. 8.

<sup>6</sup> Email communication from Trial Chamber VI on 12 May 2017 at 17:31.

<sup>7</sup> ICC-01/04-02/06-1909.

<sup>8</sup> Trial Chamber VI decision on the Defence request to modify the first and second evidentiary blocks, communicated *via* email on 17 May 2017 at 15:05. Full reasons for the decision were notified on 19 May 2017, ICC-01/04-02/06-1914.

<sup>9</sup> Trial Chamber VI decision on the Defence request to modify the first and second evidentiary blocks, communicated *via* email on 17 May 2017 at 15:05. Full reasons for the decision were notified on 19 May 2017, ICC-01/04-02/06-1914.

<sup>10</sup> ICC-01/04-02/06-1900, para. 49.

<sup>11</sup> ICC-01/04-02/06-1915.

<sup>12</sup> Email communication from Trial Chamber VI on 22 May 2017 at 11:05.

### Prosecution's Submissions

8. The Defence's original request to modify the schedule of the first and second evidentiary blocks included a request for six weeks of testimony with scheduled breaks for the Accused to rest.<sup>13</sup> The Chamber considered the Defence submissions<sup>14</sup> and determined that the Accused's testimony should conclude by 21 July 2017 - in a shorter period than that requested.<sup>15</sup> The Chamber also anticipated sitting four rather than the normal five hours per day to accommodate the Accused's assertion that he wanted rest periods, and stated that it would rule on any further submissions regarding breaks.<sup>16</sup>
9. The Defence Request amounts to a request for the Chamber to reconsider its previous decision on the number of days allocated for the Accused's testimony. As previously stated by the Chamber, *"[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment."*<sup>17</sup>
10. As set out below, the Defence fails to demonstrate a clear error of reasoning in the decision or establish that hearing the Accused's testimony for four hours per day from 14-16 June and from 27 June to 21 July 2017 – instead of for six weeks between 12 June and 21 July 2017 with longer breaks - would amount to an injustice.

<sup>13</sup> ICC-01/04-02/06-1903, paras. 1, 4, 7 and 8.

<sup>14</sup> 17 May 2017 email at 15:05 with full reasons at ICC-01/04-02/06-1914, para. 5.

<sup>15</sup> Trial Chamber VI decision on the Defence request to modify the first and second evidentiary blocks, communicated *via* email on 17 May 2017 at 15:05. Full reasons for the decision were notified on 19 May 2017, ICC-01/04-02/06-1914.

<sup>16</sup> ICC-01/04-02/06-1914, footnote 34.

<sup>17</sup> ICC-01/04-02/06-483, para. 13.

*(i) No justification for additional breaks*

11. The Defence Request fails to establish a need for further modification to the sitting schedule. The Defence merely posits that sitting four hours per day is “too demanding” for the Accused,<sup>18</sup> but does not provide any further justification. The Accused has no known medical condition and is otherwise not a vulnerable witness: a child, an elderly person, a traumatised person or a victim of sexual violence.
12. Moreover, the current sitting schedule allows for ample breaks. The Accused will testify for three days in the first week of his testimony (14-16 June 2017) sitting only four hours per day in short sessions with breaks in between each session. He will then have 10 days to rest.
13. When he resumes after the 10-day break for his second week of testimony, he will testify for four days that week (27-30 June 2017) sitting no more than four hours per day with a series of breaks after each short session. He will then have two more days to rest during the weekend.
14. For the remaining three weeks of his testimony, he will sit five days per week at four hours per day with regularly scheduled breaks between each session and full evening and weekend breaks. His current sitting schedule is less onerous than the schedule of Prosecution witnesses who testified consecutively over many days for up to six hours per day sitting extended hours.<sup>19</sup> The Defence has not justified why any additional breaks are needed beyond the significant breaks provided in the current schedule, combined with fewer sitting hours per day.

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<sup>18</sup> ICC-01/04-02/06-1915, para. 6.

<sup>19</sup> For example, Witness P-0055 testified during extended 6-hour sessions consecutively until his testimony was completed.

15. In the event the Accused experiences any health-related issues during testimony, the Chamber can consider the request at that time and take any necessary measures, if appropriate.

*(ii) No justification for more time*

16. The Defence Request also seeks reconsideration of the dates set for the Accused's testimony. The Defence states that it intends to examine the Accused for 40 hours and that the dates set by the Chamber to complete the Accused's testimony are, accordingly, insufficient.<sup>20</sup> Later, the Defence submits that it will examine the Accused for a total of 46 hours including a considerable proposed re-examination time.<sup>21</sup> The Defence will need to support its request for any re-examination based on a realistic estimate of the time required to address matters that arose during cross-examination. Accordingly, the Chamber will evaluate the Defence's request for re-examination *after* the cross-examination is completed; as such, the request for any re-examination is premature at this time.

17. The Chamber set the dates for the Accused's testimony over 22 days, which, at four hours per day, amounts to 88 hours of Court time. The Defence must plan its examination accordingly within these limits. The time allocated for the examination of the Accused should be equal between the Defence and the Prosecution in accordance with the Chamber's previous rulings,<sup>22</sup> and must adequately allow for questions by the Chamber and the Legal Representatives of Victims, if authorised, and for legal debates and procedural issues. Yet, the Defence's proposal to devote 46 hours to Defence questioning, 38 hours to Prosecution questioning, and 4 hours to be further divided between the Prosecution, the Chamber and the Legal Representatives, if authorised, is not an

<sup>20</sup> Defence Request, para. 5.

<sup>21</sup> Defence Request, paras. 9-11 (the Defence proposes 38 hours plus a further 8 hours of re-examination).

<sup>22</sup> See, ICC-01/04-02/06-T-81-CONF-ENG, p. 56, l. 1-2; ICC-01/04-02/06-T-86-CONF-ENG, p. 18, l. 15-16; ICC-01/04-02/06-T-110-CONF-ENG, p. 38, l. 14-15; Trial Chamber VI's email sent on 21 December 2016 at 13:27; ICC-01/04-02/06-619, para. 29.

equal distribution. Moreover, 8 hours of re-examination is disproportionately high when compared to the total time of the Accused's cross-examination.

18. The Prosecution also opposes the Defence request to continue the Accused's testimony after the summer recess; in the Prosecution's submission, his testimony must be completed by 21 July 2017, including any re-examination, to ensure proper continuity of the examination. It will also ensure expeditious proceedings, as the Defence intends to call a further 109 fact witnesses and up to 4 experts after the Accused's testimony.

*(iii) Alternative Proposal*

19. Should the Chamber nonetheless decide to schedule more breaks than those currently incorporated into the existing schedule, the Prosecution proposes that there be a short break after the examination-in-chief and before the start of the cross-examination, as this would be the least disruptive to the flow and continuity of the examinations by the Parties, rather than having breaks during the examinations which can disrupt the thread of questioning.
20. In this alternative scenario, the Prosecution proposes the following schedule: 32 hours for examination-in-chief (from 14-16 June to 4 July 2017), with an additional 4 hours to deal with objections and debates/ procedural matters, if necessary, followed by a short break of two days (5-6 July 2017). Thereafter, the Prosecution's cross-examination will commence over 32 hours (from 7 to 19 July 2017), with an additional 4 hours to deal with objections and debates/ procedural matters, if necessary. The remaining days (19-21 July) can accommodate questions by the Judges, the Legal Representatives of Victims, if authorised, and, also if authorised, any further questioning by the Prosecution and Defence, which should be focused and limited to no more than one hour each.

## Conclusion

21. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request. In the alternative, the Prosecution proposes an alternative schedule, as set out above.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 24<sup>th</sup> day of May 2017  
At The Hague, The Netherlands