



Original: **English**

No.: ICC-01/04-02/06
Date: **24 February 2015**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Request on Behalf of Mr Ntaganda Seeking Reconsideration and Clarification of
Decision on Pre-Trial Brief**

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the *“Decision on ‘Prosecution’s request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief”* issued by Trial Chamber VI (“Chamber”) on 19 February 2015¹ (“Decision”) and the submission by the Prosecution of the *“Public redacted version of ‘Prosecution application for delayed disclosure’, 16 February 2015, ICC-01/04-02/06-461-Conf-Exp”* and the *“Public redacted version of ‘Prosecution request for redactions’, 16 February 2015, ICC-01/04-02/06-462-Conf-Exp”* on 17 February 2015² (“Prosecution Application” and “Prosecution Request”), Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submit this:

Request on Behalf of Mr Ntaganda Seeking Reconsideration and Clarification of Decision on Pre-Trial Brief

(“Request for Reconsideration” and “Request for Clarification”)

OVERVIEW

1. A Chamber has the power to reconsider its own decision when it is manifestly unsound and its consequences are manifestly unsatisfactory. A Chamber also has the power to reconsider its own decision in the presence of particular circumstances, including new facts and new arguments, which render the consequences of its decision manifestly unsatisfactory.
2. The Prosecution Application and the Prosecution Request amount to new circumstances that will inevitably impact the contents of the Prosecution Pre-Trial Brief – due to be submitted on 9 March 2015 pursuant to the Decision – which will definitely have to be updated much later.
3. The consequences of the Decision are thus manifestly unsatisfactory as the Defence is deprived of the benefit of the Pre-Trial Brief the Chamber ordered to be filed on 2 March 2015, only to obtain an incomplete Pre-Trial Brief seven days later before obtaining a final Pre-Trial Brief much later.

¹ ICC-01/04-02/06-467.

² ICC-01/04-02/06-461-Red2; ICC-01/04-02/06-462-Red2.

4. The Chamber must thus reconsider the decision to grant an extension of the time limit for the filing of the Prosecution Pre-Trial Brief and order the Prosecution to file: (i) an initial Pre-Trial Brief on 2 March 2015 based on the information available at that time – thereby allowing the Defence to analyze the Prosecution’s theory of the case without delay; and (ii) a final Pre-Trial Brief at a date to be set, subject to the outcome of the Prosecution Application and the Prosecution Request.
5. In addition, in light of the Chamber’s holding that the Pre-Trial Brief “is one of several supplementary documents designed to provide additional assistance and notice to the Defence of the nature of the Prosecution’s case and how the intended evidence relates to the charges”, the Defence respectfully requests the Chamber to provide clarification on: (i) the identity of the “several supplementary documents designed to provide additional assistance and notice to the Defence”; and, more importantly, (ii) when and how it considers that the Accused is informed of the Prosecution’s case in accordance with Article 67(1)(a).
6. Lastly, considering the Chamber’s holding that the extension granted to the Prosecution is “relatively *de minimus* and not of a nature which would prejudice the rights of the accused to conduct effective investigations or make the necessary preparations prior to the commencement of trial”, the Defence respectfully requests the Chamber to provide clarification on the impact of the new circumstances created by the submission of the Prosecution Application and the Prosecution Request on the right of the Accused to be informed promptly and in detail of the nature, cause and contents of the charges, as well as on his right to have adequate time and facilities for the preparation of the defence.

REQUEST FOR RECONSIDERATION

Submissions

7. Although not expressly provided for in the legal framework of the International Criminal Court (“Court”), a Chamber has the power to reconsider its own decision when it is “manifestly unsound” and its consequences are “manifestly unsatisfactory”³ in the sense that its decision rests on a clear error of reasoning and would result in an injustice.⁴ A Chamber also has the power to reconsider its own decision in the presence of particular circumstances, including new facts and new arguments, which render the consequences of its decision manifestly unsatisfactory.⁵
8. On 17 February 2015, the Prosecution filed both its Prosecution Application and Prosecution Request, in which it sought delayed disclosure (either until 16 March 2015 or 30 April 2015) and significant redactions for 28 witnesses.⁶
9. The extent of the relief sought by the Prosecution in both filings was unknown to the Defence when it responded orally to the “*Public Redacted Version of Prosecution’s request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief*”, ICC-01/04-02/06-454-Conf-Exp, dated 12 February 2015” (“Prosecution Request for Variation”) during the 17 February 2015 status conference.⁷ The situation arising out of the submission of the Prosecution

³ ICC-01/04-01/06-2705 (“*Lubanga Decision*”), para.18, referred to in ICC-01/09-02/11-863 (“*Kenyatta Decision*”), para.11.

⁴ It stems from the *Lubanga Decision* that guidance was sought from the jurisprudence of the *ad hoc* tribunals in articulating the test for reconsideration by a Chamber of its own decisions: *Lubanga Decision*, paras.15-18. See *inter alia* *The Prosecutor v. Radovan Karadzic*, IT-95-5/18-T, Decision on Prosecution’s request for reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para.8.

⁵ *Kenyatta Decision*, para.11. See also *The Prosecutor v. Jadranko Prlic*, IT-04-74-AR73.16, Decision on Jadranko Prlic’s Interlocutory Appeal Against the Decision on Prlic Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para.18.

⁶ Until 23 February 2015, when the Prosecution filed its “*Prosecution withdrawal of request for redactions in relation to P-0109*” (ICC-01/04-02/06-470) the number of affected witnesses was 29.

⁷ The Defence received a courtesy copy of the Prosecution Application at 12:14 on 17 February 2015, after the adjournment of the status conference. The Defence was notified of the Prosecution Application and the Prosecution Request at 12:59 on the same day.

Application and the Prosecution Request constitutes new circumstances warranting the reconsideration of the Decision.

10. In granting the Prosecution Request for Variation, the Chamber reasoned *inter alia* that “the extension [requested by the Prosecution] is likely to result in a more useful final document”.⁸ It thus rejected the Defence’s proposal to order the Prosecution to file an initial version of its Pre-Trial Brief by 2 March 2015, followed by an amended version should the need arise.⁹
11. Bearing in mind the high number of witnesses for which delayed disclosure and/or significant redactions are sought, it is inevitable that the Pre-Trial Brief due to be submitted on 9 March 2015 pursuant to the Decision will be incomplete and will have to be updated much later, potentially less than one month prior to the commencement of trial.
12. As a result of the new circumstances, the Decision now deprives the Defence of the benefit of analyzing the Prosecution’s theory of the case without delay, as of 2 March 2015, only to make available seven days later, a Pre-Trial Brief that will not constitute the ‘useful final document’ envisaged by the Chamber.¹⁰ Bearing in mind the additional serious prejudice to the rights of the Accused to be informed promptly and in detail of the nature, cause and content of the charges, as well as to the right to have adequate time for preparation of the defence, the consequences of the Decision have thus become manifestly unsatisfactory.
13. Consequently, the Chamber must reconsider the decision to grant an extension of the time limit for the filing of the Prosecution Pre-Trial Brief.
14. Striking a balance between the rights of the Accused in relation to preparation for trial and the need for the Prosecution to accurately incorporate in the Pre-

⁸ Decision, para.12.

⁹ ICC-01/04-02/06-T-18-CONF-ENG ET 17-02-2015, p.37.

¹⁰ Decision, para.12.

Trial Brief all relevant information, the Defence respectfully requests the Chamber to order the Prosecution to submit: (i) an initial Pre-Trial Brief on 2 March 2015 based on the information available at that time – thereby allowing the Defence to analyze the Prosecution’s theory of the case without delay; and (ii) a final Pre-Trial Brief at a date to be set, subject to the outcome of the Prosecution Application and the Prosecution Request.

Relief Sought

15. In light of the above, the Defence respectfully requests the Chamber to reconsider its Decision and to:

A) **ORDER** the Prosecution to submit by 2 March 2015 an initial version of its Pre-Trial Brief, including all the information available at that time; and

B) **ORDER** the Prosecution to submit a final version of its Pre-Trial Brief at a date to be set by the Chamber once the analysis to be performed in relation to the 28 witnesses referred to in the Prosecution Application and the Prosecution Request will be concluded.

REQUEST FOR CLARIFICATION

Submissions

16. In light of the vagueness of the Chamber’s holding that the Pre-Trial Brief “is one of several documents designed to provide *additional assistance and notice* to the Defence of the nature of the Prosecution’s case and how the intended evidence relates to the charges”¹¹ and the new circumstances created by the submission of the Prosecution Application and Prosecution Request, the Defence respectfully requests the Chamber to provide clarification on the following three issues, namely:

¹¹ Decision, para.11. (emphasis added)

- A) the identity of the “several supplementary documents designed to provide additional assistance and notice to the Defence”;
 - B) when and how the Chamber considers that the Accused has been “informed” of the Prosecution’s case in accordance with Article 67(1)(a); and
 - C) the impact of the new circumstances created by the submission of the Prosecution Application and the Prosecution Request on the right of the Accused to be informed promptly and in detail of the nature, cause and contents of the charges, as well as on his right to have adequate time and facilities for the preparation of the defence.
17. The Defence posits that the Chamber’s clarification on the above three issues will allow the trial to proceed on safe grounds as well as materially advance the proceedings and avoid unnecessary litigation.

First and Second Issues

18. Considering that neither the Decision nor the “*Decision on the updated document containing the charges*”¹² have ruled on the exact weight to be attached to the Pre-Trial Brief, it is necessary to ensure that the Chamber and the parties have a common understanding of the real nature and purpose of the Pre-Trial Brief in relation to Mr Ntaganda’s right to be informed “in detail” of the nature, cause and content of the charges pursuant to Article 67(1)(a) of the Statute. This is particularly important in light of the vagueness of the Chamber’s holding that the Pre-Trial Brief is “one of several supplementary documents designed to provide *additional assistance and notice* to the Defence”.¹³
19. The Defence takes the position that as of today, it is not informed in detail of the nature, cause and content of the charges brought against Mr Ntaganda. The Defence submits that an accused is on notice only when the Prosecution files

¹² ICC-01/04-02/06-450, paras.88-89.

¹³ Decision, para.11. (emphasis added)

an updated DCC in conjunction with a second document – in this case, a Pre-Trial Brief as suggested by the parties and ordered by the Chamber – which explains the Prosecution’s theory of the case as well as how the intended evidence relates to the charges. As such, the Pre-Trial Brief cannot be regarded as a mere “supplementary document” designed to provide additional assistance and notice to the Defence.

Third Issue

20. As mentioned above, the Prosecution Application and the Prosecution Request amount to new circumstances which necessarily impact the Prosecution’s ability to submit a complete Pre-Trial Brief on 9 March 2015. Indeed, it is inevitable that the Prosecution will not be able to file a final and complete Pre-Trial Brief before the Chamber issues a decision on both the Prosecution Application and the Prosecution Request. This, for all intent and purposes, renders the Chamber’s order to the Prosecution to submit a Pre-Trial three months before the commencement of the trial, moot.
21. In such circumstances, it is of utmost importance that the Chamber clarifies the impact of the inability of the Prosecution to submit a final Pre-Trial Brief no sooner than the beginning of May 2015 – less than one month than the scheduled date for commencement of trial – on the right of the Accused to be informed promptly and in detail of the nature, cause and content of the charges, as well as on his right to have adequate time and facilities for the preparation of the defence.
22. In this regard, Mr Ntaganda recalls his undertaking expressed on numerous occasions to be ready to commence trial on the date set by the Chamber, providing a minimum period of three months between the Prosecution fully meeting its disclosure obligations and submitting its Pre-Trial Brief and the beginning of trial.

23. Hence, the Defence respectfully suggests that in issuing the requested clarification, the Chamber should consider: (i) its order to the Prosecution to complete its disclosure obligations by 2 March 2015 (three months before the scheduled date for the commencement of trial); (ii) its order to the Prosecution to submit its Pre-Trial Brief three months before the beginning of trial; and (iii) the fact that to this day, all discussions among the parties in relation to both issues have consistently focused on these deadlines.

Relief Sought

24. In light of the above submissions, and pursuant to Article 64(3)(a) of the Statute, the Defence respectfully requests the Chamber to provide clarification on:
- A) the identity of the “several supplementary documents designed to provide additional assistance and notice to the Defence”;
 - B) when and how the Chamber considers that the Accused is “informed” of the Prosecution’s case in accordance with Article 67(1)(a); and
 - C) the impact of the new circumstances created by the submission of the Prosecution Application and the Prosecution Request on the rights the Accused in relation to trial preparation.

RESPECTFULLY SUBMITTED ON THIS 24th DAY OF FEBRUARY 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands