



Original: **English**

No.: ICC-01/04-02/06
Date: 27 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

**Joint Response to the “Request on Behalf of Mr Ntaganda Seeking Reconsideration
and Clarification of Decision on Pre-Trial Brief”**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon

Mr Luc Boutin

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**

Ms Paolina Massidda

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

Amicus Curiae

States Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representatives hereby submit their joint response to the “Request on behalf of Mr Ntaganda seeking reconsideration and clarification of Decision on Pre-Trial Brief”.¹ Both requests concern the “Decision on ‘Prosecution’s request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief’”.²

2. First, the Defence seeks reconsideration of the Trial Chamber’s (the “Chamber”) ruling granting the Prosecution an extension of time of seven days for the filing of a pre-trial brief.³ This request does not meet the requirements for reconsideration and must therefore be dismissed. On the one hand, the Defence fails to identify with sufficient clarity the “*manifestly unsatisfactory consequences*” warranting the review of the time limit set by the Chamber. On the other hand, the arguments put forward by the Defence regarding the existence of changed circumstances justifying the maintenance of the initial deadline are unpersuasive and, to a large extent, speculative by nature.

3. As to the request for clarification, the Common Legal Representatives firmly oppose the interpretation suggested by the Defense regarding “when and how” should the Chamber consider that the accused is “informed” in accordance with article 67(1)(a) of the Rome Statute. It is submitted that the accused has been informed in detail of the charges brought against him since 7 July 2014, *i.e.* since the date the confirmation decision was translated into Kinyarwanda.⁴

¹ See the “Request on Behalf of Mr Ntaganda Seeking Reconsideration and Clarification of Decision on Pre-Trial Brief”, No. ICC-01/04-02/06-471, 24 February 2014 (the “Defence Requests”).

² See the “Decision on ‘Prosecution’s request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief’” (Trial Chamber VI), No. ICC-01/04-02/06-467, p. 6.

³ See the Defence Requests, *supra* note 1, paras. 4, 7-13.

⁴ See the “Icyemezo ku birego Porokireri arega Bosco Ntaganda hakurikijwe ingingo ya 61(7)(a) n’iya (b) ya Sitati y’i Roma”, No. ICC-01/04-02/06-309-tKIN, 7 July 2014.

II. SUBMISSIONS

Request for reconsideration

4. The Court case law allows a chamber to reconsider its own decision when it is manifestly unsound or its effects are manifestly unsatisfactory. Reconsideration is, therefore, an exceptional remedy that can only be granted in limited circumstances. For the reasons outlined *infra*, the Common Legal Representatives submit that the criteria for reconsideration are not met.

5. The Defense contends that the Chamber must reconsider its Decision because the Prosecution requests for redaction and for delayed disclosure constitute “changed circumstances”.⁵ The Defense further argues that the Prosecution will not be in a position to submit a final Pre-Trial Brief by 9 March 2015, since the document will have to be updated at a later stage of the proceedings to reflect the additional evidence disclosed.⁶ Moreover, the assertion by the Defence that it will only receive an incomplete Pre-Trial Brief is speculative, as it depends on the outcome of the Prosecution applications.⁷ In other words, there will only be changed circumstances if these requests are approved by the Chamber. Even in the event that these requests are granted, this *per se* does not render the Decision unsound or manifestly unsatisfactory, as it is implicit in the Chamber’s reasoning that the Pre-Trial Brief should only reflect the current state of disclosure. If supplementary evidence is filed at a later stage, it is obvious that the Pre-Trial Brief will have to be amended accordingly.

6. Furthermore, the issue concerning whether the content of the Pre-Trial Brief should be updated to reflect subsequent rulings by the Chamber does not arise from the Decision. Indeed, the issue under consideration was simply whether there exists good cause – within the meaning of regulation 35 of the Regulations of the Court – to

⁵ See the Defence Requests, *supra* note 1, paras. 9 and 12.

⁶ *Idem*, para. 11.

⁷ *Ibid.*, paras. 8 and 9.

grant the requested extension of time.⁸ When granting the Request, the Chamber noted the delays and difficulties experienced by the Prosecution in conducting witness interviews.⁹ The Chamber also took into consideration the fact that the delays were caused by reasons outside of the Prosecution's direct control. The Defence fails to address all these factors which constitute the basis of the Chamber's decision. It does not challenge the Chamber's conclusion that there was good cause to extend the time limit for the submission of the pre-trial brief. Nor does the Defense even dispute the Chamber's findings according to which the requested extension is "*relatively de minimus*" and "*not of a nature which would prejudice the rights of the accused*".¹⁰ Instead, the Defense merely requests that the Chamber clarify the impact of the extension of time on the right of the accused.¹¹

7. In addition, The Defence's contention that an accused "*is on notice only when the Prosecution files an updated DCC in conjunction with a second document – in this case, a Pre-Trial Brief*"¹² is inconsistent with the Rome Statute and Rules of Procedure and Evidence, which do not require the submission of a Pre-Trial Brief, or for that matter of fact any other documents than the Decision on the confirmation of the charges. The purpose of the Pre-Trial Brief, as explained *infra*,¹³ is not to "inform" the Defence of the charges, but rather to facilitate its preparation for trial.

8. In light of the above, the Common Legal Representatives submit that the Defense has failed to provide valid reasons warranting the review of the Decision. The Defense request for reconsideration must therefore be dismissed.

⁸ See the "Decision on 'Prosecution's request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief" (Trial Chamber VI), No. ICC-01/04-02/06-467, para. 5.

⁹ *Idem*, paras. 9 and 10.

¹⁰ *Ibid.*, para. 13.

¹¹ See the Defence Requests, *supra* note 1, paras. 16 *et seq.*

¹² *Idem*, para. 19.

¹³ See *infra*, para. 12.

9. Even if by extraordinary the Chamber would consider that the Defence request meets the requirements for reconsideration, the Common Legal Representatives contend that said request is abusive. Indeed, the Rome Statute offers an established remedy – namely the possibility to request authorisation to appeal the “Decision on ‘Prosecution’s request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief’” pursuant to article 82(1)(d) of the Rome Statute. The Common Legal Representatives incidentally note that the Defence should have filed said request on 23 February 2015, therefore on the day preceding the filing of its request for reconsideration. Moreover, the Common Legal Representatives note that since the Defence in its Requests does not challenge the basis presiding over the issuance of the Decision of the Chamber or even dispute the Chamber’s findings contained therein,¹⁴ it seems only reasonable to infer that the Defence would not have been in a position to meet the criteria established for a request for leave to appeal pursuant to article 82(1)(d) of the Rome Statute. The Common Legal Representatives recall that, in the context of an interlocutory appeal, “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁵ if constituting “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹⁶ Therefore, a mere dispute over the correctness of a time limit set by the Chamber cannot constitute a valid ground for a leave to appeal to be granted.¹⁷

¹⁴ See *supra* para. 6.

¹⁵ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168, OA3, 13 July 2006, para. 9.

¹⁶ *Ibid.*

¹⁷ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

Request for clarification

First and second issues

10. The Defence seeks clarification from the Chamber regarding: (i) the identity of the additional 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*” and (ii) “*when and how it considers that the Accused is informed of the Prosecution’s case in accordance with Article 67(1)(a)*”.¹⁸ It is important to note that, although closely related, the two issues raised by the Defence are quite distinct.

11. Indeed, article 67(1)(a) of the Rome Statute refers to the accused’s right to be informed “*promptly and in detail of the nature, cause and contents of the charges*”. In principle, such a detailed notice is provided through the delivery of the decision on the confirmation of charges which, as stated by the Appeals Chamber, “*defines the parameters of the charges at trial*”.¹⁹ Therefore, the Common Legal Representatives submit that the accused should be considered “informed” in detail of the charges as of the date of notification of the confirmation decision, provided that it is in a language which the accused fully understands and speaks.

12. In addition to the confirmation decision, which is the authoritative document for the purposes of article 67(1)(a) of the Rome Statute, other materials may be deemed necessary by the Trial Chamber in order to give effect to the requirements of article 67(1)(b) of the Statute, *i.e.* for the preparation of the defence. The Chamber’s reference to additional documents “*designed to provide additional assistance and notice to the Defence*”²⁰ therefore relates not only to the documents required for the accused to be “informed” of the charges, but also to other materials necessary for the Defence to

¹⁸ *Idem*, para. 16.

¹⁹ See the “Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), No. ICC-01/04-01/06-3121-Red (A5), 1 December 2014, para. 124.

²⁰ See the “Decision on ‘Prosecution’s request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief’” (Trial Chamber VI), No. ICC-01/04-02/06-467, para. 11.

have “adequate time and facilities” to prepare for trial. There is no exhaustive list for the documents falling within this category and there is no statutory obligation to provide the Defence with such documents.²¹ Whether and when a particular document is required pursuant to article 67(1)(b) of the Rome Statute is to be determined on a case by case basis, taking into account the circumstances of each case. In the present case, a pre-trial brief was deemed necessary in order to assist the Defence in understanding the Prosecution’s theory of the case and in particular, to facilitate the linkage between the charges and the corresponding evidence. Other documents may also be of assistance to the Defence such as the in-depth analysis chart filed at the pre-trial stage, the updated Document Containing the Charges or the lists of witnesses to be called at trial.

13. Therefore, the Common Legal Representatives submit that the accused should be considered “informed” pursuant to article 67(1)(a) of the Rome Statute as of the date of notification of the confirmation decision in a language that the accused fully understands and speaks.

Third issue

14. With respect to point C) of the Request,²² the Common Legal Representatives submit that it is unnecessary, particularly at this stage of the proceedings, to embark on an assessment of the impact of the Prosecution applications for redaction and for delayed disclosure on the rights the accused. Such an assessment can only be conducted once a final decision has been reached on these requests.

²¹ See *supra* para. 7.

²² See the Defence Requests, *supra* note 1, paras 20 *et seq.*

FOR THESE REASONS, the Common Legal Representatives respectfully request the Chamber to dismiss the “Request on Behalf of Mr Ntaganda Seeking Reconsideration and Clarification of Decision on Pre-Trial Brief” in its entirety.



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks



Sarah Pellet
Common Legal Representative of the
Child soldiers

Dated this 27th day of February 2015

At The Hague, The Netherlands and at Bunia, Democratic Republic of the Congo