

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **3 February 2016**

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

Public redacted version of ‘Decision on Defence request for reconsideration of the decision on the schedule for the third and fourth 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 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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

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') and incorporating by reference the applicable law set out in the 'Decision on the Defence request for reconsideration and clarification',¹ issues this 'Decision on Defence request for reconsideration of the decision on the schedule for the third and fourth evidentiary blocks'.

I. Procedural History and Submissions

1. On 25 January 2016, the defence team for Mr Ntaganda ('Defence') filed a request seeking an amendment to the schedule for the third and fourth evidentiary blocks ('Original Request').² In particular, the Defence requested the following revised schedule: 27 January – 2 February (Witness [REDACTED]); 8 - 12 February (Witness [REDACTED]); 15 – 16 February (Witness [REDACTED]); and the postponement of the testimony of Witnesses [REDACTED] and [REDACTED] to the fourth evidentiary block.³
2. On 27 January 2016, the Office of the Prosecutor ('Prosecution') opposed the Original Request.⁴ The Legal Representatives of victims informed the Chamber that they did not intend to make any submissions in relation to it.⁵
3. Subsequently on 27 January 2016, the Defence sought leave to reply to the Prosecution's response on three issues ('Request to Reply').⁶ The Request to Reply was rejected by the Chamber by way of oral decision on 28 January 2016.⁷

¹ 27 February 2015, ICC-01/04-02/06-483, para. 13.

² Request on behalf of Mr Ntaganda seeking Trial Chamber VI to modify the schedule for evidentiary blocks 3 and 4, ICC-01/04-02/06-1102-Conf with confidential, *ex parte*, Annex A. A public redacted version of the Request was filed on the same day, ICC-01/04-02/06-1102-Red.

³ Original Request, ICC-01/04-02/06-1102-Conf, paras 23 and 27.

⁴ Prosecution's response to the "Request on behalf of Mr Ntaganda seeking Trial Chamber VI to modify the schedule for evidentiary blocks 3 and 4", ICC-01/04-02/06-1102-Conf, ICC-01/04-02/06-1112-Conf-Exp. A confidential redacted version was notified on the same day, ICC-01/04-02/06-1112-Conf-Red. ICC-01/04-02/06-1112-Conf-Exp was subsequently reclassified as confidential pursuant to a direction of the Chamber on 1 February 2016 (e-mail from Legal Officer of the Chamber to the Registry and Prosecution on 1 February 2016 at 14:44).

⁵ E-mail from Legal Representatives of victims to the Chamber on 27 January 2016 at 8:45.

4. Also on 28 January 2016, the Chamber issued a decision partially granting the Original Request ('Impugned Decision')⁸ and directing that the schedule for the remainder of the third evidentiary block be as follows:
- Commencing on 8 February 2016, until approximately 12 February 2016: Witness [REDACTED];
 - Commencing on 15 February 2016, until approximately 17 February 2016: Witness [REDACTED]; and
 - Commencing on 22 February 2016, until approximately 26 February 2016: either Witness [REDACTED] or Witness [REDACTED], to be indicated by the Prosecution by the filing deadline on 1 February 2016.
5. On 1 February 2016, the Defence sought reconsideration of the Impugned Decision ('Request for Reconsideration').⁹ The Defence submits that the Chamber committed a 'clear error of reasoning' in adjudicating the Original Request 'without the benefit' of the Defence's submissions on two issues, namely: (i) 'the Defence's preparations for the cross-examination of forthcoming Prosecution witnesses, in particular Witnesses [REDACTED] and [REDACTED]';¹⁰ and (ii) 'the impact of the Registry's decision granting limited additional resources to replace Associate Counsel in his absence'.¹¹ The Defence submits that reconsideration of the Impugned Decision is 'the only avenue available to prevent an injustice in the present exceptional circumstances'.¹² While acknowledging that the revised schedule adopted by the Chamber in

⁶ Email communication from Defence to the Chamber on 27 January 2016 at 22:48.

⁷ Transcript of hearing on 28 January 2016, ICC-01/04-02/06-T-58-ENG ET, page 4, lines 15-17.

⁸ Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks, ICC-01/04-02/06-1115-Conf. A public redacted version was issued on the same day (ICC-01/04-02/06-1115-Red).

⁹ Application on behalf of Mr Ntaganda seeking reconsideration of "Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks", ICC-01/04-02/06-1122-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-1122-Red).

¹⁰ Request for Reconsideration, ICC-01/04-02/06-1122-Conf, paras 1 and 6-16.

¹¹ Request for Reconsideration, ICC-01/04-02/06-1122-Conf, paras 1 and 17-20.

¹² Request for Reconsideration, ICC-01/04-02/06-1122-Conf, para. 2.

respect of Witnesses [REDACTED] and [REDACTED] reflects that submitted by the Defence in the Original Request, the Defence additionally argues that the timing between those two witnesses, being two days, is 'unreasonable' and 'amounts to an abuse of the Chamber's discretion'.¹³ The Defence makes an alternative scheduling proposal, in which it proposes to postpone the testimony of Witness [REDACTED].¹⁴

6. Subsequently, on 1 February 2016, as directed,¹⁵ the Prosecution indicated that Witness [REDACTED] would be the final witness in the third evidentiary block.¹⁶
7. Having been directed to do so,¹⁷ the Prosecution responded to the Request for Reconsideration by way of e-mail on 1 February 2016 ('Prosecution Response').¹⁸ The Prosecution opposes the Request for Reconsideration, arguing that the Chamber did not abuse its discretion in rejecting the Request to Reply, and that the arguments presented by the Defence do not demonstrate a clear error of reasoning or an injustice. The Prosecution notes that the Defence has been aware since 24 November 2015 that both Witnesses [REDACTED] and [REDACTED] would be called to testify during the third evidentiary block. The Prosecution further argues that the nature of the expected testimony of Witness [REDACTED] should be considered, and that experienced counsel should be 'capable of digesting' large amounts of material in a relatively short time. The Prosecution submits that the Impugned Decision 'in no way compromises' the accused's fundamental rights.
8. The Legal Representatives of victims did not respond to the Request for Reconsideration.

¹³ Request for Reconsideration, ICC-01/04-02/06-1122-Conf, paras 21-25.

¹⁴ Request for Reconsideration, ICC-01/04-02/06-1122-Conf, paras 26-28.

¹⁵ Impugned Decision, ICC-01/04-02/06-1115-Red, para. 11.

¹⁶ Prosecution's amended schedule for the third evidentiary block, ICC-01/04-02/06-1123-Conf.

¹⁷ E-mail from Legal Officer of the Chamber on 1 February 2016 at 11:48.

¹⁸ E-mail from the Prosecution to the Chamber on 1 February 2016 at 15:32.

II. Analysis

9. Noting the Prosecution's indication, subsequent to the filing of the Request for Reconsideration, that it will call Witness [REDACTED] at the end of the third evidentiary block, the Chamber has focused its analysis below accordingly.
10. The Chamber does not consider that the standard for reconsideration has been met. The Chamber notes that the Defence largely sets out submissions on certain of the issues for which leave to reply was rejected. There is no automatic right of reply; a party may only reply with the leave of the Chamber.¹⁹ It was therefore incumbent on the Defence to provide all information it considered relevant to the Chamber's determination in the Original Request. Moreover, a reply should not serve to correct oversights or mistakes made in the initial request.²⁰ In rejecting the Request for Reply, the Chamber noted that it did not consider that further submissions on the points identified by the Defence would be of assistance. In this regard, the Chamber observes that in the Impugned Decision it did not rely on either: (i) an assumption that the Defence request for additional resources would be granted by the Registry; or (ii) the Prosecution's submissions regarding the state of Defence preparations,²¹ but rather made an objective assessment on the basis of the situation as known to the Chamber at the time.
11. The Chamber does not consider that any of the Defence's further submissions in the Request for Reconsideration, including relating to Witnesses [REDACTED] and [REDACTED], warrant reconsideration of the schedule established by way of the Impugned Decision. In particular, the Defence provides no new

¹⁹ Regulation 24(5) of the Regulations of the Court.

²⁰ See Request for Reconsideration, ICC-01/04-02/06-1122-Conf, para. 22, in which the Defence states that 'had leave to reply been granted, the Defence would have explained that the proposed two-day break between the respective testimonies of Witnesses [REDACTED] and [REDACTED] results from an oversight'.

²¹ On this point, the Chamber notes that the Defence specifically sought leave to reply on the following issue: 'The Prosecution's submissions, made in the abstract, regarding the state of Defence preparations, which in the Prosecution's view do not compromise the right of Mr. Ntaganda to effectively 'have examined' the witnesses against him'.

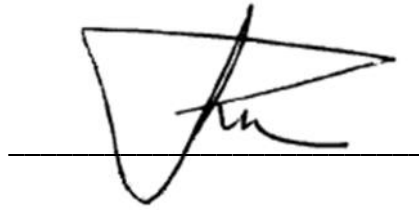
information regarding preparations for Witness [REDACTED], noting that the Chamber is fully aware of the need for the cross-examining counsel to personally familiarise him/herself with relevant witness-related material.

12. With regard to the Defence submission that the schedule identified by it in the Original Request was a matter of 'oversight', the Chamber observes that neither a reply, as noted above, nor a request for reconsideration are appropriate avenues for seeking to amend the relief originally sought. While new facts and arguments arising since the decision was rendered may be relevant to the assessment, the Chamber does not consider the information brought to its attention in this manner to qualify as such. Indeed, having regard, *inter alia*, to the scope and nature of Witness [REDACTED]'s anticipated testimony and the notice which the Defence has had thereof, including of the scheduling of the testimony, the Chamber does not consider that the schedule established by way of the Impugned Decision is unreasonable, amounts to an abuse of discretion or otherwise gives rise to an injustice warranting reconsideration.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Reconsideration.

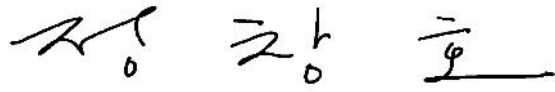
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, appearing to be 'Chang-ho Chung', positioned above a horizontal line.

Judge Chang-ho Chung

Dated 3 February 2016

At The Hague, The Netherlands