

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **14 December 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***

Confidential

**Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order
Setting certain Deadlines regarding the Presentation of Evidence by the
Prosecution and the Defence Case**

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: (i) Trial Chamber VI ("Chamber")'s *"Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution of 19 October 2016"* ("Order")¹, and; (ii) *"Prosecution's communication of the disclosure of evidence obtained pursuant to Article 70"* of 7 November 2016 ("Prosecution Notice")² as well as the disclosure of Prosecution Article 70 investigation related material ("Article 70 disclosure") on numerous occasions thereafter,³ Counsel representing Mr Ntaganda ("Defence") hereby submit this:

**Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order
Setting certain Deadlines regarding the Presentation of Evidence by the
Prosecution and the Defence Case**

"Defence Request"

INTRODUCTION

1. On 19 October 2016, the Chamber set certain deadlines related to the end of the presentation of the evidence by the Prosecution but also ordered the Defence to: (i) file a notice as to whether it intends to call evidence by 16 December 2016, and; (ii) provide the Chamber, by the same deadline, on an *ex parte* basis, with a preliminary list of witnesses it intends to call, indicating the time estimates for the examination of the witnesses.⁴
2. Significant new facts have come into existence or come to the knowledge of the Defence since the Order was rendered ("New Facts"), resulting in the Defence

¹ ICC-01/04-02/06-1588.

² ICC-01/04-02/06-1616.

³ 15 November 2016: Disclosure of 70 draft summaries of Mr Ntaganda's non-privileged Detention Centre communications; 17 November 2016: Disclosure of a spreadsheet listing all the telephone calls the Prosecution has reviewed or is in the process of reviewing; 19 November 2016: disclosure of 60 draft summaries of Mr Ntaganda's non-privileged Detention Centre communications; 23 November 2016: 30 draft summaries of Mr Ntaganda's non-privileged Detention Centre communications; 24 November 2016: 88 draft summaries of Mr Ntaganda's non-privileged Detention Centre communications; 25 November 2016: disclosure of 168 draft summaries of Mr Ntaganda's non-privileged Detention Centre communications. Based on the information provided in the Prosecution Notice, 34 draft summaries still have to be disclosed to the Defence.

⁴ ICC-01/04-02/06-1588, para.10 and 11.

being unable to provide the Chamber with a preliminary list of witnesses it intends to call.

3. The New Facts also render the end of the presentation of the evidence by the Prosecution in a single block unmanageable.
4. Accordingly, the Defence submits that reconsideration of the Order is necessary.

I. LAW APPLICABLE TO RECONSIDERATION

5. The Trial Chamber has an inherent discretion to reconsider its previous decisions, in particular, where a new fact has arisen since the time of the original decision.⁵ Reconsideration may also be appropriate “to prevent an injustice,”⁶ or simply where “there is reason to believe that [a Trial Chamber’s] original Decision was erroneous.”⁷

II. SUBMISSIONS

A. New facts that have come to existence since the Order was rendered

6. Significant new facts have come to the knowledge of the Defence since the Order was rendered, namely:

⁵ *Ruto & Sang*, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, 10 February 2015, para.19 (“[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment”); *Kenyatta*, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr. Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para.11 (“[t]he Chamber finds support, as was also done by Trial Chamber I, in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) whose statutory provisions are equally silent as to the power of reconsideration, that those circumstances can include ‘new facts or new arguments’”); *Prlić et al.*, IT-04-74-A, Decision on Motions for Reconsideration, 5 September 2014, p. 4; *Stanišić & Župljanin*, IT-08-91-T, Decision Denying Joint Defence Motion for Reconsideration or Certification of the Decision of 18 April 2012 and Allowing the Defence to Reply to the Prosecution Response to the Joint Defence Final Submissions on the CHS, 10 May 2012.

⁶ Decision on the Defence request for reconsideration, ICC-01/04-02/06-611, 27 May 2015, para.12.

⁷ *Nizeyimana*, Decision on Defence Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, ICTR-00-55C-T, 1 July 2011, para.13.

- (i) on 7 November 2016, the Prosecution put the Defence on notice that certain unidentified prospective Defence witnesses would have been coached as part of a “broad scheme to pervert the course of justice”;⁸
- (ii) during the period from 15 to 25 November 2016, the Prosecution disclosed Defence ICC Detention Center non-privileged contact lists, visitors logs, as well as more than 20,000 audio recordings of Mr Ntaganda and Mr Lubanga non-privileged telephone conversations from 22 March 2013 onwards;
- (iii) during the period from 15 to 25 November 2016 the Prosecution disclosed 416 *draft* summaries of Mr Ntaganda’s non-privileged communications, from a total of 450 summaries announced in the Prosecution Notice;
- (iv) on 23 November 2016, the Prosecution added 589 of the audio-recordings to its List of exhibits it intends to use as part of its case in chief,⁹ and;
- (v) during the 7th evidentiary block, the testimony of four Prosecution witnesses who were scheduled to testify during that block, namely Witnesses P-0773, P-0116, P-0908 and P-0875, was postponed to the 8th evidentiary block presently scheduled to begin on 16 January 2017 (together “New Facts”).

B. The New Facts result in the Defence being unable to provide a preliminary list of witnesses it intends to call by 16 December 2016

7. Based on its review of Mr Ntaganda and Mr Lubanga’s non-privileged telephone conversations from 22 March 2013 onwards, the Prosecution alleges

⁸ Prosecution Notice, para.2.

⁹ Prosecution’s Updated List of Evidence, ICC-01/04-02/06-1646, 23 November 2016, para.30.

that certain unidentified prospective Defence witnesses would have been coached as part of a "broad scheme to pervert the course of justice".¹⁰

8. According to the Prosecution "these communications are material to the Defence's preparation of its case, which is set to start in 2017, and to the selection of its witnesses".¹¹ On this basis, between 15 and 25 November 2016, the Prosecution disclosed the material set out in paragraph 6 above, pursuant Rule 77 of the Rules ("Rules").
9. On 23 November 2016, the Prosecution also listed 589 of the audio- recordings on its list of exhibits,¹² thereby confirming that the material disclosed is relevant to the current proceeding as well as material to the preparation of the Defence.
10. The Chamber recognized the same on 3 June 2016 by encouraging the Prosecution "to conclude relevant portions of its investigations as promptly as possible and to disclose all resulting information which may be material to the preparation of the Defence as soon as possible".¹³
11. Although most of the material related to the Prosecution Article 70 investigation concerning Mr Ntaganda has now been disclosed, the Defence has been unable to undertake the review and analysis of this material as all team resources were devoted to preparations for the testimony of witnesses appearing during the 7th evidentiary block.
12. The Chamber acknowledged the voluminous nature of the material disclosed and the "fact that the Defence is understandably not currently in a position to identify specific instances of concrete prejudice arising from the content of the disclosed material".¹⁴ The Chamber also recognized that "the Defence must

¹⁰ Prosecution Notice, para.2, 14.

¹¹ Prosecution Notice, para.3.

¹² Prosecution's Updated List of Evidence, ICC-01/04-02/06-1646, 23 November 2016, para.30.

¹³ ICC-01/04-02/06-1364-Red2, para.22.

¹⁴ Decision, ICC-01/04-02/06-T-159-CONF-ENG, 5:4-8.

have the opportunity to review the material to the extent relevant, as well as to consider the circumstances of the Prosecution's access to the material".¹⁵

13. On several occasions, the Defence underscored that the disclosure of Prosecution Article 70 investigation related material as well as the allegations raised by the Prosecution (including *inter alia* the coaching of potential Defence witnesses) might already have prejudiced the conduct of past and current cross-examinations of Prosecution witnesses.¹⁶ In any event, it cannot be disputed that these allegations impact the preparation of the case for the Defence case, in particular the selection of Defence witnesses.
14. Consequently, before submitting a preliminary list of witnesses, the Defence must have the opportunity to review and analyse the information contained in the material disclosed since 14 November 2016 with a view to determining if it affects any of the witnesses the Defence might intend to call.
15. Indeed, such a list cannot be produced without knowledge, whether any potential Defence witness was the object of any coaching, by whom, in what circumstances as well as the nature of such coaching. Only after this careful evaluation and assessment will the Defence be in a position to determine what witnesses to add on its preliminary list.
16. In this regard, the Defence notes that on 7 December 2016, confirmation was obtained that additional resources, albeit limited, will be allocated to conduct the assessment of the Prosecution Article 70 investigation related material disclosed. However, it is significant that due to the recruitment process and the up-coming holiday period, it will not be possible for any additional personnel to assist with the review of the material disclosed before the first week of January 2017. It is also important to note that during the same time period, all

¹⁵ T-159, p.5, ln.8-10.

¹⁶ ICC-01/04-02/06-1629-Conf; ICC-01/04-02-06-1645; ICC-01/04-02/06-1655-Conf.

Defence team resources will necessarily be devoted to preparation for the cross-examination of the Prosecution witnesses who have yet to testify.

17. In light of the above, the Defence respectfully submits that it will not be able to produce a preliminary list of witnesses to be call during the presentation of the case for the Defence before 16 February 2016 at the earliest.
 18. The Defence notes in this regard that as of 16 February 2017, the presentation of Prosecution's case in chief will still be on-going and that producing a preliminary list of witnesses by that date will remain an unprecedented procedure.
- C. The New Facts render the presentation of the end of the presentation of the Prosecution's case in chief in a single block unmanageable**
19. Pursuant to the Order, the Prosecution is instructed to end the presentation of its case in chief during the period from 16 January 2017 to 3 March 2017,¹⁷ a period of seven weeks comprising 35 trial days.
 20. Whereas 12 witnesses remained on the Prosecution's List of witnesses ("List") when the Order was issued, four additional witnesses initially scheduled to appear during the 7th evidentiary block, are now included in the end of the presentation of the Prosecution's case in chief.
 21. Based on the Prosecution's 19 July estimate, the testimony of the 16 witnesses remaining on its List, will require a minimum of 158,5 hours of court time.
 22. By adding only one additional hour *per* witness for judicial proceeding other than the specific testimony of witnesses – which is less than the past practice in this case – the end of the presentation of the Prosecution's case in chief, will require 174,5 hours of court time or 35 full trial days in absence of any other disruption.

¹⁷ ICC-01/04-02/06-1588, para.16.

23. This period does not take into account the possibility of witnesses being called to testify by the Legal Representatives of Victims (“LRVs”).
24. On 13 October 2016, before the New Facts highlighted above, the Defence informed the Chamber, parties and participants that: (i) “the tempo of Court proceeding during the sixth evidentiary block resulted in Defence resources being stretched to the limit”; (ii) suggested that the “eight evidentiary block should not begin before Monday 16 January 2017, at the earliest”, and; (iii) expressed “a net preference for the proceedings post winter recess to be conducted in two shorter blocks rather than one very long block”.¹⁸
25. Taking the New Facts into consideration, in particular the need for the Defence to complete the review of the Prosecution Article 70 investigation related material disclosed and to produce a preliminary list of witnesses without delay, the Defence posits that the presentation of the end of the Prosecution’s case in a single evidentiary block from 16 January to 3 March 2017 has become unmanageable.
26. The Defence notes in this regard that even though it will be able to rely on additional resources, from approximately the first week of January 2017, the review of the material disclosed will necessarily involve significant team resources at a time when all resources should be devoted to preparing for the last Prosecution witnesses.
27. In light of the above, the Defence respectfully submits that the New facts warrant reconsideration of the Order.
28. In this regard the Defence posits that the end of the presentation of the Prosecution’s case in chief should be divided in two shorter evidentiary blocs, beginning on 23 January 2017.

¹⁸ Email of 13 October 2016 at 18h33.

29. Lastly the Defence underscores that reconsideration of the Order would not prejudice the Prosecution, which will be in a better position to fully present the end of its case in chief. Reconsideration of the order would also not prejudice the work of the LRVs provided that any time they are allotted to adduce evidence is planned and included in the last two evidentiary blocks.

CONCLUSION AND RELIEF SOUGHT

30. The New facts highlighted above and the resulting prejudice to the Defence are matters of critical importance in order to preserve the fairness of the proceedings in this case.
31. Preserving the fairness of the proceedings require that the Defence be provided with: (i) a genuine opportunity to review the Prosecution Article 70's material disclosed before submitting a preliminary list of witnesses it intends to call; and (ii) adequate time and facilities for the preparation of the Defence.
32. Consequently, the Defence respectfully submits that reconsideration of the Order is necessary in two ways, as follows:

First, order the Defence to submit a preliminary list of witnesses it intends to call by 16 February 2017; and

Second, schedule the end of the presentation of the Prosecution's case in chief and the presentation of any evidence or views by LRVs in two shorter blocks, including a minimum two week adjournment in between, beginning on 23 January 2017.

CONFIDENTIALITY

33. Pursuant to Regulations 23*bis* (1) of the Regulations of the Court, this Request is classified as confidential, as it refers to confidential filings.

RESPECTFULLY SUBMITTED ON THIS 14TH DAY OF DECEMBER 2016

A handwritten signature in dark ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands