

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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**

**Decision on the Defence request for reconsideration and clarification**

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 Bosco Ntaganda**

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**

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**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, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67 of the Rome Statute, issues the following 'Decision on the Defence request for reconsideration and clarification'.

### **I. Procedural history**

1. On 6 February 2015, the Chamber ordered the Office of the Prosecutor ('Prosecution') to file, no later than three months prior to the commencement of trial, a pre-trial brief containing a summary of evidence intended to be relied upon at trial and explaining how that evidence relates to the charges.<sup>1</sup>
2. On 12 February 2015, the Prosecution filed a request ('Prosecution Request') for a seven day extension of that deadline, from 2 March 2015 until 9 March 2015.<sup>2</sup>
3. On 16 February 2015, the Prosecution filed applications for delayed disclosure of witness identities<sup>3</sup> and for non-standard redactions<sup>4</sup> ('Prosecution Applications').
4. During the status conference held on 17 February 2015 the defence team for Mr Ntaganda ('Defence') opposed the Prosecution Request. The Legal Representatives of Victims ('LRVs') stated that they do not oppose the request.<sup>5</sup>
5. On 19 February 2015, the Chamber granted the Prosecution Request, finding, *inter alia*, that the requisite good cause had been shown and that the extension

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<sup>1</sup> Decision on the updated document containing the charges, ICC-01/04-02/06-450, para. 89.

<sup>2</sup> 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. Confidential redacted and public redacted versions of the Prosecution Request were notified on 13 February 2015 (ICC-01/04-02/06-454-Conf-Red and ICC-01/04-02/06-454-Red2).

<sup>3</sup> Prosecution application for delayed disclosure, ICC-01/04-02/06-461-Conf-Exp, with annexes A-C3. Confidential redacted (ICC-01/04-02/06-461-Conf-Red) and public redacted (ICC-01/04-02/06-461-Red2) versions were filed on 17 February 2015. A corrigendum of Annex A was filed on 19 February 2015.

<sup>4</sup> Prosecution request for redactions, ICC-01/04-02/06-462-Conf-Exp, with annexes A-C3. Confidential redacted (ICC-01/04-02/06-462-Conf-Red) and public redacted (ICC-01/04-02/06-462-Red2) versions were notified on 17 February 2015. A corrigendum of annexes C1 and C3 was filed on 17 February 2015 and a corrigendum of annex A was filed on 19 February 2015.

<sup>5</sup> Transcript of hearing on 17 February 2015, ICC-01/04-02/06-T-18-CONF-ENG ET, page 35 line 12 – page 37, line 24.

'was not of a nature which would prejudice the rights of the accused' ('Impugned Decision').<sup>6</sup>

6. On 24 February 2015, the Defence filed a request for reconsideration of the Impugned Decision and for clarification on three specific issues ('Defence Request').<sup>7</sup>
7. On 25 February 2015, the Chamber informed the parties and participants, by e-mail, that any responses to the Defence Request should be provided no later than 12:00 midday on Friday 27 February 2015.<sup>8</sup>
8. On 26 February 2015, the Prosecution responded, opposing the Defence Request ('Prosecution Response').<sup>9</sup>
9. On 27 February 2015, the LRVs responded, requesting that the Chamber dismiss the Defence Request in its entirety.<sup>10</sup>

## II. Submissions and analysis

### a. Reconsideration

10. The Defence argues that the Prosecution Applications amount to new circumstances that will inevitably impact the contents of the pre-trial brief.<sup>11</sup> The Defence argues that the consequence of these applications means that the pre-trial brief to be received on 9 March 2015 would only be incomplete and

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<sup>6</sup> Decision on 'Prosecution's request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief', ICC-01/04-02/06-467, paras 9 and 13.

<sup>7</sup> Request on Behalf of Mr Ntaganda Seeking Reconsideration and Clarification of Decision on Pre-Trial Brief, ICC-01/04-02/06-471.

<sup>8</sup> E-mail from Legal Officer of the Chamber to the parties and participants on 25 February 2015 at 12:57.

<sup>9</sup> Prosecution response to Mr Ntaganda's request for reconsideration and clarification (ICC-01/04-02/06-471), ICC-01/04-02/06-478.

<sup>10</sup> Joint Response to the "Request on Behalf of Mr Ntaganda Seeking Reconsideration and Clarification of Decision on Pre-Trial Brief", 27 February 2015, ICC-01/04-02/06-482.

<sup>11</sup> Defence Request, ICC-01/04-02/06-471, paras 2 and 9.

would require an update at a ‘much later’ point in time.<sup>12</sup> The Defence alleges that the Impugned Decision therefore causes serious prejudice.<sup>13</sup>

11. The Defence considers that the Chamber must reconsider the Impugned Decision and order the Prosecution to file: (i) an initial pre-trial brief on 2 March 2015 based on the information available at that time; and (ii) a final pre-trial brief at a date to be set subject to the outcome of the Prosecution Applications.<sup>14</sup>
12. The Prosecution invites the Chamber to reject the Defence Request, responding that: (i) the Prosecution Applications are not in fact new, having both been filed prior to the issuance of the Impugned Decision;<sup>15</sup> and (ii) the Defence is simply incorrect that the Prosecution Applications will mean that an incomplete pre-trial brief would be filed, as the extension of time is precisely to allow for the filing of a complete pre-trial brief.<sup>16</sup>
13. The Statute does not provide guidance on reconsideration of interlocutory decisions,<sup>17</sup> but the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by one of the parties or *proprio motu*.<sup>18</sup> Reconsideration 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.<sup>19</sup> New facts and arguments arising since the decision was rendered may be relevant to this assessment.<sup>20</sup>

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<sup>12</sup> Defence Request, ICC-01/04-02/06-471, paras 3 and 11.

<sup>13</sup> Defence Request, ICC-01/04-02/06-471, para. 12.

<sup>14</sup> Defence Request, ICC-01/04-02/06-471, paras 4 and 14.

<sup>15</sup> Prosecution Response, ICC-01/04-02/06-478, para. 5.

<sup>16</sup> Prosecution Response, ICC-01/04-02/06-478, para. 6.

<sup>17</sup> See Article 84 of the Statute expressly permitting revision of a final conviction or sentence in light of, *inter alia*, new evidence.

<sup>18</sup> Article 64(2) and (3) of the Statute; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705; Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 14 December 2012, ICC-01/09-01/11-511, para. 6; Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863.

<sup>19</sup> See Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-

14. As noted by the Prosecution, the Prosecution Applications do not constitute ‘new facts and arguments’ – they were notified to the Chamber on 16 February and to the Defence on 17 February 2015. The Impugned Decision was rendered after these developments, on 19 February 2015.
15. Further, the Prosecution Response makes it quite clear that it will provide a complete pre-trial brief on 9 March 2015, and the Defence provides nothing beyond speculation to suggest this is not the case.
16. In light of the fact that the Defence would still have 85 days after receiving the pre-trial brief to prepare for the trial commencement, the Chamber has already indicated that it does not consider this seven-day extension to prejudice the rights of the accused.<sup>21</sup> The Chamber fails to see how the Defence’s submissions can justify reassessment of that finding. The Defence fails to substantiate an error of reasoning or any injustice – the Chamber rejects the request for reconsideration.

#### **b. Clarification**

17. The Defence seeks ‘clarification’ of the following three issues:
  - A. the identity of the ‘several supplementary documents designed to provide additional assistance and notice to the Defence’ (‘First Issue’);
  - 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) (‘Second Issue’); and

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1813, para. 19; ICTR, Appeals Chamber, *Jean Uwinkindi v. The Prosecutor*, Decision on Uwinkindi’s Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion, 23 February 2012, ICTR-01-75-AR11bis, para. 11; ICTR, Appeals Chamber, *Juvénal Kajelijeli v. the Prosecutor*, Judgement, ICTR-98-44A-A, para. 203; ICTY, Appeals Chamber, *Prosecutor v. Zdravko Mucić et al.*, Judgment on Sentence Appeal, 8 April 2003, IT-96-21-Abis, para. 49. For similar criteria, see also ICC-01/09-02/11-863, para. 11; ICC-01/04-01/06-2705, para. 18 (the Chamber may reconsider past decisions when they are ‘manifestly unsound and their consequences are manifestly unsatisfactory’).

<sup>20</sup> ICC-01/09-02/11-863, para. 11.

<sup>21</sup> Impugned Decision, ICC-01/04-02/06-467, para. 13.

C. the impact of the new circumstances created by the submission of the Prosecution Applications 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 ('Third Issue').<sup>22</sup>

18. The Defence submits that such clarification is required, *inter alia*, to ensure that there is a 'common understanding' of the nature and purpose of a pre-trial brief, given 'the vagueness' of the Chamber's holding that it is one of 'several supplementary documents designed to provide additional assistance and notice'.<sup>23</sup> The Defence contends that an accused is on notice of the charges only when an updated document containing the charges, in conjunction with a document explaining the Prosecution's theory of the case, has been provided.<sup>24</sup>
19. In respect of the Third Issue, the Defence relies primarily on its submissions made in relation to the reconsideration request.<sup>25</sup> The Defence submits that its undertaking to be ready to commence trial on the set date was subject to 'a minimum period of three months' applying between fulfilment by the Prosecution of its disclosure obligations, and provision of the pre-trial brief, and the start of the trial.<sup>26</sup>
20. The Prosecution submits that none of the three issues require further clarification.<sup>27</sup> It recalls its prior submissions detailing materials which it identified as having provided notice to the accused.<sup>28</sup> The Prosecution further submits that the Defence's contention that the accused is only on notice after having received the pre-trial brief is inconsistent with the statutory framework.

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<sup>22</sup> Defence Request, ICC-01/04-02/06-471, para. 16 (quoting at (A) from Impugned Decision, ICC-01/04-02/06-467, para. 11).

<sup>23</sup> Defence Request, ICC-01/04-02/06-471, paras 16 and 18.

<sup>24</sup> Defence Request, ICC-01/04-02/06-471, para. 19.

<sup>25</sup> Defence Request, ICC-01/04-02/06-471, paras 20-23. *See also* paras 11-12.

<sup>26</sup> Defence Request, ICC-01/04-02/06-471, para. 22.

<sup>27</sup> Prosecution Response, ICC-01/04-02/06-478, para. 9.

<sup>28</sup> Prosecution Response, ICC-01/04-02/06-478, paras 10-12.

The Prosecution notes that the Defence has received the decision on the confirmation of charges and an updated document containing the charges, which 'together form the basis of the charges and [...] include material facts relevant to the charges'.<sup>29</sup> The Prosecution relies on its response to the reconsideration request in respect of the Third Issue.<sup>30</sup>

21. In respect of the First and Second Issues, the Chamber considers that the existing jurisprudence of the Court provides sufficient guidance to the Defence as to the appropriate form and manner of notice of the charges.<sup>31</sup> Further, to the extent that the Defence is arguing that it has insufficient notice of the charges, the Chamber considers that the Defence has failed to adequately substantiate the submission.<sup>32</sup> In the absence of such substantiation, the Chamber will not *proprio motu* review the matter any further. The Chamber therefore declines to provide any additional clarification.
22. In respect of the Third Issue, the Chamber considers that the appropriate place to raise concerns regarding the impact of the Prosecution Applications on the accused's rights under Article 67(1)(a) of the Statute, or on Defence preparations, would be in response to the Prosecution Applications themselves, and not by way of this request for 'clarification'. However, in that regard, the Chamber additionally recalls its analysis above in respect of the reconsideration request.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Defence Request.

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<sup>29</sup> Prosecution Response, ICC-01/04-02/06-478, para. 12.

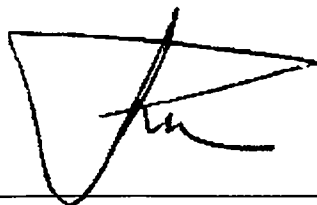
<sup>30</sup> Prosecution Response, ICC-01/04-02/06-478, para. 13.

<sup>31</sup> *See, inter alia*, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, paras 118-137.

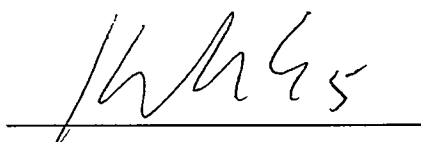
<sup>32</sup> Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, para. 134.



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



**Judge Robert Fremr, Presiding Judge**



**Judge Kuniko Ozaki**



**Judge Geoffrey Henderson**

Dated 27 February 2015

At The Hague, The Netherlands