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

Date: **26 March 2018**

**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**

**Response on behalf of Mr Ntaganda  
to Prosecution request for reconsideration of the Chamber's  
"Order providing directions related to the closing briefs and statements"**

**Source:** Defence Team of Mr Bosco Ntaganda

**Document 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**

Me Stéphane Bourgon  
Me Christopher Gosnell

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to Trial Chamber VI (“Chamber”)’s “Order providing directions related to the closing briefs and statements” (“Order”) issued on 28 December 2017,<sup>1</sup> and the “Prosecution’s application for reconsideration of a discrete portion of the Chamber’s ‘Order providing directions related to the closing briefs and statements’” submitted on 22 March 2018 (“Prosecution Request for Reconsideration”),<sup>2</sup> Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda  
to Prosecution request for reconsideration of the Chamber’s  
“Order providing directions related to the closing briefs and statements”**

**“Defence Response”**

## INTRODUCTION

1. The Defence opposes the Prosecution Request for reconsideration, which fails to meet the stringent requirements allowing the Chamber to reconsider its Decision.
2. No clear error of reasoning has been demonstrated and there has been no change of circumstances since the Decision was rendered. Moreover, the requirement to abide by the average 300 word-per-page limit applies to the parties and participants such that there is no injustice to be prevented by way of reconsideration.

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<sup>1</sup> Order providing directions related to the closing briefs and statements, 28 December 2017, ICC-01/04-02/06-2170.

<sup>2</sup> Prosecution’s application for reconsideration of a discrete portion of the Chamber’s “Order providing directions related to the closing briefs and statements”, 22 March 2018, ICC-01/04-02/06-2260.

3. The Prosecution Request is in fact a request for an extension of the applicable page limit, which requires the existence of exceptional circumstances.
4. Should the Chamber consider that the Prosecution's submissions amount to exceptional circumstances, at this stage, the Defence does not oppose the Prosecution being granted a limited extension of the number of pages authorized for the submission of its closing brief, not exceeding 50 pages or 15,000 words, subject to the average 300 word-per-page limit being maintained and the Defence being authorized the same number of pages for the submission of its closing brief.

## SUBMISSIONS

### I. No clear error of reasoning has been demonstrated

5. The Prosecution Request for Reconsideration does not articulate any clear error of reasoning. As clarified by Judge Shahabuddeen on appeal in *Čelebići*,<sup>3</sup> a "clear error" of reasoning, is "a reference to something which the court manifestly or obviously overlooked in its reasoning and which is material to the achievement of substantial justice."
6. Although the amended version of Regulation 36 of the Regulations of the Court ("RoC") does not mention the 300-word average limit per page, it stems from the Decision that the Chamber was well aware of this fact when issuing the Order. Indeed, paragraph 14 and footnote 12 of the Decision provide for the necessity to comply with the format requirements set out in Regulation 36

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<sup>3</sup> Separate opinion of Judge Shahabuddeen in *Prosecutor v. Zdravko MUCIĆ, Hazim DELIĆ and Esad LANDZO*, 8 April 2003, IT-96-21-Abis, para. 15.

and, in addition, the requirement not to exceed an average of 300 word-per-page limit.<sup>4</sup>

7. The Prosecution's assertion that the Chamber does not have the authority to reintroduce the average 300 word-per-page limit is misguided. As recalled on numerous occasions, the Chamber has broad discretionary power to fairly manage the proceedings.<sup>5</sup>
8. The Chamber's apparent aim in ordering the parties and participants to comply with an average 300 word-per-page limit - which was and continues to be the norm before other international tribunals<sup>6</sup> - is to enhance the readability of closing submissions and facilitate the assessment of the same by the Chamber, parties and participants. The average 300 word-per-page limit also provides for an objective maximum regarding the length of closing briefs with a view to avoiding excessive submissions being included in the number of pages authorized, which was also the rationale for introducing the requirement to include a word count at the end of closing briefs before other international tribunals.<sup>7</sup>
9. To be sure, the Chamber is empowered to impose such guidelines, which does not amount to a clear error of reasoning.

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<sup>4</sup> In footnote 11 of its Decision, the Chamber added concerning the length of closing briefs that it had "taken note of the parties' respective submissions in this respect, including that the Defence requested the same amount of pages as the Prosecution (...)" and that it "will decide at the relevant time on any request from the Defence for an extension of pages in order to address issues contained in the Legal Representatives' briefs."

<sup>5</sup> ICC-01/04-02/06-968, para. 14; ICC-01/04-02/06-604, para. 20; ICC-01/04-02/06-537-Conf-Exp-Red, para. 54.

<sup>6</sup> ICTY, Practice Direction on the Length of Briefs and Motions ("ICTY Practice Direction"), 16 September 2005, IT/184 Rev.2; MICT, Practice Direction on the Length of Briefs and Motions ("MICT Practice Direction"), 6 August 2013, MICT/11, para.3.

<sup>7</sup> ICTY Practice Direction, para. 8; MICT Practice Direction, para 18.

10. In fact, considering the number of pages authorized by the Chamber for the submission of the parties' and participants' closing briefs – which differs from the parties' and participants' submissions and requests on this issue during the 5 December 2017 Status Conference – it stems from the Decision that the Chamber took into account the average 300 word-per-page limit in deciding on the number of pages authorized.
11. It is also noteworthy in this regard that the length of closing briefs authorized by the Chamber for the both the Prosecution and Defence – *i.e.* 400 pages containing an average of 300 word-per-page, amounting to a total of 120,000 words - is twice the default number of words prescribed for closing briefs before the ICTY or MICT.<sup>8</sup>

## **II. There has been no change of circumstances warranting reconsideration**

12. As mentioned by the Prosecution, reconsideration of its own decision by a Trial Chamber is possible when new or previously unavailable information requires the Trial Chamber to do so.
13. This, however, is not the case here. In fact, all submissions presented in the Prosecution Request for Reconsideration pertain to issues that existed and/or were known by the Chamber, parties and participants prior to the Decision being rendered, including *inter alia*: the new version of Regulation 36 RoC, the construction of closing briefs submitted in other cases before the International Criminal Court ("ICC") and the specifics of this case in terms of the duration of the trial, number of charges, number of witnesses and the quantity of evidence admitted.

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<sup>8</sup> ICTY Practice Direction, para. 4 – 60,000 words; MICT Practice Direction, para. 5 – 60,000 words.

14. Accordingly, no change of circumstances has been demonstrated which would warrant reconsideration of the Decision.

### **III. There is no injustice to be prevented by way of reconsideration**

15. The Chamber's Decision, including the requirement to comply with an average of 300 word-per-page limit, applies to all parties and participants, such that there is no injustice to be prevented by way of reconsideration.
16. In this regard, the Prosecution's arguments that reintroducing an average of 300 word-per-page limit will counter the efficiency of the proceedings and/or risk compromising the Chamber's truth seeking function are without merit. Quite to the contrary, the Chamber's Decision will: (i) encourage the parties and participants to be more efficient by presenting clear, precise and concise submissions; and (ii) prevent closing briefs from comprising excessive submissions and references in the number of pages authorized.
17. It cannot be seriously argued based on the aim of the amendments to Regulation 36 RoC – which was first and foremost to improve efficiency – that the ICC Judges intended - when removing the express reference to the average 300 word-per-page limit - to give the parties and participants *carte blanche* regarding the quantity of words that can be included in a closing brief of a fixed number of pages, at the expense of clarity, readability and conciseness.
18. Hence, the fact that the average 300 word-per-page limit was not expressly discussed during the 5 December 2017 Status Conference leading to the Decision neither prejudiced nor caused an injustice to the parties and participants.

19. The same reasoning applies to the requirement to refrain from making substantive submissions in footnotes. Even if this requirement was not expressly provided for in the previous version of Regulation 36 RoC, this has always been the case and certainly did not give rise to an injustice.

**IV. The Prosecution Request for Reconsideration is in fact a request for an extension of the prescribed page limit**

20. By its own admission, the Prosecution seeks reconsideration of the Decision for the purpose of submitting a closing brief comprising the equivalent of 350 '300-word-pages' of submissions and references in 300 pages.
21. Not only would reconsideration of the Decision thus defeat the Chamber's apparent aim in ordering the parties and participants to comply with an average of 300 word-per-page limit, it would also result in the submission of closing briefs much more difficult to read and remove any possibility of objective oversight regarding the quantity of arguments and/or references, which can be included in the number of pages authorized.
22. For the same reason, the Prosecution's alternative request that "the word count per page apply to the text of the closing brief but not to the footnotes"<sup>9</sup> is not acceptable and must be rejected.
23. In light of the above, the Defence posits that the Prosecution Request for Reconsideration actually constitutes a request for an extension of the number of pages authorized by the Chamber, which requires pursuant to Regulation 37 RoC, the existence of exceptional circumstances.

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<sup>9</sup> Prosecution Request for Reconsideration, para. 16.

24. Even though these facts were already known during the 5 December 2017 Status Conference leading to the Chamber's Decision, the Defence acknowledges the submissions related to the specific characteristics of this case at paragraphs 11 and 12 of the Prosecution Request for Reconsideration.
25. Hence, should the Chamber consider that these submissions meet the threshold of exceptional circumstances, at this stage, the Defence does not oppose the Prosecution being granted a limited extension of the number of pages for the submission of its closing brief, not exceeding 50 pages, subject to the average 300 word-per-page limit being maintained and the Defence being granted the same number of pages.

## CONCLUSION

26. In light of the foregoing, the Defence respectfully requests the Chamber to:

**REJECT** the Prosecution Request for Reconsideration;

**MAINTAIN** the average 300 word-per-page limit;

**CONSIDER** whether the Prosecution submissions amount to exceptional circumstances, at this stage; and if so,

**GRANT** the Prosecution – and the Defence - a limited extension of the number of pages authorized for the submission of the parties' closing briefs, not exceeding 50 pages, amounting to a maximum of 135,000 words.

**RESPECTFULLY SUBMITTED ON THIS 26<sup>TH</sup> DAY OF MARCH 2018**

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda