Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-02/06**
Date: **21 August 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

Request on behalf of Mr Ntaganda seeking reconsideration of the "Second order on closing statements"

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 Trial Chamber VI ("Chamber")'s "*Second order on closing statements*"[1] ("Order") of 15 August 2018, Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Request on behalf of Mr Ntaganda seeking reconsideration of the "Second order on closing statements"

INTRODUCTION

1. The Trial Chamber is requested to modify its *Second order on closing statements* ("Order") by ensuring that the unsworn statement of Mr Ntaganda is the last word uttered in the case prior to adjournment. This has been the consistent practice of previous ICC and ICTY trials. Furthermore, and again consistent with the unswerving practice of previous cases before this Court and the ICTY, the Prosecution should not be accorded any right to respond to Mr Ntaganda's statement.

2. The Trial Chamber may reconsider and modify its own decisions on any basis that it sees fit, including: (i) whether the issue was reasonably foreseeable and whether the Defence had a reasonable opportunity prior to the issuance of the Order to seek leave to reply to the issue concerned; (ii) whether the Trial Chamber had within its contemplation the most recent ICC jurisprudence on the issue; and (iii) the danger of a violation of the rights of the accused and the likelihood of an incorrect exercise of the Trial Chamber's discretion. Reconsideration is appropriate in present circumstances to prevent an injustice and to ensure that the Trial Chamber exercises its discretion correctly.

PROCEDURAL BACKGROUND

3. On 4 July 2017, the Trial Chamber invited submissions "as soon as practicable, and in any event no later than 14 August 2018" on the "duration of the parties'

[1] Second order on closing statements, 15 August 2018, ICC-01/04-02/06-2308.

and participants' closing statements" and whether the "accused intends to make an unsworn statement".[2] Email submissions were made by the Defence,[3] Legal Representatives[4] and Prosecution[5] on 2, 6 and 13 August, respectively.

4. Two days after the Prosecution's submissions, and before the Defence had an opportunity to reply, the Trial Chamber issued the Order on 15 August 2018.[6]

SUBMISSIONS

5. The Order requires Mr Ntaganda to give his unsworn statement prior to the Prosecution's "reply," and appears to accept the Prosecution's submission that it should have the opportunity to reply not only to the Defence's submissions, but also to the "Accused's intended unsworn statement".[7]

6. Giving the Prosecution a right to comment on an accused's unsworn statement is believed to be unprecedented before this Court or the ICTY. A similar request was recently and categorically rejected in the *Bemba et al*. case:

> In response to the Prosecution's observations on the contents of unsworn statements and its ability to respond to them, the Single Judge emphasises that these statements are a right of the accused. The Single Judge will not circumscribe what Mr Babala or Mr Kilolo can say prior to them giving their unsworn statements. Noting the defence's right to present closing statements last and that the evidence presentation in this case is closed, the Prosecution will also not be permitted to reply or present further evidence in response to unsworn statements.[8]

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[2] Order on closing statements, 4 July 2018, ICC-01/04-02/06-2299.
[3] Email from Defence to Trial Chamber IV, 2 August 2018 at 15:51.
[4] Joint Email from the Legal Representatives of Victims to the Trial Chamber IV, 6 August 2018 at 12:36.
[5] Email from the Prosecution to the Trial Chamber IV, 13 August 2018 at 15:50.
[6] Second order on closing statements, 15 August 2018, ICC-01/04-02/06-2308, para.7.
[7] Email from the Prosecution to the Trial Chamber IV, 13 August 2018 at 15:50 ("The Prosecution requests an opportunity to reply to any issues arising out of the Defence's submissions including the Accused's intended unsworn statement, to be followed by an opportunity for sur-reply by Defence counsel").
[8] *Bemba et al.*, Decision on Requests to Present Unsworn Statements, ICC-01/05-01/13-1890, 12 May 2016, para.10.

7. In *Katanga & Ngudjolo*, the Trial Chamber interpreted Rule 141(2) as requiring that the Accused's statement be the last word – after any replies and sur-replies by the lawyers – and prior to the Trial Chamber retiring for deliberations.[9]

8. The Presiding Judge in *Lubanga*, contrary to the more recent precedent in *Bemba et al*. and *Katanga*, did not exclude the possibility that the content of an unsworn declaration might justify granting leave to the Prosecution to respond, but appears to have foreseen this as a truly exceptional possibility:

> By e-mail of the 24th of August, the Defence inform the Chamber that Mr. Lubanga would like to make a brief oral statement not exceeding five minutes in accordance with Article 67(1)(h) of the Statute. The accused has a statutory right to make an unsworn oral or written statement in his or her defence. Although notice of his wish to avail himself of this opportunity was received extremely late, that delay does not warrant refusing this application. It goes without saying that if any significant consequential matters arise from his observations, the Prosecution will be entitled to address us on the issue. We have some considerable confidence, however, that Maitre Mabille will have ensured that this will not be necessary.[10]

9. In practice, to the best of the Defence's knowledge, such a request has never been made or granted. In *Lubanga*, the Prosecution was not even asked whether it sought leave to respond to Mr Lubanga's final words before the Judges retired to deliberate.[11] Leave was neither sought nor granted in *Katanga & Ngudjolo* despite lengthy and detailed unsworn statements by the accused.[12] The Prosecution, to the best of the Defence's knowledge, has never sought

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[9] *Katanga & Ngudjolo*, Ordonnance relative aux modalités de présentation des conclusions orales, ICC-01/04-01/07-3274, 20 April 2012, para.10 ("*La Chambre demandera enfin aux accusés, qui conformément à la règle 141-2 du Règlement, doivent avoir la parole en dernier, s'ils entendent faire une déclaration orale au sens de l'article 67-1-h du Statut*.")

[10] *Lubanga*, ICC-01/04-01/06-T-356-ENG, p.2.

[11] *Lubanga*, ICC-01/04-01/06-T-357-ENG, 48:11-49:20.

[12] *Katanga & Ngudjolo*, ICC-01/04-01/070-T-340-ENG, 48:5-61:3 ("now that the two accused have given their statements, this trial comes to an end").

leave at the ICTY to respond to an unsworn statement of an accused at the end of a trial.[13]

10. The Prosecution's reliance[14] on the Conduct of Proceedings Decision[15] issued before the start of trial is misplaced. The issue before the Trial Chamber at that time was the Prosecution's request that the "the timing of any statement should allow" the Prosecution to be able to "produce evidence in rebuttal if warranted".[16] In effect, the Prosecution's request was that the Trial Chamber order that any unsworn statement be given during the Defence case, thus providing an opportunity to adduce rebuttal evidence. The Defence responded that any such request was premature.[17] The Conduct of Proceedings Decision is, accordingly, predicated on a statement being given at the start of the Defence case:

> Should the accused decide to exercise his right under Article 67(1)(h) of the Statute to make an unsworn oral or written statement, the Defence shall file a notice prior to the start of the Defence case, if applicable, so as to allow the Chamber to rule on the appropriate moment and modalities. As such a statement would not constitute evidence, the Prosecution may address it in its closing brief, or in the course of its closing statement, but will not be allowed to produce (new) evidence in rebuttal.[18]

11. The Conduct of Proceedings Decision addresses an issue quite different from that now before the Trial Chamber. The issue at that time was the scope of rebuttal evidence, which is determined with reference to the content of the

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[13] *See e.g. Krajisnik*, Case No. IT-00-39-T, T.27500-27501 ("Mr Krajisnik, your statement will be the last matter we'll hear. We'll then, after having heard your statement, we'll start our deliberations on the judgement"); *Popovic et al*., Case No. IT-05-88-T, T.34896:16-34911:7; *Boskoski & Tarculovski*, Case No. IT-04-82, T.11205:1-11209:15; *Prlic et al*., Case No. IT-04-74-T, T.52962:23-52976:6.

[14] Email from the Prosecution to the Trial Chamber IV, 13 August 2018 at 15:50.

[15] *Ntaganda*, Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, ("Conduct of Proceedings Decision").

[16] *Ntaganda*, Prosecution submissions on the conduct of proceedings and the modalities of victim participation at trial, 7 April 2015, ICC-01/06-02/06-547, para.87.

[17] Submissions on behalf of Mr Ntaganda on the conduct of proceedings and on modalities of victims' participation at trial, 7 April 2015, ICC-01/04-02/06-548, para.75.

[18] Conduct of Proceedings Decision, para.19.

Defence case and its foreseeability. The Trial Chamber made clear that the Prosecution could not use the content of the Accused's unsworn statement as a basis for tendering rebuttal evidence. The Prosecution now seeks to use these words to imply that the Trial Chamber has previously ruled that the Prosecution has a right of response to an unsworn statement of an accused at the end of the case – which is incorrect. The Conduct of Proceedings Decision does not address this issue, nor was it addressed by the parties at the time.

12. Permitting the Prosecution to respond to an unsworn statement as of right runs contrary to the right of the accused to directly address the judges as a human being, rather than as a mere object of the proceedings. As stated by Judge Schomburg in *Kordic and Cerkez*:

> However, before continuing, I want to emphasise that this final word should not be confused with Rule 84 *bis*. It's a possibility, an option, for an accused to address the Bench on whatever issue he so wants, and it's for the Bench to get a personal impression of the accused being not a mere object of criminal proceedings, but also a subject of these proceedings. Therefore, this right of having the final word will be granted, but, of course, only if the accused so wants. And the only thing what Rule 84 *bis* and the final word have in common is that an accused shall never be compelled to make such a final word and shall not be examined about the content of the statement.[19]

13. In Germany, the violation of the defendant's right to have the last word is taken so seriously that its violation can be a successful ground of appeal from the judgment as a whole.[20]

14. The Trial Chamber's inherent discretion to reconsider or modify its own decisions[21] should be exercised on the basis of all the facts and circumstances

[19] ICTY, *Kordic and Cerkez*, Case No. IT-95-14/2-T, T.650:1-10.
[20] *See* Section 258(2) of the German Code of Criminal Procedure (*Strafprozeßordnung*), online: *Bundesministerium der Justiz und für Verbraucherschutz* <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1729>.
[21] *Ruto & Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para.19; *Kenyatta*, Decision on the Prosecution's motion for

surrounding the request. One relevant circumstance justifying reconsideration in this case is that the Defence had little or no opportunity to respond to the Prosecution's submissions before the Order was issued. The issue has arisen in the way that it has only because the Prosecution proposed a round of replies and sur-replies that had not been proposed in the Defence's submissions.[22] Indeed, the Trial Chamber appears to be unaware that the Defence disagrees with sequencing the last word of the accused before the replies and sur-replies.[23]

15. Reconsideration is warranted even applying the most stringent test for reconsideration. The issue at hand directly concerns the rights of the accused and proper conduct of proceedings. There is a serious risk that the Trial Chamber has exercised its discretion without having directly considered the most recent jurisprudence on the issue that is directly on point.[24] New arguments, as well as new facts, can be a proper basis for a Trial Chamber exercising its discretion to reconsider,[25] especially when necessary "to prevent an injustice," [26] or simply where "there is reason to believe that [a Trial Chamber's] original Decision was erroneous".[27] This is the case here.

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reconsideration of the decision excusing Mr. Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863, 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'").

[22] Email from the Prosecution to the Trial Chamber IV, 30 March 2015 at 09:48.

[23] Order, para.7("The Chamber further agrees with the order of presentation suggested by the parties")(underline added).

[24] *Bemba et al.*, Decision on Requests to Present Unsworn Statements, ICC-01/05-01/13-1890, 12 May 2016, para.10.

[25] *Ruto & Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para.19 ("[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment") (underline added).

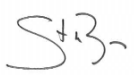
[26] Decision on the Defence request for reconsideration, 27 May 2015, ICC-01/04-02/06-611, para.12.

[27] *Nizeyimana*, ICTR-00-55C-T, 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, 1 July 2011, para.13.

RELIEF REQUESTED

16. The Trial Chamber is requested to modify the Order so that the accused is given the last word in this trial, with the Prosecution accorded no right to comment or respond to his remarks.

RESPECTFULLY SUBMITTED ON THIS 21ST DAY OF AUGUST 2018



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