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

Date: **29 April 2015**

**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 Chamber's oral decision of 22 April 2015 on the Prosecution request to amend its List of Evidence**

**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 Luc Boutin  
Me William St-Michel

**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**

**REGISTRY**

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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 the oral decision on the “*Prosecution request to amend its List of Evidence*”<sup>1</sup> rendered by Trial Chamber VI (“Chamber”) of the International Criminal Court (“Court”) on 22 April 2015 (“Decision”),<sup>2</sup> Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Request on behalf of Mr Ntaganda seeking reconsideration of the Chamber’s oral decision of 22 April 2015 on the Prosecution request to amend its List of Evidence**

## INTRODUCTION

1. On 19 March 2015, the Prosecution requested the Chamber to authorise it to add to its List of Evidence<sup>3</sup>: (i) 116 items of evidence that were not included therein “for technical reasons”;<sup>4</sup> and (ii) two items of evidence which should have been disclosed and/or reclassified as incriminating evidence on 2 March 2015.<sup>5</sup>
2. Considering that the aim of the Prosecution Request was limited to ‘updating’ its List of Evidence, the Defence opted not to respond to the Prosecution Request. In order to dispel any doubt, the Defence takes this opportunity to confirm that it did not oppose the limited relief sought in the Prosecution Request.
3. During the status conference held on 22 April 2015, when ruling on the Prosecution Request, the Chamber considered that it was “unnecessary to rule specifically on amendments to the List of Evidence”.<sup>6</sup> Rather, the Chamber directed the Prosecution to “promptly file an updated List of Evidence into the case record *whenever* amendments to it are made” (“Notification

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<sup>1</sup> ICC-01/04-02/06-524 (“Prosecution Request”).

<sup>2</sup> ICC-01/04-02/06-T-19-ENG, p.11-12.

<sup>3</sup> ICC-01/04-02/06-491-Conf-AnxC (“Prosecution’s List of Evidence” or “List of Evidence”).

<sup>4</sup> Prosecution Request, paras.1, 18-20.

<sup>5</sup> Prosecution Request, paras.2, 14-17.

<sup>6</sup> Decision, ICC-01/04-02/06-T-19-ENG, p.11, ll.18-19.

Mechanism”).<sup>7</sup> The Chamber further noted that “any amendments ought to be kept to a minimum and the Defence may at any time challenge the *use* of items subsequently added to the list of evidence on the basis that it received unduly late notice of them or had inadequate time to prepare”.<sup>8</sup>

4. For the reasons explained below, the Defence respectfully submits that the Notification Mechanism rests on clear errors of reasoning warranting reconsideration.

## SUBMISSIONS

### I. Applicable law

5. As the Chamber has previously held:

[T]he Statute does not provide guidance on reconsideration of interlocutory decisions, 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*. 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>9</sup>

### II. Arguments

6. At the outset, the Defence notes that the Decision: (i) goes beyond the relief sought by the Prosecution; and (ii) puts in place a notification mechanism which is not provided for in the legal framework of the Court.<sup>10</sup> More importantly, the Defence underscores that it did not have the chance to provide any observations on the Notification Mechanism put in place.
7. While the Defence acknowledges that the Decision provides an opportunity to challenge the *use* of items subsequently added to the Prosecution List of

<sup>7</sup> Decision, ICC-01/04-02/06-T-19-ENG, p.12, ll. 1-2 (emphasis added).

<sup>8</sup> Decision, ICC-01/04-02/06-T-19-ENG, p.11, ll.19-22 (emphasis added).

<sup>9</sup> ICC-01/04-02/06-519, Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, para.12.

<sup>10</sup> The Chamber noted that “unlike at the confirmation hearing, there are no provisions in the statutory texts specifically regulating the List of Evidence at trial, although Rule 77 provides a general disclosure obligation in respect of any material intended to be used as evidence”: Decision, ICC-01/04-02/06-T-19-ENG, p.11, ll.11-14.

Evidence, the Defence respectfully submits that the Notification Mechanism – insofar as it relates to amendments to the List of Evidence – adversely impacts not only the right of the Accused to have adequate time to prepare for the defence, but also the right of the Accused to know the case he has to meet.

8. Indeed, at stake is the finality of the Prosecution's case, on which the strategy of the Defence is based. It is possible for the Defence to adopt a coherent strategy only if the scope of the Prosecution's case is well-defined – subject solely to exceptional changes on the basis of new and previously unknown information having high probative value coming in the hands of the Prosecution. If and when a new item is added to the List of Evidence, the impact on the Defence goes well beyond having sufficient time to prepare to challenge the item in and of itself. The Defence must also factor in the new item in its overall strategy, which is much more problematic as the trial progresses.
9. As set out, the Notification Mechanism enables the Prosecution to amend its List of Evidence at any time, without any judicial control. Although the presence of an item on the Prosecution List of Evidence is different from the admission into evidence of this item, late amendments to the List of Evidence are not without prejudice to the rights of the Accused. Indeed, as recognized by the jurisprudence of the ICTY, regardless of whether the added item is ultimately used or not, any variation of the List of Evidence necessarily involves further examination and investigation on the part of the Defence in order to understand the newly added material for the preparation of the defence.<sup>11</sup> The later the change occurs, the greater the prejudice is.
10. The Defence also takes the view that the Notification Mechanism does not impose on the Prosecution any obligation: (i) when submitting an updated List of Evidence, to clearly indicate in a separate document which are the

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<sup>11</sup> Cf. ICTY, *Prosecutor v. Sefer Halilović*, IT-01-48-T, Decision on Prosecution's Application for Leave to Vary its Exhibit List Filed Pursuant to Rule 65ter(E)(iii), 14 February 2005, p.3-4.

items that were added to the List of Evidence as well as the reasons why these items are added at that stage and why they could not be included before; and (ii) when providing to the Defence and the participants the list of documents it intends to use during the testimony of a particular witness, to specify which of the documents were not on its original List of Evidence. The absence of these obligations on the Prosecution imposes a burden on the Defence to keep track of the new items added and, more importantly, makes it very difficult for the Defence to efficiently object to both the admission and the use of a document added to the original List of Evidence. Hence, while the Notification Mechanism is aimed at improving judicial efficiency, the Defence respectfully submits that it will, in fact, trigger additional delays and misunderstandings between the Parties.

11. The Defence further observes that the Notification Mechanism is at odds with the approach followed in other cases before the Court. Indeed, in both the *Katanga and Ngudjolo* and *Ruto and Sang* cases, late amendments to the list of evidence were subject to a ruling from the Chamber.<sup>12</sup> The Decision provides no reasons for departing from the established practice.
12. The Defence acknowledges that the Decision provides an opportunity to challenge the reasons justifying the late addition of new items to the List of Evidence. However, the Defence posits that such a challenge can only be meaningful if it is raised at the time of the addition. Indeed, “addition of items to the List of Evidence will necessitate additional efforts from the Defence, [which] still has to be prepared to discuss the eventual tendering and admission of these items in court”.<sup>13</sup> Such an increase of the workload of the

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<sup>12</sup> See e.g. the decisions cited in the Prosecution Request: *Katanga and Ngudjolo* case, ICC-01/04-01/07-2325-Red, Decision on the Prosecution Motion for leave to disclose and add the investigator’s report concerning Witness P-268 to the List of Incriminating Evidence, 27 September 2010 (“*Katanga and Ngudjolo* Decision”); *Ruto and Sang* case, ICC-01/09-01/11-1625-Red, Public redacted version of “Decision on the Prosecution’s Eleventh Application for Addition of Documents to Its Lists of Evidence and for Disclosure”, 12 January 2015 (“*Ruto and Sang* Decision”).

<sup>13</sup> *Ruto and Sang* Decision, para.30.

Defence – especially if the trial has been underway for some time – can only be justified if the addition of new items to the List of Evidence is, itself, justified. In allowing the Prosecution to amend its List of Evidence without seeking prior authorisation, the Notification Mechanism provides for no safeguard in this regard.

13. Considering its undesirable consequences and its adverse impact on the rights of the Accused, the Defence respectfully submits that the Notification Mechanism rests on clear errors of reasoning, thus warranting reconsideration of the Decision.
14. In lieu of the present Notification Mechanism, the Defence respectfully suggests that any amendment the Prosecution wishes to make to its List of Evidence should be the object of a request setting out: (i) when the material was obtained by the Prosecution and why it could not be added before to the List of Evidence; (ii) how the material relates to the Prosecution's overall evidentiary case; (iii) how the material significantly bolsters the Prosecution's strategy; and (iv) why the late disclosure and addition will not cause undue prejudice to the right of the Defence to have adequate time to prepare for the defence.<sup>14</sup>

## **RELIEF SOUGHT**

In light of the above submissions, and pursuant to Article 64(3)(a) of the Statute, the Defence respectfully requests the Chamber to:

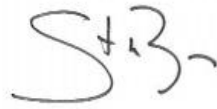
**RECONSIDER** the Notification Mechanism; and

**ADOPT** the amendment mechanism suggested or another mechanism that will provide the necessary safeguards.

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<sup>14</sup> Cf. *Katanga and Ngudjolo* Decision, para.15 and the jurisprudence cited therein.

**RESPECTFULLY SUBMITTED ON THIS 29<sup>TH</sup> DAY OF APRIL 2015**

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands