

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 15 May 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

**Prosecution response to Mr Ntaganda's motion for reconsideration
of the Chamber's decision on the Prosecution request to amend its List of
Evidence (ICC-01/04-02/06-T-19)**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. Trial Chamber VI (“Chamber”) directed the Prosecution to “promptly file an updated List of Evidence into the case record whenever amendments to it are made”¹ and held that it was “unnecessary to rule specifically on amendments to the List of Evidence.”² The basis of the Chamber’s decision is that the List of Evidence provides notice to the Defence of the materials the Prosecution *may* seek to admit into evidence, and that an item’s presence on the List of Evidence does not mean it is admitted.³
2. The Defence seeks reconsideration of this decision alleging that it rests on an error of reasoning. The Defence contends that the Chamber’s direction to file an updated List of Evidence without having to seek the prior authorisation of the Chamber puts in place a mechanism which adversely impacts the rights of the Accused both in terms of having adequate time to prepare his defence and to know the case he has to meet.⁴ The Defence further contends that it will be burdened by the lack of obligation on the Prosecution to clearly indicate the items added to the List of Evidence.⁵
3. The Prosecution submits that the Defence’s request for reconsideration should be dismissed. It fails to demonstrate that the decision is manifestly unsound or has unsound consequences.

¹ ICC-01/04-02/06-T-19, page 12, lns.1-3.

² ICC-01/04-02/06-T-19, page 11, lns.18-19.

³ ICC-01/04-02/06-T-19, page 11, lns.14-17.

⁴ ICC-01/04-02/06-577, paras.7, 13.

⁵ ICC-01/04-02/06-577, para.10.

Procedural history

4. On 2 March 2015, the Prosecution filed its List of Evidence.⁶
5. On 19 March 2015, the Prosecution sought to amend its List of Evidence to add materials that had been disclosed to the Defence by 2 March 2015, but not included on the List of Evidence filed that day.⁷
6. The Defence did not respond to this request.

Prosecution Submissions

7. Chambers of the Court have the discretion to reconsider their own decisions, but that reconsideration is exceptional and should only occur if there is a clear error of reasoning, the decision results in manifestly unsound consequences or reconsideration is necessary to prevent an injustice.⁸
8. The Prosecution disagrees that there is a clear error of reasoning in the Chamber's decision not to rule specifically on amendments to the List of Evidence and directing the Prosecution to file an updated List of Evidence whenever amendments are made.
9. First, the Defence argument on the potential impact of adding new items to the List of Evidence, regardless of whether they are able to be used at trial, is premature. It is based on the speculative claim that the Prosecution will regularly amend its List of Evidence and that these amendments will significantly impact the Defence.
10. The Defence submits that the Prosecution should be required to request prior authorisation from the Chamber to amend its List of Evidence and to provide

⁶ ICC-01/04-02/06-491-Conf-AnxC, pursuant to the 9 October 2014 order of the Chamber [ICC-01/04-02/06-382-Corr, para.9(c)].

⁷ ICC-01/04-02/06-524.

⁸ ICC-01/04-02/06-519, para.12 (including footnotes).

the following information: (i) when the material was obtained 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 Accused to have adequate time to prepare for his defence.⁹

11. Such a procedure is unnecessary since the Chamber emphasised that amendments to the List of Evidence are to be kept to a minimum and that the Defence may at any time challenge the use of items subsequently added to the List of Evidence on the basis that it received late notice or had inadequate time to prepare.¹⁰ The Chamber also stated that it would consider factors such as the lapse of time between the deadline for filing the List of Evidence and when the item was added, as well as the reason for the late notice, when assessing whether the item can be used at trial.¹¹ The Defence acknowledges the decision does not affect its ability to challenge the use of any items on the List of Evidence.¹² The Defence's preference for a different process does not mean that the process implemented by the Chamber is manifestly unsound.
12. Second, any change to the List of Evidence will be clearly indicated to the Defence, such that these amendments will not impose an additional burden as the Defence submits. The Prosecution is required to promptly file an updated List of Evidence and will advise the Defence of the changes. As such, the Defence will be fully informed of any amendments to the List of Evidence.
13. Finally, the case law cited by the Defence is distinguishable. In both cases cited, the Prosecution indeed sought prior authorisation from the Trial

⁹ ICC-01/04-02/06-577, para.14.

¹⁰ ICC-01/04-02/06-T-19, page 11, lns.19-22.

¹¹ ICC-01/04-02/06-T-19, page 11, lns.22-25.

¹² ICC-01/04-02/06-577, para.7.

Chamber to add documents to its List of Evidence; however, this does not reveal an “established practice” at this Court.¹³ The *Ruto & Sang* trial began in September 2013 and the relevant application to add documents to the List of Evidence was made in October 2014.¹⁴ As such, the proceedings were at a far more advanced stage and the application was made following an order of Trial Chamber V(A).¹⁵ The *Ngudjolo & Katanga* decision is in response to a Prosecution application under regulation 35 to admit a document in order to contest the testimony of a witness after he had testified, four months after the trial commenced.¹⁶ Once again, the circumstances underlying this decision vary greatly with this case and with the decision of this Chamber.

14. The Defence refers to one decision from the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) to support its assertion that the jurisprudence of the ICTY recognises that any variation of the List of Evidence necessarily involves further examination and investigation by the Defence.¹⁷ The decision is case specific and involves a procedural rule unique to the ICTY, as such it offers limited assistance to this Chamber. Moreover, the decision does not set out the assertion that the Defence has put forth. Rather, the Trial Chamber notes in the Preamble of the decision “that a variation of the Prosecution exhibit list at this stage of the proceedings could infringe upon those rights of the accused” and that “the Defence may need additional time to examine” the newly added documents. The Trial Chamber then orders the Prosecution to file a new list, to introduce the new exhibits at a later stage in the proceedings and informs the Defence it may seek leave for additional time to examine the new exhibits.

¹³ ICC-01/04-02/06-577, para.11.

¹⁴ ICC-01/09-01/11-1625-Red.

¹⁵ ICC-01/09-01/11-1527-Conf, page 11, as cited in ICC-01/09-01/11-1625-Red, para.7.

¹⁶ ICC-01/04-01/07-2325-Conf, paras.2-3 (decision on Prosecution filing ICC-01/04-01/07-2088-Conf).

¹⁷ ICC-01/04-02/06-577, para.9 citing *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.

Relief Sought

15. In light of the above, the Prosecution requests that the Defence request for reconsideration be dismissed.



Fatou Bensouda,
Prosecutor

Dated this 15th day of May 2015
At The Hague, The Netherlands