

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 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

Decision on the Defence request for reconsideration

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

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 ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67 of the Rome Statute, and Rule 77 of the Rules of Procedure and Evidence, issues the following 'Decision on the Defence request for reconsideration'.

I. Procedural history

1. On 2 March 2015, the Office of the Prosecutor ('Prosecution') filed a list of evidence it intends to rely on at trial ('List of Evidence').¹
2. On 19 March 2015, the Prosecution filed a submission requesting the Chamber to authorise the addition of two documents as well as 116 items which had provisionally been provided to the defence team for Mr Ntaganda ('Defence') on 2 March 2015, and formally disclosed on 17 March 2015, to its List of Evidence.² The Defence did not file a response to this request.
3. During the 22 April 2015 status conference, the Chamber issued an oral decision in which it clarified that it considers it unnecessary to rule specifically on amendments to the List of Evidence. Instead, it directed the Prosecution to promptly file an updated List of Evidence into the case record whenever amendments to it are made ('Impugned Decision').³
4. On 29 April 2015, the Defence filed a request seeking reconsideration of the Chamber's oral decision of 22 April 2015 ('Defence Request').⁴
5. On 15 May 2015, the Prosecution filed its response opposing the Defence Request ('Prosecution Response').⁵

¹ Prosecution's Lists of Witnesses, Summaries, and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf with Annexes.

² Prosecution request to amend its List of Evidence, 19 March 2015, ICC-01/04-02/06-524.

³ Transcript of hearing on 22 April 2015, ICC-01/04-02/06-T-19-ENG, page 11, line 7 – page 12, line 7.

⁴ 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, 29 April 2015, ICC-01/04-02/06-577.

⁵ 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), 15 May 2015, ICC-01/04-02/06-597.

II. Submissions and analysis

6. The Defence submits that by directing the Prosecution to promptly file an updated List of Evidence into the case record whenever amendments to it are made, the Chamber put in place a mechanism which is not provided for in the Court's legal framework, which the Defence was not given an opportunity to comment on prior to its adoption.⁶
7. The Defence further contends that this mechanism adversely impacts the right of the accused to have adequate time to prepare his defence as well as his right to know the case he has to meet. In this regard, the Defence stresses that, regardless of whether or not the new materials are ultimately admitted, it necessarily requires additional preparation by the Defence, including in 'factor[ing] in the new item in its overall strategy' which would be more and more difficult as the trial advances.⁷
8. The Defence further argues that, absent any obligation on the Prosecution to clearly indicate the items that are added to the List of Evidence, and the reasons for the delay, a burden is imposed on the Defence to keep track of the amendments which makes very difficult 'to efficiently object' to the addition and use of a document.⁸ In addition, the Defence claims that challenging the reasons justifying the late addition of new items can only be meaningful if raised at the time of the addition.⁹
9. In lieu of the mechanism established in the Impugned Decision, the Defence suggests that any amendment to the List of Evidence should be the object of a preliminary request by the Prosecution indicating, *inter alia*, the reasons for the late addition and how it fits into the Prosecution's overall strategy.¹⁰

⁶ Defence Request, ICC-01/04-02/06-577, para. 6.

⁷ Defence Request, ICC-01/04-02/06-577, paras 7-9 and 12.

⁸ Defence Request, ICC-01/04-02/06-577, para. 10.

⁹ Defence Request, ICC-01/04-02/06-577, para. 12.

¹⁰ Defence Request, ICC-01/04-02/06-577, para. 14.

10. The Prosecution submits that the Defence Request fails to demonstrate that the decision is manifestly unsound or has unsound consequences, and that it should be dismissed.¹¹ According to the Prosecution, the Defence Request is premised on the speculative claim that the Prosecution will regularly amend its List of Evidence in a manner which will significantly impact on the Defence.¹²
11. In addition, the Prosecution avers that the alternative procedure proposed by the Defence 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 once added to the List of Evidence. The Prosecution furthermore avers that it will clearly indicate any changes to the list to the Defence.¹³
12. As the Chamber has previously noted,¹⁴ the Statute does not provide guidance on reconsideration of interlocutory decisions.¹⁵ However, the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, whether prompted by one of the parties or *proprio motu*.¹⁶ 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.¹⁷

¹¹ Prosecution Response, ICC-01/04-02/06-597, para. 3.

¹² Prosecution Response, ICC-01/04-02/06-597, para. 9.

¹³ Prosecution Response, ICC-01/04-02/06-597, paras 11-12.

¹⁴ Decision on the Defence request for reconsideration and clarification, 27 February 2015, ICC-01/04-02/06-483, para. 10; Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, ICC-01/04-02/06-519, para. 12.

¹⁵ See Article 84 of the Statute expressly permitting revision of a final conviction or sentence in light of, *inter alia*, new evidence.

¹⁶ 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 ('*Lubanga Reconsideration Decision*'); Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 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 ('*Kenyatta Reconsideration Decision*').

¹⁷ 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-01/09-01/11-1813, 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*

13. As noted in the Impugned Decision, no statutory provisions specifically regulate the use of a List of Evidence at trial.¹⁸ The Chamber considers that decisions on how to deal with amendments to the List of Evidence fall squarely within the discretionary powers of each chamber. Further, the Chamber acknowledges parties have a right to be heard where their rights may be affected.¹⁹ This does not, however, extend to every decision adopted, in particular where a decision is primarily procedural in nature and does not substantively impact such rights.
14. In the Chamber's view, the Impugned Decision does not significantly impact the ability of the Defence to prepare for trial or the right to know the case. The Chamber clearly stated that it will take into account any relevant considerations, such as the timing and reasons for the late notice when deciding on whether the items may be used at trial.²⁰ Moreover, in the view of the Chamber, the Defence may bring a request to reject the amendment to the List of Evidence from the moment of notification. In this regard, the Chamber also recalls its earlier findings 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' (emphasis added).²¹
15. Further, the Chamber ordered that the Prosecution must 'promptly file an updated List of Evidence into the case record whenever amendments to it are made',²² and the Prosecution confirmed that it will clearly identify to the

al., Judgment on Sentence Appeal, 8 April 2003, IT-96-21-*Abis*, para. 49. For similar criteria, *see also* *Kenyatta* Reconsideration Decision, ICC-01/09-02/11-863, para. 11; *Lubanga* Reconsideration Decision, 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').

¹⁸ Impugned Decision, ICC-01/04-02/06-T-19-ENG, page 11, lines 11-14.

¹⁹ *See e.g.* Article 64(3)(a) of the Statute; ICTY, *The Prosecutor v. Goran Jelisić*, case no. IT-95-10-A, Judgment, 5 July 2001, para 27.

²⁰ Impugned Decision, ICC-01/04-02/06-T-19-ENG, page 11, lines 22-25.

²¹ Impugned Decision, ICC-01/04-02/06-T-19-ENG, page 11, lines 20-22.

²² Impugned Decision, ICC-01/04-02/06-T-19-ENG, page 12, lines 1-2.

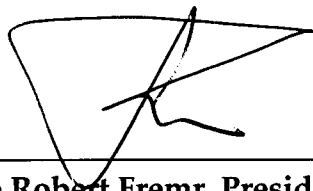
Defence any changes to the List of Evidence.²³ The Defence allegations of an additional burden for the Defence, or additional delays and misunderstanding between the parties, are therefore of a purely speculative nature. However, the Chamber does note that the Prosecution's most recent amended List of Evidence²⁴ did not clearly indicate which additions it made. The Chamber expects these changes to be notified in a clear manner to the Defence (such as by listing each additional document by its identifying number rather than integrating the new items into the original List of Evidence).

16. As the Defence has not substantiated any error of reasoning or the existence of an injustice, the Chamber will not reconsider the Impugned Decision.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request.

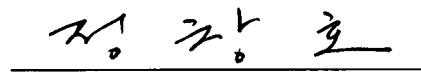
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 27 May 2015

At The Hague, The Netherlands

²³ Prosecution Response, ICC-01/04-02/06-597, paras 11-12.

²⁴ Prosecution's Updated List of Evidence and List of Witnesses, 1 May 2015, ICC-01/04-02/06-587.