

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **13 May 2014**

APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

***THE PROSECUTOR
v. THOMAS LUBANGA DYILO***

Public

**Prosecution Response to Defence Notice Concerning the Disclosure of Documents
Relating to Witnesses P-17, P-38, and P-55**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor
Mr. James Stewart
Mr. Fabricio Guariglia

Counsel for Thomas Lubanga Dyilo

Ms. Catherine Mabilie
Mr. Jean-Marie Biju-Duval
Ms. Caroline Buteau

Legal Representatives of Victims

Mr. Luc Walley
Mr. Franck Mulenda
Ms. Caroline Bapita Buyangandu
Mr. Paul Kabongo Tshibangu
Mr. Joseph Keta

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Defence has notified the Chamber of a recent disclosure made in respect of witnesses P-17, P-38, and P-55. It has reserved the right to make any further written submissions if required, after the forthcoming appeal hearing, once the disclosure has been properly evaluated.¹ Although the Prosecution does not object to this very limited form of relief, since disclosure was made precisely to enable such an evaluation, it contests certain inaccurate remarks made by the Defence, which require clarification.

Submissions

2. The Defence incorrectly asserts that at least “51 documents” were disclosed by the Prosecution on 25 April 2014.² However, these documents relate only to three witness interviews,³ and one additional document, comprising:
 - the transcript of a 1-2 June and 15-17 July 2013⁴ interview with P-17, conducted for the purpose of another case, together with supporting documents;⁵
 - the transcript of a 6-9 June 2013 interview with P-38,⁶ conducted for the purpose of another case, together with supporting documents;⁷

¹ ICC-01/04-01/06-3086 (“Notice”), paras.12-14.

² Notice, para.4. The reference in the Notice to “62 documents” reflects the fact that translations were provided of certain materials: *see below* fn.8.

³ *See* Notice, para.5.

⁴ The interview was conducted in two stages, with a break in between. Given the limited duration of audio recordings, this transcript was contained in 21 separate files: *see* Notice, Confidential Annex 1, listed items 5-15, 30-39.

⁵ These were five documents (photographs, sketches, and a legal undertaking) integral to the interview: *see* Notice, Confidential Annex 1, listed items 1, 16-19.

⁶ Given the limited duration of audio recordings, this transcript was contained in 9 separate files: *see* Notice, Confidential Annex 1, listed items 21-29.

⁷ These were three documents (a map, personal notes, a legal undertaking) integral to the interview: *see* Notice, Confidential Annex 1, listed items 2-4.

- the transcript of a 23-27 September 2013 interview with P-55,⁸ conducted for the purpose of another case, together with supporting documents;⁹ and
 - an investigator's note concerning P-55.¹⁰ An advance copy of this document was previously disclosed to the Defence, with two other documents, on 25 July 2013 (one day after it was created).¹¹
3. The Defence's reliance on this good faith Prosecution disclosure to show its very opposite—that the Prosecution does not conform to its disclosure obligations¹²—is baseless. To the contrary, the Prosecution takes its disclosure obligations with the utmost gravity.
 4. The Defence is incorrect to assert generally that “all new statements” of witnesses who have testified in this case must be disclosed under Rule 77 or Article 67(2) of the Statute, as applicable.¹³ Rather, on appeal, the Prosecution is obliged to disclose new witness statements *if* they contain information that falls under Rule 77 or Article 67(2), tailored to the relevant issues on appeal. The Prosecution adopted this practice in this instance.
 5. The three interviews (and related documents) are disclosed to the Defence under Rule 77. Although initially the Prosecution did not consider the information in the disclosed material as falling within Rule 77,¹⁴ it kept the matter under review in light of the continuous nature of its disclosure

⁸ Given the limited duration of audio recordings, this transcript was contained in 11 separate files: *see* Notice, Confidential Annex 1, listed items 41-51. Additionally, a Kinyarwanda translation of this transcript was provided in 11 further files: *see* Notice, Confidential Annex 1, listed items 52-62.

⁹ This was one document (a legal undertaking) integral to the interview: *see* Notice, Confidential Annex 1, listed item 40.

¹⁰ *See* Notice, Confidential Annex 1, listed item 20.

¹¹ Disclosure was made as package 215.

¹² *See* Notice, para.11.

¹³ *Contra* Notice, para.8.

¹⁴ P-17, P-38 and P-55 were not interviewed in 2013 for the purpose of these proceedings but rather for a different case. Thus, although the Prosecution recognised that some aspects of the statements touched upon the military activities of the UPC/FPLC (*see* Notice, para.9), it did not initially consider the nature or content of these remarks sufficient to render the interviews material to the preparation of the defence.

obligations.¹⁵ Upon receiving the Defence's request, on 17 April 2014, and considering the Defence's views, the Prosecution decided—in the particular circumstances of this appeal—that Rule 77 should be applied.

6. The materials were promptly disclosed on 25 April 2014, just over a week after the Defence request was received. This was not untimely.¹⁶
7. Should the Defence consider further action is necessary in respect of the disclosed material, having properly evaluated it,¹⁷ the established procedure of this Court provides them an appropriate remedy: an application to admit additional evidence under Regulation 62.¹⁸



Fatou Bensouda, Prosecutor

Dated this 13th day of May 2014

At The Hague, The Netherlands

¹⁵ The Prosecution further notes that it is urgently finalising transcriptions of a recent interview with witness P-16, and taking measures to implement any necessary redactions. It will disclose this material to the Defence as soon as the necessary preparations are completed, on the same basis as discussed here.

¹⁶ *Contra* Notice, paras.7, 12.

¹⁷ *See* Notice, paras.12, 14.

¹⁸ Subject to any application meeting the necessary standards for admissibility of additional evidence under Regulation 62: *see e.g.* ICC-01/04-01/06/2969, paras.37-46.