

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **12 June 2014**

THE 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
with a Public Annex**

Public Redacted Version of “Prosecution Response to « *Observations de la Défense conformément à l’ordonnance de la Chambre d’appel du 20 mai 2014 concernant la divulgation tardive par le Procureur de déclarations additionnelles de certains témoins à charge* »”, 12 June 2014

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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**Victims Participation and Reparations
Section Other**

Introduction

1. On 5 June 2014, the Defence filed its observations on the recent disclosure of interview transcripts of Witnesses [REDACTED] P-0017, P-0038, and P-0055, who were interviewed in relation to another case.¹ Despite being given ample time to review four transcripts of witness interviews and one investigator's note, the Defence fails to identify any specific information from the documents to support its claims of alleged disclosure violations.² It claims, without any support, that it is not in a position to seek the admission of the documents as additional evidence, nor to seek a variation of its grounds of appeal.³ Instead, the Defence makes unsubstantiated assertions on the alleged existence of information in these documents that is either material to the preparation of the defence, purportedly undermines the credibility of the Prosecution evidence or is potentially exonerating. Moreover, the Defence Observations are largely repetitive of its earlier notice of 9 May 2014, to which the Prosecution has already responded.⁴ Due to the continuing nature of certain inaccurate submissions, the Prosecution must again oppose the Defence Observations, including its claims of alleged disclosure violations, and provides clarification.

Submissions

2. The Defence incorrectly asserts that "51 documents" were disclosed in relation to P-0017, P-0038 and P-0055. As clarified earlier, these documents are comprised only of three witness interviews, and one additional investigator's note.⁵ Only one further witness interview relating to [REDACTED] was added to these documents.⁶ Moreover, pursuant to the Chamber's Order of 20 May 2014, the Defence has now had six weeks to evaluate the transcripts of the interviews of P-0017, P-0038 and P-

¹ ICC-01/04-01/06-3109-Red ("Defence Observations").

² See Defence Observations, paras.6-8.

³ Defence Observations, para.7.

⁴ See ICC-01/04-01/06-3089 ("Prosecution Response of 13 May 2014"), paras.1-7.

⁵ See Prosecution Response of 13 May 2014, para.2. The investigator's note relating to P-0055 had been disclosed to the Defence in advance copy on 15 July 2013.

⁶ [REDACTED].

0055 and [REDACTED] to evaluate the transcript of the interview of [REDACTED]. Yet, the Defence assertion that the Prosecution has failed to discharge its disclosure obligations is unsubstantiated. The Defence fails to make any reference to specific portions of the interviews of P-0017, P-0038 and P-0055 that it now claims fall within the scope of Article 67(2). For all the disclosed materials, the Defence also fails to demonstrate the exact manner in which it is allegedly precluded from further investigations, or from making applications under Regulations 61 and 62 of the Regulations of the Court.⁷

3. Indeed, it is for the Defence to demonstrate the alleged breach of the Prosecution's obligations and any purported prejudice.⁸ In the absence of such a showing, the Defence should be foreclosed from making any claims that it is not in a position to evaluate these materials, or is unfairly prejudiced from them.⁹ On the contrary, the vague nature of the Defence Observations leads to the conclusion that the disclosed documents do not impact on its case in any manner.

4. The Chamber in its 20 May 2014 Order had provided ample opportunity to the Defence to evaluate the disclosed materials.¹⁰ However, the Defence has chosen to file generalised and unsupported observations on the content of the disclosed transcripts. In any event, as previously submitted,¹¹ an application to admit additional evidence pursuant to Regulation 62 read in light of existing international criminal practice is the only remedy left to the Defence as further action at this

⁷ Defence Observations, para.7.

⁸ See ICC-02/11-01/11-612, para.43, fn.91, citing, *Prosecutor v. Karadžić*, Decision on Accused's Eighty-fourth Disclosure violation Motion, 16 January 2014, IT-95-5/18-T, paras.8, 15; stating "[i]n order to establish a violation of this obligation by the Prosecution, the Accused must 'present a *prima facie* case making out the probable exculpatory or mitigating nature' of the materials in question"; *Prosecutor v. Krstić*, Judgement, IT-98-33-A, 19 April 2004, para.153. The *Krstić* Appeals Chamber further emphasised in this passage that, to obtain any remedy even for an actual breach of the Prosecution's disclosure obligations and "[a]s a general proposition", "the Defence must show [...] that the Defence's case suffered material prejudice as a result."; See also, *Prosecutor v. Karadžić*, Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013, IT-95-5/18-T, para.24; *Karemera v. Prosecutor*, Decision on Joseph Nzirorera's Appeal from Decision of Alleged Rule 66 Violation, ICTR-98-44-AR73.18, 17 May 2010, para.13; *Kamuhanda v. Prosecutor*, Decision on Motion for Disclosure, ICTR-99-54A-R68, 4 March 2010, paras.14, 17.

⁹ See for example, Defence Observations, paras.6-8.

¹⁰ ICC-01/04-01/06-T-363-Red-ENG, p.3 line 17-p.4 line 11.

¹¹ Prosecution Response of 13 May 2014, para.7.

stage.¹² Outside of this procedure and subject to meeting the stringent criteria for the admission of additional evidence, the Defence has no other recourse.

5. The Prosecution files a confidential version of its response [REDACTED], and because it is responding to a confidential Defence filing of the same classification, pursuant to Regulation 23 *bis* (2) of the Regulations of the Court. It will simultaneously file a public redacted version of its response.



Fatou Bensouda, Prosecutor

Dated this 12th day of June 2014

At The Hague, The Netherlands

¹² See for example, ICC-01/04-01/06-3110, paras.6-7; ICC-01/04-01/06-2969-Red, paras.37-46; ICC-01/04-01/06-3091, paras.7-9.