

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 4 February 2015

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Confidential, Prosecution, Defence, Legal Representatives of Victims and
Victims and Witnesses Unit**

**Prosecution's further clarification in relation to "Prosecution's urgent request
pursuant to regulation 35 to vary the time limit for disclosure of material
relating to potential trial witnesses", ICC-01/04-02/06-433-Conf-Exp, dated 28
January 2015**

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. As instructed by Trial Chamber VI ("Chamber")¹, the Office of the Prosecutor ("Prosecution") provides further clarification on its request for authorisation to disclose four victim applications after 31 January 2015.² These applications concern four witnesses, two of whom were included on the *provisional* witness list without disclosure of their identity.³
2. The Prosecution submits that:
 - one victim application no longer requires disclosure because the witness (DRC-OTP-P-0904) is no longer willing to testify; accordingly, the Prosecution withdraws its request to vary the deadline to disclose the corresponding victim application;
 - an extension of time should be granted for disclosure of the other three victim applications, in the event the Chamber determines that disclosure was required by 31 January 2015.
3. The extension of time is necessary because, as the applications were in the Prosecution's possession prior to 9 October 2014, disclosure is now due. Accordingly, disclosure of these witnesses' identities *before* the Prosecution has finally decided to call them at trial, before the necessary security measures have been put in place, and before their statements have been disclosed,

¹ ICC-01/04-02/06-437-Conf ("Decision"), para.11, p.6.

² ICC-01/04-02/06-433-Conf-Exp with confidential redacted version at ICC-01/04-02/06-433-Conf-Red ("Request").

³ ICC-01/04-02/06-426-Conf-Exp-AnxA with confidential redacted version at ICC-01/04-02/06-426-Conf-AnxA-Red.

would impact their safety and security. Given the timing of this application, any prejudice to the Defence of the extension of time would be very limited.

4. However, as the circumstances of witness DRC-OTP-P-0904 demonstrate, the victim applications may not, in fact, be disclosable before the Prosecution decides to rely on these witnesses for trial.⁴

Confidentiality

5. This document is classified as Confidential pursuant to regulation 23*bis*(1) of the Regulations of the Court, since it is based on a decision of the Chamber with the same classification.

Procedural Background

6. On 9 October 2014, the Chamber ordered *inter alia*, that “all material currently already in the Prosecution's possession, for which delayed disclosure is not requested and authorised, should be disclosed not later than 31 January 2015. Disclosure by the Prosecution to the Defence of all remaining incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and provision of all Rule 77 material for inspection to the Defence shall be completed by 2 March 2015, save where delayed disclosure has been specifically requested and authorised.”⁵

⁴ See ICC-01/04-02/06-382-Corr (“Order”), para.9(c): the Prosecution’s final witness list is due on 2 March 2015.

⁵ Order, para.9(d).

7. On 15 January 2015, the Prosecution provided the Chamber with, *inter alia*, a provisional list of witnesses⁶ and summaries of the expected testimony of these witnesses.⁷ The Prosecution simultaneously provided redacted versions of the provisional list of witnesses⁸ and the summaries⁹ in which it redacted the identities and summaries of certain witnesses. The Prosecution also noted that there are other witnesses whom the Prosecution is considering adding to its final witness list.¹⁰
8. On 28 January 2015, the Prosecution requested that the Chamber vary the 31 January 2015 deadline to permit the Prosecution to disclose lesser redacted versions of four victim applications by 2 March 2015 since the Prosecution had not yet reached a final determination as to whether these four victims would be included in the final version of the Prosecution's list of witnesses, due on 2 March 2015, and the statements relevant to these potential witnesses were taken after 9 October 2014.¹¹
9. On 30 January 2015, the Chamber issued its Decision in which it granted authorisation for the non-disclosure of the four victim applications on an interim basis and directed the Prosecution to provide further clarification regarding (i) the basis upon which it considers the four application forms to fall within its disclosure obligations at this stage, and consequently why the 31 January 2015 disclosure deadline would apply to such material; and (ii) in

⁶ ICC-01/04-02/06-426-Conf-Exp-AnxA.

⁷ ICC-01/04-02/06-426-Conf-Exp-AnxB.

⁸ ICC-01/04-02/06-426-Conf-AnxA-Red.

⁹ ICC-01/04-02/06-426-Conf-AnxB-Red.

¹⁰ ICC-01/04-02/06-426-Conf-Exp, para.6 with confidential redacted version at ICC-01/04-02/06-426-Conf-Red, para.6; ICC-01/04-02/06-426-Conf-Exp-AnxD.

¹¹ Request.

light of the basis for such disclosure, why delayed disclosure should be granted in this case.¹²

Prosecution Submissions

The basis upon which the applications fall within the Prosecution's disclosure obligations at this stage

10. The victim applications may fall within the Prosecution's disclosure obligations at this stage solely because they were in the Prosecution's possession before 9 October 2014 and they relate to potential witnesses whose statements will be disclosed by 2 March 2015 should the Prosecution decide to rely on them. The Prosecution acknowledges that the applications may not yet fall within the Prosecution's disclosure obligations because it has not reached a final decision to rely on these witnesses.

The Prosecution has good cause for requesting delayed disclosure

11. Should the Chamber determine that the applications fall under the Prosecution's disclosure obligations in advance of the Prosecution's final determination that it will rely on these three witnesses, the Prosecution seeks a variation of the date to disclose them until 2 March 2015. The applications belong to potential witnesses whom the Prosecution interviewed between November 2014 and January 2015 and whom the Prosecution is considering including in the final version of its list of witnesses due 2 March 2015.¹³

¹² Decision, para.11, p.6.

¹³ Order, para.9(c).

12. The Prosecution has not yet made a final determination as to whether or not it will include any of the three potential witnesses in the final version of its list of witnesses. According to the Order, the Prosecution has until 2 March 2015 to make this determination.¹⁴
13. The process of determining which witnesses will be relied upon takes time and involves a careful assessment of the necessary security measures that need to be implemented. The paramount consideration is the safety and security of the potential witnesses.
14. Therefore, the Prosecution made its Request out of an abundance of caution in case it were to decide to include all or any of the three potential witnesses in the final version of its witness list. The Prosecution does not wish to disclose any further information (i.e. the victim applications) which could impact their safety and security before it is necessary to do so.
15. In its Decision, the Chamber noted that “the basis for the original redactions to the victims’ applications no longer exists in the case of individuals who the Prosecution intends to call as witnesses”.¹⁵ It follows that, since a final decision as to whether or not these three victims will be called as witnesses has not yet been made, the Prosecution may maintain the original redactions until such a determination is made.

¹⁴ Order, para.9(c).

¹⁵ Decision, para.10.

Relief Requested

16. Based on the foregoing, the Prosecution withdraws its request for a variation of the time limit in respect of the victim application form of witness DRC-OTP-P-0904. Should the Chamber determine that the remaining three victim application forms were disclosable on 31 January 2015, the Prosecution seeks a variation of the deadline for disclosure until 2 March 2015.



Fatou Bensouda,
Prosecutor

Dated this 4th day of February 2015
At The Hague, The Netherlands