

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 9 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***

Public

Decision on Prosecution request for an extension of time for disclosure of victim applications

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**

**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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Article 64(6)(a) and (f) of the Rome Statute, Rules 76 and 77 of the Rules of Procedure and Evidence ('Rules') and Regulations 23*bis* and 35(2) of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution request for an extension of time for disclosure of victim applications'.

I. Procedural history

1. On 9 October 2014, the Chamber ordered, *inter alia*, that: (i) all material then in the possession of the Office of the Prosecutor ('Prosecution'), and for which delayed disclosure is not requested and authorised, should be disclosed not later than 31 January 2015;¹ (ii) the disclosure of 'all remaining incriminatory material in the form of witness statements and any other material to be relied on at trial', as well as of all Article 67(2) and Rule 77 material shall be completed by 2 March 2015; and (iii) the Prosecution should file its final list of witnesses to be relied on at trial by 2 March 2015.²
2. On 28 January 2015, the Prosecution filed a request for an extension of time for the disclosure of four victim applications ('Applications') until 2 March 2015 ('Request').³
3. Also on 28 January 2015, the Chamber shortened the deadline for any responses to the Request.⁴
4. The Legal Representatives of Victims ('LRVs') indicated that they do not oppose the Request.⁵

¹ Order Scheduling a Status Conference and Setting a Commencement Date for the Trial, ICC-01/04-02/06-382, para. 9(d). A corrigendum was filed on 28 November 2014 (ICC-01/04-02/06-382-Corr).

² ICC-01/04-02/06-382-Corr, para. 9(c).

³ 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. A confidential redacted version was filed on the same day (ICC-01/04-02/06-433-Conf-Red). The confidential redacted version was reclassified as public on 4 February 2015 (ICC-01/04-02/06-433-Red).

⁴ E-mail from Legal Officer of the Chamber to the parties, participants and Victims and Witnesses Unit ('VWU') on 28 January 2015 at 16:58.

5. On 29 January 2015, the defence team for Mr Ntaganda ('Defence') indicated that it does not oppose the Request, but sought disclosure of the victim numbers of the four individuals.⁶
6. On 30 January 2015, the Chamber, deferring its ruling on the Request but granting non-disclosure of the Applications on an interim basis, directed the Prosecution to provide further clarification in relation to: '(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 light of the basis for such disclosure, why delayed disclosure should be granted in this case'.⁷
7. On 4 February 2015, the Prosecution submitted the requested further clarification ('Prosecution Clarification')⁸, in which it, *inter alia*, withdrew its request in respect of one of the application forms as the relevant individual is no longer willing to testify as a witness.⁹

II. Submissions and analysis

8. In the Prosecution Clarification, it is submitted that the Request was filed 'out of an abundance of caution' because the victim applications were in the Prosecution's possession prior to 9 October 2014 and relate to 'potential witnesses'.¹⁰ The Prosecution 'acknowledges that the applications may not yet fall within [its] disclosure obligations because it has not reached a final decision to rely on these witnesses'.¹¹ In particular, the Prosecution submits

⁵ E-mail from LRVs to Legal Officer of the Chamber on 28 January 2015 at 17:10.

⁶ Response on Behalf of Mr Ntaganda to Prosecution Applications ICC-01/04-02/06-432-Conf-Red and ICC-01/04-02/06-433-Conf-Red, ICC-01/04-02/06-435-Conf.

⁷ Decision on Prosecution requests relating to victims applications, ICC-01/04-02/06-437-Conf.

⁸ 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, ICC-01/04-02/06-442-Conf.

⁹ Prosecution Clarification, ICC-01/04-02/06-442-Conf, paras 2 and 16.

¹⁰ Prosecution Clarification, ICC-01/04-02/06-442-Conf, paras 10 and 14.

¹¹ Prosecution Clarification, ICC-01/04-02/06-442-Conf, para. 10.

that, although it is 'considering' including the individuals on its final witness list,¹² that determination cannot be made until there has been, *inter alia*, a 'careful assessment of the necessary security measures that need to be implemented'.¹³

9. Nonetheless, the Prosecution asserts that, if the Chamber should find the Applications to have been disclosable by 31 January 2015,¹⁴ there is good cause pursuant to Regulation 35(2) of the Regulations to extend the time limit for their disclosure until 2 March 2015.¹⁵ It submits that disclosure of the identity of these victims should not be made in advance of a 'final determination' as to whether or not they will be included on the Prosecution's list of witnesses¹⁶ as it would 'identify them as potential Prosecution witnesses'¹⁷ and impact their 'safety and well-being'.¹⁸
10. The Prosecution submits that this would not result in any prejudice to the accused, including because the Defence is already in possession of redacted versions of the Applications.¹⁹
11. The Defence states that it does not oppose the Request.²⁰ However, it contends that the Prosecution 'should have submitted' an application for delayed disclosure before the 31 January 2015 disclosure deadline. The Defence argues that from when statements were taken from the relevant individuals, the Applications and their statements became disclosable, pursuant to either Rules 76 or 77 of the Rules.²¹

¹² Prosecution Clarification, ICC-01/04-02/06-442-Conf, para. 11.

¹³ Prosecution Clarification, ICC-01/04-02/06-442-Conf, para. 13.

¹⁴ Prosecution Clarification, ICC-01/04-02/06-442-Conf, para. 11.

¹⁵ Request, ICC-01/04-02/06-433-Red, paras 1-2 and 7-8; Prosecution Clarification, ICC-01/04-02/06-442-Conf, paras 11-15.

¹⁶ Request, ICC-01/04-02/06-433-Red, paras 1 and 11.

¹⁷ Request, ICC-01/04-02/06-433-Red, para. 9.

¹⁸ Request, ICC-01/04-02/06-433-Red, para. 1; Prosecution Clarification, ICC-01/04-02/06-442-Conf, para. 14.

¹⁹ Request, ICC-01/04-02/06-433-Red, paras 2 and 11.

²⁰ ICC-01/04-02/06-435-Conf, para. 3.

²¹ ICC-01/04-02/06-435-Conf, paras 5-6.

12. The Defence further submits that unless, 'at a minimum', the victim numbers of the relevant victims are disclosed it is 'incorrect to say that there is no prejudice to the Defence'.²² The Defence consequently requests disclosure of the victim numbers so that it 'will at least have some information to include in its preparations' for trial.²³
13. The Chamber notes that the Prosecution has stated that the Applications were in its possession prior to 9 October 2014. The determination as to the applicability of the 31 January 2015 deadline therefore turns upon whether the Applications fell within the Prosecution's disclosure obligations at that time. Without prejudice to whether the Applications may become disclosable on other grounds in due course, the Chamber considers that the Prosecution's disclosure obligations in respect of the Applications was dependent upon the status of the relevant individuals as witnesses within the meaning of Rule 76 of the Rules.
14. The Chamber observes that this status would not necessarily arise from the moment that their statements were taken, as the evidentiary value of the statements in question, including in light of other material, would, amongst other factors, inevitably need to be first considered.
15. The Chamber recalls that the applicable standard under Rule 76 of the Rules is whether or not the Prosecution 'intends to call' the witnesses to testify. The Chamber reserves its position on whether, as a general principle, this necessitates a 'final determination'²⁴ having been made. Nonetheless, the Chamber understands the Prosecution's position as being that the requisite intention has not yet been formed. The Chamber notes in particular in this regard the Prosecution's submission that security assessments, which will

²² ICC-01/04-02/06-435-Conf, para. 7.

²³ ICC-01/04-02/06-435-Conf, paras 8-9.

²⁴ Request, ICC-01/04-02/06-433-Red, para. 1; Prosecution Clarification, ICC-01/04-02/06-442-Conf, paras 8, 11-12.

inform its decision on which witnesses to rely upon, need to first be conducted. On this basis, the Chamber considers that the Applications had not yet fallen within the Prosecution's disclosure obligations, and consequently the Request was premature.

16. The Chamber notes that the Prosecution is not required to disclose the status of individuals who are merely potential witnesses.²⁵ Therefore, pending determination of their status, the Chamber does not consider it necessary or appropriate to require the Prosecution to identify the relevant victim numbers to the Defence.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECLARES the Request moot at this time;

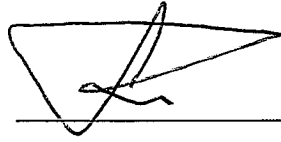
REJECTS all other requests;

DIRECTS the Prosecution to file public redacted version of the Prosecution Clarification; and

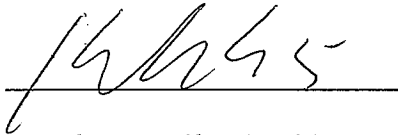
DIRECTS the Registry to reclassify the Chamber's decision ICC-01/04-02/06-437-Conf as public.

²⁵ See Order setting deadlines for filing of submissions on outstanding protocols, 18 December 2014, ICC-01/04-02/06-416, para. 10.

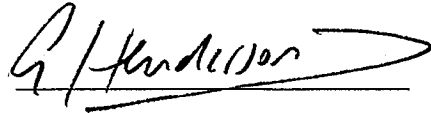
Done in both English and French, the English version being authoritative.


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Judge Robert Fremr, Presiding Judge


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Judge Kuniko Ozaki


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Judge Geoffrey Henderson

Dated 9 February 2015
At The Hague, The Netherlands