

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 13 March 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

With Confidential, *EX PARTE* - Annexes A-F - only available to the Prosecution

**Public redacted version of "Prosecution request for authorisation of non-disclosure of five documents obtained pursuant to article 54(3)(e)", 13 March 2015,
ICC-01/04-02/06-509-Conf-Exp**

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. The Office of the Prosecutor ("Prosecution") informs Trial Chamber VI ("Chamber") that a provider of information, [REDACTED], has refused to consent to the disclosure of five documents obtained pursuant to article 54(3)(e) of the Rome Statute ("Statute") which contain information that is material to the preparation of the Defence ("Rule 77 Material"). As detailed below, the non-disclosure of these documents is of no prejudice to the Defence since all the Rule 77 Material they contain has been disclosed in documents of the same nature authored by the same or similar sources.
2. The Prosecution requests authorisation for non-disclosure of these documents ("Request").

Confidentiality

3. The present filing and Annexes A-F to this filing are classified as "Confidential, *EX PARTE*- only available to the Prosecution" pursuant to regulation 23*bis*(1) of the Regulations of the Court because they contain information of a confidential nature and concern material that is subject to conditions imposed pursuant to article 54(3)(e) of the Statute. The Prosecution will file a confidential, redacted version of this filing.

Procedural Background

4. During the 17 February 2015 status conference, the Prosecution updated the Chamber on the status of material obtained pursuant to article 54(3)(e) of the

Statute.¹ The Prosecution noted that it would inform the Chamber of any difficulties in relation to the disclosure of such material.²

5. From the article 54(3)(e) materials identified by the Prosecution as containing potentially exculpatory or Rule 77 Material, five documents³ ("Five Documents") remain undisclosed. They are the subject of this Request.

Prosecution's Submissions

6. The non-disclosure of the Five Documents is not prejudicial to the rights of the Accused since evidence analogous to the Rule 77 Material they contain, or the original documents on which the Rule 77 Material is based, has been disclosed.
7. The Appeals Chamber has held that it "cannot exclude that the provision of alternative evidence may, in appropriate circumstances be one way of ensuring fairness in spite of the non-disclosure of material obtained on the condition of confidentiality under Article 54 (3) (e) of the Statute", noting that "this would require an assessment by a Chamber of the adequacy of the alternative evidence proposed by the Prosecutor".⁴

[REDACTED], [REDACTED], [REDACTED], [REDACTED]

8. Four of the Five Documents are related: three⁵ are annexes to the fourth document,⁶ which is [REDACTED]. Although the Prosecution is not in a position to disclose these four documents, the Rule 77 Material they contain is found in

¹ ICC-01/04-02/06-T-18-CONF-ENG, p.5, lns.16–25 (open session).

² ICC-01/04-02/06-T-18-CONF-ENG, p. 5, ln.25-p.6, ln.2 (open session).

³ [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]. Unredacted copies of these Five Documents are provided in Confidential, *EX PARTE*, Annexes B-F.

⁴ ICC-01/04-01/06-1486, para.95.

⁵ [REDACTED]; [REDACTED]; [REDACTED].

⁶ [REDACTED].

other disclosed materials. In particular, the [REDACTED],⁷ an unredacted version of which was disclosed to the Defence on [REDACTED] 2013, covers the same or substantially the same information as that contained in these four documents. [REDACTED].

9. Other material containing information analogous to the Rule 77 Material in these four documents has also been disclosed.⁸ This analogous information is provided by [REDACTED] and by organisations similarly situated to it. Accordingly, this analogous information is a solid substitute for the four documents that cannot be disclosed as it will enable the Defence to investigate and/or present evidence on the same substance.⁹ It is a sufficient safeguard for the rights of the Accused under article 67 of the Statute.

[REDACTED]

10. [REDACTED] compiles typed notes taken by [REDACTED] who reviewed various [REDACTED] reports (“[REDACTED] Notes”). These [REDACTED] reports are not identified in the [REDACTED] Notes, but the Prosecution has located two such reports¹⁰ containing some of the Rule 77 Material mentioned in the [REDACTED] Notes. The two [REDACTED] reports and the [REDACTED] Notes refer to the same facts and situate them on the same dates. The two [REDACTED] reports appear to be the original evidence seen by [REDACTED]. They were disclosed on 25 July 2013 and 21 January 2015. The Defence is therefore in possession of the best evidence in the form of the original [REDACTED] reports.

⁷ [REDACTED] Specifically, pp. [REDACTED] (bearing ERNs [REDACTED]) of [REDACTED] provide all the Rule 77 Material contained in the four documents.

⁸ See Confidential, *EX PARTE* Annex A, which sets out the evidence analogous to these four documents.

⁹ Two of these four documents were the subject of a ruling at the pre-trial stage: on 30 January 2014, the Prosecution notified Pre-Trial Chamber II that it could not disclose them because of conditions imposed by the provider. On 6 February 2014, the Single Judge of Pre-Trial Chamber II decided that their non-disclosure did not prejudice the rights of the Defence for the confirmation of charges hearing. ICC-01/04-02/06-247, p.10.

¹⁰ [REDACTED], [REDACTED].

11. As for the remainder of the Rule 77 Material referred to in the [REDACTED] Notes, the Prosecution has disclosed analogous evidence.¹¹ Together with the two [REDACTED] reports, this analogous evidence is a solid substitute for the information contained in the [REDACTED] Notes which cannot be disclosed. The analogous evidence will enable the Defence to investigate and/or present evidence on the same substance. It is a sufficient safeguard for the rights of the Accused under article 67 of the Statute.

Relief Requested

12. For the foregoing reasons, the Prosecution requests the Chamber to authorise the non-disclosure of the Five Documents.



Fatou Bensouda,
Prosecutor

Dated this 13th day of March 2015
At The Hague, The Netherlands

¹¹ See Confidential *EX PARTE* Annex A.