

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 19 March 2015

TRIAL CHAMBER VI

Before: Judge Kuniko Ozaki
Judge Robert Fremr
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

**Public
With Confidential Annexes A and B
Prosecution request to amend its List of Evidence**

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. On 2 March 2015 the Office of the Prosecutor ("Prosecution") submitted its List of Evidence,¹ which included 7,709 items of incriminating evidence disclosed to the Defence to date. The same day, the Prosecution provided to the Defence advance copies of 116 items of evidence that were not included in the List of Evidence for technical reasons ("Pre-Disclosed Documents").
2. In the days following that submission, the Prosecution realised that two items of evidence ("Two Documents") should have been disclosed and/or re-classified as incriminating evidence on 2 March 2015 and included in its List of Evidence.
3. The Prosecution requests Trial Chamber VI ("Chamber") to authorise it to add these items² to its List of Evidence ("Request").
4. One of the Two Documents is a better quality copy of a photograph already disclosed as incriminating evidence,³ while the second document⁴ is discussed in a disclosed witness statement and was previously disclosed to the Defence as information which could be material to its preparation ("Rule 77 Material"). The Pre-Disclosed Documents were provisionally provided to the Defence on 2 March 2015 and formally disclosed on 17 March.

¹ ICC-01/04-02/06-491-Conf-AnxC.

² Confidential Annexes A and B to this filing contain copies of the Two Documents (DRC-OTP-0077-0304 and DRC-OTP-0152-0240). ICC-01/04-02/06-520-Conf-AnxA lists the Pre-Disclosed Documents (DRC-OTP-0001-0033, DRC-OTP-0001-0214, DRC-OTP-0003-0072, DRC-OTP-0004-0057, DRC-OTP-0009-0146, DRC-OTP-0011-0476, DRC-OTP-0016-0139, DRC-OTP-0024-0090 and DRC-OTP-0062-0319; DRC-OTP-2082-1664 to DRC-OTP-2082-2180; and DRC-OTP-2082-2257 to DRC-OTP-2082-2704).

³ DRC-OTP-0152-0240, *see* paras.14-16 below.

⁴ DRC-OTP-0077-0304, *see* para.17 below.

Confidentiality

5. Annexes A and B to this request are classified as “Confidential” pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”) because they contain information which has been disclosed as “Confidential”.

Procedural History

6. On 9 October 2014, the Chamber determined that the Prosecution should file its final List of Evidence by 2 March 2015.⁵
7. On 2 March 2015, the Prosecution filed its List of Evidence.⁶ It contains 7,709 items on which the Prosecution intends to rely at trial.
8. On 3 March 2015, the Prosecution notified the Chamber of this disclosure, noting that a number of items were provided to the Defence by way of advance copies.⁷ These items were formally disclosed on 17 March.⁸

Prosecution’s Submissions

9. Under regulation 35(2) of the RoC, a Chamber may extend a time limit “if good cause is shown”. The Chamber may extend the time limit after it has elapsed if it can be demonstrated that the extension of the time limit could not be sought prior to its expiration for reasons outside a participant’s control.
10. In granting requests pursuant to regulation 35 where the applicable deadline had elapsed in this case, the Single Judge of Pre-Trial Chamber II took into

⁵ ICC-01/04-02/06-382-Corr, para.9(c).

⁶ ICC-01/04-02/06-491-Conf-AnxC.

⁷ ICC-01/04-02/06-496, para.3.

⁸ ICC-01/04-02/06-520.

consideration the “circumstances at the time”, including upcoming major disclosure deadlines in the case.⁹

11. In *Ruto and Sang*, Trial Chamber V(A) has considered the nature and size of the items to be added belatedly to the list of evidence in ruling on applications brought under regulation 35(2).¹⁰

12. In *Katanga and Ngudjolo*, Trial Chamber II has held that even where the conditions of regulation 35(2) are not met the Chamber may authorise the late addition of incriminating evidence pursuant to its powers under articles 64(6)(d) and 69(3) of the Rome Statute (“Statute”) to order the production of evidence that it deems necessary for the determination of the truth, provided it can be shown that:

(i) the new material is either significantly more compelling than other items of evidence already disclosed to the Defence, or brings to light a previously unknown fact which has a significant bearing upon the case, and (ii) the late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(l)(b) of the Statute.”¹¹ (footnotes omitted)

13. Granting the Request will make for a more complete List of Evidence. The requested variation of the time limit will not “derail the proceedings from their ordained course”¹² and is not unduly prejudicial.

⁹ See ICC-01/04-02/06-175-Conf, paras.11-13. See also ICC-01/05-01/08-3046, paras.8, 9 and 13.

¹⁰ ICC-01/09-01/11-1625-Red, para.33; ICC-01/09-01/11-1549-Red, para.21; ICC-01/09-01/11-1485-Red, para.35.

¹¹ ICC-01/04-01/07-2325, para.15.

¹² ICC-01/04-01/07-653, para.6.

A. The Two Documents

DRC-OTP-0077-0304

14. DRC-OTP-0077-0304 is a two-page document authored by P-0245 and referred to in his witness statement.¹³ It was disclosed as Rule 77 Material on 10 January 2014 but was inadvertently not re-disclosed as incriminatory material or included in the List of Evidence.
15. The Prosecution seeks to rely on this document to establish the contextual elements of crimes against humanity, specifically the UPC/FPLC's attack on Bunia on or about 6 August 2002 and the UPC/FPLC's pattern of persecution of non-Hema civilians.
16. DRC-OTP-0077-0304 is significantly more compelling than other evidence already disclosed¹⁴ because it contains the complaints made by Witness P-0245 contemporaneously with the events and identifies individuals targeted by the UPC/FPLC during its attack on Bunia. Its inclusion in the List of Evidence will not cause undue prejudice to the Defence in relation to its right to have adequate time and facilities to prepare in accordance with article 67(1)(b) of the Statute because it is a short document already discussed in Witness P-0245's statement.

DRC-OTP-0152-0240

17. DRC-OTP-0152-0240 is a photograph of victims of the Kobu massacre inadvertently omitted from disclosure and from the List of Evidence. The

¹³ DRC-OTP-2079-0354, paras.74-77.

¹⁴ For example DRC-OTP-2062-1062, pp.307-309, lns.294-299; DRC-OTP-2079-0354, p.0366, para.75.

image in DRC-OTP-0152-0240 is of better quality than the other two copies; it is therefore significantly more compelling material. The addition of this photograph to the List of Evidence will not cause undue prejudice to the Defence because two other copies of this photograph¹⁵ were already disclosed as incriminatory material on 2 September and 7 October 2013.¹⁶

B. Pre-Disclosed Documents

MONUC and OLA documents

18. On 2 March 2015, the United Nations (UN) authorised the Prosecution to disclose nine documents obtained from the UN Mission in the DRC (MONUC) and the Office of Legal Affairs (OLA) pursuant to article 54(3)(e) of the Statute. The Prosecution secured the UN authorisation to disclose these documents shortly prior to the filing deadline and was not able to disclose them formally or to include them in its List of Evidence.

19. The Prosecution provided the Defence with copies of the nine documents on 2 March 2015 and informed the Defence that they would be formally disclosed as soon as possible. As such, the Defence was on notice of the Prosecution's intention of relying on these documents at trial. The documents have now been formally disclosed.¹⁷ The Prosecution therefore seeks leave to update its List of Evidence to include them.

¹⁵ DRC-OTP-0072-0477 and DRC-OTP-0077-0292.

¹⁶ These documents appear as entries 2565 and 2567 on the Prosecution's List of Evidence.

¹⁷ ICC-01/04-02/06-520 and ICC-01/04-02/06-520-Conf-AnxA.

OHCHR documents

20. Between 27 February and 2 March 2015, the UN Office of the High Commissioner for Human Rights (OHCHR) provided a number of documents to the Prosecution. Due to the timing of the collection of these documents and technical difficulties encountered in registering them in Ringtail, the Prosecution did not have the ERNs to include them in its List of Evidence. The Prosecution provided the Defence with copies of the documents on 2 March 2015 and informed the Defence that they would be formally disclosed as soon as possible. As such, the Defence was on notice of the Prosecution's intention of relying on these documents at trial. The documents have now been formally disclosed.¹⁸ The Prosecution therefore seeks leave to update its List of Evidence to include them.

Relief Requested

21. Based on the foregoing, the Prosecution requests that the Chamber authorise the addition of the Two Documents to its List of Evidence. The Prosecution also seeks leave to include the Pre-Disclosed Documents on the List of Evidence.



Fatou Bensouda, Prosecutor

Dated this 19th day of March 2015
At The Hague, The Netherlands

¹⁸ ICC-01/04-02/06-520 and ICC-01/04-02/06-520-Conf-AnxA.