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

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TRIAL CHAMBER VI

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Prosecution's response to the Defence request in "Response on behalf of Mr Ntaganda to Prosecution request for authorisation of non-disclosure of five documents obtained pursuant to article 54(3)(e)" or, in the alternative, leave to reply

Source: The 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 13 March 2015, the Office of the Prosecutor ("Prosecution") informed the Trial Chamber VI ("Chamber") that the provider of five documents obtained pursuant to article 54(3)(e) of the Rome Statute ("Statute") refused to lift the conditions of collection.¹ It sought the Chamber's approval that, since the relevant information contained in these five documents is also contained in other disclosed documents, any prejudice to the Defence as a result of non-disclosure had been mitigated ("Prosecution's Application").
2. In its response to the Prosecution's Application, the Defence made new requests that the Chamber ("Chamber"): (i) delay adjudication of the Prosecution's Application; (ii) order the Prosecution to provide additional information on the five documents; and (iii) grant the Defence a further opportunity to respond ("Defence Request").²
3. The Prosecution does not oppose providing certain additional information to the Defence on the five documents. Nor does the Prosecution oppose the Defence request for more time to respond to the Prosecution's Application. Accordingly, the Prosecution sets out the categories of information contained in the five documents that that may be material to the Defence's preparation under rule 77 of the Rules of Procedure and Evidence ("Rules") and/or article 67(2). The Prosecution also identifies for the Defence the proposed analogous evidence. The Prosecution opposes, however, the Defence's request that further information be provided to the Chamber and the Defence, either because the additional information is irrelevant to a proper determination of the issue, has already been provided to the Chamber or cannot be provided to the Defence by the terms of article 54(3)(e). This part of the Defence Request should be rejected.

¹ ICC-01/04-02/06-509.

² ICC-01/04-02/06-542.

4. The Prosecution responds to the Defence's new request for relief pursuant to regulation 24(1) of the Regulations of the Court ("RoC"), giving it a right to respond.³ In the alternative, the Prosecution seeks leave to reply to the new Defence requests pursuant to regulation 24(4) of the RoC.

Procedural Background

5. On 17 February 2015, the Prosecution updated the Chamber on the status of material obtained pursuant to article 54(3)(e) of the Statute.⁴ The Prosecution noted that it would inform the Chamber of any difficulties in relation to the disclosure of such material.⁵
6. On 13 March 2015, the Prosecution informed the Chamber that a provider refused to lift the conditions attached to five documents that contain information falling under the Prosecution's disclosure obligations under article 67(2) or rule 77. The Prosecution sought a ruling of the Chamber approving the non-disclosure of the five documents because the same or substantially the same information has already been disclosed in documents of the same nature authored by similar sources.⁶
7. On 7 April 2015, the Defence responded to the Prosecution's Application and made these new requests for relief.⁷

³ See, ICC-01/09-02/11-886, para.8: "Additionally, given the new and distinct issues of law raised by the Defence Response and the nature of the relief requested therein, the Chamber finds that it is appropriate to treat it as a new request to which the Prosecution is entitled to fully respond. Pursuant to Regulations 24(1) and 34 of the Regulations, the Chamber sets a deadline for the Prosecution response of Friday, 31 January 2014."

⁴ ICC-01/04-02/06-T-18-CONF-ENG, p.5, lns.16–25 (open session).

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

⁶ ICC-01/04-02/06-509.

⁷ ICC-01/04-02/06-542.

Prosecution's Submissions

The Prosecution has provided the necessary information to the Chamber

8. Contrary to the Defence's assertion,⁸ the Prosecution has provided the Chamber with the necessary information to rule on the non-disclosure of the five documents.
9. The Prosecution's Application and annexes provide the Chamber with the five documents for which lifting of article 54(3)(e) conditions was refused and information such as their date of creation, author and the identity of the provider. The Prosecution also identified the information within each document that could be considered material to the Defence's preparation or potentially exculpatory.⁹
10. The Prosecution proposed concrete measures to remedy the non-disclosure of the items through either disclosure of analogous information contained in other documents from the same or similar sources and even, in two cases, the disclosure of the original reports. For the analogous evidence, the Prosecution provided the date of creation, author, and identified the references to similar information within these documents.¹⁰ In the Prosecution's assessment, all necessary information to adjudicate the issue has been provided to the Chamber.
11. The reasons for the provider's refusal to lift conditions of receipt are not relevant to the Chamber's determination as to the sufficiency of the proposed measures to address non-disclosure, contrary to the Defence's assertion.¹¹ The Chamber has the documents and the full extent of the relevant information that is assessed as potentially exculpatory, mitigating or otherwise material to the Defence's preparation.

⁸ ICC-01/04-02/06-542, paras.15-19.

⁹ ICC-01/04-02/06-509-Conf-Exp and annexes B to F.

¹⁰ ICC-01/04-02/06-509-Conf-Exp and annex A.

¹¹ ICC-01/04-02/06-542, para.18.

The categories of information contained in the five documents and in the analogous evidence

12. Article 54(3)(e) prescribes that the Prosecutor may:

“Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents”.

13. In interpreting article 54(3)(e),¹² the Appeals Chamber in the *Lubanga* case held that: (i) the Trial Chamber cannot order the disclosure of the material without prior consent of the provider; (ii) the assessment by the Chamber of the disclosable nature of the information obtained under confidentiality agreement is an *ex parte* proceeding – open only to the Prosecution; and (iii) if the information is deemed disclosable but the provider does not consent to disclosure to the Defence, “the Chamber will have to determine whether and if so, which counter balancing measures can be taken to ensure fair trial and protection of the rights of the accused in spite of the non-disclosure of the information”, including the provision of alternative evidence.¹³

14. Accordingly, the Prosecution’s provision of the documents to which article 54(3)(e) applies is appropriately made on an *ex parte* basis.

15. The Prosecution nonetheless agrees to provide a description of the information falling within the scope of rule 77 or article 67(2) in the five documents, namely information:

- (i) that crimes were committed by armed groups other than the UPC during the Bunia takeover in August 2002;¹⁴
- (ii) that foreign powers supported the UPC and other armed groups;¹⁵

¹² Together with article 64(6)(c) of the Statute and rule 81(3) of the Rules of Procedure and Evidence.

¹³ ICC-01/04-01/06-1486, paras.48 and 95.

¹⁴ ICC-01/04-02/06-509-Conf-Exp-AnxB, analogous evidence: DRC-OTP-0074-0797, at 0823-0825; DRC-OTP-0154-1301, at 1313, 1315; DRC-OTP-0074-0423, at 0439-0440; DRC-OTP-1061-0793 at 1025, para.411.

- (iii) that crimes were committed in previous attacks on Nyakunde by armed groups other than the UPC, Lendu militia against Hema civilians;¹⁶
- (iv) as to Thomas LUBANGA's lack of control over the UPC when under house arrest in Kinshasa;¹⁷
- (v) relating to Bosco NTAGANDA's admission that underage soldiers in the UPC volunteered to be there;¹⁸ and
- (vi) as to a UPC request not to be described as a Hema militia.¹⁹

16. The Prosecution does not oppose providing additional time to the Defence for it to respond to the Prosecution's Application.

The remainder of the Defence Request should be rejected

17. Because the provider has refused to lift conditions imposed on the five documents, information related to the source provider's identity, and the full content, substance or dates of the documents cannot be disclosed to the Defence. The Chamber alone can assess the information and decide whether the alternative information is a sufficient remedy to the non-disclosure of these items. The reasons for the provider's refusal and the "relationship between the prosecution and the provider"²⁰ are irrelevant to the issue.

¹⁵ ICC-01/04-02/06-509-Conf-Exp-AnxB, E and F, analogous evidence: DRC-OTP-0074-0797, esp. at 0823-0825, 0834-0840, 0852-0854; DRC-OTP-0193-0296; DRC-OTP-0174-0025 at 0029; DRC-OTP-0154-1301, at 1313, 1315; DRC-OTP-0074-0526; DRC-OTP-1061-0793 at 1025, para.411; DRC-OTP-0208-0272 at 0275, para.12.

¹⁶ ICC-01/04-02/06-509-Conf-Exp-AnxC, D and E, analogous evidence: DRC-OTP-0074-0797, at 0834-0840; DRC-OTP-0074-0422 at 0440, paras.50-52; DRC-OTP-0001-0251, at 0257; DRC-OTP-0204-0122, at 0122.

¹⁷ ICC-01/04-02/06-509-AnxE, analogous evidence: DRC-OTP-0044-0333; DRC-OTP-0074-0797, at 0809; DRC-OTP-1015-0592; DRC-OTP-0066-0002; DRC-OTP-0147-0002, at 0012 and DRC-OTP-0165-0999 at 1008; DRC-OTP-0109-0065 at 0085-0086; DRC-OTP-0105-0171 at 0112, 0118; DRC-OTP-0173-0012.

¹⁸ ICC-01/04-02/06-509-Conf-Exp-AnxF, analogous/original evidence: DRC-OTP-2067-1914 at 1916, para.10

¹⁹ ICC-01/04-02/06-509-Conf-Exp-AnxF, analogous evidence: DRC-OTP-0037-0274, at 0274; DRC-OTP-0037-0308, esp. para.2.

²⁰ ICC-01/04-02/06-542, para.12.

Conclusion

18. Based on the foregoing, the Prosecution:

- (i) does not oppose the Defence request to obtain certain additional information and for additional time to respond to the Prosecution's Application; and
- (ii) opposes the remaining Defence requests.

19. In the alternative, the Prosecution seeks leave to reply to the new Defence requests pursuant to regulation 24(4) of the RoC.



Fatou Bensouda
Prosecutor

Dated this 28th day of April 2015
At The Hague, The Netherlands