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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 on behalf of Mr Ntaganda seeking disclosure of any and all material in the possession of the Prosecution obtained from 'Radio Candip'"

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 Defence requests an order for the Prosecution to disclose, pursuant to article 67(2) of the Statute and rule 77 of the Rules, *“any and all materials in its possession obtained from ‘Radio Candip’, including inter alia: audio files, transcription of audio files, recordings of ‘Radio Candip’ broadcast – whether in audio, video or hard copy – as well as written documents and notes compiled by ‘Radio Candip’ personnel during the period from 1 January 2000 to 31 December 2003”* (“Defence Request”).¹ The Defence Request appears limited to “material collected by the Prosecution at the premises of ‘Radio Candip’”.²
2. The sole bases for the Defence Request are the Prosecution’s obligation under article 54(1)(a) to investigate incriminating and exonerating circumstances equally,³ an erroneous claim that the Prosecution made “numerous” references to Radio Candip in its Pre-Trial Brief,⁴ and an assertion that Radio Candip was actively covering the situation in Ituri between January 2000 to December 2003.⁵ On these bases, the Defence argues that it is “evident” that the requested material “is material to the preparation of the Defence and/or potentially exculpatory”.
3. The Defence Request should be rejected. First, because the Prosecution has disclosed all relevant material in its possession that it collected from Radio Candip. Second, because the Prosecution’s obligation to investigate incriminating and exonerating circumstances equally is not a proper basis for requesting disclosure. Third, because the Defence request fails to show that the requested materials are either exculpatory or material to the Defence preparation.

¹ ICC-01/04-02/06-779, paras.3 and 12.

² ICC-01/04-02/06-779, para.13.

³ ICC-01/04-02/06-779, paras.2 and 10.

⁴ ICC-01/04-02/06-779, para.12.

⁵ ICC-01/04-02/06-779, para.10.

Prosecution's Submissions

4. The Prosecution has already disclosed the following documents relevant to the Defence Request:
 - a. 2 statements directly related to Radio Candip;⁶
 - b. 14 photographs of the Radio Candip archives;⁷
 - c. 6 audio files of Radio Candip broadcasts;⁸
 - d. 5 transcripts of Radio Candip broadcasts;⁹
 - e. 5 translations of these transcripts;¹⁰
 - f. 1 Prosecution Investigation Report;¹¹ and
 - g. 9 photographs of handwritten label notes made by Radio Candip employees for archiving purposes.¹²
5. In addition, the Prosecution disclosed a number of witness statements that refer to Radio Candip.
6. Lastly, the Prosecution disclosed one recently completed transcript¹³ of a previously disclosed Radio Candip audio broadcast and five corrected transcripts.¹⁴ These five transcripts were originally disclosed on 1 May 2015 but the transcription contained inconsequential errors that have been corrected.¹⁵
7. The Defence partly bases its request on the Prosecutor's obligations under article 54(1)(a) which is not a proper basis for a disclosure request. It does not show that the requested material is in the custody or control of the Prosecutor.

⁶ DRC-OTP-2076-0091, DRC-OTP-2076-0116.

⁷ DRC-OTP-2076-0131-DRC-OTP-2076-0144.

⁸ DRC-OTP-2077-0083-DRC-OTP-2077-0087.

⁹ DRC-OTP-2085-0233, DRC-OTP-2085-0247, DRC-OTP-2085-0258, DRC-OTP-2085-0280, DRC-OTP-2085-0311.

¹⁰ DRC-OTP-2085-0233, DRC-OTP-2085-0247, DRC-OTP-2085-0258, DRC-OTP-2085-0280, DRC-OTP-2085-0311.

¹¹ DRC-OTP-2082-1587.

¹² These photographs were taken by a Prosecution investigator during a visit to the Radio Candip archives in October 2014 and the ERN range is cited in the Investigation Report disclosed to the Defence on 2 March 2015: DRC-OTP-2082-1587 p.3, fn.2.

¹³ DRC-OTP-2087-1664.

¹⁴ DRC-OTP-2087-1694, DRC-OTP-2087-1694, DRC-OTP-2087-1719, DRC-OTP-2087-1741, DRC-OTP-2087-1772.

¹⁵ The Prosecution disclosed the 5 transcripts on 1 May, by way of advance copies. The translations were formally disclosed through Ringtail on 6 May 2015. See ICC-01/04-02/06-588, para.7 and ICC-01/04-02/06-591, para.3.

8. The Defence also bases its request on a claim that the Prosecution Pre-Trial Brief references Radio Candip “numerous” times.¹⁶ In fact, the Prosecution Pre-Trial Brief references material from Radio Candip once¹⁷ and otherwise mentions Radio Candip only four times in two paragraphs.¹⁸
9. Lastly, the Defence bases its request on an assertion that Radio Candip was actively covering the situation in Ituri between January 2000 to December 2003. Radio Candip is a radio station that covered a variety of topics and programs also unrelated to the armed conflict during that period. The scope of the Defence Request is such that it would capture clearly irrelevant material, such as cooking programs, health programs, learning and language programs, other community programs or music shows.
10. These three bases do not support the Defence contention that it is “evident” that disclosure of all audio files, transcription of audio files, recordings of Radio Candip broadcasts and written documents and notes compiled by Radio Candip personnel during the period from 1 January 2000 to 31 December 2003 is material to the preparation of the Defence and/ or potentially exculpatory.¹⁹
11. Potentially exculpatory material under article 67(2) “[i]ncludes material, first, that shows or tends to show the innocence of the accused; second, which mitigates the guilt of the accused; and, third, which may affect the credibility of prosecution evidence.”²⁰
12. The potentially exculpatory evidence must have a real, and not merely, minimal impact on the trial in favour of the accused.²¹

¹⁶ ICC-01/04-02/06-779, para.12.

¹⁷ ICC-01/04-02/06-503-Conf-AnxA-Red, para.107, fn. 372.

¹⁸ ICC-01/04-02/06-503-Conf-AnxA-Red, paras.109 and 110.

¹⁹ ICC-01/04-02/06-779, para.12.

²⁰ ICC-01/04-01/06-1401, para.59.

²¹ ICC-01/04-01/06-2152, para.94.

13. To show that the Prosecution is in breach of its article 67(2) obligations, the Defence must not only prove that the material requested is in the custody or under the control of the Prosecutor, but must also (i) specifically identify the material and (ii) make a *prima facie* showing of the sought material's probable exculpatory nature.²² To discharge this burden, the Defence must present a *prima facie* showing of the probable exculpatory nature of the material.²³ To establish a *prima facie* case, the Defence need not show that the material directly contradicts the Prosecution's evidence,²⁴ or that it is in fact exculpatory.²⁵ But, it must be shown, in light of the submissions of the parties, that the evidence is potentially exculpatory, or could be relevant to the defence of the accused.²⁶

14. Like article 67(2), the Defence bears the onus of demonstrating any alleged breach of the Prosecutor's rule 77 disclosure obligation. To succeed, the Defence not only has to (i) show that the material is in the possession or control of the Prosecution²⁷ but also (ii) show the material's *prima facie* materiality to the preparation of the Defence case²⁸ and (iii) sufficiently identify the requested material.²⁹ The Prosecution is not under any obligation "[t]o offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection; it is instead to provide all items that are material to the preparation of

²² For the Tribunal for the former Yugoslavia ("ICTY"), see e.g. *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para.179; for the Tribunal for Rwanda ("ICTR"), see e.g., *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira Appeal Judgement*"), para.18; *Mugenzi et al v. The Prosecutor*, Case No. ICTR-99-50-A, Decision on Prosper Mugiraneza's Motions for Relief for Rule 68 Violations, 24 September 2012, para.8.

²³ For the ICTR, see e.g. *Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para.17.

²⁴ ICTR's *Kalimanzira Appeal Judgement*, para.19.

²⁵ ICTR's *Kalimanzira Appeal Judgement*, para.19.

²⁶ *Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend His Notice of Appeal and Motion to Admit Evidence, 23 March 2011, para. 13; *Kalimanzira Appeal Judgement*, paras. 18-20.

²⁷ ICC-02/05-03/09-501 OA4, 28 August 2013, para.34.

²⁸ ICC-02/05-03/09-501 OA4, 28 August 2013, paras.2 and 42.

²⁹ ICC-01/09-01/11-1465, para.15.

the defence [...].”³⁰ Indeed, the Prosecutor “[d]oes not have an obligation of “handing the defence the keys to the warehouse [...].”³¹

Conclusion

15. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request. First, because the Prosecution has disclosed all relevant material that it collected from Radio Candip and second, because the Defence Request is not properly grounded.



Fatou Bensouda,
Prosecutor

Dated this 25th day of August 2015
At The Hague, the Netherlands

³⁰ ICC-01/05-01/08-632, para.20.

³¹ ICC-01/05-01/08-632, para.26.