

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 2 October 2015

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

Decision on Defence request for disclosure of material obtained from Radio Candip

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**

Ms Paolina Massidda

**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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda* having regard to Article 67(2) of the Rome Statute ('Statute') and Rule 77 of the Rules of Procedure and Evidence ('Rules') issues this 'Decision on Defence request for disclosure of material obtained from Radio Candip'.

I. Background and submissions

1. On 13 August 2015, the defence team for Mr Ntaganda ('Defence') requested the Chamber to order the Office of the Prosecutor ('Prosecution') to disclose any and all material in the Prosecution's possession that was obtained from Radio Candip ('Request'),¹ including: 'audio files, transcription of audio files, recordings of "Radio Candip" broadcast [...] - as well as written documents and notes compiled by "Radio Candip" personnel during the period from 1 January 2000 to 31 December 2003' ('Materials').²
2. The Defence submits that the fact that: i) the Prosecution had access to the archives of Radio Candip; and ii) Radio Candip was actively covering the situation in Ituri between January 2000 and December 2003, suggest that the Prosecution is in possession of more materials from Radio Candip than what has already been disclosed to the Defence.³ The Defence further argues that the numerous references to Radio Candip in the Prosecution's Pre-Trial Brief demonstrate that any and all material from Radio Candip in the Prosecution's possession is material to the preparation of the Defence and/or potentially exculpatory, and that it should be disclosed accordingly.⁴

¹ Request on behalf of Mr Ntaganda seeking disclosure of any and all material in the possession of the Prosecution obtained from "Radio Candip", ICC-01/04-02/06-779.

² Request, ICC-01/04-02/06-779, para. 3.

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

⁴ Request, ICC-01/04-02/06-779, para.13.

3. On 25 August 2015, the Prosecution responded, opposing the Request ('Response').⁵ The Prosecution argues that it has previously disclosed all relevant material collected from Radio Candip.⁶ The Prosecution further contests the legal basis the Defence provides for the Request.⁷ It argues that: i) Article 54(1)(a) does not constitute a proper basis for the Request - rather the Defence should have demonstrated that the Prosecution has breached its disclosure obligations;⁸ ii) references to Radio Candip in the Pre-Trial Brief were limited to one reference to material from Radio Candip, whilst Radio Candip itself is mentioned 'only four times';⁹ and iii) that Radio Candip's broadcasts covered 'a variety' of topics, including programmes 'unrelated to the armed conflict during that period'.¹⁰
4. On 31 August 2015, the Defence filed a request for leave to reply to the Response on three issues ('Leave Request'):¹¹ i) the Prosecution's submissions on the scope of the Request; ii) 'the Prosecution's argument that the Defence has not shown that the material requested is material to the preparation of the defence and/or potentially exculpatory'; and iii) 'the Prosecution's failure to confirm that it has disclosed all "Radio-Candip" material in its possession'.¹²
5. On 11 September 2015, the Prosecution opposed to the Leave Request.¹³

⁵ 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'", ICC-01/04-02/06-794.

⁶ Response, ICC-01/04-02/06-794, paras 3 and 15.

⁷ Response, ICC-01/04-02/06-794, paras 11-14.

⁸ Response, ICC-01/04-02/06-794, paras 7 and 10-14.

⁹ Response, ICC-01/04-02/06-794, para.8.

¹⁰ Response, ICC-01/04-02/06-794, para. 9.

¹¹ Request on behalf of Mr Ntaganda seeking leave to reply to 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, ICC-01/04-02/06-802.

¹² Leave Request, ICC-01/04-02/06-802, para. 5.

¹³ Prosecution's response to the Defence "Request on behalf of Mr Ntaganda seeking leave to reply to 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'", ICC-01/04-02/06-802, ICC-01/04-02/06-820.

II. Analysis

6. As a preliminary matter, the Chamber observes that, on the basis of the information before it, it is not apparent that the Defence approached the Prosecution in an *inter partes* manner to: i) clarify whether the Prosecution is in possession of any other Radio Candip materials than those items that the Prosecution already had disclosed to the Defence; or ii) to request the Prosecution to disclose the Materials.¹⁴ In this regard, the Chamber notes that prior *inter partes* consultation has the potential to better focus, or indeed obviate the need for, litigation before the Chamber.
7. As another preliminary matter, the Chamber considers that the Leave Request relates to matters that could have been addressed in the initial request. In addition, the Chamber does not consider that it would be assisted by further submissions on these matters. Therefore, the Leave Request is rejected.
8. As to the Request, the Chamber notes that the Prosecution's disclosure obligations extend only to material falling within Article 67(2) and/or Rules 76 and 77. Although the Defence only has 'a low burden' to meet in demonstrating materiality within the meaning of Rule 77,¹⁵ the Chamber does not consider the Defence's submission that 'any and all' material from Radio Candip in the Prosecution's possession is evidently material to its preparation and/or potentially exculpatory meets this requirement.
9. The Chamber further notes the Prosecution's undertaking that it 'has disclosed all relevant material in its possession that it collected from Radio Candip'.¹⁶ In this regard, the Chamber notes that Radio Candip broadcasts

¹⁴ See, e.g., Request, ICC-01/04-02/06-779, para. 13.

¹⁵ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", ICC-02/05-03/09-501, para. 42.

¹⁶ Response, ICC-01/04-02/06-794, para. 3.

that are 'unrelated to the armed conflict [...] such as cooking programs, health programs, learning and language programs, other community programs or music shows'¹⁷ appear not be of relevance to the case.

10. In light of the foregoing, the Chamber is of the view that, on the basis of the information before it, it does not appear that the Prosecution has any material in its possession which would fall under Article 67(2) of the Statute or Rule 77 of the Rules. Therefore, the Request is rejected.

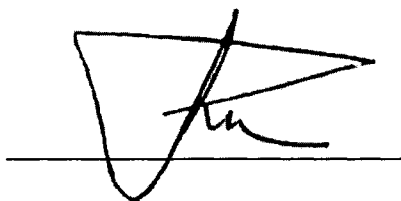
¹⁷ Response, ICC-01/04-02/06-794, para. 9.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

REJECTS the Leave Request.

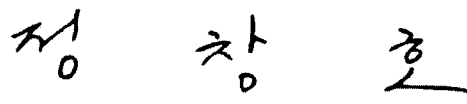
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a cursive 'r', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to read 'Kuniko Ozaki' in a cursive script, written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct cursive characters, written over a horizontal line.

Judge Chang-ho Chung

Dated 2 October 2015

At The Hague, The Netherlands