



Original: **English**

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

Date: **27 May 2016**

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

**Public redacted version of “Prosecution’s response to the ‘Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963’, ICC-01/04-02/06-1242-Conf”, 5 April 2016,
ICC-01/04-02/06-1251-Conf**

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 Prosecution opposes the “Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963” (“Defence Request”).¹
2. The Prosecution disclosed a signed statement and transcript of the audio-recording of an interview conducted on [REDACTED]² related to Witness P-0963’s [REDACTED]³ (“Interview Records”). The Prosecution did not disclose the audio-recording of the interview, as the Interview Records fully covered the content of the interview. The Defence now seeks disclosure of the audio-recording.
3. For [REDACTED] interviews of insider witnesses, which Trial Chamber VI (“Chamber”) has previously ruled do not fall within the scope of rule 76 for disclosure purposes,⁴ the Defence must demonstrate the materiality of the information it seeks. The Defence Request should be dismissed for failing to meet this test, because it is premised on the mere possibility that inaudible portions of the interview, or portions where there are overlapping speakers, might contain material information. The Defence request is also inexplicably late.

Procedural History

4. On [REDACTED], in a decision relating to insider Witness [REDACTED], the Chamber held that interviews that [REDACTED] cannot be considered as “recordings of statements for the purposes of Rule 76”, and that, to obtain

¹ ICC-01/04-02/06-1242-Conf.

² “Interview”.

³ Collectively referred to as the “Interview Records”.

⁴ [REDACTED].

disclosure of the materials related to such interviews, the Defence must demonstrate that they fall within the scope of rule 77 or article 67(2).⁵

5. On 24 and 27 November 2015, the Prosecution communicated and then updated to the Chamber, the Defence and the Participants its forthcoming witness list for the third evidentiary block, which was scheduled to begin on 18 January 2015. [REDACTED].⁶
6. On [REDACTED], the Defence requested disclosure of [REDACTED] (“[REDACTED] Disclosure Request”).⁷
7. On [REDACTED], the Prosecution responded to the [REDACTED] Disclosure Request,⁸ and disclosed the Interview Records as incriminating evidence.
8. On 25 January 2016, the Defence filed a request to postpone the testimony of Witnesses [REDACTED] and [REDACTED] to the fourth evidentiary block (“Defence 27 January 2016 Request”).⁹ On 27 January 2016, the Prosecution opposed this request.¹⁰
9. [REDACTED].
10. On 28 January 2016, the Chamber partially granted the Defence 27 January 2016 Request, ordering, *inter alia*, the Prosecution to call either [REDACTED] or Witness [REDACTED] to commence testimony on 22 February 2016.¹¹
11. On 1 February 2016, as directed by the Chamber, the Prosecution indicated that [REDACTED] would be called during the third evidentiary block.¹²

⁵ [REDACTED].

⁶ [REDACTED].

⁷ See Confidential Annex A.

⁸ See Confidential Annex B.

⁹ ICC-01/04-02/06-1102-Conf with public redacted version at ICC-01/04-02/06-1102-Red.

¹⁰ ICC-01/04-02/06-1112-Conf-Exp with confidential redacted version at ICC-01/04-02/06-1112-Conf-Red.

¹¹ ICC-01/04-02/06-1115-Conf with public redacted version at ICC-01/04-02/06-1115-Red.

12. [REDACTED].¹³

13. On 21 March 2016, the Defence requested additional disclosure of the audio-recording of the Interview (“Disclosure Request”).¹⁴

14. On 22 March 2016, in response to the Disclosure Request, the Prosecution noted that the Defence was already in possession of the entirety of the contents of the Interview, save for discrete redactions to the name of the interpreter and the telephone number of [REDACTED], through disclosure of the Interview Records.¹⁵

15. On 1 April 2016, the Defence filed the Defence Request, seeking an order compelling disclosure of the audio-recording of the Interview.¹⁶

Confidentiality

16. This filing and its annexes are classified as “Confidential” pursuant to regulation 23bis(2) of the Regulations of the Court in line with the classification of the Defence Request.

Prosecution’s Submissions

The Prosecution has discharged its disclosure obligations

17. The Prosecution has discharged its disclosure obligations. The Defence Request for a disclosure order as a remedy to alleged disclosure violations¹⁷ should be dismissed.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ ICC-01/04-02/06-1242-Conf.

¹⁷ Defence Request, paras. 11 and 13.

18. The Defence Request seeks disclosure of the audio-recording of the Interview on the basis that the Prosecution is not authorised by articles 64(3)(c) and 67(1)(a) and (b) of the Statute to “withhold” incriminatory material on the basis that it is already known to the Defence.¹⁸ However, these statutory provisions do not provide any basis for the Defence Request.
19. Article 64(3)(c) gives the Chamber the authority to order disclosure of any documents or information not already provided. It does not by itself provide any guidance on the scope of the Prosecution’s disclosure obligations.
20. As for article 67(1)(a) and (b), they relate to the Accused’s right to be informed promptly and in detail of the nature, cause and content of the charges against him, in a language which he fully understands and speaks, and the right to have adequate time and facilities for the preparation of the defence. The Prosecution has discharged its duties under article 67(1)(a) and (b). The Defence acknowledges that it has been in possession of the incriminating material relating to P-0963 for some time, including the Interview Records.¹⁹ The Prosecution notes that it disclosed materials related to the Interview as incriminating material in case it must to rely on them during the testimony of P-0963 or later on in the case. These materials do not, however, deal with any of the charges faced by the Accused. Instead, they deal with [REDACTED]. As such, article 67(1)(a) and (b) do not support the Defence Request.
21. The Defence Request also relies on article 55 and rule 112 of the Rules.²⁰ This reliance is similarly misconceived, however, since neither of these provisions is applicable to the Interview Record. While the Prosecution chose to audio-record the Interview to facilitate the creation of an accurate written record thereof, the Interview did not in fact fall within the scope of article 55(2) and rule 112(1). This

¹⁸ Defence Request, paras. 6 and 7.

¹⁹ Defence Request, para. 10.

²⁰ Defence Request, para. 8.

is because the matters on which Witness P-0963 was questioned did not pertain to his participation in the events in Ituri while he was a member of the UPC, or to any other conduct which could give grounds to believe that he committed a crime within the jurisdiction of the Court. Thus, the Prosecution did not inform Witness P-0963 or any rights pursuant to article 55(2) during the interview. In these circumstances, the Prosecution chose to audio-record the Interview pursuant to rule 112(4). Therefore, article 55(2) and rule 112 provide no basis for the disclosure of the audio-recording.

The Defence Request fails to establish the materiality of the audio-recording

22. Moreover, the relief sought in the Defence Request fails to meet the test of materiality identified in recent decisions from this and other Chambers of the Court.
23. In a decision from [REDACTED] relating to insider Witness [REDACTED], the Chamber found that interviews that [REDACTED] cannot be considered as “recordings of statements for the purposes of Rule 76”, and that, to obtain disclosure of the materials related to such interviews, the Defence must demonstrate that they fall within the scope of rule 77 or article 67(2).²¹
24. A decision from Trial Chamber III in *Bemba* from March 2016 also supports the position that, where the Prosecution discloses the transcript of an interview, disclosure of the audio- or video-recording is unnecessarily duplicative.²² Trial Chamber III found that the Defence had failed to establish the materiality of the recordings it sought – it had not made “specific substantiation as to why the additional disclosure or audio or video recordings is necessary”.²³

²¹ [REDACTED].

²² ICC-01/05-01/08-3336, para. 33.

²³ *Ibid.*

25. The Defence Request does not invoke, or indeed appear to be based on, rule 77.

The Defence clearly state that they consider themselves to already be “privy to the contents of the 9 June 2015 Interview”.²⁴ Nor does the Defence refer to any specific or material portion of the Interview that might be further elucidated by the disclosure of the audio-recording. Instead, the Defence Request only advances a speculative argument about the possible materiality of information that *may* be contained in the audio-recording of the Interview, but not in the Interview Records already disclosed.²⁵ Insofar as the Defence Request seeks disclosure of the audio-recording to “verify the accuracy of the transcript in case of doubt”,²⁶ such as in relation to inaudible portions or overlapping speakers, it is hypothetical and fails to establish the materiality of the information sought.

The Defence Request is inexplicably late

26. To the extent that the Defence Request establishes any marginal benefit from the disclosure of the audio-recording, it should nevertheless be rejected on the basis that the request was brought inexplicably late. As noted above, the Defence have been in possession of the Interview Records since 11 December 2015, but only requested disclosure of the related audio-recording on 21 March 2016, and – when its Disclosure Request was rejected on 22 March 2016 – only sought relief from the Chamber on 1 April 2016, ten days before the witness was due to testify.

The accuracy of the transcript of the Interview is not in dispute

27. The Prosecution submits that the mention of the word “inaudible” in the transcript does not affect the reliability and/or substance of the information contained therein.²⁷ The Defence have not actually disputed the accuracy of the

²⁴ Defence Request, para. 10.

²⁵ See Defence Request, para. 8.

²⁶ Defence Request, para. 8.

²⁷ *Ndayambaje et al.*, Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, Case No. ICTR-98-42-T, T.Ch., 15 May 2006, para.64.

transcription of the Interview. The Defence Request seeks the audio-recording “in case of doubt”, but does not identify any specific portions of the transcript in relation to which it in fact has doubt. Where it points to portions of a transcript marked as inaudible, the Defence Request in fact refers to an earlier interview, conducted with P-0963 in [REDACTED], rather than [REDACTED].²⁸

28. In the decision [REDACTED], the Chamber ruled that disclosure of the material [REDACTED] pursuant to rule 77 “may have been appropriate (...) as soon as the materiality to the Defence of [REDACTED] ... became apparent”.²⁹ The Prosecution had assessed that the materials [REDACTED] fell within the scope of rule 77. But in the present case, the Prosecution does not have any reason to believe that the inaudible portions of the audio-recording of the Interview or portions with overlapping speakers contain information that is material to the Defence. The Prosecution relies on qualified transcribers to produce accurate transcripts of its interviews and has no reason to doubt the accuracy of the transcript of the Interview it disclosed to the Defence.

29. Moreover, the Interview was conducted in [REDACTED] and [REDACTED], with the assistance of an interpreter. This means that the questions and answers appear twice in the transcript, once in each language, having been enunciated by two different speakers during the interview – making it simpler to discern what was said, or at a minimum to identify portions where what was not captured in the transcript could be material to the preparation of the Defence. Notwithstanding this, the Defence have not identified any specific areas of concern.

²⁸ Defence Request, para.8, footnote 6.

²⁹ [REDACTED].

Conclusion

30. For these reasons, the Prosecution requests that the Chamber dismiss the Defence Request and find that the Prosecution did not violate its disclosure obligations.



Fatou Bensouda
Prosecutor

Dated this 27th day of May 2016
At The Hague, The Netherlands