

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 2 June 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***

Confidential

**Decision on Defence request seeking orders in relation to Witness P-0046 and
disclosure of related MONUC documents**

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 Christopher Gosnell

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**

**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 ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 54(1)(a), 64 and 67 of the Rome Statute ('Statute') and Regulation 24(5) of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence request seeking orders in relation to Witness P-0046 and disclosure of related MONUC documents'.

I. Procedural history

1. On 19 May 2016, the defence team for Mr Ntaganda ('Defence') filed a motion seeking that the Chamber order the Office of the Prosecutor ('Prosecution'):
 - i) to assist the Defence in obtaining documentation from the United Nations ('UN') and/or United Nations Organization Mission in the Democratic Republic of the Congo ('MONUC') that is relevant to the testimony of Witness P-0046; and
 - ii) to disclose any requests for assistance sent on behalf of the Prosecution to the UN in relation to the present case and the cases against Messrs Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui ('DRC Trial Cases'), with a view to determining whether the Prosecution has discharged its obligations under Article 54(1)(a) of the Statute ('Request').¹
2. On 20 May 2016, the Chamber shortened the deadline to file any response to 26 May 2016 and invited the Registry to provide any related complementary observations by the same deadline.² The Chamber further ordered the Defence to file confidential redacted versions, or to otherwise seek reclassification, of its 'Notice on behalf of Mr Ntaganda informing the Chamber of difficulties encountered in obtaining United Nations/MONUC documents' ('First Defence

¹ Request for orders in relation to Witness P-0046 and disclosure of related MONUC documents, ICC-01/04-02/06-1324-Conf.

² E-mail from Legal Officer of the Chamber to the parties and participants on 20 May 2016 at 8:57.

Notice'), which was filed confidential *ex parte*, available to the Chamber and the Defence only, on 13 April 2016, as well as its annexes.³

3. On 23 May 2016, the Defence filed confidential redacted versions of the First Defence Notice, available to the Prosecution and the Legal Representatives of victims, respectively,⁴ and requested reclassification of Annexes A to O to the First Defence Notice as 'confidential, *ex parte*, available to the Chamber, Defence and Prosecution only',⁵ which the Chamber authorised that same day.⁶
4. On 26 May 2016, the Prosecution filed a response ('Response'), whereby it seeks that the Chamber dismiss the Request *in limine* and, in the alternative, dismiss the Request on its merits.⁷
5. On 27 May 2016, after having been granted an extension of time,⁸ the Registry filed its observations on the Request ('Registry Observations').⁹
6. On 31 May 2016, the Defence filed a request seeking leave to reply on eight identified issues ('Request for Leave to Reply').¹⁰
7. On 1 June 2016, the Prosecution filed a response to the Request for Leave to Reply.¹¹

³ ICC-01/04-02/06-1266-Conf-Exp and Annexes A to U.

⁴ ICC-01/04-02/06-1266-Conf-Exp-Red and ICC-01/04-02/06-1266-Conf-Red2.

⁵ E-mail from the Defence to the Chamber on 23 May 2016 at 12:10.

⁶ E-mail from Legal Officer of the Chamber to the Registry on 23 May 2016 at 12:45.

⁷ Prosecution's Response to the Defence's "Request for orders in relation to Witness P-0046 and disclosure of related MONUC documents", ICC-01/04-02/06-1324-Conf ('Response'), notified on 27 May 2016, ICC-01/04-02/06-1337-Conf-Exp. A confidential redacted version was filed on the same day (ICC-01/04-02/06-1337-Conf-Red).

⁸ E-mail from Legal Officer of the Chamber to the Registry on 26 May 2016 at 14:08; and E-mail from the Registry to the Chamber on 26 May 2016 at 10:53.

⁹ Registry Observations on the "Request for orders in relation to Witness P-0046 and disclosure of related MONUC documents" (ICC-01/04-02/06-1324-Conf), ICC-01/04-02/06-1341-Conf-Exp.

¹⁰ Request on behalf of Mr Ntaganda seeking leave to reply to "Prosecution's Response to the Defence's 'Request for orders in relation to Witness P-0046 and disclosure of related MONUC documents'", ICC-01/04-02/06-1350-Conf.

¹¹ Response to the "Request on behalf of Mr Ntaganda seeking leave to reply to "Prosecution's Response to the Defence's 'Request for orders in relation to Witness P-0046 and disclosure of related MONUC documents'", 31 May 2016, ICC-01/04-02/06-1350-Conf, ICC-01/04-02/06-1354-Conf.

8. Also on 1 June 2016, the Defence filed a confidential, *ex parte*, available to the Chamber and the Defence only, 'Notice of further difficulties encountered by the Defence in obtaining MONUC documents from the United Nations'.¹²

II. Submissions

A) Defence Submissions

9. The Defence seeks that the Chamber order the Prosecution to urgently request, from the UN and MONUC, all documents relevant to assessing the credibility of Witness P-0046, in particular 'any reports, drafts of reports, or other communications' she authored ('Documents'), as well as, from the witness directly, 'all documents in her possession reflecting her work with the UN and the MONUC at least during 2002 and 2003'.¹³
10. By way of background, the Defence indicates, *inter alia*, that on 4 and 6 May 2016, it consulted with the Registry regarding the possibility of requesting the UN's assistance in obtaining, on an urgent basis, documents that appeared to be related to the work of Witness P-0046. A request to that effect was transmitted to the Registry on 6 May 2016.¹⁴ It further notes that, on 5 May 2016, it inquired whether the Prosecution would agree to postpone the testimony of Witness P-0046, and that on 11 May 2016, the Prosecution responded that 'it would not or could not defer the testimony of P-0046'.¹⁵
11. The Defence submits that the Documents are 'obviously relevant, if not essential' to the preparation of its cross-examination of Witness P-0046,¹⁶ and argues that the Prosecution's assistance is required to ensure that they are 'obtained as quickly as possible with a view to avoiding interruptions in trial

¹² ICC-01/04-02/06-1355-Conf-Exp ('Second Defence Notice') with three confidential, *ex parte*, annexes.

¹³ Request, ICC-01/04-02/06-1324-Conf, para. 25.

¹⁴ Request, ICC-01/04-02/06-1324-Conf, para. 16.

¹⁵ Request, ICC-01/04-02/06-1324-Conf, paras 14-15.

¹⁶ Request, ICC-01/04-02/06-1324-Conf, para. 26.

proceedings and/or the necessity of recalling witnesses that could arise if documents are obtained late'.¹⁷

12. The Defence additionally seeks to obtain all requests for assistance sent to the UN on behalf of the Prosecution in relation to the DRC Trial Cases. The Defence submits that the Prosecution should be required to 'transparently demonstrate that it has discharged its obligations under Article 54(1)(a)',¹⁸ notably given that the Prosecution is 'in a better and more efficient position than the Defence to collect the information in question'.¹⁹

B) Prosecution Submissions

13. The Prosecution requests that the Chamber dismiss the Request *in limine* as it considers that the Defence has not identified a proper legal basis for the orders requested. The Prosecution submits, in this regard, that Article 54(1)(a) of the Statute does not, as such, provide for judicial oversight over the Prosecution's investigative obligations.²⁰
14. In the alternative, should the Chamber decide to address the merits of the Request, the Prosecution considers that it should be dismissed entirely.
15. In support, the Prosecution submits that the Defence's lack of access to the Documents is the consequence of the timing of its requests seeking UN assistance in relation to MONUC documents.²¹ The Prosecution is of the view that there was nothing preventing the Defence from seeking UN cooperation at an earlier stage, notably in relation to MONUC documents it considers necessary to its preparation for Witness P-0046's cross-examination.²²

¹⁷ Request, ICC-01/04-02/06-1324-Conf, para. 1

¹⁸ Request, ICC-01/04-02/06-1324-Conf, para. 23.

¹⁹ Request, ICC-01/04-02/06-1324-Conf, para. 24.

²⁰ Response, ICC-01/04-02/06-1337-Conf-Exp, paras 2, 12-13

²¹ Response, ICC-01/04-02/06-1337-Conf-Exp, paras 3, 12, 14 and 19-20.

²² Response, ICC-01/04-02/06-1337-Conf-Exp, para. 19.

16. The Prosecution notes that the Defence has been in possession of UN materials potentially relevant to the testimony of Witness P-0046 since the pre-trial stage of the case²³ and recalls it has obtained and disclosed thousands of UN documents pursuant to and in response to multiple Defence requests for additional disclosure.²⁴ In the view of the Prosecution, at least since July 2015, 'the Defence was already in a position to establish the likelihood that further UN materials may be obtainable'.²⁵
17. The Prosecution also contends that the Defence fails to explain why the Documents are relevant. Indeed, the Prosecution considers that the Defence did not offer 'any element tending to show that the credibility of Witness P-0046 may be affected by any of the Documents'.²⁶ Moreover, the Prosecution disagrees with the Defence in that it does find that its obligation to investigate incriminating and exonerating circumstances equally requires that it seek to obtain 'all documentation emanating from entities in which witnesses have performed their professional duties'.²⁷
18. Concerning the order requested by the Defence for the Prosecution to obtain directly from Witness P-0046 materials 'reflecting her work with the UN and MONUC at least during 2002 and 2003', the Prosecution submits that the UN is the owner of these documents and that any such order would be 'contrary to the cooperation regime in place between the UN and the Court'.²⁸ In support, the Prosecution refers to Article 11(8) of the Memorandum of Understanding concerning cooperation between MONUC and the Court,²⁹ according to which

²³ Response, ICC-01/04-02/06-1337-Conf-Exp, para. 15.

²⁴ Response, ICC-01/04-02/06-1337-Conf-Exp, paras 16-18 referring to First Defence Notice, ICC-01/04-02/06-1266-Conf-Exp-Red, Annexes A to O.

²⁵ Response, ICC-01/04-02/06-1337-Conf-Exp, para. 15.

²⁶ Response, ICC-01/04-02/06-1337-Conf-Exp, para. 29.

²⁷ Response, ICC-01/04-02/06-1337-Conf-Exp, paras 27-28.

²⁸ Response, ICC-01/04-02/06-1337-Conf-Exp, para. 35.

²⁹ Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, 8 November 2005, ICC-01/04-01/06-1267-Anx2 ('MoU').

‘members of MONUC who may be interviewed by the Prosecutor are not at liberty to provide [it] with copies of any confidential documents of the United Nations that might be in their possession’.

19. The Prosecution therefore submits that it has no duty to assist the Defence in its investigations³⁰ and that, in the present circumstances, channelling the Defence requests for assistance through the Prosecution is duplicative and ‘would not have any impact on the celerity of the UN’s responses’.³¹
20. Finally, concerning the disclosure of the Prosecution’s requests for UN assistance related to the DRC Trial Cases, the Prosecution submits that the Request is ‘entirely speculative’.³² In its view, the Defence has provided no basis to question the Prosecution’s investigations conducted pursuant to Article 54(1)(a) of the Statute and, absent a substantiated allegation that the Prosecution has violated such obligations, it considers that the requests for assistance sent to the UN on its behalf are not disclosable.³³

C) Registry Observations

21. The Registry provides the Chamber with complementary information concerning the steps undertaken with respect to the Defence requests for cooperation in obtaining documents from the UN. Notably, the Registry indicates that the urgent request for assistance discussed with the Defence on 6 May 2016, seeking disclosure of documents ‘drafted, used, distributed, sent or received by the upcoming witness P-0046 or the MONUC Child Protection Section from January 2002 to December 2003’, was transmitted to the UN on 12 May 2016 (‘Urgent RFA’), upon receipt of a final version from the Defence.³⁴

³⁰ Response, ICC-01/04-02/06-1337-Conf-Exp, para. 30.

³¹ Response, ICC-01/04-02/06-1337-Conf-Exp, paras 31-34.

³² Response, ICC-01/04-02/06-1337-Conf-Exp, paras 4 and 22.

³³ Response, ICC-01/04-02/06-1337-Conf-Exp, paras 23-24.

³⁴ Registry Observations, ICC-01/04-02/06-1341-Conf-Exp, paras 3(b) and 18. *See also*, Request, ICC-01/04-02/06-1324-Conf, para. 16.

22. The Registry further informs the Chamber that, on 19 May 2016, it received a letter from the UN stating that the Urgent RFA did not conform to the principles of the Memorandum of Understanding, in particular the requirement of relevance,³⁵ and that this letter was transmitted to the Defence on 23 May 2016.³⁶ On the basis of its informal consultation with the UN, the Registry further indicates that an updated version of the Urgent RFA would be considered by the UN, but that an 'explanation as to why the documents sought would be relevant to the conduct of the accused' needs to be provided.³⁷

III. Analysis

23. As a preliminary matter, regarding the Request for Leave to Reply, the Chamber does not consider that it would be assisted by further submissions on any of the eight issues identified by the Defence. Additionally, the Chamber notes that the Response addresses matters that should reasonably have been foreseen and that, for example, the legal and factual basis for the relief sought should already have been included in the Request. Pursuant to Regulation 24(5) of the Regulations, the Chamber therefore rejects the Request for Leave to Reply.
24. At the outset, the Chamber recalls that – although certain correspondence and cooperation requests seeking UN military-related documents had been ongoing since June 2015³⁸ – the Urgent RFA was only transmitted to the UN on 12 May 2016, and that a prior version of this request was first submitted to the Registry on 6 May 2016. On the basis of the information before the Chamber, it appears that it was only then, in May 2016, over a year after receiving the Prosecution's

³⁵ Registry Observations, ICC-01/04-02/06-1341-Conf-Exp, para. 19 referring to Article 10(3) of the MoU, ICC-01/04-01/06-1267-Anx2.

³⁶ Registry Observations, ICC-01/04-02/06-1341-Conf-Exp, para. 20.

³⁷ Registry Observations, ICC-01/04-02/06-1341-Conf-Exp, paras 21-22.

³⁸ See Annexes to ICC-01/04-02/06-1266-Conf-Exp-Red; and Registry Observations, ICC-01/04-02/06-1341-Conf-Exp, paras 11-15; and Second Defence Notice, ICC-01/04-02/06-1355-Conf-Exp.

witness list,³⁹ and two weeks after the scheduling of Witness P-0046's testimony, that the Defence specifically sought to obtain the Documents for the first time.⁴⁰ In the Chamber's view, these belated steps to obtain UN documents authored by Witness P-0046 rendered it unlikely that the materials sought would be provided prior to her scheduled testimony. There is no apparent justification for the lateness of the attempt to obtain the Documents, and such conduct appears to be inconsistent with the alleged importance of the material.

25. Turning to the merits of the Request, the Chamber recalls that pursuant to Article 54(1)(a) of the Statute the Prosecution has an obligation to 'investigate incriminating and exonerating circumstances equally'. Further, pursuant to Article 67(2) of the Statute, the Prosecution has an obligation to disclose all evidence in its possession or control which, *inter alia*, 'may affect the credibility of prosecution evidence'. The Chamber considers that where there are reasonable grounds to believe that information not in the Prosecution's possession or control may be potentially exculpatory, or may affect the credibility of Prosecution evidence, the Prosecution would be under an obligation to make reasonable efforts to obtain that information.⁴¹
26. The Chamber does not, however, consider that the Defence has established this to be the case. In the Chamber's view, the mere existence, or likelihood of the existence, of other documents which Witness P-0046 authored falls far below the standard required to trigger the Prosecution's obligations under Article 54. Moreover, the Defence's submissions regarding 'efficiency', and the Prosecution's direct relationship with MONUC, do not provide a basis for

³⁹ Annex A to Prosecution's Lists of Witnesses, Summaries, and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf-AnxA-Red, page 3. It is additionally noted that Witness P-0046 was relied upon at the confirmation stage and therefore the Defence should already have been on notice of the likelihood of her inclusion in the Prosecution's final witness list for trial.

⁴⁰ Registry Observations, ICC-01/04-02/06-1341-Conf-Exp, paras 16-18.

⁴¹ See similarly, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Joint Defence Application for Further Prosecution Investigation Concerning [REDACTED] of Certain Prosecution Witnesses, ICC-01/09-01/11-1655-Red, para. 32.

extending those obligations. Indeed, as noted above, the Chamber considers the urgency of the matter to arise predominantly from the Defence's belated efforts.

27. The Chamber notes that the UN has replied to the Defence's prior requests for assistance; that the Urgent RFA was appropriately dealt with on an urgent basis by the UN; and that an updated version of the Urgent RFA, providing a justification as to the relevance of the Documents to the Defence's efforts to adduce evidence relevant to assess the credibility of Witness P-0046, will apparently be considered further by the UN.⁴²
28. Moreover, as submitted by the Prosecution,⁴³ the Chamber also finds that an order requesting Witness P-0046 to personally produce documents in her possession that reflect her work with the UN and MONUC would be contrary to the Memorandum of Understanding and would consequently contravene the cooperation regime in place.
29. In light of the above, the Chamber finds no basis to order the Prosecution to undertake additional investigations with a view to obtaining the Documents. The Chamber however recalls that the Defence will have the opportunity to cross-examine Witness P-0046 in relation to the work she conducted with MONUC in 2002 and 2003, including in relation to the existence of documents reflecting her work with MONUC as well as their content.
30. Turning to the request for disclosure of Prosecution requests for assistance sent to the UN in relation to the DRC Trial Cases, the Chamber considers that requests for assistance are disclosable if they fall within Article 67(2) of the Statute or Rule 77 of the Rules.⁴⁴ In this regard, the Chamber finds that the Request does not establish the *prima facie* materiality of the documents sought

⁴² Registry Observations, ICC-01/04-02/06-1341-Conf-Exp, paras 19-22.

⁴³ Response, ICC-01/04-02/06-1337-Conf-Exp, para. 35.

⁴⁴ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on defence requests for disclosure, 2 July 2014, ICC-01/05-01/08-3100, para. 29; and Decision on Defence requests for further disclosure, 9 March 2016, ICC-01/05-01/08-3336, para. 54.

to be disclosed. The Defence makes minimal submissions in this regard, seemingly arguing that the requests for assistance are required simply in order to 'demonstrate' that the Prosecution has fulfilled its Article 54(1)(a) obligations. The Chamber does not consider this to be a sufficient basis for a broad disclosure request of the nature presented but, to the extent this has not already been done, the Prosecution should ensure that any request for assistance falling under the above provisions be disclosed forthwith to the Defence.

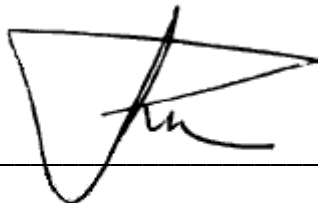
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

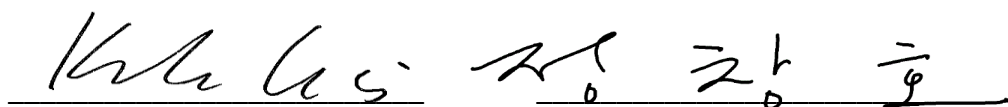
REJECTS all other requests; and

ORDERS the Registry, in consultation with the Defence if appropriate, to file a redacted version of the Registry Observations available to the Prosecution.

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 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, written over a horizontal line. The first signature is 'Kuniko Ozaki' and the second is 'Chang-ho Chung'.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 2 June 2016

At The Hague, The Netherlands