

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-02/06**
Date: **24 October 2017**

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 request for the Chamber to decline to hear the testimony of Defence Witness D-0214”, 6 October 2017,
ICC-01/04-02/06-2055-Conf-Exp**

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. Defence Witness D-0214 is scheduled to appear as [REDACTED] for the Defence in the upcoming block of evidence. The only evidence that he is expected to provide relates to [REDACTED].¹ None of these issues are relevant to the charges of war crimes and crimes against humanity or to any other matter at issue in the proceedings against the Accused.

2. Accordingly, pursuant to articles 64(2), (6)(f) and (9)(a) and 69(4) of the Rome Statute, rule 64 of the Rules,² and regulation 43 of the Regulations,³ the Prosecution requests the Chamber to decline to hear the evidence of D-0214. Alternatively, should the Chamber deem that one or more of the three issues that this witness is expected to testify about are relevant, the Prosecution asks the Chamber to issue an order limiting D-0214's testimony to any such issue.

Confidentiality

3. This filing is classified as "Confidential, *EX PARTE* - only available to the Prosecution, Defence and the Victims and Witnesses Unit" pursuant to regulation 23*bis*(1) and (2) of the Regulations, since it refers to material not currently available to the Legal Representatives or to the public.

4. Although the Legal Representatives do not currently have access to the litigation [REDACTED], they were present in court when the issue was addressed,⁴ and, presumably, will be in court during D-0214's testimony should the Chamber reject this request. Further, the Legal Representatives have access to the Defence's summary of D-0214's anticipated evidence,⁵ [REDACTED]. For these reasons, the

¹ ICC-01/04-02/06-1881-Conf-AnxB, p. 141.

² Rules of Evidence and Procedure.

³ Regulations of the Court.

⁴ ICC-01/04-02/06-T-97-CONF-ENG ET, p. 78, ln. 19 – p.80, ln.18 (private session).

⁵ ICC-01/04-02/06-1881-Conf-AnxB, p. 141.

Prosecution does not oppose the reclassification of this filing to “Confidential” should the Chamber deem this appropriate.

Background

5. [REDACTED],⁶ [REDACTED].⁷

6. [REDACTED]:

[REDACTED].⁸

7. [REDACTED]:

[REDACTED].⁹

8. [REDACTED].¹⁰

9. [REDACTED].¹¹ [REDACTED]¹² [REDACTED].¹³ [REDACTED].

10. [REDACTED].¹⁴ [REDACTED].¹⁵ [REDACTED].¹⁶ [REDACTED].¹⁷
[REDACTED].¹⁸

11. On 26 April 2017, the Defence included D-0214 on its list of witnesses and provided the following summary of his anticipated evidence:

[REDACTED].

⁶ ICC-01/04-02/06-658-Conf-Exp with confidential redacted version at ICC-01/04-02/06-658-Conf-Red.

⁷ ICC-01/04-02/06-667-Conf-Exp.

⁸ ICC-01/04-02/06-731-Conf-Exp, para. 29 (footnotes omitted).

⁹ ICC-01/04-02/06-731-Conf-Exp, para. 30.

¹⁰ ICC-01/04-02/06-767-Conf-Exp-Red2, paras. 1, 13.

¹¹ ICC-01/04-02/06-777-Conf-Exp, para. 28.

¹² ICC-01/04-02/06-777-Conf-Exp, para. 28.

¹³ ICC-01/04-02/06-777-Conf-Exp, para. 29. [REDACTED], ICC-01/04-02/06-777-Conf-Exp, para. 30.

¹⁴ ICC-01/04-02/06-T-97-CONF-ENG ET, p. 78, ln. 19 – p.80, ln.18 (private session).

¹⁵ ICC-01/04-02/06-T-97-CONF-ENG ET, p. 79, lns. 20-22 (private session).

¹⁶ ICC-01/04-02/06-T-97-CONF-ENG ET, p. 81, lns. 10-21 (private session).

¹⁷ ICC-01/04-02/06-T-98-CONF-ENG CT p. 4, lns. 16-19 (private session).

¹⁸ ICC-01/04-02/06-T-98-CONF-ENG CT, p. 6, lns. 5 – 13 (private session).

[REDACTED]:

1. [REDACTED].
2. [REDACTED].
3. [REDACTED].¹⁹

12. On 18 September 2017, the Defence provided the Chamber, Prosecution and participants with its forthcoming witness list for the fourth evidentiary block.²⁰ D-0214 was listed [REDACTED] to appear in this block and the Defence indicated that his examination-in-chief is expected to last four hours.²¹

Prosecution's Submissions

The Accused does not have the right to adduce irrelevant evidence

13. As stated by Trial Chamber VII, "[a]lthough the parties' are entitled to a degree of deference in the selection and presentation of their evidence, their discretion is not unlimited"²² and the Chamber "may intervene in these matters in order to ensure the fair and expeditious conduct of the trial, as foreseen in Articles 64(2) and (9), 67(1)(c) and 69(4) of the Statute."²³

14. Parties do not have an unfettered right to present any evidence they desire to. Pursuant to article 69(3) of the Statute, the evidence that parties may submit must be relevant to the case. The evidence that D-0214 is expected to provide fails to meet this basic requirement and should not be heard. His expected testimony would not assist

¹⁹ ICC-01/04-02/06-1881-Conf-AnxB, p. 141.

²⁰ Email from the Defence to the Chamber, Prosecution and participants dated 18 September 2017 at 16:08. The Prosecution did not file this request before D-0214 appeared on the Defence forthcoming witness list for the next evidentiary block in view of the numerous instances in which the Defence stated that it would be reducing its list of witnesses, which may have meant that D-0214 would no longer be called to testify, *see* ICC-01/04-02/06-1903, para. 6, ICC-01/04-02/06-T-208-CONF-ENG ET, p. 41, lns. 10-17 (open session) and ICC-01/04-02/06-T-238-CONF-ENG CT, p. 85, lns. 17-22 (open session).

²¹ Email from the Defence to the Chamber, Prosecution and participants dated 18 September 2017 at 16:08.

²² ICC-01/05-01/13-1600, para. 6.

²³ ICC-01/05-01/13-1600, para. 6.

the Chamber in its determination of any of the charges against the Accused because it is irrelevant to the material facts of the case.

The Chamber has the power to decline to hear D-0214's evidence

15. Another Trial Chamber of this Court has ordered a Defence team to strike a witness from its list due to the lack of relevance of that witness's expected testimony, amongst other reasons.²⁴

16. In *Ruto and Sang*, Trial Chamber V(A) noted that:

[REDACTED].²⁵

17. Declining to hear D-0214's evidence is consistent with the Chamber's duty to ensure a fair and expeditious trial. It is also consistent with the Chamber's power to rule on the relevance or admissibility of evidence. The anticipated evidence goes to matters that are at best ancillary, or entirely irrelevant, to the charges against the Accused and [REDACTED].²⁶

None of the three issues that D-0214 is expected to testify about are relevant to the proceedings

18. None of the three issues upon which Witness D-0214 is expected to testify are probative of any of the incidents charged, the acts and conduct of the Accused, or any salient issue in the case.

19. The Defence's proposed examination of D-0214 will be limited to the three issues as set out in the Defence's 26 April 2017 summary of his anticipated evidence.²⁷ Summaries of anticipated evidence filed by the Defence should be prepared in a "sufficiently detailed and comprehensive manner to enable the parties,

²⁴ ICC-01/05-01/13-1600, paras. 7-11.

²⁵ ICC-01/09-01/11-1776-Conf, para. 19.

²⁶ See articles 64(2) and 69(4) of the Statute.

²⁷ ICC-01/04-02/06-1881-Conf-AnxB, p. 141.

participants and Chamber to prepare meaningfully”.²⁸ The Defence should not be permitted, in its response to this request or at any other time prior to D-0214’s scheduled appearance, to seek to make any additions to the issues that D-0214 is expected to testify about.

20. In ordering the Defence to strike a witness from its list, Trial Chamber VII in *Bemba et al.* noted, *inter alia*, that what mattered are the Accused’s “own acts and conduct in respect of the alleged criminal offences” and that there was no indication that the witness at issue had any personal knowledge specific to the Accused in that case.²⁹ Similarly, as set out in the summary of D-0214’s anticipated testimony, this witness is being called to address his [REDACTED]. He will not address the Accused’s own conduct in 2002-2003 or any evidence related to the charged incidents.

21. The first issue that D-0214 is expected to address is [REDACTED]. This issue is irrelevant to the Accused’s actions during the temporal scope of the charges and to the charged crimes that are at issue in this case. As such, the first issue that D-0214 is expected to address is not at issue in the proceedings against the Accused.

22. The second issue that D-0214 is expected to address is [REDACTED]. This proposed evidence is unrelated to the charges and irrelevant to them. The Chamber made certain determinations further to the Prosecution’s request [REDACTED]. This litigation is not part of the evidence in this case, nor does it make D-0214’s [REDACTED] relevant to the charges against the Accused. To the contrary, it is completely divorced from the salient issues in this case.

23. Neither has the Prosecution made D-0214’s [REDACTED] an issue [REDACTED]. As such, D-0214’s [REDACTED] is not a matter that is at issue in the proceedings against the Accused.

²⁸ ICC-01/04-02/06-1757, para. 10.

²⁹ ICC-01/05-01/13-1600, para. 9.

24. [REDACTED],³⁰ [REDACTED]³¹ [REDACTED].³² [REDACTED].

25. The third issue that D-0214 is expected to address is [REDACTED]. None of these [REDACTED] are relevant to any issue in the proceedings against the Accused. [REDACTED].³³

26. [REDACTED].³⁴ [REDACTED].

27. Moreover, the Defence should not be allowed to question D-0214 [REDACTED].³⁵ [REDACTED].³⁶

Request

28. For the foregoing reasons, the Prosecution requests the Chamber to decline to hear the evidence of D-0214. Alternatively, should the Chamber deem that one or more of the three issues that this witness is expected to testify about are relevant, the Prosecution asks the Chamber to issue an order limiting D-0214's testimony to any such issue.



Fatou Bensouda
Prosecutor

Dated this 24th day of October 2017
At The Hague, The Netherlands

³⁰ ICC-01/04-02/06-777-Conf-Exp, para. 28.

³¹ ICC-01/04-02/06-731-Conf-Exp, para. 29.

³² ICC-01/04-02/06-777-Conf-Exp, para. 29.

³³ ICC-01/04-02/06-T-97-CONF-ENG ET, p. 79, lns. 20-22 (private session).

³⁴ ICC-01/04-02/06-777-Conf-Exp, para. 28.

³⁵ ICC-01/04-02/06-T-98-CONF-ENG CT p. 6, lns. 5 – 13 (private session).

³⁶ ICC-01/04-02/06-619, para. 28.