

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **12 December 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 urgent request for disclosure concerning
Defence Witness D-0017", 1 November 2017, ICC-01/04-02/06-2092-Conf**

Source: Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the 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

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. Further to the Chamber's 4 May 2017 Order,¹ the Prosecution requests the Chamber to order the Defence to disclose an identification document for Witness D-0017, who is scheduled to appear in the next evidentiary block commencing on 27 November 2017.

2. To date, the Defence has disclosed Witness D-0017's name, a nickname, a date and place of birth, and his ethnicity. However, the Defence refused Prosecution requests for an identity document for this witness, even though the Prosecution has indicated that it has been unable to verify the accuracy of the biographical information provided by the Defence.

3. The Prosecution has reason to believe that some of the biographical information provided by the Defence in relation to Witness D-0017 is incorrect. A form of identification with a photograph for Witness D-0017 is necessary in order to carry out investigations.

4. *First*, the authorities of the Democratic Republic of the Congo ("DRC") have confirmed that no individual in its [REDACTED] records matches the names and the biographical information provided for D-0017. *Second*, the biographical information for individuals found in records by the DRC authorities bearing similar names as D-0017 does not match the biographical information provided by the Defence; nor do they resemble the individual identified by the Defence as being D-0017 during the cross-examination of Prosecution witnesses. *Third*, the Prosecution has likewise been unable to find the names provided for D-0017 in any [REDACTED] or any other relevant records. *Fourth*, the names provided for D-0017 – [REDACTED] – are common names in Ituri, increasing the scope for error in identifying the correct

¹ Email from the Chamber to the Parties and participants dated 4 May 2017 at 19:08 ("4 May 2017 Order"); See also ICC-01/04-02/06-1900, paras. 19-20.

individual. *Fifth*, the Prosecution has previously been provided incomplete and, more importantly, inaccurate information for other Defence witnesses, which has hindered and delayed its investigations.

5. Accordingly, the Prosecution requests that the Chamber order disclosure of official identification for Witness D-0017, including a clear identity photograph, to enable the Prosecution to verify D-0017's identity and properly investigate him. The disclosure of an identity document for D-0017 will further assist the Chamber's truth-seeking function, pursuant to article 69(3) of the Statute.

Confidentiality

6. This filing is classified as "Confidential" pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, since it refers to information not yet available to the public and to information bearing the same classification. The Prosecution will also file a public redacted version of this filing.

Background

7. On 30 January 2017, the Chamber ordered the Defence to provide summaries of the anticipated testimony of its witnesses *"in a sufficiently detailed and comprehensive manner to enable the parties, participants and Chamber to prepare meaningfully."*²

8. On 31 March 2017, the Defence filed its provisional witness list, including D-0017 confirming that his name was "[REDACTED]".³

9. On 5 April 2017, the Defence disclosed an alternative name for D-0017, namely "[REDACTED]", and his date of birth.⁴

² ICC-01/04-02/06-1757, para. 10.

³ ICC-01/04-02/06-1843-Conf-AnxB.

10. On 13 April 2017, the Chamber directed the Defence to provide, in its summaries of anticipated testimony of Defence witnesses, *inter alia* “any relevant information on [the witnesses’] personal history and background, which is available to the Defence”.⁵

11. On 4 May 2017, the Chamber directed the Prosecution to: (i) identify any specific information not currently contained in the Defence witness summaries that it considers necessary to meaningfully prepare for cross-examination; and (ii) request such information from the Defence in *inter partes* consultations, to be conducted in good faith with a view to reaching an agreement.⁶ The Chamber noted that in case no agreement can be reached, the Prosecution shall seize the Chamber with a written request setting out the information sought.⁷

12. On 5 May 2017, the Prosecution requested specific additional information that it considered necessary to meaningfully prepare for the cross-examination of the six witnesses that then appeared on the Defence’s forthcoming witness list for the first evidentiary block, including Defence Witness D-0017.⁸ Between 8 and 15 May 2017, the Prosecution made six separate *inter partes* requests for specific additional information in relation to witnesses other than those included in its 5 May 2017 request.⁹

13. On 8 May 2017, the Defence further disclosed a nickname for D-0017 and his place of birth and ethnicity, but refused to disclose the names and ethnicity of the

⁴ Email with attachment from the Defence on 5 April 2017 (DRC-OTP-2104-0369).

⁵ ICC-01/04-02/06-1862, para. 12.

⁶ 4 May 2017 Order.

⁷ 4 May 2017 Order.

⁸ Email from Nicole Samson to the Chamber and Defence dated 5 May 2017 at 17:45.

⁹ Emails from Nicole Samson to Stéphane Bourgon sent on 8 May 2017 at 16:40, 9 May 2017 at 17:53, 11 May 2017 at 12:37 and 17:50, 12 May 2017 at 16:51, and 15 May 2017 at 12:56.

parents arguing that they were not involved in the events and that their identity is covered by the Protocol as Standard Category “B” redactions.¹⁰

14. On 18 September 2017, the Defence provided the Chamber, Prosecution and participants with its forthcoming witness list for the fourth evidentiary block.¹¹

15. On 20 September 2017,¹² the Prosecution requested the Defence to disclose the complete names, date and place of birth of D-0017. Later the same day, the Defence responded and informed the Prosecution, *inter alia* that “[t]he Defence has additional names or variant spellings only in respect of D-0038”.¹³

16. On 11 October 2017, the Prosecution requested the disclosure of an identification document for Witness D-0017.¹⁴ On 16 October 2017, the Defence declined to disclose an identification document for Witness D-0017, indicating that “it has no blanket obligation to obtain or disclose identity documents of its witnesses”.¹⁵

17. On 18 October 2017, the Prosecution reiterated its request for the disclosure of an identification document for Witness D-0017, noting that the Defence had disclosed identification documents for Witnesses D-0041, D-0142, D-0169, D-0172, D-0178 and D-0179 and that the electoral authorities of the DRC have no record of a person with the names provided for Witness D-0017.¹⁶

18. On 19 October, the Defence requested the postponement of Witness D-0017’s testimony to the fifth evidentiary block.¹⁷ On 20 October 2017, the Chamber granted the Defence’s request.¹⁸

¹⁰ Email from Stéphane Bourgon dated 8 May 2017 at 17:07 with attachment.

¹¹ Email from the Defence to the Chamber, Prosecution and participants dated 18 September 2017 at 16:08.

¹² Email from Nicole Samson to Stéphane Bourgon dated 20 September 2017 at 09:40.

¹³ Email from Stéphane Bourgon to Nicole Samson dated 20 September 2017 at 19:35.

¹⁴ Email from Nicole Samson to Stéphane Bourgon dated 11 October 2017 at 18:20.

¹⁵ Email from Stéphane Bourgon to Nicole Samson dated 16 October 2017 at 20:29.

¹⁶ Email from Nicole Samson to Stéphane Bourgon dated 18 October 2017 at 11:50.

¹⁷ Email from Stéphane Bourgon to Trial Chamber VI dated 19 October 2017 at 10:09.

19. On 23 October 2017, the Defence again declined to provide an identification document for Witness D-0017, indicating that *“the documents that [...] have been disclosed in the past were documents that the Defence intended to use as exhibits which, in turn, triggers a disclosure obligation under Rule 78”* and that it has *“no intention to tender any identification document for D-0017”*.¹⁹

Prosecution’s Submissions

20. The Prosecution identified specific information that it considers necessary to prepare for the cross-examination of Witness D-0017 and engaged with the Defence in *inter partes* consultations to obtain a form of identity document for Witness D-0017.²⁰ The Defence however rejected two Prosecution requests for the disclosure of such documentation.²¹ Accordingly, pursuant to the Chamber’s 4 May 2017 Order, the Prosecution requests the Chamber to order disclosure of an identity document for this witness.

21. The Prosecution needs to identify the witness well in advance of his testimony to confirm whether or not he is the person as claimed – namely, [REDACTED]²² - as well as to investigate effectively all other aspects of his account and background for the purposes of cross-examination. In contrast to the Defence, the Prosecution requires the information to be able to carry out its separate statutory obligations to conduct investigations to establish the truth pursuant to article 54 of the Rome Statute. Moreover, the disclosure of an identity document for D-0017 will assist the Chamber’s truth-seeking function, pursuant to article 69(3) of the Statute.

¹⁸ Email from Trial Chamber VI to Stéphane Bourgon dated 20 October 2017 at 16:22.

¹⁹ Email from Stéphane Bourgon to Nicole Samson dated 23 October 2017 at 16:48.

²⁰ See paragraphs 16-17 and 19 above.

²¹ See paragraphs 16 and 19 above.

²² See summary of anticipated testimony for D-0017 at ICC-01/04-02/06-1843-Conf-AnxC, p. 4 and ICC-01/04-02/06-1881-Conf-AnxB, p. 13; see also email from Stéphane Bourgon to Trial Chamber VI dated 8 May 2017 at 17:07.

22. Without an identity document including a photograph for Witness D-0017, the Prosecution is unable to definitively ascertain the witness's identity.²³

23. The Prosecution has independently sought to obtain identity records for D-0017 from the DRC authorities, on the basis of all biographic information provided to date, including alternative spellings and his supposed date and place of birth. However, these authorities recently confirmed that no individual with the names and date and place of birth provided for D-0017 appears [REDACTED]. The name "[REDACTED]" is not an uncommon name. However, the individuals whose names match D-0017 did not have the same date or place of birth as provided for D-0017. Moreover, where photographs were available of individuals with names like D-0017 their images did not match the images of the individual identified as being D-0017 by the Defence during cross-examination of Prosecution witnesses.²⁴ Likewise, based on the names and date and place of birth provided for D-0017 to date, the Prosecution has not been able to locate this witness within any of the [REDACTED] or other relevant records in the Prosecution's possession.

24. On previous occasions, the provision of incomplete or inaccurate witness related information, including related to the identity of Defence witnesses, has hindered and delayed Prosecution investigations. For instance, the Defence recently provided a different name and a new spelling for one of D-0038's names.²⁵ Similarly, the Defence initially provided incorrect information in respect of D-0041,²⁶ and incomplete and inaccurate information in the case of D-0172.²⁷ The provision of incomplete and/or inaccurate information is a major impediment in the Prosecution's ability to properly identify and investigate the individual coming to testify.

²³ See summary of anticipated testimony for D-0017 at ICC-01/04-02/06-1843-Conf-AnxC, p. 4 and ICC-01/04-02/06-1881-Conf-AnxB, p. 13; see also email from Stéphane Bourgon to Trial Chamber VI dated 8 May 2017 at 17:07.

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

25. Moreover, it is only after the Prosecution requested the Defence to disclose further identity information for D-0017 that the Defence disclosed the identity under which D-0017 is actually known in this case,²⁸ namely [REDACTED].²⁹ In these circumstances, and given the inability to identify D-0017 (based on the names, date and place of birth, as provided) in any DRC [REDACTED] records or any [REDACTED] records in the Prosecution's possession, the Prosecution submits that there is reason to believe that the information provided for D-0017 may be incomplete or inaccurate.

26. The disclosure of an identity document containing D-0017's names, date and place of birth, together with his photograph, will enable the Prosecution to check whether the information as provided by the Defence is accurate or not, to provide updated accurate information to the DRC authorities if possible to complete their searches, and ultimately for the Prosecution to conduct accurate searches and investigations into the witness. The starting point for any such endeavour is establishing the witness's identity. An identification document is crucial to this necessary investigative step. The Chamber will appreciate that searches, for example in record databases, cannot yield accurate results absent accurate search criteria.

27. The Defence has provided electoral cards for a number of its other witnesses.³⁰ The Defence stated that it only did so previously when it intended to admit the electoral cards as evidence.³¹ However, where the Prosecution has indicated to the Defence that there are likely problems with the information as provided to date and it needs to be cross-checked and verified, the Defence's refusal to provide, at a minimum, the same level of disclosure in relation to D-0017 is contradictory. There is no justification for the Defence's refusal to provide this information.

²⁸ See email from Stéphane Bourgon to Trial Chamber VI dated 8 May 2017 at 17:07.

²⁹ [REDACTED].

³⁰ See, e.g. DRC-D18-0001-5808 containing D-0041's electoral card and DRC-D18-0001-5353 containing D-0172's electoral card.

³¹ See paragraph 19 above.

Relief Requested

28. For the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 12th day of December 2017
At The Hague, The Netherlands