



Original: English

No.: ICC-01/04-02/06
Date: 29 January 2018

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
With Confidential Annex A**

**Public redacted version of “Prosecution notification of the consultation of 20
original items by an external expert”, 21 November 2017,
ICC-01/04-02/06-2121-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. Pursuant to regulation 16(3) of the Regulations of the Registry ("RoR"), the Prosecution notifies the Chamber of the consultation by an external expert of 20 original items of evidence.
2. The Accused testified that he signed Defence document DRC-D18-0001-5147, which relates to his whereabouts immediately prior to the UPC/FPLC's attack on Lipri, Bambu and Kobu in February 2003. The Prosecution intends to request a forensic examination of the signature on the document. The Prosecution may submit the resulting expert report as rebuttal evidence following the completion of the Defence case.
3. The intended forensic examination will include a comparison of the signature on document DRC-D18-0001-5147 with a set of samples of the Accused's signature, including 20 samples from items of evidence currently stored in the Registry's vault.
4. The Prosecution notes the language of regulation 16(3) of the RoR, which provides that "[e]xperts [...] may consult the original form of evidence [...], subject to an order of the Chamber" as well as the Registry's interpretation that such consultation requires the Chamber's authorisation. The Prosecution considers that regulation 16(6) of the RoR reflects a principle of access, unless ordered otherwise. Accordingly, the Prosecution notifies the Chamber of the consultation by an external expert of these 20 "original" items.¹ In the alternative, the Prosecution requests the Chamber to authorise an external expert to consult the 20 original items of evidence.
5. According to regulation 16(5) of the RoR, the Registry thereafter governs the procedure for a party to apply to consult the items outside of the designated area within the Registry.

¹ Some items are copies, not originals.

Confidentiality

6. This filing is classified as “Confidential, *EX PARTE*, only available to the Prosecution and the Registry” pursuant to regulation 23*bis*(1) of the Regulations of the Court because it concerns a prospective investigative step envisaged by the Prosecution, namely the collection of potential rebuttal evidence, of which the Defence is not entitled to be notified.

Background

7. On 2 June 2015, the Chamber issued the “Decision on the conduct of proceedings”, indicating that the Prosecution may submit evidence in rebuttal following the completion of the Defence case.²

8. On 26 April 2017, the Defence disclosed four documents from “*Auberge La Caverne*” related to the Accused’s alleged stay in Kigali, Rwanda, between 14 and 17 February 2003 (“Hotel Documents”).³ This was the first time the Defence raised any issue of alibi and the first time it indicated that the Accused was in Rwanda on those dates.

9. On 2 May 2017, the Defence placed the Hotel Documents on its list of evidence.⁴

10. On 7 July 2017, the Accused testified for the first time during the Defence’s examination-in-chief that, between 14 and 17 February 2003, he travelled to Kigali, Rwanda, to visit his first son Bienvenu, and spent three nights in a Kigali hotel.⁵

² ICC-01/04-02/06-619, para. 12.

³ DRC-D18-0001-5147, DRC-D18-0001-5148, DRC-D18-0001-5149 and DRC-D18-0001-5150 (*see* ICC-01/04-02/06-1885-Conf-AnxA, numbers 12-15).

⁴ ICC-01/04-02/06-1881-AnxC-Corr, numbers 688-691; *see also* the Defence’s updated lists of evidence: ICC-01/04-02/06-1933-AnxA; ICC-01/04-02/06-1958-AnxA; ICC-01/04-02/06-1959-AnxA; ICC-01/04-02/06-2003-AnxA; and ICC-01/04-02/06-2049-AnxA.

⁵ ICC-01/04-02/06-T-220, p. 46, ln. 1 to p. 47, ln. 16 and p. 51, ln. 23 to p. 55, ln. 3.

11. On 3 August 2017, the Prosecution requested the Registry to facilitate an inspection of the original Hotel Documents in accordance with regulation 16(3) of the RoR.⁶ On the same day, the Registry informed the Prosecution that it was only in possession of electronic versions of the Hotel Documents.⁷ The Prosecution accordingly re-directed its request to inspect the original Hotel Documents to the Defence, pursuant to rule 78 of the Rules. The Prosecution further requested that, following the inspection, the originals be transferred to the Registry vault, in accordance with regulation 16(2) of the RoR, which provides that “[t]he original form of evidence [...] shall be stored in the Registry vault”.⁸

12. On 7 August 2017, the Defence informed the Prosecution that it was not in possession of the original Hotel Documents, was “not aware whether ‘originals’ exist for these documents” and was “in the process of confirming whether ‘originals’ exist and if so, obtaining the same”.⁹

13. On 22 August 2017, the Prosecution reiterated its request to inspect the original Hotel Documents.¹⁰ On 23 August 2017, the Defence indicated that it had been “unable to obtain further information but [were] pursuing the matter”.¹¹

14. On 31 August 2017, Counsel for the Defence orally informed the Prosecution that the original Hotel Documents had been found but were not yet in the Defence’s possession.

15. On 6 September 2017, the Accused was cross-examined about his alleged stay in Kigali, Rwanda between 14 and 17 February 2003.¹² In particular, the Accused testified that he arrived in Kigali on 14 February 2003 and spent his first night at the

⁶ Email from Rens van der Werf to Carine Pineau dated 3 August 2017 at 10:05.

⁷ Email from Carine Pineau to Rens van der Werf dated 3 August 2017 at 14:53.

⁸ Email from Dianne Luping to Stéphane Bourgon dated 3 August 2017 at 16:32.

⁹ Email from Stéphane Bourgon to Dianne Luping dated 7 August 2017 at 13:42.

¹⁰ Email from Nicole Samson to Stéphane Bourgon dated 22 August 2017, at 17:53.

¹¹ Email from Stéphane Bourgon to Nicole Samson dated 23 August 2017 at 16:29.

¹² ICC-01/04-02/06-T-238-Conf-Eng, p. 25, ln. 14 to p. 39, ln. 20.

house of a friend,¹³ after which he stayed at a hotel from 15 to 17 February 2003.¹⁴ In this context, the Accused further testified that he signed one of the Hotel Documents, namely DRC-D18-0001-5147,¹⁵ which is a registration form for “*Auberge La Caverne*” purportedly indicating that the Accused arrived in Kigali from the Democratic Republic of the Congo on 15 February 2003, occupied hotel room number 3 for several nights, and left on 19 February 2003.¹⁶

16. On 18 September 2017, the Prosecution reiterated its request for inspection of the four Hotel Documents in light of [REDACTED].¹⁷

17. On 19 September 2017, during its cross-examination of the Accused, the Prosecution informed the Chamber of its pending request to inspect the original Hotel Documents. In this context, the Defence informed the Chamber the originals of the Hotel Documents were in its possession and would be made available to the Prosecution without delay.¹⁸ On the same day, the Defence informed the Prosecution that, although it had “*expected to receive the originals of the four receipts from the member of the Ntaganda Defence Team who was on mission*”, said team member only provided the Defence with photocopies of the Hotel Documents. The Defence further indicated that it would continue looking for the original Hotel Documents.¹⁹

18. On 20 September 2017, the Prosecution responded that it would require time to inspect the originals sufficiently in advance of the testimony of [REDACTED] and asked to be updated without delay on any development regarding the retrieval of the original Hotel Documents.²⁰

¹³ ICC-01/04-02/06-T-238-Conf-Eng, p. 27, lns. 19-22.

¹⁴ ICC-01/04-02/06-T-238-Conf-Eng, p. 27, ln. 19 to p. 28, ln. 6.

¹⁵ ICC-01/04-02/06-T-238-CONF-ENG, p. 36, ln. 17 to p. 37, ln. 2 [REDACTED]

¹⁶ See DRC-D18-0001-5147.

¹⁷ Email from Dianne Luping to Stéphane Bourgon dated 18 September 2017 at 17:07.

¹⁸ ICC-01/04-02/06-T-238-CONF-ENG, p. 38, ln. 16 to p. 39, ln. 10.

¹⁹ Email from Stéphane Bourgon to Dianne Luping dated 19 September 2017 at 20:23.

²⁰ Email from Nicole Samson to Stéphane Bourgon dated 20 September 2017 at 09:45.

19. On 5 October 2017, the Defence informed the Prosecution that it had been unable to locate the original Hotel Documents and further indicated that it neither relied on these documents, nor raised the issue of these documents during the testimony of the Accused. The Defence also informed the Prosecution that it no longer intended to [REDACTED].²¹

20. On 24 October 2017, the Prosecution requested access to 20 original items of evidence currently stored in the Registry vault, indicating that it intended to submit them to an external laboratory for forensic examination.²² On the same day, the Registry responded to the Prosecution advising it to “seek the Chamber’s approval”.²³

21. On 30 October 2017, the Prosecution inspected the electronic files of the Hotel Documents pursuant to rule 78 of the Rules and obtained copies of said electronic files.

Prosecution’s Request

22. Regulation 16(3) of the RoR provides that “[e]xperts or other specified persons may consult the original form of evidence [...] subject to an order of the Chamber”. In accordance with this provision, the Prosecution notifies the Chamber of the consultation by an external expert of 20 original items of evidence currently stored in the Registry’s evidence vault.²⁴

23. The Prosecution is not persuaded by the Registry’s interpretation that a consultation by an expert pursuant to regulation 16(3) of the RoR necessarily

²¹ Email from Stéphane Bourgon to Nicole Samson dated 5 October 2017 at 10:47.

²² Email from Selamawit Yirgou to Caroline Bossette dated 24 October 2017 at 12:46.

²³ Email from Caroline Bossette to Selamawit Yirgou dated 24 October 2017 at 15:20.

²⁴ The original items of evidence are: DRC-OTP-0014-0272, DRC-OTP-0016-0047, DRC-OTP-0016-0049, DRC-OTP-0016-0055, DRC-OTP-0016-0098, DRC-OTP-0016-0106, DRC-OTP-0016-0110, DRC-OTP-0016-0113, DRC-OTP-0016-0119, DRC-OTP-0016-0122, DRC-OTP-0016-0131, DRC-OTP-0016-0133, DRC-OTP-0016-0285, DRC-OTP-0017-0003, DRC-OTP-0018-0170, DRC-OTP-0029-0255, DRC-OTP-0102-0038, DRC-OTP-0113-0131, DRC-OTP-0141-0009 and DRC-OTP-0165-0254.

requires the Chamber's leave. Regulation 16(3) indeed expresses a principle of access – “[e]xperts [...] may consult the original form of evidence” – with the exception of an order by the Chamber to the contrary (“*subject to an order by the Chamber*”). In any event, it agrees that the Chamber must be seized with the matter, at a minimum to verify that there are no compelling reasons militating against access warranting an adverse order. Accordingly, it notifies the Chamber should it have any objections to the consultation taking place. In the alternative, the Prosecution requests the Chamber to authorise an external expert to consult the 20 original items of evidence.

24. The consultation of these original documents is necessary to allow the external document expert to carry out the forensic examination of the signature on document DRC-D18-0001-5147 and determine whether it is consistent with the Accused's testimony regarding his whereabouts around mid-February 2003.

25. The Accused testified that he travelled to Kigali, Rwanda, between 14 and 17 February 2003. He further testified that he signed a registration form at a Kigali hotel called “*Auberge La Caverne*”, namely DRC-D18-0001-5147, on 15 February 2003, which purportedly confirms his stay in Rwanda on those dates.²⁵

26. The Prosecution has reasons to believe that the Accused's signature on this document is not authentic.²⁶ It intends to submit the document to an external expert for forensic examination²⁷ and may, following the completion of the Defence case, submit the resulting expert report as evidence in rebuttal of the Accused's testimony on this issue.

²⁵ See ICC-01/04-02/06-T-238-Conf-Eng, p. 25, ln. 14 to p. 39, ln. 20.

²⁶ There are noticeable differences between the signature on DRC-D18-0001-5147 and samples of the Accused's signature dated between August 2002 and December 2004, whereas the signature presents similarities with samples of the Accused's signature dated between March 2013 and June 2017 (See Confidential, *EX PARTE*, Prosecution and Registry only, annex A). Moreover, the Accused's signature on DRC-D18-0001-5147 is the only handwriting in black on all four Hotel Documents provided to the Defence by [REDACTED] and appears to have been photocopied onto the document.

²⁷ The Prosecution notes that the intended forensic examination will not involve any altering or destructive procedures.

27. Whilst the Defence has recently indicated that it will neither seek to rely on document DRC-D18-0001-5147, [REDACTED],²⁸ it remains important to verify the authenticity of the signature on this document for the Chamber to evaluate the credibility of the Accused's testimony regarding his whereabouts in February 2003, immediately prior to the UPC/FPLC's attack on Lipri, Bambu and Kobu.

28. The intended forensic examination will include a signature comparison. In order to obtain a result that will meaningfully assist the Chamber in its evaluation of the Accused's testimony, the external expert requires the best available versions of both the questioned document – DRC-D18-0001-5147 – and the comparison samples.

29. The Defence recently informed the Prosecution that it was unable to locate the original version of DRC-D18-0001-5147. However, the Prosecution has obtained the original scanned version of this document,²⁹ which it will submit to the external expert. The Prosecution has also identified a set 24 comparison samples of the Accused's signature.³⁰ Among these samples, 20 are evidentiary items – orders, letters and other documents signed by the Accused – that were disclosed and tendered by the Prosecution and, as a result, are currently stored in the Registry's evidence vault. The remaining four are samples from Defence filings or documents dated between March 2013 and June 2017, two of which are confidential.³¹ In respect of these confidential documents, the Prosecution intends to submit extracts limited to the Accused's signature and excluding any other information.

30. In the absence of any objection from the Chamber or, in the alternative, with the Chamber's authorisation, the Prosecution will submit a request to the Registry

²⁸ Email from Stéphane Bourgon to Nicole Samson dated 5 October 2017 at 10:47.

²⁹ The quality of this scanned version is better than the version uploaded in ringtail.

³⁰ These samples, ranging from 26 August 2002 to 9 June 2017, have either been authenticated by the Accused during his testimony, admitted into evidence without Defence objection to the Prosecution's assertion that the signature was the Accused's, or submitted by the Defence in the context of the proceedings. A table listing these samples is appended in Confidential, *EX PARTE*, Prosecution and Registry only, annex A.

³¹ These four samples are ICC-01/04-02/06-678-AnxA (public), ICC-01/04-02/06-1502-AnxB (public), ICC-01/04-02/06-44-Conf-Exp-Anx1 (confidential) and DRC-D18-0001-5516 (confidential).

pursuant to regulation 16(5) of the RoR to consult these 20 documents outside the area designated within the Registry for a period not exceeding two months.³²

Relief Requested

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



Fatou Bensouda
Prosecutor

Dated this 29th day of January 2018
At The Hague, The Netherlands

³² Regulation 16(5) of the RoR provides that “in exceptional circumstances, Chambers, participants, experts and other specified persons may request to consult the original form of evidence [...] outside the area designated within the Registry for a period not to exceed 24 hours. Reasons for such a request shall be indicated on the standard form. The same procedure shall apply where consultation is requested outside the designated area within the Registry for a period exceeding 24 hours”.