

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 March 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***

Confidential

**with Confidential, *EX PARTE*, only available to the Prosecution
and the Registry Annexes A-C**

**Confidential redacted version of "Prosecution's submissions in relation to
'Decision on Defence requests for lifting of redactions and disclosure',
ICC-01/04-02/06-2252-Conf", 14 March 2018, ICC-01/04-02/06-2257-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 the 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. In its 9 March 2018 Decision,¹ the Chamber directed the Prosecution to review the information provided by [REDACTED], on whom the Prosecution will not rely in rebuttal, and disclose to the Defence any information that falls under the Prosecution's disclosure obligations. In case of uncertainty or serious and justified concerns that disclosure would undermine the protection of the individual's identity, the Chamber ordered the Prosecution to provide the Chamber with the relevant information.² In the same decision, the Chamber also directed the Prosecution to lift certain redactions³ in two Prosecution filings⁴ absent "further and supported justification...as to why the lifting of the relevant redactions would lead to the identification of the Individual".⁵
2. With regards to disclosure of information that [REDACTED] provided to the Prosecution, this information is incriminatory in nature since [REDACTED]. The Prosecution will not rely on this information due to the witness's security concerns and unwillingness to testify. Accordingly, rule 76 of the Rules⁶ is not engaged as it obliges disclosure of prior statements of witnesses upon whom the Prosecution will rely. Nor is the information potentially exonerating under article 67(2) of the Statute.⁷

¹ ICC-01/04-02/06-2252 ("9 March 2018 Decision").

² See 9 March 2018 Decision, para. 24, p. 13.

³ See 9 March 2018 Decision, paras. 22, 25, p. 13.

⁴ The first filing is the Prosecution's request for authorisation to refer to confidential testimony during a witness interview, originally filed *ex parte* (ICC-01/04-02/06-2148-Conf-Exp "Filing 2148") on 12 December 2017, with a confidential redacted version (ICC-01/04-02/06-2148-Conf-Red) provided on 16 February 2018. The second filing is the Prosecution's preliminary submissions concerning the presentation of evidence in rebuttal, originally filed *ex parte* (ICC-01/04-02/06-2179-Conf-Exp, "Filing 2179") on 11 January 2018, with a confidential redacted version (ICC-01/04-02/06-2179-Conf-Red) provided on the same day. A second confidential redacted version (ICC-01/04-02/06-2179-Conf-Red2) was provided on 25 January 2018, and a third confidential redacted version (ICC-01/04-02/06-2179-Conf-Red3) was provided on 28 February 2018.

⁵ See 9 March 2018 Decision, paras. 22, 25.

⁶ Rules of Procedure and Evidence.

⁷ Rome Statute.

3. The Prosecution considered whether the information is material to the preparation of the Defence under rule 77 and determined that it is not. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. Significantly, the Prosecution will not be able to rely on [REDACTED]'s information [REDACTED], and the Accused will not have to answer in any way to [REDACTED]'s information.
4. Should the Chamber deem, however, that any of the information provided by [REDACTED] is disclosable, the Prosecution requests non-disclosure under rule 81(4) of the Rules because the specificity of this information will identify him. This would result in security risks for [REDACTED] and would be in violation of the Chamber's decision that the protection of his identity is justified and necessary.
5. With regards to the redactions in the two filings, the Prosecution maintains its position that the redactions applied to Filings 2148 and 2179 are necessary and appropriate to protect [REDACTED]'s identity. [REDACTED].
6. Nevertheless, the Prosecution has prepared, and annexes, a second confidential redacted version of Filing 2148,⁸ having lifted the redactions referred to by the Chamber in its 9 March 2018 Decision. For Filing 2179, however, the Prosecution provides further justification for not lifting any of the redactions applied to paragraph 3.

⁸ See Confidential, *EX PARTE*, only available to the Prosecution and Registry Annex C.

Confidentiality

7. This filing and its annexes are 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 since they identify a witness whose identity the Chamber has authorised the Prosecution not to disclose. The Prosecution will file redacted versions of this filing.

Prosecution's Submissions

I. [REDACTED] has not provided disclosable information

8. Prior to the 9 March 2018 Decision, the Prosecution reviewed the information provided by [REDACTED] and determined that it is incriminatory in nature rather than potentially exculpatory or material to the preparation of the Defence. Indeed, [REDACTED] states that, [REDACTED],⁹ [REDACTED].¹⁰
9. Since the Prosecution does not intend to rely on [REDACTED] incriminatory information, it determined that is not disclosable under rule 76. The Prosecution also determined that [REDACTED] information is equally not disclosable under article 67(2) since it does not tend to show the innocence of the Accused, it does not mitigate his guilt, and it does not affect the credibility of Prosecution evidence.
10. Nor did the Prosecution consider this information to be disclosable under rule 77. First, because it is not intended for use by the Prosecutor as evidence at trial, which is one facet of rule 77. Second, because it is not material to the preparation

⁹ [REDACTED].

¹⁰ [REDACTED].

of the Defence. Third, because the information was neither obtained from nor belonged to the Accused. [REDACTED]. [REDACTED]. [REDACTED].

11. Subsequent to the 9 March 2018 Decision, the Prosecution once again reviewed the information provided by the witness and reached the same conclusions. Should the Chamber decide differently, the Prosecution seeks non-disclosure of the information under rule 81(4) because disclosure will identify the individual, as set out below.

II. Disclosure of the information provided by [REDACTED] will identify him

12. The Chamber held that protection of this witness's identity is "justified and necessary" and, since the witness's information will not be adduced during these proceedings, such protections are "not unduly prejudicial to the accused".¹¹

13. In accordance with the Chamber's directions in its 9 March 2018 Decision, the Prosecution annexes the information provided by the witness to this filing.¹² Should the Chamber deem that the information provided by the witness is disclosable in whole or in part, the Prosecution requests that the Chamber authorise non-disclosure in accordance with the protections to victims and witnesses under rule 81(4) and in accordance with the Chamber's decision to protect [REDACTED]'s identity.

14. [REDACTED].¹³

15. [REDACTED],¹⁴ [REDACTED].¹⁵ [REDACTED].

¹¹ ICC-01/04-02/06-2230, para. 11.

¹² See Confidential, *EX PARTE*, only available to the Prosecution and Registry Annexes A-B.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

16. [REDACTED]¹⁶ [REDACTED],¹⁷ [REDACTED].¹⁸

17. Providing the Defence with this information, redacting only the witness's name, will identify [REDACTED]. The combination of: (i) [REDACTED] (ii) [REDACTED] and (iii) [REDACTED].

18. [REDACTED].¹⁹ [REDACTED].

19. [REDACTED].²⁰

20. The Prosecution requests that, if the Chamber finds any of the information provided by [REDACTED] disclosable, it authorise non-disclosure of the information under rule 81(4) on the basis that disclosure will identify [REDACTED]. Given the specificity of the information provided on a discrete issue, no lesser means are available to protect [REDACTED] than to order non-disclosure of the totality of the information he provided.

III. Lifting the redactions in Filings 2148 and 2179 may identify the witness

Filing 2148

21. In its 9 March 2018 Decision, the Chamber found, referring to Filing 2148, that "the redactions in paragraphs 5 to 7, with the exception of the first sentence in paragraph 5, can be lifted without concretely identifying the Individual."²¹ The Chamber also found that it "considers that the redactions to the planned lines of enquiry of the Individual in paragraphs 8 and 9, and to the fact that the accused's testimony on the relevant issues was elicited to a large extent in

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ See Confidential, *EX PARTE*, only available to the Prosecution and Registry Annex B.

²¹ 9 March 2018 Decision, para. 22.

private session in paragraph 10 could be lifted without revealing the Individual's identity."²²

22. The Prosecution is concerned that lifting any of the redactions referred to by the Chamber may identify [REDACTED], given the Accused will be aware that: (i) [REDACTED]; (ii) [REDACTED]; and (iii) [REDACTED].

23. These concerns are heightened by the fact that [REDACTED].

24. The Prosecution has lifted all the redactions referred to by the Chamber in Filing 2148 and annexes a second confidential redacted version of Filing 2148 to this decision for the Chamber's further consideration bearing in mind all of the above information.

Filing 2179

25. In its 9 March 2018 Decision, the Chamber considered that "the redactions to paragraph 3 of Filing 2179 can be limited to references to the Individual without revealing his identity."²³

26. Lifting any of the redactions in paragraph 3 of Filing 2179 will identify [REDACTED]. It will reveal that [REDACTED]. It will also reveal that the witness is [REDACTED]. Revealing this information in combination with other details now being provided to the Accused will lead to [REDACTED]'s identification. This would contravene the Chamber's own decision on protections for [REDACTED], as well as its obligation to protect persons who are at risk on account of their cooperation with the Court as set out in article 68(1).

²² 9 March 2018 Decision, para. 22.

²³ 9 March 2018 Decision, para. 25.

Request

27. For the foregoing reasons, should the Chamber find that any information from [REDACTED] to the Prosecution is disclosable, the Prosecution requests that the Chamber authorise the non-disclosure of the information provided by [REDACTED].

28. The Prosecution also requests that the Chamber authorise the redactions to paragraph 3 of Filing 2179. The Prosecution awaits the Chamber's confirmation that it deems the second confidential redacted version of Filing 2148 to sufficiently protect [REDACTED]'s identity and well-being.



Fatou Bensouda
Prosecutor

Dated this 15th day of March 2018
At The Hague, the Netherlands