

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 5 April 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

Prosecution reply to 26 March 2018 Defence Response (ICC-01/04-02/06-2262-Conf)

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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Other

Prosecution's Submissions

1. As authorised by the Chamber,¹ the Prosecution replies to one issue² raised in the 26 March 2018 Defence response³ to Prosecution submissions⁴ on disclosure.
2. Contrary to the Defence assertion,⁵ the Chamber's review of materials to determine disclosability or to decide a request for non-disclosure under rule 81(4) of the Rules⁶ is neither prejudicial to, nor inconsistent with, the Accused's fair trial rights.
3. First, the Chamber did not decide on the disclosure of the material. Instead, it directed that, in case of uncertainty about disclosure or because of serious and justified concerns that information cannot be disclosed without revealing the identity of a non-trial witness, the Prosecution shall provide the Chamber with the relevant information in order for it to determine whether, and under which conditions, the information is disclosable to the Defence.⁷ The Defence did not challenge the propriety of this direction at the time it was issued. It neither submitted that the direction was beyond the powers of the Chamber nor that it was prejudicial. It is plain that in order to comply with this instruction, if engaged, the Prosecution had to submit the relevant material for the Chamber's review and determination; the Chamber cannot assess the disclosability of an item if it cannot see it.

¹ Email from the Chamber to the Parties and participants dated 3 April 2018 at 17:01 partially granting the Prosecution's 27 March 2018 request for leave to reply (ICC-01/04-02/06-2264-Conf, "Request for Leave to Reply") in relation to issue (ii) as identified in that request. The Chamber set 5 April 2018 as the deadline for this reply.

² "Whether, further to its own order, and in view of its powers under articles 64 and 68 of the Statute, a Chamber's review of materials to determine disclosability or to decide a request for non-disclosure under rule 81(4) of the Rules is prejudicial to or inconsistent with an accused's fair trial rights, when Chambers engage in such a review routinely throughout the proceedings, including in relation to incriminatory material that is never subsequently disclosed", Request for Leave to Reply, para. 2(ii) (footnotes omitted).

³ ICC-01/04-02/06-2262-Conf ("26 March 2018 Defence Response").

⁴ ICC-01/04-02/06-2257-Conf-Red, filed on 15 March 2018 ("15 March 2018 Request").

⁵ See 26 March 2018 Defence Response, paras. 14-15.

⁶ Rules of Procedure and Evidence.

⁷ ICC-01/04-02/06-2252, para. 24 ("9 March 2018 Decision").

4. Second, the Chamber evidently has the power to review material to determine disclosure in case of uncertainty and to adjudicate requests for non-disclosure to protect witnesses and victims or ongoing investigations under articles 64, 67 and 68 of the Statute,⁸ and rule 81(2) and (4) of the Rules. Indeed, these provisions oblige the Chamber to protect witnesses and authorise it to rule on any relevant matter.
5. Indeed, Chambers are routinely seized of applications for redactions, for non-disclosure of information, and to determine the scope of disclosure. Such applications arise both at the pre-trial⁹ and trial stages.¹⁰ These are *ex parte* submissions in the main, and the Prosecution must provide the Chamber with the material at issue to review in order to decide on the request.¹¹ Chambers cannot avoid reviewing the material in full and considering the nature of the security risks or of the ongoing investigative activities. There is no other way for a Chamber to adjudicate such requests, and there is nothing inherently prejudicial in this review.
6. If the Chamber decides that redactions or non-disclosure is necessary and justified, the information is not disclosed to the Defence. If the information falls under rule 77 or is potentially exonerating under article 67(2) yet protection issues arise with disclosure, Chambers balance the interests at stake,¹² but non-

⁸ Rome Statute.

⁹ See, e.g. ICC-01/04-01/06-437.

¹⁰ See, e.g. ICC-01/04-02/06-545-Conf-Exp with confidential, *ex parte*, redacted version at ICC-01/04-02/06-545-Conf-Exp-Red and public redacted version at ICC-01/04-02/06-545-Red2 ("7 April 2015 Decision"); ICC-01/04-02/06-550-Conf-Exp with public redacted version at ICC-01/04-02/06-550-Red ("8 April 2015 Decision").

¹¹ See, e.g. ICC-01/04-01/06-437, p. 6 where the Single Judge of Pre-Trial Chamber I noted that she "has carefully examined the redactions proposed by the Prosecution in each of the hundreds of documents, witness statements and transcripts of witness interviews contained in the Prosecution requests and the Prosecution amended requests filed under rule 81 (2) and (4) of the Rules", and 7 April 2015 Decision, para. 18 where the Chamber noted that "it has reviewed the redactions sought individually and reached its conclusions in light of the circumstances of the present case."

¹² See ICC-01/04-01/07-475, para. 66: "The Appeals Chamber concludes that, while the non-disclosure of information for the protection of persons at risk is permissible in principle pursuant to rule 81(4) of the Rules, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake."

disclosure of information to protect witness identity has been approved, including to identifying details of the core account.

7. By way of example, the Chamber authorised the Prosecution to redact information in material related to non-trial witnesses P-0087, P-0125, P-0809, P-0813, P-0871, P-0876, P-0882, P-0013, P-0044, P-0816 and P-0040.¹³ The Chamber read the information in relation to which it authorised redactions. In authorising the redactions, the Chamber noted that the Prosecution was not relying on these witnesses¹⁴ and also considered, in relation to several of these witnesses, the fact that their material mainly contained incriminatory information, with limited potentially exculpatory and Rule 77 information.¹⁵ It granted authorisation to redact information provided by these witnesses despite Defence arguments that this would unduly prejudice the Accused's fair trial rights and hamper Defence investigations.¹⁶ The Chamber acknowledged that the redactions necessary to protect the identity of the witnesses may at times need to be extensive.¹⁷
8. Where the Prosecution was ordered to provide redacted versions of the material emanating from these witnesses, it was because their statements contained information on a number of issues, some of which could be disclosed without revealing their identity. Such is not the case for the witness at issue, whose information is limited to one discrete point that is highly identifying.
9. The Appeals Chamber has noted that *"the right to disclosure is not absolute, that the withholding of disclosure of information from the Defence is permissible so as to preserve the fundamental rights of another individual and that not every incident of non-disclosure automatically results in an unfair trial"*,¹⁸ and emphasised the need to *"carefully*

¹³ 7 April 2015 Decision; 8 April 2015 Decision.

¹⁴ 7 April 2015 Decision, paras. 17, 32, 35, 39, 46, 50-51, 60; 8 April 2015 Decision, para. 14.

¹⁵ 7 April 2015 Decision, paras. 37, 41, 44, 49, 54.

¹⁶ See 7 April 2015 Decision, paras. 31, 36, 40, 45, 48, 52, 63, 67; 8 April 2015 Decision, para. 10.

¹⁷ See 7 April 2015 Decision, para. 64.

¹⁸ ICC-01/04-01/07-475, para. 62.

assess the type of information in respect of which authorisation for non-disclosure is sought."¹⁹

10. The Appeals Chamber further held that there may be situations "*in which the withholding of certain information from the Defence may be necessary so as to preserve the fundamental rights of an individual put at risk by the activities of the International Criminal Court.*"²⁰ This is the situation in the present case.

Confidentiality

11. This filing is classified as "Confidential" under regulation 23bis(2) of the Regulations of the Court since it refers to filings bearing the same classification. The Prosecution requests the Chamber's authorisation to reclassify this filing as "Public" since it contains no confidential information.

Request

12. Based on the foregoing, the Prosecution asks the Chamber to authorise the non-disclosure of the information provided by the witness at issue for the reasons set out in its 15 March 2018 Request.



Fatou Bensouda
Prosecutor

Dated this 5th day of April 2018
At The Hague, The Netherlands

¹⁹ ICC-01/04-01/07-475, para. 69.

²⁰ ICC-01/04-01/07-475, para. 58.