

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 April 2015

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

**Decision on the Prosecution's request for variation of time limit to disclose the
transcripts of 'Radio Candip' broadcasts**

Decision 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 Bosco Ntaganda

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of 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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber')¹ of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Rule 77 of the Rules of Procedure and Evidence and Regulation 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on the Prosecution's request for variation of time limit to disclose the transcripts of "Radio Candip" broadcasts'.

I. PROCEDURAL HISTORY

1. On 9 October 2014, the Chamber filed an order setting 31 January 2015 and 2 March 2015 as the deadlines for disclosure of evidence.²
2. On 2 March 2015, the Office of the Prosecutor ('Prosecution') filed a request for an extension of the 2 March 2015 time limit to disclose the transcriptions of "'Radio Candip" broadcasts' ('Request').³
3. On 20 March 2015, the defence team for Mr Ntaganda ('Defence') filed a response to the Request ('Response'), stating that it would be meaningless to respond, but at the same time requesting the Chamber to: (i) instruct the Prosecution to justify its redactions to the request and; (ii) to reject the Request. Alternatively, should the Chamber grant the Request, the Defence requests that the trial schedule be adjusted.⁴
4. On 23 March 2015, the Prosecution sought leave to reply to the Response ('Leave to Reply Request').⁵

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber VI as composed by the Presidency's 'Decision replacing a judge in Trial Chamber VI', 18 March 2015, ICC-01/04-02/06-521 and to the Chamber in its previous composition.

² Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382, para. 9(d). A corrigendum was filed on 28 November 2014 (ICC-01/04-02/06-382-Corr).

³ Prosecution's request pursuant to regulation 35, ICC-01/04-02/06-489-Conf-Exp, available to the Prosecution only. A public redacted version was filed that same day (ICC-01/04-02/06-489-Red).

⁴ Response on behalf of Mr Ntaganda to Prosecution's request for variation of time limit to disclose the transcriptions of "Radio Candip" broadcasts, ICC-01/04-02/06-527.

⁵ Prosecution request to file a reply to the "Response on Behalf of Mr Ntaganda to Prosecution's request for variation of time limit to disclose the transcriptions of 'Radio Candip' broadcasts", ICC-01/04-02/06-531.

II. SUBMISSIONS

5. In its Request, the Prosecution informs the Chamber that it collected audio copies of five Radio Candip broadcasts in the final months of 2014, which it would disclose to the Defence by the 2 March 2015 deadline.⁶ However, it requests an extension of the time limit until 30 April 2015 to disclose transcripts of the broadcasts.⁷
6. The Prosecution submits that the delay is due to the fact that the Prosecution has prioritised the transcription of interviews conducted under Article 55(2) of the Statute. Furthermore, as the broadcasts are in both French and Swahili, the transcription needs to be made in two languages, which requires additional time.⁸
7. The Prosecution argues that good cause, within the meaning of Regulation 35(2) of the Regulations, exists, because the transcripts will assist the Chamber and parties in reviewing the broadcasts, and the accused will not be unduly prejudiced by the delay, since audio copies of the broadcasts will be disclosed by 2 March 2015.⁹
8. The Prosecution further makes submissions '[i]n the interests of keeping the Chamber informed of relevant developments',¹⁰ which are redacted. As no subsequent requests have yet been made on the basis of these submissions, they will not be addressed in the present decision.
9. In the Response, the Defence avers that the Prosecution has placed the Defence, the participants and the Chamber in a position where it has no

⁶ Request, ICC-01/04-02/06-489-Red, paras 7-8.

⁷ Request, ICC-01/04-02/06-489-Red, para. 9.

⁸ Request, ICC-01/04-02/06-489-Red, para. 8.

⁹ Request, ICC-01/04-02/06-489-Red, para. 10.

¹⁰ Request, ICC-01/04-02/06-489-Conf-Exp, paras 16 and 20.

choice but to wait for the transcripts.¹¹ The Defence submits that the Prosecution did not provide any information as to when the broadcasts were obtained and/or why the broadcasts could not be obtained earlier.¹²

10. The Defence further submits that although the Prosecution has failed to show good cause for the requested extension, it takes no position with respect to the Request as it would be meaningless to do so.¹³ However, the Defence nevertheless stresses that the transcribing should have taken place earlier,¹⁴ and that as of the date of filing, full disclosure of all material in the possession of the Prosecutor 'is far from being complete'.¹⁵ In addition, it opposes the Prosecution's suggestion that the Defence will not be unduly prejudiced by the delay, as 'there is a huge difference between analysing the relevance and potential probative value of radio broadcasts by reading the transcriptions thereof and listening to the audio version of the broadcasts'.¹⁶

11. Finally, the Defence submits that if the Request is granted, the trial schedule should be adjusted accordingly.¹⁷

12. In its Leave to Reply Request, the Prosecution requests to respond to the Defence's statement that the Prosecution has not provided information as to why the broadcasts could not be obtained earlier.¹⁸ Furthermore, the Prosecution seeks to respond to some statements made by the Defence regarding disclosure that it considers inaccurate.¹⁹

¹¹ Response, ICC-01/04-02/06-527, para. 3.

¹² Response, ICC-01/04-02/06-527, para. 4.

¹³ Response, ICC-01/04-02/06-527, paras 5-6.

¹⁴ Response, ICC-01/04-02/06-527, para. 10.

¹⁵ Response, ICC-01/04-02/06-527, para. 7.

¹⁶ Response, ICC-01/04-02/06-527, para. 9.

¹⁷ Response, ICC-01/04-02/06-527, paras 10-11.

¹⁸ Leave to Reply Request, ICC-01/04-02/06-531, para. 5.

¹⁹ Leave to Reply Request, ICC-01/04-02/06-531, paras 6-7.

III. ANALYSIS

Preliminary remarks

13. The Defence submits it cannot make meaningful observations on the Request as it contains redactions that are applied unilaterally and without providing any justification. As such, the Defence requests the Chamber to order the Prosecution to justify these redactions.²⁰

14. As stated above, no requests are made on the basis of the redacted submissions in paragraphs 11 to 20 of the Request, the contents of which are unrelated to the Request. Therefore, these redactions, or the redacted content, need not be addressed here. For that same reason, the Defence's ability to assess the relevant content of the Request was not affected. However, the Chamber notes that it would have been of assistance for the Prosecution to have indicated at the outset, for the benefit of the Defence, that the majority of the redacted content was unrelated to the Request, and not to redact the justification of the redactions to the substance of the Request.²¹ The Chamber further considers that the Prosecution could have framed its submissions in a manner that gave the Defence an approximate indication of the length of time it had been in possession of the radio broadcasts.

15. As to the Leave to Reply Request, the Chamber does not consider that would be assisted by further submissions on any of the issues raised in it, and it is therefore rejected.

²⁰ Response, ICC-01/04-02/06-527, para. 2.

²¹ In that regard, the Chamber finds the Prosecution's reaction, when requesting leave to reply, that '[t]he justification for the redactions is set out in paragraph 4 of the [Request]' (Leave to Reply Request, ICC-01/04-02/06-531, para. 4), a paragraph that was redacted from the Defence, to be unhelpful.

Decision on the Request

16. At the outset, the Chamber notes with concern the timing of the Request, which was received on 2 March 2015. According to the Defence, the Prosecution thereby ‘places the Chamber, the Defence and the participants before a *fait accompli*’.²² Whilst the Chamber understands that requests for extension of deadline sometimes can only be made at the last moment, the Chamber does not see why in the present case, the Prosecution could not have foreseen, at an earlier stage, that the transcripts – as a result of a decision taken by the Prosecution itself to prioritise other transcripts first – would not be ready by 2 March 2015. In this regard, when a request for extension of time is filed this close to the relevant deadline, the Chamber may reject the request if no justification exists for the lateness of the filing of the application.

17. As to the requested delayed provision of the transcripts, the Chamber notes that the audio recordings of the radio broadcasts, which according to the Request would be disclosed by 2 March 2015,²³ were indeed disclosed to the Defence by that disclosure deadline.²⁴ The Chamber further notes the labour-intensiveness of the transcription process, and the existence of finite transcription and translation resources, and consequent need to prioritise. In that regard, the Chamber considers the Prosecution’s prioritisation of the transcription of Article 55(2) interviews to be reasonable and therefore that good cause exists for delayed disclosure. However, noting the quality of the audio recordings and – in particular – that the recordings in question are in a mixture of French and Swahili, the Chamber considers that a degree of prejudice may arise to the Defence from the delay in disclosure

²² Response, ICC-01/04-02/06-527, para. 3.

²³ Request, ICC-01/04-02/06-489-Red, para. 7.

²⁴ Prosecution’s Communication of the Disclosure of Evidence, 3 March 2015, ICC-01/04-02/06-496-Conf-AnxA, p. 3.

of the transcripts. The Chamber therefore considers it appropriate for them to be disclosed as soon as possible. The degree of prejudice is not such as would individually warrant an amendment to the trial schedule, but was nonetheless cumulatively within the Chamber's contemplation at the time it issued its recent decision postponing the commencement date of trial.²⁵

18. The Chamber observes that the Prosecution estimated that the transcription of the broadcasts would be completed by 30 April 2015 and that it would disclose the transcripts as soon as they would be completed. Therefore, if the transcripts have been provided to the Defence by now, the Chamber's instruction to do so is moot, but if they have not yet been provided to the Defence, the Prosecution is ordered to do so forthwith.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

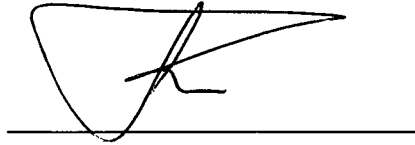
GRANTS the Request;

ORDERS the Prosecution to disclose the transcripts of the five Radio Candip broadcasts forthwith;

REJECTS the Leave to Reply Request.

Done in both English and French, the English version being authoritative.

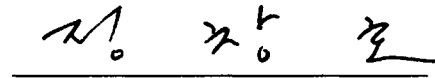
²⁵ Transcript of Hearing, 22 April 2015, ICC-01/04-02/06-T-19-ENG ET, p. 7.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 30 April 2015

At The Hague, The Netherlands