

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 June 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 Prosecution request for authorisation of non-disclosure of five documents

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 ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 54(3)(e) and 67(2) of the Rome Statute ('Statute'), Rules 77 and 82 of the Rules of Procedure and Evidence ('Rules') and Regulation 24(1) and (5) of the Regulations of the Court ('Regulations'), issues this 'Decision on Prosecution request for authorisation of non-disclosure of five documents'.

I. Background and Submissions

1. On 13 March 2015, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution request for authorisation of non-disclosure of five documents obtained pursuant to article 54(3)(e)' ('Request') on a confidential *ex parte*, available only to the Prosecution, basis.² Three days later, on 16 March 2015, it filed a confidential redacted version of the Request.³ In the Request, the Prosecution seeks authorisation for non-disclosure of five documents ('Five Documents') that were obtained pursuant to Article 54(3)(e) of the Statute, and for which the provider of the documents ('Information Provider') has refused to consent to disclosure.⁴ The documents contain information that is material to the preparation of the defence, but according to the Prosecution the non-disclosure of the documents does not prejudice the defence team of Mr Ntaganda ('Defence'), 'since all the Rule 77 Material they contain has been disclosed in documents of the same nature authored by the same or similar sources'.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 ICC-01/04-02/06-509-Conf-Exp.

³ ICC-01/04-02/06-509-Conf-Red. That same day, a public redacted version was filed: ICC-01/04-02/06-509-Red2.

⁴ Request, ICC-01/04-02/06-509-Conf-Red, paras 1-2, and 12.

⁵ Request, ICC-01/04-02/06-509-Conf-Red, para. 1.

2. On 7 April 2015, the Defence responded to the Request ('Response'),⁶ arguing that insufficient information has been provided to the Defence and to the Chamber, respectively, to effectively respond and assess whether the rights of the accused can be fully respected when the five documents are not disclosed.⁷ Therefore, it requests the Chamber not to adjudicate on the Request at this stage, but to order the Prosecution to provide the Chamber and the Defence with additional information, after which the Defence should be given a further opportunity to respond.⁸
3. On 28 April 2015, the Prosecution made a filing ('Prosecution's Further Submissions'),⁹ in which it submits that the Defence made 'new requests' in the Response, 'giving it a right to respond'.¹⁰ In the alternative, the Prosecution seeks leave to reply to the 'new Defence requests'.¹¹ In the filing, the Prosecution provides a description of the categories of information contained in the Five Documents that falls within the scope of Article 67(2) of the Statute and/or Rule 77 of the Rules, and lists the proposed analogous evidence.¹²
4. On 8 May 2015, the Defence sent an e-mail to the Chamber requesting clarification how the Prosecution Response 'should be understood and treated'.¹³

⁶ Response on behalf of Mr Ntaganda to Prosecution request for authorisation of non-disclosure of five documents obtained pursuant to article 54(3)(e), ICC-01/04-02/06-542.

⁷ Response, ICC-01/04-02/06-542, paras 4-9, 13, 15.

⁸ Response, ICC-01/04-02/06-542, para. 20.

⁹ Prosecution's response to the Defence request in "Response on behalf of Mr Ntaganda to Prosecution request for authorisation of non-disclosure of five documents obtained pursuant to article 54(3)(e)" or, in the alternative, leave to reply, ICC-01/04-02/06-574.

¹⁰ Prosecution's Further Submissions, ICC-01/04-02/06-574, para. 4.

¹¹ Prosecution's Further Submissions, ICC-01/04-02/06-574, para. 4.

¹² Prosecution's Further Submissions, ICC-01/04-02/06-574, paras 3 and 15.

¹³ E-mail from the Defence to the Chamber on 8 May 2015 at 16:19. Receipt of the email was acknowledged by way of E-mail from Legal Officer of the Chamber to the Defence on 21 May 2015 at 16:11.

II. Analysis

Preliminary Issue

5. The Prosecution submits that, in the Response, the Defence made new requests for relief, giving the Prosecution a right to respond pursuant to Regulation 24(1) of the Regulations. The Chamber notes that, in certain cases, when a responding party raises 'new and distinct issues of law' or requests relief that lies outside the normal scope of a response, the response may be treated as a request, entitling the other party to a full response pursuant to Regulation 24(1) of the Regulations.¹⁴ However, the Chamber does not consider the Defence to have raised issues, or requested relief, that fall outside the normal scope of a response to a request made pursuant to Article 54(3)(e) of the Statute. The Chamber does not therefore consider that the Prosecution was entitled to a response, as of right. The submissions made in the Prosecution's Further Submissions are therefore dismissed.
6. However, the Chamber notes that paragraph 15 of the Prosecution's Further Submissions contains information that is relevant for the Defence, including :
 - (i) to allow it to have some insight into the content of the materials for which non-disclosure is requested; and
 - (ii) to know which materials, in the Prosecution's view, constitute analogous evidence. To that extent, note is taken of the aforementioned paragraph, although the Chamber considers that the Prosecution should have provided the information contained in this paragraph in its Request.
7. As the Chamber does not consider that it would be assisted by the requested leave to reply, the request in the alternative is rejected.

Request

¹⁴ See, for example, *The Prosecutor v. Uhuru Muigai Kenyatta*, Order vacating trial date of 5 February 2014, convening a status conference, and addressing other procedural matters ICC-01/09-02/11-886, para.8.

8. The Chamber recalls that, pursuant to Article 54(3)(e) of the Statute, the Prosecution agrees not to disclose documents, or information, that it obtained on the condition of confidentiality and solely for the purpose of generating new evidence. The aforementioned provision shall not be relied on routinely. Rather, it should only be resorted to in exceptional circumstances.¹⁵
9. The Appeals Chamber has set out the procedure to follow with regard to material covered by Article 54(3)(e) of the Statute. In accordance with this procedure, 'the Chamber will have to determine, in *ex parte* proceedings open only to the Prosecutor, whether the material would have had to be disclosed to the defence, had it not been obtained under article 54(3)(e) of the Statute. If the Chamber concludes that this is the case, the Prosecutor should seek the consent of the information provider, advising the provider of the ruling of the Chamber.'¹⁶ Only after this first step ('Step 1'), '[i]f the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the nondisclosure of the information'.¹⁷
10. The Chamber notes that the Prosecution merely states that the Information Provider has refused to consent to the disclosure of the Five Documents.¹⁸ It is not clearly stated when the Prosecution sought the consent of the Information Provider, or when consent was refused, but the Chamber understands this to

¹⁵ See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401 ('*Lubanga Decision*'), para. 72.

¹⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486 ('*Appeals Chamber Judgment*'), para. 48.

¹⁷ *Appeals Chamber Judgment*, ICC-01/04-01/06-1486, para. 48.

¹⁸ Request, ICC-01/04-02/06-509-Conf-Red, para. 1.

be some time in between the update on Article 54(3)(e) documents, provided during the 17 February 2015 status conference, and the filing of the Request.¹⁹

11. Furthermore, the Prosecution does not indicate whether the Five Documents have previously been submitted to a chamber in order for the Step 1 analysis to be conducted.²⁰ The Chamber notes, however, that the Prosecution does not dispute that the Five Documents contain material which is relevant to the preparation of the Defence. Having reviewed the Five Documents, the Chamber has concluded that they would have had to be disclosed to the Defence, had they not been obtained under Article 54(3)(e) of the Statute. That said, the Chamber notes that the Five Documents are either based on original sources that have been disclosed to the Defence in their original form, or are sufficiently similar to other material disclosed to the Defence due to a common authorship or identical underlying sources. Indeed, in the Chamber's assessment, all essential elements contained in the Five Documents can be found in the analogous materials indicated by the Prosecution. The Chamber therefore considers that no undue prejudice to the accused would arise from non-disclosure of the Five Documents.

12. However, the Chamber still considers it necessary, in accordance with the Appeals Chamber's jurisprudence and the practice of other chambers, to assess whether any measures short of complete nondisclosure are available.²¹

¹⁹ See Request, ICC-01/04-02/06-509-Conf-Red, paras 4-5.

²⁰ The Prosecution's indication that two of the documents were the subject of a ruling by the Pre-Trial Chamber is noted (Request, ICC-01/04-02/06-509-Conf-Red, footnote 9), but no information in that regard is provided in respect of the three other documents.

²¹ Appeals Chamber Judgment, ICC-01/04-01/06-1486, para. 48; and see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Second decision on documents obtained pursuant to article 54(3)(e) and already disclosed to the Defence in redacted form, 21 December 2009, ICC-01/04-01/07-1661-Red2-tENG ('*Katanga and Ngudjolo Decision*'), para. 11, in which Trial Chamber II considered that it had to 'request the Prosecutor to approach the source with a view to agreeing other solutions that might allow the redactions to be reconsidered or modified'; as well as, the discussion of possible less restrictive measures in paras 12-17 of same. See further *The Prosecutor v. Abdallah Banda Nourain and Saleh Mohammed Jerbo Jamus*, Second Decision on Article 54(3)(e) documents, 26 October 2012, ICC-02/05-03/09-407-Red, para. 9, referring to Appeals Chamber Decision, ICC-01/04-01/06-1486, paras 28 and 44, and stating that as 'appropriate counter-balancing measures may include identifying new similar exculpatory material, providing the material in summarised form, stipulating the relevant facts or amending or withdrawing the charges'.

In this regard, the Chamber notes that the Prosecution has not informed the Chamber of the reasons why the Information Provider has refused to consent to the Five Documents being disclosed. The Chamber therefore instructs the Prosecution to again seek the consent of the Information Provider, advising it of the present ruling of the Chamber, and to provide an update to the Chamber about the outcome of the consultation with the Information Provider by 30 June 2015. The Prosecution is further instructed to also consult, by the same date, with the Information Provider whether it is possible to disclose certain information in or related to the Five Documents to the Defence. Such information could include, but is not limited to: (i) a redacted version of some or all of the Five Documents; (ii) a summary of the information contained in the Five Documents; (iii) a description of the type of documents that make up the Five Documents; and/or (iv) the identity of the Information Provider.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

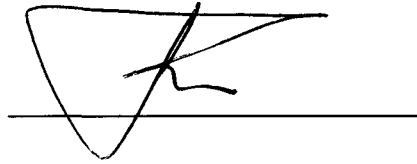
RESERVES its decision on the Request;

ORDERS the Prosecution to consult with the Information Provider, as described in paragraph 12, and to report to the Chamber by 30 June 2015;

REJECTS the Prosecution's request for leave to reply contained in the Prosecution's Further Submissions; and

REJECTS the Defence's request to make further submissions.

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

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

A cursive signature with several loops and a long horizontal tail.

Judge Chang-ho Chung

Dated this 11 June 2015

At The Hague, The Netherlands