

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **13 April 2017**

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 related to the Defence 'Further Provisional List of
Witnesses and Summaries'**

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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64 and 67 of the Rome Statute ('Statute') and Rules 78 and 79 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution request related to the Defence "Further Provisional List of Witnesses and Summaries"'

I. Procedural history

1. On 16 December 2016, in accordance with the Chamber's directions of 19 October 2016,¹ the defence team for Mr Ntaganda ('Defence') filed its 'Preliminary list of Defence Witnesses', on an *ex parte*, Chamber only, basis.²
2. On 30 January 2017, the Chamber issued a decision ('Decision of 30 January 2017') providing certain further directions relating to the presentation of evidence by the Defence.³
3. On 31 March 2017, in accordance with the Decision of 30 January 2017, the Defence filed its 'Further Provisional List of Defence Witnesses and Summaries' ('Further Provisional List'), including one version as *ex parte*, Chamber only, and one version as confidential, available to the Chamber, Office of the Prosecutor ('Prosecution') and Legal Representatives of Victims ('LRVs').⁴

¹ See Order setting certain deadlines related to the presentation of evidence by the Prosecution, 19 October 2016, ICC-01/04-02/06-1588, para. 11. A corrigendum was filed on 12 December 2016 (ICC-01/04-02/06-1588-Corr).

² ICC-01/04-02/06-1690-Conf-Exp.

³ Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence, ICC-01/04-02/06-1757.

⁴ ICC-01/04-02/06-1843-Conf-Exp, *ex parte*, Chamber only. A confidential redacted version was filed on the same day (ICC-01/04-02/06-1843-Conf-Red). Three annexes were also filed, including *ex parte* Chamber-only Annex A, and confidential Annexes A and B.

4. On 10 April 2017, the Prosecution filed the 'Prosecution's Urgent request for orders related to the Defence's Confidential redacted "Further Provisional List of Defence Witnesses and Summaries"' ("Request").⁵
5. On the same day, the Chamber invited the Defence to make oral submissions on the Request at the conclusion of the hearing of 12 April 2017.⁶
6. Accordingly, on 12 April 2017, oral submissions on the Request were made before the Chamber.⁷

II. Submissions and analysis

7. In the Request, the Prosecution seeks that the Chamber: (i) order the Defence to immediately provide 'sufficiently detailed and comprehensive' summaries of the anticipated testimony of the witnesses listed in its Further Provisional List, to enable the Prosecution to prepare meaningfully for the Defence's presentation of evidence ('First Issue');⁸ (ii) order the Defence to provide the identity of four witnesses whose identifying information is redacted in the Further Provisional List, including the basis for any other types of redactions applied to their information, the time estimate for their examinations and summaries of their anticipated evidence with redactions, if justified ('Second Issue');⁹ (iii) decline to hear the evidence of Defence Witnesses D-0178 and D-0179 on the basis that their anticipated testimony appears to breach evidentiary rules prohibiting the admission of evidence on collateral matters ('Third Issue');¹⁰ and (iv) order the Defence to disclose all materials in its possession

⁵ ICC-01/04-02/06-1855-Conf. A courtesy copy was transmitted to the Chamber, parties and participants on 7 April 2017 at 17:46.

⁶ Email communication from Legal Officer of the Chamber to the parties and participants on 10 April 2017 at 10:06.

⁷ See Transcript of hearing on 12 April 2017, ICC-01/04-02/06-T-203-ENG RT.

⁸ Request, ICC-01/04-02/06-1855-Conf, paras 7-8 and 19-36.

⁹ Request, ICC-01/04-02/06-1855-Conf, paras 7-8 and 37-43.

¹⁰ Request, ICC-01/04-02/06-1855-Conf, paras 7-8 and 44-51.

falling under its disclosure obligations to date, and to remind it of its disclosure obligations arising from the Decision of 30 January 2017 ('Fourth Issue').¹¹

8. In its oral response on 12 April 2017 ('Response'), the Defence submitted that the Request is premature, noting that, according to the Decision of 30 January 2017, it is not until 26 April 2017 that the Defence is required to provide a final version of its list of witnesses and to have effected disclosure of all materials it intends to rely on during the presentation of its evidence. In particular, the Defence argued that: (i) in terms of the summaries of anticipated testimony of its witnesses provided to date, the Defence has complied with what it has been ordered to provide, averring that it is not required that summaries of anticipated testimony must have a comparable level of detail to witness statements; (ii) in following the Decision of 30 January 2017, the Defence took the view that it was permitted to submit a confidential redacted version of the Further Provisional List, and that the *ex parte* version of its filing recounts the specific reasons as to why the identities of four of its witnesses are redacted; (iii) the Defence intends to call Witnesses D-0178 and D-0179 solely to establish what it has put to previous witnesses in cross-examination, and indicated that it will seek to make applications under Rule 68(2)(b) of the Rules in relation to these witnesses; and (iv) the Defence is 'working very hard' to obtain documents to include on its list of evidence by 26 April 2017, as noted in the Decision of 30 January 2017, and that it has transmitted all disclosable material in its possession to date.¹²
9. The Chamber will proceed to analyse and adjudicate the Request issue by issue.

¹¹ Request, ICC-01/04-02/06-1855-Conf, paras 52-54.

¹² See, generally, ICC-01/04-02/06-T-203-ENG RT.

First Issue

10. The Chamber recalls its direction in the Decision of 30 January 2017 that a further provisional list of Defence witnesses must be submitted by 31 March 2017, including, *inter alia*, statements or summaries of each witness's anticipated testimony prepared 'in a sufficiently detailed and comprehensive manner to enable the parties, participants and Chamber to prepare meaningfully'.¹³ Having reviewed the Further Provisional List, the Chamber notes that the majority of the summaries are currently very broad, insofar as they list certain topics without any further description of the facts upon which the witness is anticipated to testify, do not include comprehensive references to dates and locations, and do not address linkages between the anticipated testimony and the case. For example, the summary for Witness D-0055 contains no reference to the timeframe of the events the witness is expected to testify in relation to, to the location of certain of the alleged incidents listed therein, or any account of the relevance of her anticipated testimony to the *Ntaganda* case.¹⁴
11. Notwithstanding, the Chamber notes that the Decision of 30 January 2017 required such list to be merely provisional, with the final witness list to be filed only on 26 April 2017 ('Final List'). Accordingly, noting: (i) that there appears to have been *inter partes* discussion on the issue of whether certain summaries in the Further Provisional List are considered to be 'final' or as-yet 'provisional'; (ii) the brevity of the Chamber's guidance in the Decision of 30 January 2017 on the constituent requirements for the summaries, which may warrant the provision of further directions; and (iii) the Defence undertaking to include further information in the summaries where possible, as it becomes available, the Chamber finds it appropriate to provide further directions to the Defence ahead of the filing of the Final List.

¹³ Decision of 30 January 2017, ICC-01/04-02/06-1757, para. 10.

¹⁴ See Further Provisional List, ICC-01/04-02/06-1843-Conf-AnxC, page 10.

12. Having regard to the approach adopted by other chambers of the Court in relation to this issue, the Chamber hereby directs that the summaries of anticipated testimony of Defence witnesses in the Final List should contain the key elements that each witness will address during his or her testimony, including, at a minimum: (i) a description, as exhaustive as possible, of the facts upon which the witness will testify, including any relevant information on their personal history and background, which is available to the Defence;¹⁵ and (ii) the relevance of the anticipated testimony of the witness to the case¹⁶ ('Directions').
13. While noting the timing of the relief sought in this limb of the Request, any amendments to the current summaries in the Further Provisional List that are required to be made by the Defence to ensure compliance with the Directions are to be made no later than **26 April 2017**, the deadline for the Final List. The Final List must contain all summaries, and must comply with the Directions. As previously noted in the Decision of 30 January 2017, the Final List must also include time estimates for the examination of each witness.

Second Issue

14. The Chamber notes that it previously ordered that, upon filing its further provisional list of witnesses, the Defence was required to 'simultaneously file a confidential redacted version' of the same.¹⁷ Accordingly, the Chamber considers that the fact that identifying information of certain of the Defence witnesses is redacted in the Further Provisional List does not breach the Decision of 30 January 2017, given that this witness list was of a provisional

¹⁵ See in this regard, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the 'Prosecution's Application Concerning Disclosure Pursuant to Rules 78 and 79(4)', 14 September 2010, ICC-01/04-01/07-2388, para. 60.

¹⁶ See in this regard, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on defence disclosure and related issues, 24 February 2012, ICC-01/05-01/08-2141, para. 29, sub-issue (vi).

¹⁷ Decision of 30 January 2017, ICC-01/04-02/06-1757, para. 10.

nature only, that the filing of a confidential redacted version was anticipated, and that the Chamber is apprised of the reasons for the redactions. However, to facilitate the preparation of the Prosecution and LRVs for the Defence case, the Chamber encourages the Defence to reveal the identities of these witnesses as soon as practicable, as well as to prepare and disclose the related summaries of anticipated testimony in accordance with the Directions. Subject to the Chamber granting any motivated request seeking delayed disclosure of any witnesses' identities, which shall be made by **21 April 2017**,¹⁸ or any request for non-standard redactions in accordance with the Redactions Protocol,¹⁹ transmission of this material must occur **in full** prior to or no later than the filing of the Final List on **26 April 2017**.

Third Issue

15. The Chamber notes that, pursuant to the Third Issue, the Prosecution requests the Chamber to decline to hear the evidence of Witnesses D-0178 and D-0179, 'as well as any other witness whom the Defence may intend to call for the same purpose',²⁰ on the basis that allowing these witnesses to testify would 'allow the trial to be extended impermissibly on collateral matters' and for the record 'to be cluttered with irrelevant evidence'.²¹ Noting the Defence's submissions on this issue as outlined in its Response, and the fact that the Defence is not yet required to furnish its Final List, the Chamber considers this limb of the Request to be speculative and premature.

¹⁸ While the Decision of 30 January 2017 does not address this matter, as the issue was raised by the Defence in its Response, the Chamber considers that any requests for delayed disclosure of witness identities should be made no later than 21 April 2017. *See in this regard* paragraph 9(b) of the Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, 9 October 2014, ICC-01/04-02/06-382-Corr.

¹⁹ *See in this regard* Decision of 30 January 2017, ICC-01/04-02/06-1757, para. 15 and footnote 13, referring to Annex to the Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411-AnxA.

²⁰ Request, ICC-01/04-02/06-1855-Conf, para. 51.

²¹ Request, ICC-01/04-02/06-1855-Conf, para. 50.

Fourth Issue

16. The Chamber notes that, as its Fourth Issue, the Prosecution seeks further orders from the Chamber, namely: (i) to direct the Defence to immediately disclose any items that fall under its disclosure obligations to date; and (ii) to remind the Defence of its disclosure obligations flowing from the Decision of 30 January 2017. While the Chamber observes that limited Defence material has apparently been disclosed to date, it notes the Defence indication that ‘at this point in time, [it] do[es] not have any more information’, but shall acquire further material by 26 April 2017, and will disclose this material accordingly.²² Therefore, the Chamber does not find it necessary to make any further orders in relation to this issue, and considers the directions in the Decision of 30 January 2017 to be sufficient for this purpose.

²² See ICC-01/04-02/06-T-203-ENG RT.

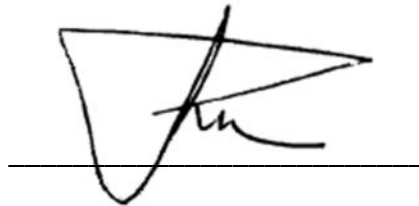
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

ORDERS compliance with the directions and deadlines outlined above; and

ORDERS the Prosecution to file a public redacted version of its Request (ICC-01/04-02/06-1855-Conf) within two weeks of the present decision being issued.

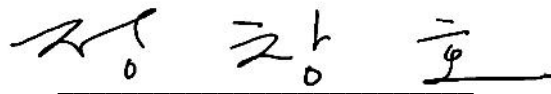
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by 'Fremr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of Korean characters '정창호' followed by a horizontal line.

Judge Chang-ho Chung

Dated this 13 April 2017

At The Hague, The Netherlands