

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 30 July 2019

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's request for access to the identity of Defence witness D-0308 and
associated submissions and materials**

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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Introduction

1. The Prosecution requests access to the identity of Defence witness D-0308 as well as unredacted versions of all submissions and materials related to his or her proposed evidence.
2. The Chamber ordered the Parties to provide details of any documentary evidence intended to be submitted and to disclose the identity of any witness sought to be called, giving the opposing party and participants a chance to respond. The Defence has not complied with this order and has not advanced any reason for not doing so. To the extent that any justification for withholding D-0308's identity is redacted, the Defence should have ensured that such justification be provided in sufficient detail to allow the opposing party to meaningfully respond.
3. In any event, based on the information provided, there is no valid reason for hiding the identity of Witness D-0308, since there is no suggestion that D-0308 may be at risk. That the Defence is not ready to provide D-0308's identity to the Prosecution is not a valid reason for it not to comply with the Chamber's order. Accordingly, the Chamber should order the Defence to immediately disclose D-0308's identity and all related materials, or disallow D-0308's inclusion on the Defence's list of witnesses.

Confidentiality

4. This filing is classified as "Confidential" pursuant to regulation 23bis(1) and(2) of the Regulations of the Court since it refers to information not yet available to the public and responds to filings bearing the same classification.

Procedural Background

5. On 8 July 2019, Trial Chamber VI (the “Chamber”) convicted Bosco Ntaganda of 18 counts of war crimes and crimes against humanity.¹
6. On the same day, the Chamber issued an order on the sentencing procedure (Sentencing Order).² The Parties and Legal Representatives of Victims (“LRVs”) were directed to file any requests to submit further evidence or to call witnesses by 29 July 2019. The requests are to provide the details of any documentary evidence intended to be submitted, the identities of any witnesses sought to be called, an estimated length of examination, a summary of anticipated testimony and any requests for protective measures, video-link testimony and/or admission of prior recorded testimony.
7. On 29 July 2019, the Prosecution and Defence filed their respective requests to submit further evidence and call witnesses.³ While the Prosecution’s request includes the identities of all five witnesses whose evidence it seeks to present, the Defence withheld the identity of one witness, namely D-0308, by redacting his or her identity, witness summary⁴ and significant portions of its submissions,⁵ as well as by withholding from the Prosecution a document related to the witness’s evidence.⁶

Prosecution Submissions

8. The Prosecution requests to be provided with D-0308’s identity, a summary of his or her anticipated evidence, and all associated materials, to be able to respond

¹ ICC-01/04-02/06-2359.

² ICC-01/04-02/06-2360.

³ ICC-01/04-02/06-2368-Conf and ICC-01/04-02/06-2369-Conf-Red.

⁴ ICC-01/04-02/06-2369-Conf-AnxA, p. 10.

⁵ ICC-01/04-02/06-2369-Conf-Red, paras. 5, 26-30, and 36.

⁶ ICC-01/04-02/06-2369-Conf-AnxC.

meaningfully to the Defence's request to present this witness's evidence by 5 August 2019.

9. The Chamber ordered the Defence to disclose the identity of all the witnesses it intends to present for the purposes of the determination of Bosco Ntaganda's sentence. Indeed, in its Sentencing Order, the Chamber held that the Parties' "[s]entencing requests *shall* provide the details of any documentary evidence intended to be submitted as well as the identities of any witnesses sought to be called" (emphasis added).⁷ The Chamber should instruct the Defence to comply with its order, as there is no justification for withholding D-0308's identity at this stage.
10. *First*, the Defence appears not to have provided any justification for not complying with the Sentencing Order, as it describes, in general terms, aspects of the witness's proposed evidence "about Mr. Ntaganda's acts and conduct while in detention", merely indicating that it is "highly relevant to his character, individual circumstances, and potential for rehabilitation".⁸ As previously confirmed by the Chamber,⁹ it is for the party withholding information to ensure that the justification for a redaction is provided to the opposing Party so it is placed in a position to respond. The Defence failed to do so in its request.
11. To the extent that the Defence's reference to its filing and annexes "contain[ing] privileged information"¹⁰ is to be understood as a justification for withholding the identity of D-0308, the Prosecution submits that this is both insufficient and

⁷ ICC-01/04-02/06-2360, para. 2(iii).

⁸ ICC-01/04-02/06-2369-Conf-Red, para. 4.

⁹ ICC-01/04-02/06-2230, para. 8: "the Chamber further adopted a 'flexible approach' for the use of *ex parte* procedures, considering that the other party should be notified, and its legal basis should be explained, unless to do so is inappropriate, considering that complete secrecy would, for instance, be justified if 'providing information about the procedure would risk revealing the very thing that requires protection'. See also ICC-01/04-01/06-1058, para. 12: "[...] even when an *ex parte* procedure is used, the other party should be notified of the procedure, and its legal basis should be explained, unless to do so is inappropriate [...]. If the applicant has not notified the other party of the fact of the application or its legal basis, then the reason for not doing so should also be set out for the Chamber's consideration".

¹⁰ ICC-01/04-02/06-2369-Conf-Red, para. 36.

incorrect. Absent further detail as to the nature of the alleged privilege, the Prosecution is unable to assess whether the Defence's claim has any merit. However, even without such information, it seems unreasonable for the Defence to claim that any information related to D-0308 is covered by privilege, as the alleged privilege presumably concerns Bosco Ntaganda himself, in which case he effectively waived such privilege when choosing to submit the information as proposed evidence.

12. *Second*, based on the information available to the Prosecution, there is no reason to hide the identity of this witness, as the Defence does not appear to suggest that its redactions are grounded in a need to ensure the witness's security. In fact, a witness who is allegedly able to provide "specific information about Mr. Ntaganda's acts and conduct while in detention"¹¹ at the ICC Detention Centre, in The Hague, is unlikely to be at any risk. If the issue is that the Defence has not yet received final approval or agreement for this witness to provide evidence, or is simply not ready for any other reason, this is not a valid justification for redacting his or her identity. Absent such valid justification, the appropriate procedural avenue for the Defence was to refrain from listing this witness in its submissions and to seek a variation of its time limit for doing so, pursuant to regulation 35 of the Regulations of the Court.

13. The Chamber should, accordingly, order the Defence to disclose D-0308's identity and associated submissions and materials to the Prosecution, or disallow D-0308's inclusion on the Defence's list of witnesses.

¹¹ ICC-01/04-02/06-2369-Conf-Red, para. 4.

Relief Requested

14. Based on the foregoing, the Prosecution requests access to (1) the identity of D-0308, (2) an unredacted version of the Defence's submissions and D-0308's witness summary, and (3) Annex C to the Defence's submissions, which contains a document related to D-0308's evidence.
15. The Prosecution reserves its right to respond to the Defence seven days after it has been provided with the identity of D-0308 as well as all related submissions and materials, consistent with the Sentencing Order.



Fatou Bensouda
Prosecutor

Dated this 30th day of July 2019
At The Hague, The Netherlands