

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 July 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 Redacted version of

Decision on Prosecution requests to vary the time limit for disclosure

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') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2), (6)(f) and 67(1)(b) of the Rome Statute ('Statute'), Rules 76 and 77 of the Rules of Procedure and Evidence ('Rules'), and Regulation 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution requests to vary the time limit for disclosure'.

I. Background and submissions

1. On 9 October 2014, the Chamber, *inter alia*, set 16 February 2015 as the deadline for filing by the Office of the Prosecutor ('Prosecution') of any request for delayed disclosure, and 2 March 2015 as the deadline for completion of Prosecution disclosure and for filing of, *inter alia*, a list of evidence to be relied on at trial ('List of Evidence').¹
2. On 2 March 2015, the Prosecution indicated to the Chamber that it intended to file a request pursuant to Regulation 35(2) of the Regulations for a variation of the 2 March 2015 deadline in relation to, *inter alia*, a second interview to be conducted with [REDACTED] ('Prosecution Indication').²
3. During the 22 April 2015 status conference, the Chamber issued an oral decision establishing the procedure to follow for amending the List of Evidence ('Decision on List of Evidence').³
4. On 18 May 2015, the Prosecution filed a request for variation of time limit to rely upon [REDACTED] ('First Witness')'s recent interview ('Prosecution Request').⁴ The Prosecution indicates that the First Witness is on the

¹ Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382, para. 9(b), (c) and (d). A corrigendum was filed on 28 November 2014 (ICC-01/04-02/06-382-Corr).

² Prosecution's request pursuant to regulation 35, 2 March 2015, ICC-01/04-02/06-489-Conf-Exp, paras 3 and 11-16.

³ Transcript of Hearing on 22 April 2015, ICC-01/04-02/06-T-19-ENG, page 11, line 7 – page 12, line 7.

⁴ Prosecution's request pursuant to regulation 35 to vary the time limit for disclosure of [REDACTED] recent interview, ICC-01/04-02/06-598-Conf. A public redacted version was filed on 19 May 2015 (ICC-01/04-02/06-598-Red).

Prosecution's list of witnesses who will testify at trial. It had met with the witness the previous month for limited additional questioning relating to three UPC/FPLC recruitment lists obtained near the beginning of this year. The First Witness's name appears on one of these lists.⁵ The Prosecution submits that disclosure of the further interview at this stage will not cause undue prejudice to the defence team for Mr Ntaganda ('Defence') and further indicates that it was ready to disclose the audio-recording immediately and that the transcript was expected to be completed by 22 May 2015 and the translation by 15 June 2015.⁶ It indicated that, should the Prosecution Request be granted, it would file an updated List of Evidence to reflect the addition of the relevant material.⁷

5. Upon instruction of the Chamber,⁸ on 28 May 2015, the Defence responded to the Prosecution Request, arguing that it should be rejected ('Defence Response').⁹ The Defence argues that the Prosecution Request fails to fulfil the requirements of Regulation 35(2) of the Regulations as good cause has not been shown. It submits that as the Prosecution was aware that it would not be able to meet the 2 March 2015 deadline, it was incumbent on it to file a request for delayed disclosure before the 16 February 2015 deadline set by the Chamber.¹⁰ The Defence further submits that the Prosecution Request fails to meet the applicable criteria for the late addition of incriminatory evidence, relying on a decision from Trial Chamber II. It additionally argued, *inter alia*, that in the absence of the transcript of the audio-recording of the further interview, it was unable to respond to the Prosecution Request.¹¹

⁵ Prosecution Request, ICC-01/04-02/06-598-Conf, paras 11-12.

⁶ Prosecution Request, ICC-01/04-02/06-598-Conf, paras 2-3, 13-14.

⁷ Prosecution Request, ICC-01/04-02/06-598-Conf, para. 15.

⁸ Email from a Legal Officer of the Chamber to the Defence on 21 May 2015 at 17.01.

⁹ Corrected version of 'Response on behalf of Mr Ntaganda to Prosecution Request to vary the time limit for disclosure of [REDACTED] recent interview', 28 May 2015, ICC-01/04-02/06-612-Conf-Corr. A public redacted version was filed on the same day (ICC-01/04-02/06-612-Corr-Red).

¹⁰ Defence Response, ICC-01/04-02/06-612-Conf, paras 2 and 12-17.

¹¹ Defence Response, ICC-01/04-02/06-612-Conf, paras 18-22.

6. With leave of the Chamber,¹² on 5 June 2015, the Prosecution filed a reply to the Defence Response ('Prosecution Reply'),¹³ in which it submits: (i) that it could not have requested an extension of time prior to the 2 March 2015 disclosure deadline since the audio-recording of the interview with the First Witness only came into existence after that date and the request would have therefore been considered premature;¹⁴ and (ii) that 'delayed disclosure' would not have been a proper basis for its Request, as it relates to the non-disclosure of the identity of witnesses, and the First Witness's identity was known to the Defence since 2013.¹⁵
7. The audio-recording and transcription of the witness interview were disclosed to the Defence on 2 June 2015.¹⁶
8. On 5 June 2015, the Prosecution filed a second request to rely upon an interview conducted with another witness ('Second Witness') in May 2015 ('Second Prosecution Request').¹⁷
9. Upon instruction of the Chamber,¹⁸ on 12 June 2015, the Defence filed further observations on the Prosecution Request ('Defence Further Observations').¹⁹
The Defence maintains that the Prosecution failed to meet the requirements of

¹² Decision on Prosecution Request for leave to reply in relation to its request to vary the time limit for disclosure of [REDACTED] recent interview, 3 June 2015, ICC-01/04-02/06-623-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-623-Red). *See also* Prosecution request to file a reply to the 'Corrected version of "Response on behalf of Mr Ntaganda to Prosecution Request to vary the time limit for disclosure of [REDACTED] recent interview"', ICC-01/04-02/06-614-Conf. A public redacted version was filed on 2 June 2015 (ICC-01/04-02/06-614-Red).

¹³ Prosecution's reply to the "Corrected version of 'Response on behalf of Mr Ntaganda to Prosecution Request to vary the time limit for disclosure of [REDACTED] recent interview'", ICC-01/04-02/06-627-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-627-Red).

¹⁴ Prosecution Reply, ICC-01/04-02/06-627-Conf, paras 2-3, making reference to Decision on Prosecution request for an extension of time for disclosure of victim Applications, 9 February 2015, ICC-01/04-02/06-452.

¹⁵ Prosecution Reply, ICC-01/04-02/06-627-Conf, paras 4 to 6.

¹⁶ Prosecution's communication of the disclosure of evidence, 3 June 2015, ICC-01/04-02/06-620, with confidential annex.

¹⁷ Prosecution's request pursuant to regulation 35 to vary the time limit for disclosure of [REDACTED] supplementary interview, ICC-01/04-02/06-629-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-629-Red) and notified on 8 June 2015.

¹⁸ Email from a Legal Officer of the Chamber to the Defence on 7 June 2015 at 11.31.

¹⁹ Further observations on behalf of Mr Ntaganda on Prosecution Request to vary the time limit for disclosure of [REDACTED] recent interview, 12 June 2015, ICC-01/04-02/06-642-Conf.

Regulation 35 of the Regulations. The Defence submits that the Prosecution 'disregarded' the deadline set by the Chamber for 'delayed disclosure', and notes in this regard that the First Witness is now part of the first group of witnesses the Prosecution intends to call at trial.²⁰ The Defence further claims that the Prosecution did not satisfactorily establish that 'this new material is either significantly more compelling than other items of evidence already disclosed to the Defence or brings to light a previously unknown fact which has a significant bearing upon the case', a criterion set out by Trial Chamber II in the *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.²¹ The Defence acknowledges that the Prosecution may add the audio-recording and transcription of the First Witness's recent interview to the List of Evidence. However, it states that should the Prosecution attempt to use this material or to have it admitted into evidence at whatever stage, the Defence will object.²²

10. On 29 June 2015, the Defence filed its response to the Second Prosecution Request ('Second Defence Response'),²³ in which it opposed the Prosecution's request for variation of the deadline to rely upon the audio-recording of the interview with the Second Witness. Noting that the Second Prosecution Request was filed after the 16 February 2015 deadline for delayed disclosure, the Defence submits that: (i) the requirements of Regulation 35(2) of the Regulations have not been met; and (ii) although the Prosecution may add the material to the List of Evidence, in accordance with the Decision on List of Evidence, the Defence objects to any request to rely on the evidence at trial as the material does not meet 'the applicable criteria for late addition of new incriminatory material'.²⁴

²⁰ Defence Further Observations, ICC-01/04-02/06-642-Conf, paras 7-8.

²¹ Defence Further Observations, ICC-01/04-02/06-642-Conf, paras 5-6.

²² Defence Further Observations, ICC-01/04-02/06-642-Conf, para. 9.

²³ Response on behalf of Mr Ntaganda to Prosecution Request to vary the time limit for disclosure of [REDACTED] supplementary interview, ICC-01/04-02/06-682-Conf.

²⁴ Second Defence Response, ICC-01/04-02/06-682-Conf, paras 16-34.

II. Analysis

11. The Chamber understands the Prosecution to have submitted these filings because of its practice of specifically disclosing material as incriminatory, once a decision is made to rely upon it. The Chamber therefore understands the Prosecution's requests to 'vary the time limit for disclosure' of the material to be equivalent to seeking to rely upon the material at trial, which in turn, in the Chamber's view, is equivalent to adding the material to the List of Evidence. Each of these mechanisms serves the same purpose of notifying the Defence of the Prosecution's intention to rely on the material at trial. Noting the Decision on List of Evidence, the Chamber considers that the Prosecution was not required to seek prior authorisation in this regard. Additionally, the Chamber finds it appropriate, notwithstanding the Defence's submission of intent to oppose future use of the material, to treat the Defence Response and Second Defence Response, seeking that the Prosecution's requests be rejected, as 'request[s] to reject the amendment[s] to the List of Evidence', within the meaning of the Chamber's clarification of its Decision on List of Evidence.²⁵
12. As an initial point, the Chamber emphasises that while the Statute does not prohibit the Prosecution from conducting post-confirmation investigations, investigations should be largely completed by the Confirmation Hearing.²⁶ The Chamber recalls that the Prosecution was supposed to have finished its further

²⁵ Decision on the Defence request for reconsideration, 27 May 2015 (notified on 28 May 2015), ICC-01/04-02/06-611, para. 14.

²⁶ See Transcript of Hearing on 2 June 2015, ICC-01/04-02/06-T-20-CONF-ENG, page 5, lines 16-19. See also *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568 (OA 3), para. 54; *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 44.

'limited investigations' in January 2015.²⁷ Furthermore, the Chamber's ruling that no prior authorisation of the Chamber is required to add materials to the List of Evidence does not entail an unconditional right to do so. In this regard, the Chamber recalls that 'any amendments ought to be kept to a minimum'.²⁸

13. The Chamber recalls that it had directed the Prosecution by 2 March 2015 to, *inter alia*, (i) complete its disclosure of material to the Defence; and (ii) file its List of Evidence. The purpose of these deadlines was to provide the Defence with sufficient time to prepare for trial and sufficient notice of the material that the Prosecution seeks to rely on at trial. In the Decision on List of Evidence, the Chamber indicated that, in adjudicating upon items added to the List of Evidence after the deadline, which may be challenged on the basis that the Defence received unduly late notice of them or had inadequate time to prepare, it would consider any relevant factor, such as the timing and reasons for the late notice.²⁹ The Chamber further concurs with Trial Chamber V(b) that, where the requirements of Regulation 35 of the Regulations are not met, any ruling on additions to the List of Evidence after the Chamber's deadline will entail 'a case-by-case assessment which balances the justifications for adding new evidence against the potential prejudice which may be caused to the other party'.³⁰ Additional factors that may be considered include whether the new evidence brings to light a previously unknown fact that has a significant bearing on the case; whether the other party will have adequate time to investigate the new evidence, bearing in mind the need to conduct the trial

²⁷ See, e.g., Prosecution's Additional Observations in Preparation for the Status Conference, 8 September 2014, ICC-01/04-02/06-365-Red, para. 48.

²⁸ ICC-01/04-02/06-T-19-ENG, page 11, lines 19-20.

²⁹ ICC-01/04-02/06-T-19-ENG, page 11, lines 22-25; repeated in Decision on the Defence request for reconsideration, 27 May 2015 (notified on 28 May 2015), ICC-01/04-02/06-611, para. 14.

³⁰ See *Prosecutor v Uhuru Muigai Kenyatta*, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, ICC-01/09-02/11-832 ('Kenyatta Decision'), para. 11.

fairly and expeditiously; and whether it would be in the interests of justice to grant the request.³¹

14. With regard to the addition of the items related to the First Witness to the list of material upon which the Prosecution will rely at trial, in assessing the Prosecution Request in relation to the factors outlined above, the Chamber notes the limited extent of the material and the fact that it was disclosed on 2 June 2015. Considering that the presentation of evidence is not now due to commence until 15 September 2015³² and that the First Witness is scheduled to testify not earlier than January 2016,³³ the Chamber considers that the timing of the disclosure of the further interview with the First Witness as incriminatory, with the subsequent amendment of the List of Evidence, will not unduly impact on the ability of the Defence to prepare for trial. The Chamber therefore authorises, in principle, the Prosecution to rely on the interview for incriminatory purposes, while noting that this decision has no bearing on whether or not the Chamber ultimately permits the admission of the material, should it be tendered for admission in due course.
15. As to the Second Prosecution Request, which concerns the addition of items related to the Second Witness, the Chamber notes that, on 2 March 2015, the Prosecution indicated to the Chamber that it intended to conduct a further interview with the Second Witness ('Further Interview') after the 2 March 2015 disclosure deadline.³⁴ The Chamber notes that the audio recording of the

³¹ See *Kenyatta* Decision, ICC-01/09-02/11-832, para. 11. See also *Prosecutor v William Samoei Ruto & Joshua Arap Sang*, Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, 3 September 2013, ICC-01/09-01/11-899-Red (redacted version notified on 5 September 2013); Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, ICC-01/09-01/11-762. See, in addition, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecution Motion for leave to disclose and add the investigator's report concerning Witness P-268 to the List of Incriminating Evidence, 27 September 2010, ICC-01/04-01/07-2325-Red, para. 15.

³² Transcript of Hearing on 3 July 2015, ICC-01/04-02/06-T-22-CONF-ENG, page 5, lines 13-14.

³³ See Prosecution's further amended list of witnesses to be called during the second evidentiary block, 26 June 2015, ICC-01/04-02/06-675-Conf-AnxA.

³⁴ Prosecution Indication, 2 March 2015, ICC-01/04-02/06-489-Conf-Exp, paras 3 and 11-16.

Further Interview was disclosed on 5 June 2015,³⁵ and the Second Witness's original interview has been disclosed to the Defence since 2013. The Chamber further notes that the Second Witness is not amongst the witnesses to be called during the first two scheduled blocks³⁶ and thus will not testify until, at the earliest, January 2016. Therefore, having assessed the Second Prosecution Request against the factors outlined above, and without prejudice to whether the Chamber will permit the admission of the material should it be tendered for admission, the Chamber considers that the late addition of the materials related to the Further Interview to the List of Evidence will not unduly impact on the Defence's ability to prepare for trial.

16. Relatedly, the Chamber notes that although the reasons for the timing of the Further Interview are contained in the Second Prosecution Request, these were not previously known to the Defence as they were completely redacted in the redacted version of the Prosecution Indication. The Defence notes that it 'is unaware whether such information was indeed transmitted to the Chamber'.³⁷ To provide the Defence with a complete picture of the Prosecution's submissions as to the Further Interview, the Chamber directs the Prosecution to file a lesser redacted version of the Prosecution Indication.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

AUTHORISES the Prosecution to add the materials described in the Prosecution Request to the List of Evidence;

AUTHORISES the Prosecution to add the materials described in the Second Prosecution Request to the List of Evidence;

³⁵ Second Prosecution Request, ICC-01/04-02/06-629-Red, paras 4 and 21.

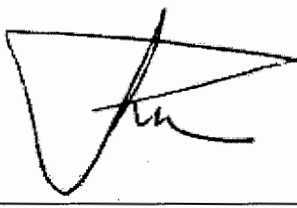
³⁶ See Prosecution's further amended list of witnesses to be called during the second evidentiary block, 26 June 2015, ICC-01/04-02/06-675-Conf-AnxA.

³⁷ Second Defence Response, ICC-01/04-02/06-682-Conf, para. 13.


DIRECTS the Prosecution to file a lesser redacted version of the Prosecution Indication (ICC-01/04-02/06-489-Conf-Exp), by 31 July 2015; and

DIRECTS the Defence to file a public redacted version of the Defence Further Observations (ICC-01/04-02/06-642-Conf), and of the Second Defence Response (ICC-01/04-02/06-682-Conf), by 7 August 2015.

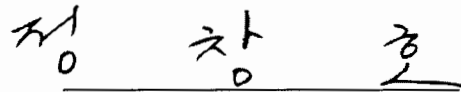
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 22 July 2015

At The Hague, The Netherlands