

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **10 March 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 for additional Defence 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 Christopher Gosnell

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 54(1)(a), 64, 67 and 68 of the Rome Statute ('Statute'), Rules 77-79 of the Rules of Procedure and Evidence ('Rules'), and Regulations 36-37 and 54 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution request for additional Defence disclosure'.

I. Procedural History

1. On 30 January 2017, the Chamber issued directions and a schedule for the lead-up to the presentation of evidence by the defence team for Mr Ntaganda ('Defence').¹ Specifically, the Chamber ordered that by 31 March 2017, the Defence (i) provide a further provisional witness list and statements or summaries of the anticipated testimonies, to be prepared 'in a sufficiently detailed and comprehensive manner to enable the parties, participants and Chamber to prepare meaningfully';² and (ii) disclose all material in its possession which falls under its disclosure obligations.³ The Chamber further ordered that by 26 April 2017, the Defence (i) provide the final list of its witnesses together with statements or summaries;⁴ and (ii) disclose all remaining materials it intends to rely upon during the presentation of its evidence.⁵ In addition, the Chamber 'indicate[d] its intention that the presentation of evidence by the Defence should commence within one month following the final Defence disclosure deadline'.⁶

¹ 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 ('Disclosure Directions').

² Disclosure Directions, ICC-01/04-02/06-1757, para. 10.

³ Disclosure Directions, ICC-01/04-02/06-1757, para. 13.

⁴ Disclosure Directions, ICC-01/04-02/06-1757, para. 11.

⁵ Disclosure Directions, ICC-01/04-02/06-1757, para. 14.

⁶ Disclosure Directions, ICC-0104-02/06-1757, para. 16.

2. On 10 February 2017, the Office of the Prosecutor ('Prosecution') requested that the Defence be ordered to disclose, two months prior to the start of the Defence case:⁷

- (i) the identity of the witnesses it intends to call as well as any material on which the Defence intends to rely in relation to such witnesses;
- (ii) signed statements, with dates of all interviews and persons present, including interpreters;
- (iii) detailed records, including a log of all prior meetings with Defence witnesses by the (current and former) Defence team, dates and persons present and documents/ items discussed during the meeting;
- (iv) a list of all persons who facilitated the witness's contacts with the Defence team;
- (v) any records in the possession of the Defence of prior meetings between the witnesses and specific individuals known to have been involved in the coaching scheme;
- (vi) any purported contemporaneous documents the Defence intends to rely upon, together with the necessary information on its provenance/source and chain of custody;
- (vii) official identity documents for Defence witnesses.

3. On 21 February 2017, the Chamber partially granted a Defence request for extension of time.⁸ While noting the Defence's submissions regarding the time required to analyse the summaries appended to, or referred to in, the Request, it indicated that 'any response should focus on the relief sought by the Prosecution, rather than on a detailed analysis of the individual summaries provided in support of the Request', and ordered that any response be filed by 1 March 2017.⁹

4. On 23 February 2017, the Chamber rejected a Prosecution request for admission of transcripts and translations of calls made from the Detention Centre between the accused and 'prospective Defence witnesses' from 22 March 2013 to date, on the basis that the Prosecution failed to demonstrate

⁷ Prosecution's request for additional Defence disclosure, ICC-01/04-02/06-1783 and public Annex A and confidential Annexes 1-10. A corrected and a public redacted version were filed on 15 February 2017, ICC-01/04-02/06-1783-Corr+Conf-Corr-Anx and ICC-01/04-02/06-1783-Red ('Request'), paras 4 and 37.

⁸ Email from the Defence to the Chamber, Prosecution and participants on 20 February 2017 at 12:49, seeking an extension until 6 March 2017 to respond to the Request.

⁹ Email from the Chamber to the parties and participants on 21 February 2017 at 15:11.

good cause and reasons outside its control to justify the late submission, and considering that the proffered material's probative value, due to its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused.¹⁰

5. On 1 March 2017, the Defence opposed the Request ('Response').¹¹
6. Also on 1 March 2017, the Prosecution filed an addendum to its Request, clarifying that footnote 14 of the Request should refer to eleven rather than twelve potential Defence witnesses, given that the designations initially considered to relate to two different individuals actually refer to only one person ('Addendum').¹²
7. The Defence was granted until 6 March 2017 to file any response to the Addendum,¹³ but did not make any further observations.

II. Submissions and analysis

Prosecution's submissions

8. The Prosecution argues that a variation of the disclosure deadlines imposed on the Defence as well as additional disclosure obligations are necessary to safeguard the integrity of the proceedings and the Chamber's ability to establish the truth, and to allow the Prosecution 'to investigate fully Defence evidence.'¹⁴ In this regard, the Prosecution notes that, on the basis of a first set of communications of the accused that were recorded at the Court's detention

¹⁰ Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence, ICC-01/04-02/06-1799.

¹¹ Response on behalf of Mr Ntaganda to Prosecution's request for additional Defence disclosure, ICC-01/04-02/06-1811-Conf and confidential Annex A.

¹² Addendum to the "Prosecution's request for additional Defence disclosure", 10 February 2017, ICC-01/04-02/06-1783-Conf", ICC-01/04-02/06-1809-Conf and confidential Annexes A and B.

¹³ In view of the limited scope of the Addendum, the Chamber shortened the time limit for the submission of responses and ordered that any responses be submitted by 6 March 2017: Email from the Chamber to the parties and participants on 2 March 2017 at 11:35.

¹⁴ Request, ICC-01/04-02/06-1783-Red, paras 2 and 8.

centre ('Detention Centre') and submitted to the Chamber, 'the Chamber found reasonable grounds to believe that the Accused intended to engage in a serious form of witness interference and coached potential witnesses'.¹⁵

9. In addition, the Prosecution claims that having reviewed 'nearly 600 of the Accused's calls', it found 'further alarming evidence of the extent to which the Accused is attempting to tamper with evidence'.¹⁶ Specifically, on the basis of a total of 57 summaries of communications appended to its Request, the Prosecution submits that the communications reveal that the accused: (i) engaged in a 'direct and indirect coaching scheme' in order to 'brief and prepare potential witnesses before their interviews by the Defence', in coaching witnesses himself and using his and Mr Lubanga's non-privileged telephone lines and having recourse to a network of individuals;¹⁷ and (ii) attempted to conceal this scheme by using coded language or Kihema language, listing associates on his list of contacts under a false identity, speaking to unauthorised callers, using unmonitored non-privileged visits at the Detention Centre, and 'relying on his associates on the ground'.¹⁸
10. The Prosecution further avers that although active monitoring was imposed in March 2015, there are 'a number of factors that point to the substantial likelihood that the scheme is ongoing, that coached witnesses may be called or that "prepared" documents may be tendered'.¹⁹ Finally, the Prosecution submits that, on the basis of information recently obtained and 'curious omissions' in the chain of custody of certain items, there is a 'real risk that false documents were created to defend the accused'.²⁰

¹⁵ Request, ICC-01/04-02/06-1783-Red, para. 8, referring to ICC-01/04-02/06-1494-Red3, para. 22.

¹⁶ Request, ICC-01/04-02/06-1783-Red, para. 8.

¹⁷ Request, ICC-01/04-02/06-1783-Red, paras 9-23.

¹⁸ Request, ICC-01/04-02/06-1783-Red, para. 12.

¹⁹ Request, ICC-01/04-02/06-1783-Red, para. 24.

²⁰ Request, ICC-01/04-02/06-1783-Red, paras 26-27.

Defence's response

11. Firstly, the Defence argues that the Request should be rejected on the sole basis that it constitutes a request for reconsideration of the Disclosure Directions, but fails to demonstrate a clear error of reasoning, or that reconsideration would be necessary to prevent an injustice.²¹
12. Further, the Defence notes that the additional disclosure obligations sought are 'a marked departure from the statutory and regulatory framework of the Court as consistently interpreted by this Chamber and by other Trial Chambers' and, as, such, can only be imposed 'in the presence of the most compelling reasons determined pursuant to the balance of probabilities standard' which is higher than the standard of 'reasonable grounds to believe' that was used by the Chamber when imposing restrictions on Mr Ntaganda's non-privileged communications.²²
13. Finally, the Defence argues that 'contrary to the Prosecution's claims, the additional disclosure obligations sought are neither necessary to safeguard the integrity of the trial or the Chamber's ability to establish the truth nor justified in the circumstances.'²³ In this regard, the Defence stresses in particular that: (i) the additional disclosure obligations are not founded on any contemporaneous allegations and do not take into account the 'significant developments' with regard to the organisation of the Defence team;²⁴ (ii) although the Prosecution has been in the possession 'of abundant information about the Defence case', it failed to demonstrate why 'fully investigating Defence evidence' would assist in safeguarding the integrity of the

²¹ Response, ICC-01/04-02/06-1811-Conf, paras 3, 14-17.

²² Response, ICC-01/04-02/06-1811-Conf, paras 4, 18-29.

²³ Response, ICC-01/04-02/06-1811-Conf, para. 5.

²⁴ Response, ICC-01/04-02/06-1811-Conf, paras 33-36.

proceedings;²⁵ and (iii) the summaries provided in support of the Request are ‘inherently unreliable and cannot form the basis of any decision by the Chamber’.²⁶ Finally, the Defence stresses that, under the schedule envisaged in the Disclosure Directions, the additional disclosure obligations would place an ‘unnecessary and impracticable burden’ on the Defence, which would be ‘entirely disproportionate’ and ‘far outweigh [...] any benefit that may or may not result therefrom’.²⁷

Analysis

14. The Chamber notes that the Prosecution seeks a variation of the time limits, nature and scope of the disclosure obligations imposed by the Chamber in its Disclosure Directions. Indeed, under the schedule currently in place,²⁸ granting the Prosecution’s request for final disclosure to be completed two months prior to the commencement of the Defence case would require the Defence to provide its final witness list and disclose all material it intends to rely upon by the end of March 2017.
15. In addition, the Prosecution’s request for ‘signed statements, with dates of all interviews and persons present, including interpreters’ or ‘detailed comprehensive record[s] of anticipated evidence from each meeting’²⁹ goes beyond the scope of the information requested by the Chamber. Further, although the Chamber did not address the following materials in its Disclosure Directions, it is clear they do not form part of the disclosure ordered by the Chamber: (i) ‘detailed records, including a log of all prior meetings with Defence witnesses by the (current and former) Defence team, dates and persons present and documents/items discussed during the

²⁵ Response, ICC-01/04-02/06-1811-Conf, paras 37-38.

²⁶ Response, ICC-01/04-02/06-1811-Conf, paras 39-48.

²⁷ Response, ICC-01/04-02/06-1811-Conf, paras 49-52.

²⁸ Disclosure Directions, ICC-01/04-02/06-1757, paras 11 and 16.

²⁹ Disclosure Directions, ICC-01/04-02/06-1757, paras 4 and 5.

meeting’; (ii) ‘a list of all persons who facilitated the witness’s contacts with the Defence team’; (iii) ‘any records in the possession of the Defence of prior meetings between the witnesses and specific individuals known to have been involved in the coaching scheme’, and (vi) ‘official identity documents for Defence witnesses’, as requested by the Prosecution’.³⁰

16. Accordingly, the Chamber understands the Request to be a request for reconsideration of the Disclosure Directions.

(i) *Whether the standard for reconsideration of the Disclosure Directions is met*

17. The Chamber incorporates by reference the applicable law set out in the ‘Decision on the Defence request for reconsideration and clarification’,³¹ and on that basis, and noting further that the Prosecution did not make any submissions in this respect, finds that the relevant standard has not been met.

18. First, the Disclosure Directions, including the relevant deadlines,³² were issued taking into account the Defence’s disclosure obligations pursuant to the statutory framework, including its interpretation by other chambers of the Court. In particular, the Chamber noted that ‘the disclosure obligations of the Prosecution and Defence differ significantly under the statutory framework’.³³ As previously emphasised by Trial Chamber II, the difference in disclosure obligations applicable to the parties reflects the particular roles the parties have at trial, and the fact that the Prosecution bears the burden of proof and has to investigate both incriminating and exonerating circumstances pursuant to Article 54(l)(a) of the Statute, while the role of the Defence is ‘largely

³⁰ Request, ICC-01/04-02/06-1783-Red para. 4.

³¹ 27 February 2015, ICC-01/04-02/06-483, para. 13.

³² Request, ICC-01/04-02/06-1783-Conf-Corr, para. 5.

³³ Disclosure Directions, ICC-01/04-02/06-1757, para. 6.

reactive to the Prosecution's presentation of evidence'.³⁴ In this regard, the Chamber finds that the Prosecution's observation that it had to disclose its final witness list and materials three months before the initial trial date³⁵ is irrelevant.

19. The Chamber further notes that the Prosecution failed to demonstrate the existence of any new facts or arguments that would warrant reconsideration of the Disclosure Directions. The Chamber issued the Disclosure Directions in cognizance of the Prosecution's allegations regarding witness coaching and its intention to submit additional evidence in this regard, and had already found reasonable grounds to believe that the accused had engaged in a scheme of witness interference.

20. With regard to the summaries of communications recorded at the Detention Centre and relied upon by the Prosecution in the Request, the Chamber notes that they mainly aim to support allegations that were previously made, and, as such, cannot be seen as 'new facts or arguments' arising since the Disclosure Directions were rendered. Moreover, the summaries have been prepared by the Prosecution itself and their accuracy and reliability is contested by the Defence. In these circumstances, and noting that the identity and nature of the witnesses the Defence intends to call is still to be determined, the Chamber considers that it would not be appropriate to consider this material in deciding on the Request.

21. In view of the foregoing, the Chamber does not find any error of reasoning on the part of the Chamber in the Disclosure Directions, nor does it consider that reconsideration would be necessary to prevent an injustice. Having found that

³⁴ See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, ICC-01/04-01/07-2388, para. 36.

³⁵ Request, ICC-01/04-02/06-1783-Red, para. 5.

the standard for reconsideration has not been met, the Chamber considers it appropriate to briefly address the Prosecution's claim that additional disclosure obligations are necessary to safeguard the integrity of the proceedings and the Chamber's ability to establish the truth.

(ii) *Whether additional disclosure obligations are necessary to safeguard the integrity of the proceedings and the Chamber's ability to establish the truth*

22. The Prosecution argues that the additional disclosure obligations are warranted to enable the Prosecution to investigate Defence evidence properly. However, the Prosecution fails to provide – and the Chamber does not, at this stage, find – any sufficiently substantiated factual or legal justification for this claim.

23. First, the Chamber notes that the bulk of the arguments and material submitted in the Request aims to support the Prosecution's allegations of witness coaching, rather than to demonstrate why additional disclosure obligations are necessary for the Prosecution's investigations. In this regard, the Chamber recalls that, for the reasons set out in paragraph 20 above, it will not consider the supporting material in its determination of the Request.

24. Second, noting that the Prosecution has not yet received any information in relation to the identities of prospective Defence witnesses and whether any of these witnesses are affected by the Prosecution's allegations, the Chamber finds that the Request is overly broad and speculative.

25. Third, the Chamber recalls that by 31 March 2017, the Prosecution will have a provisional list of witnesses, including statements or comprehensive summaries. While the identities of witnesses may still be redacted at that stage, the Chamber is of the view that this list should enable the Prosecution

to prepare meaningfully and to consider whether its allegations appear to be of relevance with respect to any of these witnesses.

26. Moreover, the Chamber is of the view that, noting the resources available to the Prosecution and the fact that the witnesses will be scheduled to appear in blocks with breaks in between, the current schedule leaves the Prosecution with sufficient time to carry out meaningful investigations in relation to Defence witnesses, including any witnesses suspected to be affected by coaching allegations. For the same reasons, the Chamber finds that the request for additional information and documentation is overly broad and speculative.
27. Finally, the Chamber considers that compliance with the schedule and additional obligations sought by the Prosecution would place an additional burden on the Defence which outweighs any potential benefits of the requested measures.
28. Regarding the Prosecution's request to be provided with 'the necessary information on the provenance/source and chain of custody' of documentary evidence, the Chamber notes that this is already regulated in the 'Unified Technical protocol [...] for the provision of evidence, witness and victims information in the e-court protocol' ('Protocol'),³⁶ by which all parties and participants are bound in this case. Absent any concrete submission as to a current failure to comply with the terms of the Protocol, the Chamber considers that no order to this effect is required at this stage.

³⁶ Unified Technical protocol ("E-court Protocol") for the provision of evidence, witness and victims information in electronic form, ICC-01/04-02/06-47-Anx1.

Defence request to strike Annex 1 from the record

29. Lastly, the Chamber notes the Defence's request that the 28-page confidential Annex 1 to the Request ('Annex 1') be struck from the record and not considered by the Chamber in adjudicating the Request. In support of this request, the Defence argues that Annex 1 exceeds the page limit set out in Regulation 37 while containing argumentative material, which according to Regulation 36(2)(b) should be counted towards the page limit in Regulation 37(1), and that the Prosecution failed to request an extension of page limit pursuant to Rule 37(2).³⁷

30. The Chamber recalls that it already indicated that it would not rely on the annexes of the Request for the purpose of the present decision. It therefore does not consider that striking Annex 1 from the record would serve any purpose.

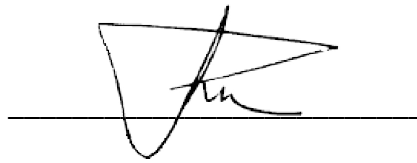
³⁷ Response, ICC-01/04-02/06-1811-Conf, para. 12 and page 20.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

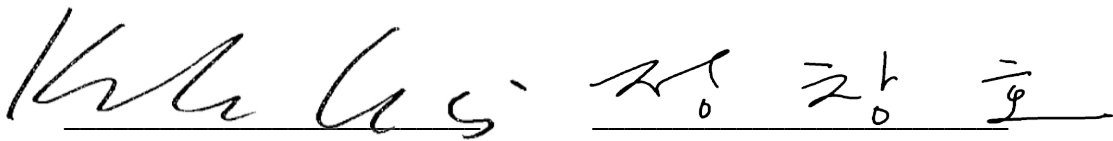
REJECTS the Request; and

ORDERS that the parties file public redacted versions of the Addendum and the Response within two weeks of issuance of this decision.

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

Two handwritten signatures in black ink, one on the left and one on the right, each written over a horizontal line. The left signature is 'Kuniko Ozaki' and the right signature is 'Chang-ho Chung'.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 10 March 2017

At The Hague, The Netherlands