

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **10 November 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 disclosure concerning Witness D-0017

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 64 and 67 of the Rome Statute ('Statute'), Rules 78 and 79 of the Rules of Procedure and Evidence ('Rules'), and Regulation 24(5) of the Regulations of the Court, issues the following 'Decision on Prosecution request for disclosure concerning Witness D-0017'.

I. Procedural history

1. On 1 November 2017, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution urgent request for disclosure concerning Defence Witness D-0017' ('Request'),¹ requesting that the Chamber 'order disclosure of official identification for Witness D-0017, including a clear identity photograph' ('Requested Documentation').²
2. On 6 November 2017, in line with the time limit set by the Chamber,³ the defence team for Mr Ntaganda ('Defence') responded to the Request ('Response'),⁴ opposing it.
3. On 7 November 2017, the Prosecution sought leave to reply to the Response in relation to five issues ('Request for Leave to Reply').⁵
4. On 8 November 2017, the Defence opposed the Request for Leave to Reply ('Response to Request for Leave to Reply').⁶

¹ ICC-01/04-02/06-2092-Conf.

² Request, ICC-01/04-02/06-2092-Conf, para. 5.

³ Email communication from the Chamber to the parties and the participants on 1 November 2017, at 14:51.

⁴ Response to "Prosecution urgent request for disclosure concerning Defence Witness D-0017", ICC-01/04-02/06-2092-Conf, ICC-01/04-02/06-2097-Conf and confidential Annexes A-K.

⁵ Prosecution request for leave to reply to the "Response to 'Prosecution urgent request for disclosure concerning Defence Witness D-0017'", ICC-01/04-02/06-2097-Conf, ICC-01/04-02/06-2102-Conf.

⁶ Response on behalf of Mr Ntaganda to the "Prosecution request for leave to reply to the 'Response to 'Prosecution urgent request for disclosure concerning Defence Witness D-0017''" (ICC-01/04-02/06-2102-Conf), ICC-01/04-02/06-2104-Conf, notified on 9 November 2017.

II. Submissions and analysis

(i) *Preliminary issue: Request for Leave to Reply*

5. The Chamber finds that it would not benefit from receiving additional submissions on any of the five issues identified by the Prosecution in the Request for Leave to Reply, and rejects it on this basis. Consequently, the Chamber does not find it necessary to address the submissions made by the Defence in its Response to Request for Leave to Reply.

(ii) *Prosecution submissions*

6. In the Prosecution's submission, the Requested Documentation is necessary for it to identify Witness D-0017 'well in advance of his testimony to confirm whether or not he is the person as claimed [...] as well as to investigate effectively all other aspects of his account and background for the purposes of cross-examination', as required by its 'separate statutory obligations to conduct investigations to establish the truth pursuant to article 54 of the Rome Statute'.⁷
7. For that purpose, the Prosecution argues that: (i) without an identity document including a photograph, it is unable to 'definitively ascertain' the witness's identity;⁸ (ii) further to independent Prosecution efforts to obtain identity records for the witness from the authorities of the Democratic Republic of the Congo, the latter confirmed that no individual with the witness's biographical information appears in the relevant registers, and the Prosecution has also been unable to locate the witness in other relevant records, including those in its own possession;⁹ (iv) as was the case on previous occasions, the provision of incomplete or inaccurate witness-related information is a 'major impediment' to the Prosecution's ability to properly identify and investigate upcoming

⁷ Request, ICC-01/04-02/06-2092-Conf, para. 21.

⁸ Request, ICC-01/04-02/06-2092-Conf, para. 22.

⁹ Request, ICC-01/04-02/06-2092-Conf, para. 23.

witnesses;¹⁰ (v) given the lateness of the Defence's disclosure of Witness D-0017's nickname under which he is known in this case, and the inability to identify the witness in the relevant records, there is 'reason to believe that the information provided for [Witness] D-0017 may be incomplete or inaccurate';¹¹ and (vi) noting that the Defence has provided electoral cards for other witnesses, and in view of the Prosecution's indications to the Defence as to the need to cross-check and verify the information provided so far, there is 'no justification for the Defence's refusal to provide this information'.¹²

(iii) *Defence submissions*

8. The Defence submits that the Request 'has no merit' and 'should, accordingly, be denied in its entirety'.¹³ According to the Defence, its statutory obligations do not impose upon it the obligation to disclose the Requested Documentation, noting that: (i) Rule 78 of the Rules limits this obligation to documents 'intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial', and, in line with this obligation, the Defence has only disclosed identification cards of witnesses when it intended to use them as evidence;¹⁴ (ii) while the Defence has an obligation to identify its witnesses, the information provided by the Defence in relation to Witness D-0017 goes beyond the requirements identified by other chambers of the Court and was considered by this Chamber as 'sufficient to enable the Prosecution to prepare meaningfully for its cross-examination' of, among others, Witness D-0017;¹⁵ (iii) although Rule 79(4) of the Rules permits a chamber to impose additional disclosure obligations on the Defence, doing so after the Defence has

¹⁰ Request, ICC-01/04-02/06-2092-Conf, para. 24.

¹¹ Request, ICC-01/04-02/06-2092-Conf, para. 25.

¹² Request, ICC-01/04-02/06-2092-Conf, para. 27.

¹³ Response, ICC-01/04-02/06-2097-Conf, paras 33-34.

¹⁴ Response, ICC-01/04-02/06-2097-Conf, paras 18-19.

¹⁵ Response, ICC-01/04-02/06-2097-Conf, paras 20-22, referring to an email communication from the Chamber to the parties and the participants on 9 May 2017, at 08:40, contained in Annex E to the Response.

conducted its investigations would be ‘especially inappropriate’, and ‘mean conscripting the work of the Defence, potentially, for the purpose of incriminating the accused person’;¹⁶ and (v) the Prosecution’s justification for imposing this additional obligation, based on its Article 54 obligation to conduct investigations to establish the truth is ‘vague and unsound’.¹⁷

9. The Defence further posits that the information concerning Witness D-0017’s identity provided by the Defence ‘accurately reflects’ the information on the witness’s electoral card and that the Prosecution’s suspicion to the contrary is ‘speculative and unfounded’, arguing that the failure of the relevant authorities to produce a record corresponding to Witness D-0017’s biographical information ‘is just as likely a reflection of the notorious inaccuracy’ of their records.¹⁸ The Defence also submits that the Prosecution’s argument that the Defence has provided inaccurate biographical information for other witnesses is ‘equally unmeritorious’, noting that, like the Prosecution, it has not hesitated to correct or supplement the biographical information of its witnesses whenever necessary.¹⁹ The Defence avers further that the Prosecution has suffered no prejudice from the late disclosure of Witness D-0017’s nickname,²⁰ and that the Prosecution’s reference to its failure to identify the witness in its own records is ‘misplaced’, does not suggest inaccuracy in the biographical information provided, and may arise from the Prosecution’s own errors.²¹ Finally, the Defence argues that the Prosecution’s assertion that an identity document is a pre-condition for effective investigations is contradicted by its own practice.²²

¹⁶ Response, ICC-01/04-02/06-2097-Conf, para. 23.

¹⁷ Response, ICC-01/04-02/06-2097-Conf, para. 24.

¹⁸ Response, ICC-01/04-02/06-2097-Conf, para. 26.

¹⁹ Response, ICC-01/04-02/06-2097-Conf, para. 27.

²⁰ Response, ICC-01/04-02/06-2097-Conf, para. 28.

²¹ Response, ICC-01/04-02/06-2097-Conf, paras 29-30.

²² Response, ICC-01/04-02/06-2097-Conf, para. 32.

(iv) Analysis

10. At the outset, the Chamber notes that, in line with its previous direction,²³ the Request was preceded by *inter partes* consultations and was filed after failure to reach an agreement on that basis.²⁴ The Chamber also observes that the relevant *inter partes* consultations were conducted over a period of more than five months, during which part of the requested information was provided ‘on a courtesy basis’,²⁵ while no agreement on the Requested Documentation could be reached.²⁶ In this regard, the Chamber re-emphasises its direction that the relevant consultations ‘be conducted in good faith with a view to reaching an agreement’²⁷ and regrets the parties’ failure in this respect.
11. Turning to the merits of the Request, and in light of the applicable law relating to disclosure by the Defence as previously set out by it,²⁸ the Chamber agrees with the Defence’s submission regarding the absence of any formal obligation under the statutory framework to provide identity documents and/or photographs for its witnesses.
12. The Chamber also recalls its previous finding that the information provided for, among others, Witness D-0017, was ‘sufficient to enable the Prosecution to prepare meaningfully for its cross-examination’.²⁹
13. Moreover, the Chamber is unpersuaded by the Prosecution’s claim that the Requested Documentation is necessary to comply with its obligations under

²³ Email communication from the Chamber to the parties and the participants on 4 May 2017, at 19:08.

²⁴ See Request, ICC-01/04-02/06-2092-Conf, paras 12-19 and Response, ICC-01/04-02/06-2097-Conf, paras 8-16 and Annexes F-K.

²⁵ See, e.g., Response, ICC-01/04-02/06-2097-Conf, Annex G.

²⁶ See, e.g., Response, ICC-01/04-02/06-2097-Conf, Annex H and Annex I.

²⁷ Email communication from the Chamber to the parties and the participants on 4 May 2017, at 19:08.

²⁸ 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, 30 January 2017, ICC-01/04-02/06-1757, para. 6. See also Decision on Prosecution request for additional Defence disclosure, 10 March 2017, ICC-01/04-02/06-1818.

²⁹ Email communication from the Chamber to the parties and the participants on 9 May 2017, at 08:40.

Article 54 of the Statute, and considers that any doubts as to the accuracy of the witness's biographical information may be adequately explored during cross-examination.

14. Absent any persuasive indication that the information provided by the Defence is inaccurate, the Chamber further considers that inspection of the witness's electoral card by the Chamber on an *ex parte* basis, as proposed by the Defence,³⁰ is not required in the circumstances.
15. In view of the foregoing, the Chamber rejects the Request. That notwithstanding, to ensure an efficient conduct of proceedings, and to minimise the potential loss of court time to address matters pertaining to the identity of Witness D-0017, the Chamber encourages the Defence to disclose the Requested Documentation in advance of the witness's testimony.

³⁰ See Response, ICC-01/04-02/06-2097-Conf, paras 31 and 34.

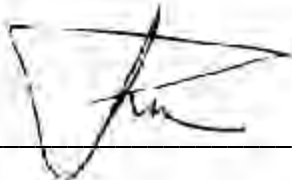
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply;

DECLARES the Response to Request for Leave to Reply moot; and

REJECTS the Request.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 10 November 2017

At The Hague, The Netherlands