

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 13 October 2016

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

Public redacted version of 'Decision on Defence request seeking the Chamber to order the Prosecution to conduct an investigation into the testimony of Witness [REDACTED] under Article 70'

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 the Defence

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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2) and (6)(f) and 70 of the Rome Statute ('Statute') and Rule 165 of the Rules of Procedure and Evidence ('Rules'), issues this 'Decision on Defence request seeking the Chamber to order the Prosecution to conduct an investigation into the testimony of Witness [REDACTED] under Article 70'.

I. Background and Submissions

1. On 31 August 2016, the defence team for Mr Ntaganda ('Defence') filed a request,¹ seeking that the Chamber order the Office of the Prosecutor ('Prosecution') to 'initiate and conduct an investigation into Witness [REDACTED] [(Witness's)]'s testimony for the purpose of determining whether proceedings under Article 70(1)(a) should be instigated' ('Request').² In support of its Request, the Defence posits that the Witness lied in testifying that [REDACTED] Mr Ntaganda kill [REDACTED]³ [REDACTED] ('Incident'),⁴ which, according to the Defence, is contradicted by documentary evidence, specifically two reports ('Reports'),⁵ demonstrating that the Incident did not unfold in the way described by the Witness.⁶ The Defence submits that when confronting the Witness with the Reports, he 'implicitly acknowledged' their content, as well as the fact that the Incident did not happen as he described it and that he was neither involved nor present when it happened, 'while continuing to deny that he did not tell the truth'.⁷ Noting that the Witness's

¹ Request on behalf of Mr Ntaganda seeking Trial Chamber VI to request the Prosecutor to conduct an investigation into Witness [REDACTED]'s testimony for the offence of giving false testimony under Article 70, ICC-01/04-02/06-1483-Conf. A public redacted version was filed on 1 September 2016 (ICC-01/04-02/06-1483-Red). A corrected public redacted version was filed on 2 September 2016 (ICC-01/04-02/06-1483-Red-Corr).

² Request, ICC-01/04-02/06-1483-Conf, para. 23.

³ [REDACTED].

⁴ The Defence refers to transcript of hearing on [REDACTED].

⁵ The Defence refers to [REDACTED] and [REDACTED].

⁶ Request, ICC-01/04-02/06-1483-Conf, paras 12-16.

⁷ Request, ICC-01/04-02/06-1483-Conf, paras 18-19.

testimony on the Incident ‘does not concern a minor detail, but a false accusation of murder’, the Defence asserts that his conduct goes ‘far beyond a mere question of credibility’ and constitutes a situation where the Witness ‘intentionally tried to mislead’ the Chamber.⁸ According to the Defence, ‘such behaviour from a witness must be investigated, and if there are sufficient grounds to believe that the witness lied under oath, prosecuted in order to avoid creating an impression of impunity when a witness openly lies when testifying’.⁹

2. On 22 September 2016, the Prosecution filed its response (‘Response’),¹⁰ urging the Chamber to reject the Request.¹¹ The Prosecution submits that the Request is ‘premature’, in so far as it puts forward ‘conclusory arguments’ which are to be assessed by the Chamber in light of the trial record as a whole upon completion of the trial proceedings.¹² The Prosecution further asserts that the Request is unsubstantiated and speculative, noting that the Defence: (i) fails to establish the truth of the Reports;¹³ (ii) does not consider other possibilities that may explain the inconsistency between the Reports and the Witness’s testimony;¹⁴ and (iii) omits to mention other ‘material evidence’ which would ‘rebut the unsupported assertions’ that the Witness should be investigated for an Article 70 offence, notably a statement of a non-trial witness which gives a very similar account of the Incident to that of the Witness.¹⁵ Finally, the Prosecution clarifies that the purpose of eliciting evidence on the Incident was not to prove beyond

⁸ Request, ICC-01/04-02/06-1483-Conf, para. 20. The Defence refers to *The Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui*, transcript of hearing on 22 September 2012, ICC-01/04-01/07-T-190-Red-ENG, page 5.

⁹ Request, ICC-01/04-02/06-1483-Conf, para. 21.

¹⁰ Prosecution’s response to the Defence request for Trial Chamber VI to ask the Prosecution to conduct an investigation under Article 70, ICC-01/04-02/06-1530-Conf.

¹¹ Response, ICC-01/04-02/06-1530-Conf, para. 17.

¹² Response, ICC-01/04-02/06-1530-Conf, paras 6-9.

¹³ Response, ICC-01/04-02/06-1530-Conf, para. 10.

¹⁴ Response, ICC-01/04-02/06-1530-Conf, para. 11.

¹⁵ Response, ICC-01/04-02/06-1530-Conf, paras 12-14.

reasonable doubt that the accused committed the murder, which is not a charged incident, but to establish the discriminatory intent of the accused.¹⁶

II. Analysis

3. Article 70(1)(a) of the Statute provides the Court with jurisdiction over the offence against the administration of justice ‘when committed intentionally’ of ‘[g]iving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth’. Pursuant to Rule 165 of the Rules, the power to initiate and conduct an investigation into such offence rests with the Prosecutor who can act ‘on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source’. The statutory scheme does not explicitly mandate a chamber to make any sort of binding ‘request’ on the Prosecution to initiate an Article 70 investigation.
4. Other trial chambers of this Court have noted that there may be situations where the allocation of investigatory authority to the Prosecution may give rise to conflicts of interests, notably when there are allegations of false testimony attributable to a Prosecution witness. It has further been considered that in such cases, it may be appropriate for the relevant chamber, pursuant to Articles 64(2) and 64(6)(f) of the Statute, to remind the Prosecution of its authority under Rule 165 of the Rules and to communicate to it the information that the chamber may have.¹⁷ However, it has also been stressed that for there to be a situation warranting such communication, there must be a strong indication that a witness intentionally lied to the Court, whereas allegations of mere

¹⁶ Response, ICC-01/04-02/06-1530-Conf, para. 15.

¹⁷ See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of hearing on 22 September 2010, ICC-01/04-01/07-T-190-Red-ENG, pages 3-4; Decision on the Prosecution’s renunciation of the testimony of witness P-159, 24 February 2011, ICC-01/04-01/07-2731, para. 18; *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of hearing on 14 April 2011, ICC-01/04-01/06-T-350-Red2-ENG, page 17; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of “Decision on the ‘Defence application concerning Witness CAR-OTP-WWWW-0042’s evidence’” of 10 October 2013, 16 October 2016, ICC-01/05-01/08-2830-Red (‘Bemba Decision’), para. 14.

inconsistencies in a witness's testimony have been considered to pertain to the credibility of a witness and the probative value of his or her testimony.¹⁸

5. The Chamber notes that the present Request is based on alleged discrepancies between the Witness's testimony and the two Reports. In the view of the Chamber, these allegations pertain to the credibility of the Witness and the probative value of his testimony, which are to be considered in the context of the Chamber's assessment of the entirety of the evidence in the record of this case. At this stage, the Chamber does not consider there to be a strong indication that the Witness intentionally tried to mislead or lie to the Chamber, supporting an inference of false testimony under Article 70(1)(a) of the Statute. In these circumstances, and noting that the information underlying the Request has already been communicated to the Prosecution, the Chamber considers that the relief sought must be rejected.

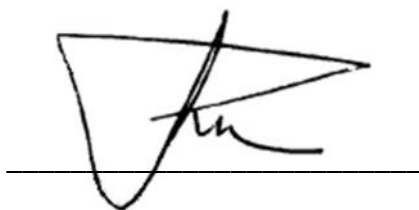
¹⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-190-Red-ENG, page 5; *Bemba* Decision, ICC-01/05-01/08-2830-Red, paras 15-19. For a similar approach, see also ICTR, *The Prosecutor v. Rutaganda*, Trial Chamber I, Decision on the Defence Motion to Direct the Prosecutor to investigate the matter of false testimony by Witness "CC", 10 March 1998, page 4; ICTR, *The Prosecutor v. Akayesu*, Trial Chamber I, Decision on the Defence Motions to Direct the Prosecutor to investigate the matter of false testimony by Witness "R", 9 March 1998, page 4; ICTR, *The Prosecutor v. Simba*, Appeals Chamber Judgement, 27 November 2007, ICTR-01-76-A, para. 32.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

DIRECTS the Prosecution to file a public redacted version of its Response (ICC-01/04-02/06-1530-Conf) within two weeks from the date of this decision.

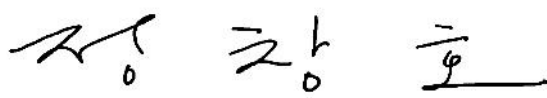
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 13 October 2016

At The Hague, The Netherlands