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No.: ICC-01/04-02/06  
Date: **19 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 “Prosecution’s response to the Defence request for Trial Chamber VI to ask the Prosecution to conduct an investigation under Article 70”,  
22 September 2016, ICC-01/04-02/06-1530-Conf**

**Source:** The 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 opposes the Defence motion seeking Trial Chamber VI (“Chamber”) to request the Prosecution to initiate an article 70 investigation into the testimony of [REDACTED].<sup>1</sup> The Defence motion should be dismissed as the motion impermissibly uses a filing as a vehicle for what is actually closing argument for the end of the trial and is therefore premature.
2. Alternatively, should the Chamber consider the substance of the Defence motion, the request should be rejected. The Defence motion is insufficiently substantiated, speculative, and omits material evidence, detailed below, from the Chamber’s consideration of the matter.

## Confidentiality

3. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, this response is classified as “*Confidential*” as it is in response to a Defence filing of the same classification. The Prosecution will file a public redacted version of this filing.

## Procedural Background

4. On [REDACTED], under direct examination, [REDACTED] testified that he was present in 2004 when the Accused killed [REDACTED] because the Accused believed [REDACTED] was complicit with the Lendu against the UPC or the FPLC.<sup>2</sup>

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<sup>1</sup> ICC-01/04-02/06-1483-Conf, (“Defence motion”).

<sup>2</sup> [REDACTED].

5. On 8 June 2016, under cross-examination, [REDACTED] testified that he was present in February 2004 outside [REDACTED] when the Accused shot and killed [REDACTED].<sup>3</sup>

### **Prosecution's Submissions**

*The Defence motion is closing argument for the end of the proceedings*

6. The Defence impermissibly uses its motion as a vehicle for what is, in effect, closing argument and is therefore premature. The Defence has simply put forward conclusory arguments and not objectively identifiable grounds to believe that [REDACTED] testified falsely. In the introductory section of the motion, the Defence quickly concludes that “the witness lied”<sup>4</sup> and, prior to any potential investigation, calls for “the imposition of a meaningful sanction”.<sup>5</sup> To a reasonable observer, the Defence’s conclusory submissions are not objective and purely argumentative, aimed at obtaining a sanction against [REDACTED] on the basis of pure speculation.<sup>6</sup>
7. Without prejudice to the form of acceptable closing argument, the proper phase for such argument is at the end of the trial, where each party will have a full opportunity to fairly summarise its views of the evidence of the case. It will then be for the Chamber to assess, in light of the trial record as a whole, whether the conclusions offered by the Defence in its motion contain merit or not. The Defence motion is therefore premature at this stage in the trial.
8. Whatever inconsistencies or contradictions are reflected in the testimony will be considered by the Trial Chamber upon completion of trial proceedings. It is at that stage that the Chamber can properly determine what probative value should

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<sup>3</sup> [REDACTED].

<sup>4</sup> Defence motion, para. 2.

<sup>5</sup> Defence motion, para. 3.

<sup>6</sup> [REDACTED].

be accorded to the witness's evidence. Chambers of other international criminal courts have adopted this position: for example, requests similar to the instant one were presented in the ICTR *Akayesu* and *Rutaganda* cases by the respective defence teams.<sup>7</sup> In both cases, the Trial Chambers found that the Defence had confused instances of possible contradictions – which only raised doubts as to the witness's credibility – with intentionally testifying falsely: “the arguments submitted by the Defence [...] are pertinent only to raising doubts as to the credibility of the statements made by the witness rather than to showing that there [...] may have been false testimony”.<sup>8</sup> The Chamber further clarified that “raising doubts about the reliability of statements made by a witness is not in itself sufficient to establish that this witness knowingly and willfully gave false testimony...”.<sup>9</sup> The Chambers concluded that “inaccuracies and other contradictions” ought to be entertained at the end of the trial and in light of all the evidence presented.<sup>10</sup> Similarly, the ICTR Appeals Chamber found that “the mere existence of discrepancies between a witness's testimony and his earlier statements does not constitute strong grounds for believing that a witness may have knowingly and willfully given false testimony”.<sup>11</sup>

9. The Defence cites to an oral decision in *Katanga* in support of its motion.<sup>12</sup> However, the jurisprudence cited does not in fact support the Defence position. In *Katanga*, Trial Chamber II *rejected* a similar Defence motion finding that inconsistencies in testimony are not necessarily explained by false testimony.<sup>13</sup> This Chamber should, in similar fashion, reject the Defence motion.

<sup>7</sup> See *Prosecutor v. Akayesu*, ICTR-96-4-T, T.Ch. Decision on the Defence Motions to Direct the Prosecutor to investigate the matter of false testimony by Witness "R", 9 March 1998, p. 3; *Prosecutor v. Rutaganda*, ICTR-96-3-T, T.Ch., Decision on the Defence Motion to Direct the Prosecutor To investigate the matter of false testimony by Witness "CC", 10 March 1998, p. 2.

<sup>8</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, T.Ch. Decision on the Defence Motions to Direct the Prosecutor to investigate the matter of false testimony by Witness "R", 9 March 1998, p. 4.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Prosecutor v. Simba*, ICTR-01-76-A, Judgement, 27 November 2007, para. 32.

<sup>12</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07-T-190-Red-ENG, 22 Sept. 2010, pp. 1-5.

<sup>13</sup> *Cf Ibid.*

*The Defence motion is unsubstantiated, speculative, and omits material evidence*

10. The Defence does not make substantiated allegations and fails to consider consistent, similar information about this incident from an independent witness. The Defence attempts to substantiate its conclusion that [REDACTED] must have lied by offering two documents, both similar in content,<sup>14</sup> that provide an account that differs from [REDACTED] testimony. The documents are a [REDACTED] weekly report and a bi-monthly report from the [REDACTED]. Both documents are dated 20 February 2004. The Defence takes the documents at face value and as the truth against which it contests [REDACTED] sworn testimony. However, nowhere in evidence has the Defence established the truth of the contents of the documents. The documents themselves do not purport to be a full and accurate account of the relevant incident. It is not even apparent that the Defence, before making such a serious allegation, attempted to verify the accuracy of the contents of the documents, which appear to be based on a preliminary report issued days after the incident, rather than a full and final investigation of the incident.

11. The analysis of the Defence begins and ends with the two similar documents it cites. Based on the documents, with nothing more, it speculatively concludes that [REDACTED] must have lied in his testimony. The Defence does not consider the myriad of other possibilities that may explain an inconsistency between a preliminary report of a serious incident and an eye-witness's sworn testimony. One such likelihood may be that a preliminary report issued soon after a serious incident may contain inaccurate or incomplete information. Often in testimony, there are accounts of an event or events that differ or may appear inconsistent. Such differences do not necessarily indicate that a witness has lied.

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<sup>14</sup> DRC-OTP-0009-0146 and DRC-OTP-0155-0147.

12. Additionally, but not inconsequentially, the Defence omitted material evidence from the Chamber's consideration. The material evidence bears directly on the issue of its allegations against [REDACTED]. [REDACTED], a non-trial witness whose statement was disclosed to the Defence on 17 March 2015 contains an account of the murder of the [REDACTED].<sup>15</sup> [REDACTED] states that he was an eye-witness to the murder and identifies the Accused as the direct perpetrator of the murder. [REDACTED] account is strikingly similar to the account provided by [REDACTED]. [REDACTED] mentions only a single [REDACTED] vehicle, a jeep.<sup>16</sup> [REDACTED] mentions the jeep was stopped and the [REDACTED] was outside the vehicle.<sup>17</sup> He states that the Accused shot and killed [REDACTED] with an AK-47.<sup>18</sup> The significance of the statement of [REDACTED] is not only its consistent content but also that it is entirely independent from [REDACTED] statement. There is no indication or suggestion that [REDACTED] and [REDACTED] are, in fact, acquainted with one another or would know what the other may have said to the Prosecution in statements or in testimony.

13. The Prosecution offers the statement of [REDACTED] not as evidence in the case, but rather to rebut the unsupported assertions of the Defence that [REDACTED] should be investigated for an offence under article 70.

14. Furthermore, other relevant evidence to consider is DRC-OTP-0142-0048, which is a written order signed by the Accused which suggests the Accused ordered his subordinates to target [REDACTED]. The written order, dated less than two months prior to the murder of [REDACTED], demonstrates the Accused's state of mind and apparent willingness to target high-level [REDACTED] to achieve his objectives. The letter suggests that the Accused had the intent to murder to meet his objectives.

<sup>15</sup> DRC-OTP-2081-0124, ll. 140-181; DRC-OTP-2081-0255 l. 880 to DRC-OTP-2081-0282, l. 116.

<sup>16</sup> DRC-OTP-2081-0282, ll. 48-68.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

15. In adducing this evidence, it is not the Prosecution's purpose to prove that the Accused committed the murder of [REDACTED] beyond reasonable doubt. And it is unnecessary to do so, as the murder is not a charged incident. The purpose for eliciting the evidence from [REDACTED] was to further establish the intent of the Accused to target Lendu and perceived or real Lendu supporters, and the lengths he would go in acting on that intent; in this instance allegedly targeting [REDACTED] due to the Accused's perception that [REDACTED] was allied with the Lendu.

16. Raising the specter of article 70 investigations is not something that should be done lightly. The offences under article 70 are serious offences and the evidence in support of any allegation should also be sufficiently serious. In its motion, the Defence fails in both its allegations and its evidentiary support for those allegations. The motion should be rejected in its entirety.

### **Relief Requested**

17. The Prosecution requests the Chamber to reject the Defence request.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 19<sup>th</sup> day of October 2016  
At The Hague, The Netherlands