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No.: ICC-01/04-02/06
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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 'Urgent Request for Reconsideration of Decision Denying Adjournment', ICC-01/04-02/06-1655-Conf", 29 November 2016, ICC-01/04-02/06-1661-Conf

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. Trial Chamber VI (“Chamber”) should reject the Defence request for reconsideration (“Defence Request”)¹ of its decision denying an adjournment of the trial (“Decision”).² The Defence fails to present any new fact or argument warranting the exceptional remedy of reconsideration and fails to demonstrate either a clear error of reasoning or that an injustice would result should the trial continue.

2. Nor does the Defence’s request for reconsideration of one of the Chamber’s findings – whether litigation in the case since August 2014 provided any notice to the Defence of coaching by the Accused and others – meet the threshold for reconsideration. The Defence has not claimed that there are any new facts in relation to this issue, that the Chamber clearly erred in its reasoning or that the Decision would result in an injustice. The Defence merely disagrees with the Decision and repeats its previous arguments that it could not have anticipated the Accused’s alleged scheme to fabricate evidence as set out in the disclosed material. This assertion is untenable in the face of the Chamber’s numerous, clear findings since March 2015 that the Accused may have engaged in serious attempts to coach witnesses. The Accused’s alleged conduct that formed the basis of these decisions was never confined to one or two cases but, rather, revealed a much broader plan. The Chamber correctly determined that the Defence cannot sustainably argue that “a situation of the accused’s own making unfairly prejudices his rights”.³

¹ ICC-01/04-02/06-1655-Conf.

² ICC-01/04-02/06-T-159-Conf, p.2, line 12 to p.7 line 24.

³ Decision, p.5, lines 2-3.

Confidentiality

3. This filing is classified as “Confidential” pursuant to regulation 23*bis*(2) of the Regulations of the Court consistent with the classification of the Defence Request.

Background

4. On 8 August 2014, the Prosecution requested restrictions to the Accused’s non-privileged contacts pursuant to regulation 101(2) of the Regulations,⁴ notified to the Defence.
5. On 8 December 2014, the Chamber imposed the first restrictions on the Accused’s contacts,⁵ ordered the Registry to notify the Accused that the Registry may listen to all his non-privileged telephone conversations and ordered the Registry to conduct *post factum* review of some of the Accused’s telephone communications and report its findings to the Chamber.
6. On 10 March 2015, the Registry filed its first report on the *post factum* review of the Accused’s phone conversations (“First Report”).⁶
7. On 13 March 2015, on the basis of the information contained in the First Report and its annexes, the Chamber *proprio motu* found that the Accused had abused the right to communication afforded to him at the Detention Centre. It ordered the Registry to actively monitor all of his non-privileged telephone communications until further notice, and to restrict them to two time-slots per week. The Chamber further ordered the Registry to restrict contact with persons through whom the

⁴ ICC-01/04-02/06-349-Conf-Exp, with Confidential redacted version at ICC-01/04-02/06-349-Conf-Red and lesser redacted Confidential version ICC-01/04-02/06-349-Conf-Red2.

⁵ ICC-01/04-02/06-410-Conf-Exp, unavailable to the Prosecution. A *corrigendum* of the Decision, ICC-01/04-02/06-410-Conf-Exp-Corr, was made available to the Prosecution on 16 February 2015. See also ICC-01/04-02/06-410-Conf-Exp-Red-Corr.

⁶ ICC-01/04-02/06-504-Conf-Exp. The main submission and annexes 1, 2, 4, 5, and 6, as well as redacted annexes 3, 8 and 9, were made available to the Prosecution on 30 April 2015. Redacted annex 7 was made available on 16 July 2015.

Accused had breached the Detention Centre's instructions.⁷ On 18 March 2015, the Registry began actively monitoring the Accused's telephone communications.⁸

8. On 22 May 2015, the Registry submitted its second report on the *post factum* review of the Accused's phone conversations ("Second Report").⁹ On 10 June 2015, the Prosecution requested further restrictions to the Accused's communications.¹⁰

9. [REDACTED],¹¹ [REDACTED].¹²

10. [REDACTED].¹³ [REDACTED].¹⁴ [REDACTED].¹⁵

11. On 29 June 2015, Trial Chamber VI ordered the active monitoring of Thomas Lubanga's calls¹⁶ and restricted all telephone communication between any individual in the Detention Centre and the 11 individuals named in the decision.¹⁷

12. On 13 August 2015, the Prosecution filed an *ex parte* request with Pre-Trial Chamber II for judicial assistance to access the Accused's and Lubanga's non-privileged call logs, visitors logs and the recordings of their non-privileged telephone conversations from 22 March 2013 to date and on an on-going basis.¹⁸

⁷ ICC-01/04-02/06-508-Conf-Exp.

⁸ ICC-01/04-02/06-714-Conf-Exp, para.2. This report was communicated to the Prosecution on 16 July 2015.

⁹ ICC-01/04-02/06-607-Conf-Exp. The Second Report was submitted *ex parte*. The Prosecution received advance copies of Annexes 9 and 15 on 13 July 2015 and of the Second Report and annexes 1, 2, 3, 5-8, 11, 12, 14, 16-18 on 15 July 2015 at 17:41. See ICC-01/04-02/06-607-Conf-Exp-Red2. The Prosecution received a courtesy copy of the *corrigendum* of Annex 5 to the Second Report on 20 July; it was subsequently filed on 21 July 2015. ICC-01/04-02/06-607-Conf-Exp-Anx-Red-Corr.

¹⁰ ICC-01/04-02/06-635-Conf-Exp with confidential redacted version at ICC-01/04-02/06-635-Conf-Red.

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ ICC-01/04-02/06-683-Conf-Exp, paras.13-14.

¹⁷ ICC-01/04-02/06-683-Conf-Exp, para.11.

¹⁸ ICC-01/04-638-Conf-Exp.

13. On 14 August 2015, the Prosecution informed the Chamber of its request to Pre-Trial Chamber II and requested that certain records filed in the proceedings be transferred to Pre-Trial Chamber II.¹⁹
14. On 7 November 2016, the Prosecution disclosed the Accused's and Thomas Lubanga's ICC Detention Centre call logs and recordings, *via* a folder in TRIM and filed a notice of the disclosure of evidence obtained under Article 70 to explain this disclosure.²⁰ The Prosecution stated that *"it further reserves the right to use the evidence obtained under Article 70 during and after the Defence case, in particular for the establishment of the truth, the fair evaluation of the evidence, witness impeachment purposes, rebuttal and sentencing, if applicable"*.²¹
15. On 14 November 2016, the Defence filed an urgent request for a stay of proceedings.²² The Prosecution and the Legal Representatives of Victims responded on 15 November 2016.²³
16. On 16 November 2016, the Chamber issued an oral decision rejecting the Defence's request for an immediate adjournment of proceedings.²⁴
17. On 22 November 2016, the Defence sought leave to appeal the decision denying an immediate adjournment of proceedings.²⁵
18. On 25 November 2016, the Defence filed an urgent request for reconsideration of the Chamber's decision denying an immediate adjournment.²⁶ The Chamber shortened the deadline for responses to 29 November 2016.²⁷

¹⁹ ICC-01/04-02/06-781-Conf.

²⁰ ICC-01/04-02/06-1616.

²¹ ICC-01/04-02/06-1616, para.18.

²² ICC-01/04-02/06-1629-Conf; ICC-01/04-02/06-1629-Red (public redacted version).

²³ ICC-01/04-02/06-1636-Conf; ICC-01/04-02/06-1635-Conf.

²⁴ ICC-01/04-02/06-T-159-CONF-ENG, p.2, line 12 to p. 7, line 24.

²⁵ ICC-01/04-02/06-1645.

²⁶ Courtesy copy sent by the Defence *via* email on 25 November 2016 at 20:37. The filing was formally notified on 28 November 2016: ICC-01/04-02/06-1655-Conf.

²⁷ Email from Trial Chamber VI on 28 November 2016 at 9:23.

Prosecution's Submissions

19. As previously stated by the Chamber, "[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment."²⁸
20. The Defence fails to present any new fact or argument warranting reconsideration. It also fails to demonstrate a clear error of reasoning in the Decision or establish that the continuation of the trial would amount to an injustice.
21. The Defence claims it discovered "new facts"²⁹ since its request for an adjournment and bases the Defence Request for reconsideration on the purported new facts. The Defence also requests that the Chamber reconsider one of its findings that the litigation to restrict the Accused's communications from the Detention Centre provided notice of the nature of the information in the undisclosed materials. The Defence does not specify the legal basis for reconsideration of this finding.³⁰
22. The three purported "new facts" are not new, and reconsideration on this ground should not be granted. Nor should the Chamber reconsider its findings that the Defence was already on notice of the Accused's attempts to coach witnesses, and of the potentially extensive impact to its investigation and to the presentation of its case. Indeed, in June 2015, [REDACTED].³¹
23. Each of the purported "new facts", and the Defence's separate request for reconsideration of one finding in the Decision, are addressed in turn, below.

²⁸ ICC-01/04-02/06-483, para.13 (citations omitted).

²⁹ Defence Request, para.1.

³⁰ Defence Request, para.2.

³¹ [REDACTED].

24. **First**, the Defence has known that the Prosecution would seek to rely on the recordings since 7 November 2016, *before* it sought an adjournment.
25. The Prosecution informed the Defence, the participants and the Trial Chamber on 7 November 2016 that it reserved the right to use the evidence obtained under Article 70, *in particular* for the establishment of the truth, the fair evaluation of the evidence, witness impeachment purposes, rebuttal and sentencing, if applicable.³² While not exhaustive, the list identified several purposes for which the Prosecution intended to rely on material obtained from its article 70 investigation. In any event, the Chamber's decision does not require reconsideration. The facts are not new, there was no clear error in the Chamber's reasoning and no injustice will ensue from its Decision to continue trial proceedings.
26. Moreover, the Defence framed its request for an adjournment on two arguments: (i) first, alleged potential prejudice in cross-examining Prosecution witnesses; and (ii) second, alleged need to assess the potential impact on the fairness of the proceedings so that, if any unfairness is eventually identified, to consider appropriate remedies as soon as possible.³³ The Prosecution's reliance on a number of the Accused's conversations, done in accordance with its stated intention to do so, does not affect the time needed to assess the potential prejudice in cross-examining witnesses or the potential impact on the fairness of the proceedings. The Chamber correctly concluded that the Accused can immediately advise the Defence on the extent to which the cross-examination of Prosecution witnesses or the presentation of his case has been affected – or not – by coaching or false information. Nothing in the Prosecution's reliance on a number of these conversations changes the basis upon which the Chamber reached its Decision in any way. This first ground should be dismissed.

³² ICC-01/04-02/06-1616, para.18.

³³ Decision, p.3, line 25 to p.4, line 9.

27. **Second**, the Defence made lengthy submissions in no less than nine paragraphs of its original request for an adjournment on the “non-disclosure” of the material from the date of the Prosecution’s access until 7 November 2016.³⁴ Notably, no new arguments have been advanced in the Defence Request on this point. Nor is it correct that it was “not addressed in the Decision”.³⁵ The Chamber considered this issue *because it was raised by the Defence* and held that “the temporary nondisclosure” of the material does not in itself support the request for an immediate adjournment³⁶ but submissions on this point “could be considered at the time of arguing specific instances of concrete prejudice”.³⁷ Rather than reviewing the material and identifying concrete prejudice upon which it could seek specific remedies, the Defence is merely asking the Chamber to reconsider its decision on the same facts.

28. It is also incorrect that the Prosecution “did not inform the Trial Chamber of the potential existence of such material for eight months”.³⁸ [REDACTED].³⁹ The Defence was notified of this decision. On 13 August 2015, the Prosecution filed an *ex parte* request with Pre-Trial Chamber II for judicial assistance to access the Accused’s and Lubanga’s non-privileged call logs, visitors logs and the recordings of their non-privileged telephone conversations from 22 March 2013 to date and on an on-going basis.⁴⁰ The very next day, on 14 August 2015, the Prosecution informed the Chamber of its request to Pre-Trial Chamber II, including its request for access to recordings of non-privileged telephone conversations from 22 March 2013 to date on an ongoing basis.⁴¹ Accordingly, this second ground should be dismissed.

³⁴ ICC-01/04-02/06-1629-Conf, paras.6, 7, 8, 10, 17(ix), 19, 20, 21, 25.

³⁵ Defence Request, para.16.

³⁶ Decision, p.6, lines 4-6.

³⁷ Decision, p.6, lines 6-7.

³⁸ Defence Request, paras.13 and 15.

³⁹ [REDACTED].

⁴⁰ ICC-01/04-638-Conf-Exp.

⁴¹ ICC-01/04-02/06-781-Conf, para.2.

29. The **third** alleged “new fact” is no more than the Defence’s disagreement with the Chamber’s discretionary decision to approve non-disclosure of certain summaries of the Accused’s telephone communications, and a repeat of its second submission that it should have received earlier notice that more of the Accused’s schemes had been discovered. Even within this argument, the Defence submits that it “cannot comment definitively on the merits of the decision to continue to withhold information from the Defence”.⁴² The Defence simply disagrees with the Chamber’s decision by musing that “it is difficult to discern why the audio-recordings themselves – even leaving aside the summaries thereof – could not have been disclosed to the Defence at that time”.⁴³ This is no more than a repeat of its arguments on non-disclosure.⁴⁴ Chambers have “discretion” to “determine, within the framework of the applicable law, whether applications are kept *ex parte* [...]”.⁴⁵ There may well be circumstances where it is “inappropriate” for a Party even to be aware of some applications, and such matters must “be determined on [their] own facts and consistently with internationally recognized human rights standards”.⁴⁶ Information that is the subject of a decision for non-disclosure under rule 81(2) is precisely the type of information that is not disclosable. In any event, this is not a ground for reconsideration. This third argument should be dismissed.
30. Lastly, the Defence asks the Chamber to reconsider its finding that the Accused is best placed to advise the Defence team about his own conduct and the impact of such conduct on Defence lines of cross-examination.⁴⁷ The Defence concedes that coaching “figured as part of the Restrictions Litigation” but denies that the Defence had notice of the substance of the undisclosed material or could have

⁴² Defence Request, para.18.

⁴³ Defence Request, para.18.

⁴⁴ ICC-01/04-02/06-1629-Conf, paras.6, 7, 8, 10, 17(ix), 19, 20, 21, 25.

⁴⁵ *Lubanga* Rule 81 Appeal Decision, ICC-01/04-01/06-568 OA3, para. 66.

⁴⁶ *Lubanga* Rule 81 Appeal Decision, ICC-01/04-01/06-568 OA3, para. 67. *Also Lubanga Ex Parte* Proceedings Decision, ICC-01/04-01/06-1058, para. 12 (“Complete secrecy” may be justified “if providing information about the procedure would risk revealing the very thing that requires protection”).

⁴⁷ Defence Request, para.20.

taken measures to safeguard its investigations.⁴⁸ The disclosed information from the [REDACTED] and the “Restrictions Litigation” was clear; so much so that the Chamber made specific and serious preliminary findings, including of coaching.⁴⁹ The Defence had a sufficient basis to ensure that its investigations were not tainted by witness coaching, and was on notice of the issue as of at least March 2015.

31. The Accused is perhaps the only person who can assist the Defence in understanding the content and context of his own telephone conversations and their impact – if any – to the presentation of his case. As to the Defence’s assertion that it is “impossible”⁵⁰ to have meaningful consultations with the Accused until it knows the “nature of the allegations”,⁵¹ the Prosecution submits that the nature of the allegations was set out in the Accused’s own conversations in 2015 in the First and Second Registry reports and by the Chamber in its decision in August 2015:

*[...]The Chamber considers that coaching of witnesses is a form of witness interference and has the potential to severely affect the integrity of the proceedings. [...] the Chamber nonetheless finds there to be reason to believe that Mr Ntaganda instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by Mr Ntaganda and the necessity of synchronising the stories.”*⁵²

⁴⁸ Defence Request, para.24.

⁴⁹ In July 2015, [REDACTED]; In August 2015: “the Chamber finds that reasonable grounds exist to believe that the use of codes was meant to disguise attempts to disclose confidential information or to interfere with witnesses, including [...] by way of **coaching**”. [...]The Chamber considers that **coaching of witnesses** is a form of witness interference and has the potential to severely affect the integrity of the proceedings. [...] the Chamber nonetheless finds there to be reason to believe that Mr Ntaganda instructed his interlocutors **to coach witnesses**, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by Mr Ntaganda and the necessity of synchronising the stories.” (ICC-01/04-02/06-785-Conf-Exp, paras.50 and 56); on 7 September 2016, in the context of ongoing litigation to restrict the Accused’s telephone communications from the detention centre that “in a context where the Chamber has previously found there to be reason to believe **that Mr Ntaganda both engaged in witness coaching himself**, and directed his interlocutors to do so, the fact that preparations for any defence case should currently be actively underway is a relevant consideration”. (ICC-01/04-02/06-1494-Conf-Exp-Red, para.30). (emphasis added)

⁵⁰ Defence Request, para.21.

⁵¹ Defence Request, para.21.

⁵² ICC-01/04-02/06-785-Conf-Exp, para.56.

32. The Defence team should certainly not have accepted that these instances of coaching were limited to isolated cases, since the information pointed to a much wider problem. Indeed, the information gleaned from the Registry's review of the Accused's telephone conversations and the recording of the Defence investigator's meeting suggested that the Accused was involved in a broad scheme to interfere with Prosecution witnesses and coach potential Defence witnesses.
33. Absent any new fact or new argument, the Defence Request fails to meet the test for reconsideration and should be rejected. Further, the Decision in no way adversely affects the Accused's fair trial rights.
34. As the Defence does not raise any clear error of reasoning by the Chamber, the Prosecution does not address that prong of the test for reconsideration.

Conclusion

35. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 30th day of November 2016
At The Hague, The Netherlands