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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

Second public redacted version of "Prosecution's submissions on the restrictions to NTAGANDA's contacts", 9 May 2016, ICC-01/04-02/06-1313-Conf-Exp

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Introduction

1. Pursuant to the order of Trial Chamber VI (“Chamber”),¹ the Prosecution submits its observations on the periodic review of the restrictions imposed on the contacts of Bosco Ntaganda (“Accused”) and on the inclusion of [REDACTED] (“[REDACTED]”) amongst the Accused’s authorised contacts.
2. First, the restrictions imposed on the Accused’s contacts should be continued in full, as there are no changed circumstances that require their modification. In fact, continued attempts to interfere with Prosecution witnesses and additional information obtained regarding the coaching of potential Defence witnesses warrant the continuation of the current restrictions beyond the completion of the testimony of the Prosecution’s insider witnesses and until the end of the Defence case.
3. There are reasonable grounds to believe that the continued attempted interference with Prosecution witnesses is the result of the Accused’s past access to his networks of associates from the Detention Centre. Whilst it is likely that the names of Prosecution witnesses have already been disseminated and the Accused’s associates engaged, the Prosecution submits that maintaining the current restrictions is necessary to prevent the Accused from giving further instructions aimed at preventing witnesses from testifying, especially the Prosecution’s remaining [REDACTED].
4. There is also increasing evidence suggesting that the Accused has attempted to pervert the course of justice by coaching potential Defence witnesses and instructing his associates to do so, using his ability to communicate from the Detention Centre. The Chamber has held that “coaching of witnesses is a form of witness interference and has the potential to severely affect the integrity of the

¹ E-mail of Trial Chamber VI of 1 April 2016.

proceedings”.² In order to prevent the further coaching of potential Defence witnesses and safeguard the integrity of the proceedings, the Prosecution submits that the current restrictions should be maintained until the end of the Defence case.

5. Second, the Prosecution opposes the inclusion of [REDACTED] on the Accused’s list of contacts on the basis that he and the Accused used coded language in conversations on at least two occasions, whilst being actively monitored, in an attempt to prevent the Detention Centre officers from understanding the true content of their conversations. Further, whilst [REDACTED] is listed on the Accused’s list of non-privileged telephone numbers as a “[REDACTED]”, information obtained by the Prosecution suggests that this individual may be using a false identity and is not [REDACTED].
6. Should the Chamber nevertheless decide to re-instate [REDACTED], the Prosecution requests that the authorisation of renewed contact be subjected to a number of pre-conditions, including a thorough verification of his identity by the Registry, the results of which should be reported to the Chamber and the Parties. The Prosecution further requests that [REDACTED] be permanently removed from the Accused’s list of authorised contacts in the event he or the Accused again breach the restrictions imposed by the Chamber.

Confidentiality

7. This filing and annexes A to O are classified as “Confidential, *EX PARTE* – only available to the Prosecution and Victims and Witnesses Unit” pursuant to regulation 23bis(1), as they contain information emanating from the Prosecution’s ongoing Article 70 investigations of which the Accused has not been informed and which stems from an *ex parte* decision of Pre-Trial Chamber I.³ The Prosecution will file a confidential, *ex parte*, version of these submissions that will

² ICC-01/04-02/06-785-Conf-Exp, para.57.

³ ICC-01/04-729-Conf-Exp.

be made available to the Defence, together with confidential redacted versions of annexes A and B. The Prosecution will also file a public redacted version of this filing.

Procedural History

8. On 8 August 2014, the Prosecution requested restrictions to the Accused's non-privileged contacts pursuant to regulation 101(2) of the Regulations.⁴
9. On 8 December 2014, the Chamber imposed the first restrictions on the Accused's contacts and ordered the Registry to conduct a *post factum* review of some of the Accused's telephone communications and report its findings to the Chamber.⁵
10. On 10 March 2015, the Registry filed its first report on the *post factum* review of the Accused's phone conversations ("First Report").⁶
11. On 13 March 2015, on the basis of the information contained in the First Report and its annexes, the Chamber ordered the active monitoring of the Accused's non-privileged telephone communications.⁷ On 18 March 2015, the Registry began actively monitoring the Accused's telephone communications.⁸
12. On 10 June 2015, the Prosecution requested further restrictions to the Accused's communications.⁹
13. On 12 June 2015, the Registry reported to the Chamber, in an *ex parte* filing, that, on 5 June 2015, it had interrupted a call between the Accused and [REDACTED] on the grounds that coded language was used.¹⁰

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.

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

14. On 29 June 2015, the Chamber imposed interim restrictions on contact with [REDACTED] individuals who were suspected of interfering with Prosecution witnesses in the case.¹¹
15. On 13 July 2015, pursuant to the Chamber's order¹², the Registry filed a report on the active monitoring review of the Accused's telephone conversations ("Active Monitoring Report"),¹³ in which it reported that the Accused and [REDACTED] had used coded language during calls on 8 May and 5 June 2015, and that the latter call was interrupted by the detention authorities.¹⁴
16. On 16 July 2015, the Registry filed the confidential redacted version of the second report on the *post-factum* review of the phone conversations made by the Accused ("Second Report").¹⁵
17. On 18 August 2015, the Chamber decided to maintain the active monitoring of the Accused's non-privileged telephone conversations and to impose further restrictions, including restricting his contact to two persons. With respect to a third person, [REDACTED], the Chamber deferred its decision to allow contact between the Accused and this person until the Registry decided on a separate request made before it to reinstate [REDACTED] on his list of contacts. Lastly, the Chamber decided to periodically review the need for the restrictions to the Accused's contacts.¹⁶
18. On 13 August 2015, the Prosecution filed an ex parte request with Pre-Trial Chamber I for authorisation to obtain access to the Accused's and LUBANGA's non-privileged call logs and visitors logs as well as the recordings of their non-

¹⁰ ICC-01/04-02/06-640-Conf-Exp. This filing was made available to the Prosecution on 16 July 2015.

¹¹ ICC-01/04-02/06-683-Conf-Exp, ICC-01/04-02/06-683-Conf-Exp-Red and ICC-01/04-02/06-683-Conf-Exp-Red2.

¹² ICC-01/04-02/06-697-Conf-Exp-Red.

¹³ ICC-01/04-02/06-714-Conf-Exp. This filing and annex were made available to the Prosecution on 16 July 2015.

¹⁴ ICC-01/04-02/06-714-Conf-Exp-Anx-Red, pp.6 and 8.

¹⁵ ICC-01/04-02/06-607-Conf-Exp-Red2. Annexes 9 and 15 and the redacted version of annexes 1, 2, 3, 5-8, 11, 12, 14, 16-18 were made available to the Prosecution on 16 July 2015.

¹⁶ ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red. paras.46, 50, 60, 62-65 and 70.

privileged telephone conversations from 22 March 2013 to date and on an on-going basis. On 18 September 2015, Pre-Trial Chamber I granted the Prosecution's request.¹⁷

19. On 1 April 2016, the Chamber invited the Parties to "file any submissions they have on: (i) the inclusion of [REDACTED] amongst Mr Ntaganda's authorised contacts for the purposes of active monitoring; and (ii) the continuation, lifting or adjustment of the other restrictions on Mr Ntaganda's contacts which are currently in force".¹⁸

Prosecution's Submissions

I. Prosecution's submissions on the restrictions to the Accused's contacts

20. The restrictions imposed on the Accused's contacts should be continued in full, as the reasons for their imposition persist, namely the risk that the Accused continues to engage in witness interference, by attempting to prevent Prosecution witnesses from testifying or by coaching potential Defence witnesses.
21. The Prosecution recalls that, having reviewed transcripts or summaries of a mere fraction of the Accused's phone calls, the Chamber found that: (a) the Accused "abused his entitlement to communication by speaking to non-registered interlocutors without prior approval by the Registry";¹⁹ (b) that reasonable grounds to believe exist that the Accused used coded language "to prevent possible interceptors on his end, at the Detention Centre, from understanding the true content of his conversations"; and, (c) that the coded language was intended to disguise attempts to disclose confidential information or to interfere with witnesses, including [...] by way of coaching".²⁰

¹⁷ ICC-01/04-638-Conf-Exp and ICC-01/04-729-Conf-Exp.

¹⁸ E-mail from Trial Chamber VI of 1 April 2016, at 20:56.

¹⁹ ICC-01/04-02/06-508-Conf-Exp, para.7 and ICC-01/04-02/06-785-Conf-Exp (with its public redacted version at ICC-01/04-02/06-785-Red, para.46).

²⁰ ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red, para.50.

22. The Chamber further found that Prosecution Witness [REDACTED]'s identity as a Prosecution witness had been disclosed by the Accused over the telephone during a conversation in which the Accused mentions that "everything will collapse if they don't show up".²¹ It held that it was sufficiently clear that this conversation dealt with Prosecution Witness [REDACTED] testifying and pressure being put on him in this regard,²² adding that it considered "the content of the conversation concerned to be deeply troubling and giving rise to a reasonable belief that Mr Ntaganda, through the relevant interlocutor, intended to engage in a serious form of witness interference".²³
23. On the basis of these findings, the Chamber concluded that, in order to ensure witness safety, prevent breaches of confidentiality and ensure the integrity of the proceedings,²⁴ it was "necessary for the active monitoring of Mr Ntaganda's non-privileged telephone conversations to continue" and "having regard to certain concerning information pertaining to visits [...] the Chamber consider[ed] it necessary for the restrictions to Mr Ntaganda's private visits under Regulation 185 of the Regulations of the Registry to remain in place". The Chamber further decided to order restrictions as to the content of his monitored calls.²⁵
24. The Prosecution submits that there are no changed circumstances that require the modification of these measures. In fact, continued attempts to interfere with Prosecution witnesses and additional information obtained regarding the coaching of potential Defence witnesses warrant the continuation of the current restrictions beyond the completion of the testimony of the Prosecution's insider witnesses and until the end of the Defence case.

²¹ ICC-01/04-02/06-785-Conf-Exp, paras.51-52. The fact of the Accused disclosing the identity of Prosecution Witness [REDACTED] was acknowledged by the Defence (ICC-01/04-02/06-759-Conf-Exp, paras.51-52).

²² ICC-01/04-02/06-785-Conf-Exp, para.53.

²³ ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red, para.55.

²⁴ ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red, paras. 42, 66, 69.

²⁵ ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red, paras.60 and 69.

A. Continued interference with Prosecution witnesses

25. From April 2013 onwards, Prosecution witnesses have been the target of regular attempts to interfere with their testimony. Despite the Chamber's 2014 and 2015 restrictions to the Accused's ability to communicate from the Detention Centre, Prosecution witnesses continue to be targeted. Indeed, since the start of trial in September 2015, alleged associates of the Accused have pressured or threatened Prosecution [REDACTED] and members of their family, [REDACTED].

(a) Attempts to interfere with Witness [REDACTED]'s testimony

26. The Prosecution recalls that Witness [REDACTED] has reported being threatened on several occasions by [REDACTED] as a direct result of his cooperation with the Prosecution in these proceedings.²⁶ Furthermore, as indicated above, the Chamber found that [REDACTED]'s identity as a Prosecution witness had been disclosed by the Accused over the telephone during a conversation in which the Accused mentions that "everything will collapse if they don't show up".²⁷

27. [REDACTED].²⁸ He and his family members were repeatedly approached, pressured and threatened by the Accused's associates [REDACTED].

28. [REDACTED] reported to the Prosecution that, [REDACTED].²⁹ [REDACTED].³⁰

29. [REDACTED].³¹ [REDACTED].³² [REDACTED].³³ [REDACTED].

²⁶ See [REDACTED].

²⁷ ICC-01/04-02/06-785-Conf-Exp, paras.51-52. The fact of the Accused disclosing the identity of Prosecution Witness [REDACTED] was acknowledged by the Defence (ICC-01/04-02/06-759-Conf-Exp, paras.51-52).

²⁸ See [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

(b) Attempts to interfere with Witnesses [REDACTED]'s and [REDACTED]'s testimony

30. In addition to the above attempts to interfere with [REDACTED], the Prosecution recalls that [REDACTED] other Prosecution [REDACTED] witnesses, namely Witnesses [REDACTED], were the targets of recent and repeated pressure and threats by alleged associates of the Accused. In this regard, the Prosecution refers the Chamber to the detailed descriptions of these incidents it provided in [REDACTED],³⁴ and to [REDACTED].³⁵

(c) Maintaining the restrictions is necessary for the protection of Prosecution witnesses

31. The Prosecution submits that there are reasonable grounds³⁶ to believe that the continued interference with its witnesses, referred to above, is the result of the Accused's past access to his networks of associates from the Detention Centre.

32. Whilst the summaries and transcripts of the Accused's calls provide reasonable grounds to believe that the names of Prosecution witnesses have already been disseminated and the Accused's associates engaged,³⁷ maintaining the current restrictions is necessary to prevent the Accused from giving further instructions aimed at preventing witnesses from testifying, especially [REDACTED] and their family members.

33. In accordance with the Chamber's direction to "[REDACTED]",³⁸ the Prosecution amended its original order of appearance of its witnesses and, as a result, [REDACTED].³⁹ However, [REDACTED],⁴⁰ [REDACTED]⁴¹ and [REDACTED],⁴² as well as [REDACTED],⁴³ are yet to testify.

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ Regulation 101(2) of the Regulations of the Court; ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red, para.40.

³⁷ See [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

34. The Prosecution requests that the restrictions to the Accused's contacts remain in place until the end of the Defence case, as argued below. In the alternative, the Accused's contacts should be restricted at minimum until the completion of the testimony of the above witnesses, [REDACTED].

B. Coaching of potential Defence witnesses

35. The Prosecution submits that the restrictions to the Accused's contacts should be maintained and extended until the end of the Defence case to prevent the coaching of potential Defence witnesses and protect the integrity of the proceedings.

36. There is increasing evidence suggesting that the Accused may have attempted to pervert the course of justice by coaching potential Defence witnesses and instructing his associates, in particular [REDACTED] to coach witnesses, using his ability to communicate from the Detention Centre.

37. The Chamber has held that "coaching of witnesses is a form of witness interference and has the potential to severely affect the integrity of the proceedings".⁴⁴ The Prosecution further recalls that the Chamber, having reviewed a sample of the Accused's calls contained in the Registry's second report on the post factum review of the Accused's phone conversations ("Second Report"), found that there is "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".⁴⁵

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red, para.57.

⁴⁵ *Ibid.*

38. In particular, Annex 2 of the Second Report,⁴⁶ a transcript of a conversation dated [REDACTED] between the Accused and [REDACTED], shows that the Accused caused a group of individuals to be brought together and arranged for them to tell the “same” story to his lawyers: “Now, most important I wanted you to remind each other the whole history [...] Any time you will meet my lawyers, they will ask you about that history”. His interlocutor confirms that he has understood: “[O]kay, there is no problem at all, let us sit together and organise well, and come up with one thing so that we speak one same things and have one position”.⁴⁷ The Chamber noted that parts of this transcribed conversation, which is heavily redacted for the Prosecution, suggest that the Accused was “coaching his counterpart on certain factual matters pertaining to the case”.⁴⁸
39. The Prosecution recently obtained information in the Prosecution’s possession lends further support to its allegation that the above conversation was not an isolated incident. It points, in fact, to a broader scheme of coaching aimed at ensuring that Defence witnesses tell the “same” story.
40. Following the Chamber’s instructions to direct any further requests related to the litigation regarding witness interference to a pre-trial Chamber,⁴⁹ the Prosecution requested Pre-Trial Chamber I’s judicial assistance and obtained access to the recordings of the non-privileged phone conversations of the Accused and LUBANGA since 22 March 2013, the day of the arrival of the Accused at the Detention Centre. The Prosecution’s translation and analysis of certain priority conversations confirm that the alleged coaching of potential Defence witnesses by the Accused with the assistance of [REDACTED] extends beyond the conversation of 12 January 2014.

⁴⁶ ICC-01/04-02/06-607-Conf-Exp-Anx2.

⁴⁷ ICC-01/04-02/06-607-Conf-Exp-Anx2, lns.103-104. See also lns.109-110 (“That one knows everything he can tell you... you ask him... tell him the whole history... and speak the same thing”); 152 (“I can see you know the entire history...discuss...so that a person”); 173 (“Discuss with others and speak one thing”).

⁴⁸ ICC-01/04-02/06-710-Conf-Exp-Red, para.13; ICC-01/04-02/06-607-Conf-Exp-Anx2, lns. 103-110, 160-173.

⁴⁹ ICC-01/04-02/06-T-22-CONF-ENG, p.2, ln.23 to p.3, ln.6. and ICC-01/04-02/06-777-Conf-Exp, para. 38.

41. Indeed, the Prosecution has identified two additional conversations the Accused had with unauthorised callers through [REDACTED]'s telephone, which present similar features, namely: that the Accused spoke Kihema with his interlocutor, and stated that he did so because the Court could monitor his calls, and that the discussions pertain to issues relevant to the Accused's judicial case.
42. During the first of these calls, dated [REDACTED], [REDACTED] passes his phone to an individual called [REDACTED]. [REDACTED].⁵⁰ Following a brief introduction, the Accused explains "I'll try to speak Kihema even if I don't speak it well as they are listening to us", after which both interlocutors switch to Kihema. The Prosecution does not yet have Kihema translation capacity, but certain words it was able to identify reveal clearly that the discussion is about the Accused's case. These words include names of UPC commanders [REDACTED], but also names of locations, such as Kobu, Bambu, Nyangaray and Mongbwalu.⁵¹
43. During the second of the two calls, which is dated [REDACTED], [REDACTED] passes his phone to an unidentified individual who starts a discussion with the Accused in Kihema. Again, the words spoken during this conversation unequivocally concern the Accused's case and again include names of UPC commanders, [REDACTED], names of places such as Sayo and Mongbwalu, but also the French word "Témoignage" (testimony).⁵²
44. In addition to these conversations, another conversation the Accused had with [REDACTED] on [REDACTED], shortly after he arrived at the Detention Centre, clearly reveals his intention to coach a specific witness on a factual matter pertaining to his case. Explaining to [REDACTED] that he is charged with crimes committed in Kobu, Bambu, Lipri and Nyangaray, the Accused states that he was not present at these locations and discusses strategies to demonstrate this. His words unequivocally denote an intention to coach a witness to say that he was in

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

a place called [REDACTED] when the attack took place and to provide him with the relevant dates:

[REDACTED].⁵³

45. [REDACTED].⁵⁴ [REDACTED].⁵⁵

46. The Prosecution's allegation that there are reasonable grounds to believe that the Accused has coached, and instructed his associates to coach, potential Defence witnesses is further supported by details provided by Prosecution Witnesses [REDACTED] and [REDACTED].

47. [REDACTED].⁵⁶ [REDACTED]⁵⁷ [REDACTED].⁵⁸

48. [REDACTED].⁵⁹

49. In order to prevent the coaching of potential Defence witnesses from damaging the integrity of the proceedings, the current restrictions, namely the active monitoring of the Accused's phone conversations as well as their limitation in time and as to their content, should be maintained until the end of the Defence case. In order to prevent the Accused from circumventing these restrictions and ensure their effectiveness, it is also necessary for the restrictions to the Accused's private visits under Regulation 185 to remain in place.

II. Prosecution's submissions on the inclusion of [REDACTED] on the Accused's list of contacts

50. The Prosecution opposes the inclusion of [REDACTED] on the Accused's list of contacts on the basis that he and the Accused used coded language in conversations on at least two occasions, whilst being actively monitored, in an

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

attempt to prevent the Detention Centre officers from understanding the true content of his conversations.⁶⁰

51. Further, whilst [REDACTED] is listed on the Accused's list of non-privileged telephone numbers as a "[REDACTED]",⁶¹ it appears that this individual may be using a false identity and if not [REDACTED], [REDACTED].⁶²

52. [REDACTED],⁶³ [REDACTED].⁶⁴ [REDACTED].⁶⁵ [REDACTED].

53. The Prosecution notes that, for several years, [REDACTED] was listed as an authorised contact for the Accused [REDACTED] under a false identity.⁶⁶ [REDACTED]. The Accused and [REDACTED] inadvertently revealed the latter's true identity during a phone conversation transcribed by the Registry for the purpose of the First Report.⁶⁷ [REDACTED].⁶⁸ This suggests that the use of false identities to speak with ICC detainees is common practice and it is reasonable to suspect that this is not an isolated case.

54. Accordingly, the Prosecution opposes [REDACTED]'s re-instatement on the Accused's authorised contact list. However, should the Chamber decide to re-instate him, the Prosecution requests that the Registry be ordered to conduct a thorough verification of his identity, the results of which should be reported to the Chamber and the Parties. In particular, the Prosecution should be provided with full and accurate biographic details, including a copy of the individual's identity document(s) and a photograph.

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

55. The Prosecution further requests that he be permanently removed from all detainees' lists of authorised contacts in the event that the Registry's verification reveal that [REDACTED] indeed uses a false identity, or should he or the Accused again breach any of the restrictions imposed by the Chamber, in particular those imposed as to the content of their conversations.

Conclusion

56. For the foregoing reasons, the Prosecution submits that the current restrictions to the Accused's contacts should be maintained until the end of the Defence case and that [REDACTED] should not be included on the Accused's list of authorised contacts.



Fatou Bensouda
Prosecutor

Dated this 14th day of December 2016
At The Hague, The Netherlands