



Original: **English**

No.: ICC-01/04-02/06
Date: 14 December 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 “Urgent request on behalf of Mr Ntaganda seeking disclosure of the annexes to the Prosecution’s submissions on the restrictions to Mr Ntaganda’s contacts and related requests”, 16 May 2016, ICC-01/04-02/06-1318-Conf-Exp

Source: Office of the Prosecutor

Document 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 the Victims

Mr Dmytro Suprun
Ms Sarah Pellet

Legal Representatives of the 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**

Other

Introduction

1. The Prosecution opposes the Defence request for an order to (a) disclose thirteen *ex parte* annexes ("*Ex Parte* Annexes") and lift or scale back redactions to two annexes ("*Redacted Annexes*") submitted by the Prosecution in support of its submissions on the restrictions to the contacts of Bosco Ntaganda ("*Accused*") ("*Submissions*"); and (b) re-submit "any investigator's submissions amongst these annexes with an appropriate affirmation of truth" ("*Defence Request*").

2. *First*, the *Ex Parte* Annexes should not be made accessible to the Defence because this would significantly compromise the Prosecution's ongoing investigations into potential offences under article 70. The article 70 investigations, and any resultant prosecutions - as well as any ensuing request for restrictions on the Accused's contacts - are effectively tools in preserving the integrity of the proceedings and to protect witnesses. Essentially, the Chamber is being asked to balance the interests of the Accused in terms of his communications with friends and family (namely, his right to private and family life, which is not absolute), against the interests of preserving the integrity of the proceedings and protecting witnesses from interference. Where the evidence in question involves conversations of the Accused himself, of which he is therefore fully aware, and which suggest his attempts to interfere with or coach witnesses, that balance must be exercised in favour of protecting witnesses and preserving the integrity of the proceedings.

3. *Second*, the Defence does not require access to the evidence contained in the *Ex Parte* Annexes to meaningfully respond to the allegations made. The Defence is sufficiently informed of the nature and scope of the Prosecution's allegations. In particular, the *Ex Parte* Annexes do not expand the scope of the Prosecution's allegations of witness interference and coaching of potential witnesses; they merely provide additional examples of the Accused's conduct (and further

background) prior to the Chamber's original decision to impose restrictions on the Accused's contacts, in support to the allegations. Importantly, the Defence is also informed of the entirety of the evidence relied on by the Prosecution in relation to the period subsequent to the imposition of restrictions to the Accused's contacts, namely the evidence of continued interference with three of the Prosecution's key insider witnesses.

4. *Thirdly*, the Defence should not be granted access to the *Ex Parte* Annexes because the evidence currently unavailable to the Defence is not disclosable pursuant to rule 77 of the Rules of Procedure and Evidence ("Rules") or article 67(2) of the Rome Statute. It is not information regarding the facts of the Accused's case from the period 2002 to 2003, but relates to separate and independent suspected criminal activity, postdating by more than a decade the criminal acts underlying the charges. As such, the evidence would not "significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case".¹ Should the Chamber consider that the undisclosed evidence falls within the scope of rule 77 of the Rules, the Prosecution submits that rule 81(2) of the Rules permits its non-disclosure at this stage in order to protect the confidentiality of the ongoing investigation. There is no prejudice by the non-disclosure or late disclosure, because the undisclosed evidence consists of records of conversations to which the Accused was a party, and the contents of which he is therefore already privy to. An accused cannot engage in criminal conduct aimed at interfering with the administration of justice and expect advance notice as to whether such activity has been detected in the form of disclosure.
5. *Alternatively*, should the Chamber be inclined to order access for the Defence to some or all of the *Ex Parte* Annexes, the Prosecution would, with a view to protecting the confidentiality of its investigation, seek to withdraw its reliance upon them and request that they not be communicated to the Defence.

¹ ICC-01/04-01/06-2624, para. 16.

6. In terms of the Defence's request to lift redactions to the Redacted Annexes, the Prosecution has provided to the Defence the Redacted Annexes, retaining as much information as it could possibly provide without prejudicing its ongoing investigation into potential article 70 offences and the security of Prosecution witnesses, their family members or innocent third parties.
7. The Defence has further requested an attestation of truth of the investigation notes, but this is neither required by the Statute and Rules, nor necessary in order to support a finding by the Chamber of reasonable grounds to believe that the restrictions on contacts should remain, pursuant to regulation 101 of the Regulations of the Court.

Procedural History

8. On 1 April 2016, the Chamber invited the Parties to "file any submissions they have on: (a) the inclusion of [REDACTED] amongst Mr Ntaganda's authorised contacts for the purposes of active monitoring; and (b) the continuation, lifting or adjustment of the other restrictions on Mr Ntaganda's contacts which are currently in force".²
9. On 9 May 2016, the Prosecution³ and the Defence⁴ filed their submissions on the restrictions of the Accused's contacts. The Prosecution's submissions are supported by fifteen annexes. Annexes A and B (the Redacted Annexes), an investigation note and a statement from Witness [REDACTED], were provided to the Defence in redacted form.⁵ The remaining thirteen annexes (the *Ex Parte* Annexes), annexes C through O, were filed on an *ex parte*, Prosecution and Victims and Witnesses Unit only, basis.

² E-mail from Trial Chamber VI of 1 April 2016, at 20:56.

³ ICC-01/04-02/06-1313-Conf-Exp and ICC-01/04-02/06-1313-Conf-Exp-Red.

⁴ ICC-01/04-02/06-1312-Conf-Exp.

⁵ ICC-01/04-02/06-1313-Conf-Exp-AnxA-Red and ICC-01/04-02/06-1313-Conf-Exp-AnxB-Red.

10. On 11 May 2016, the Defence filed an urgent request for the Chamber to order the Prosecution to: (a) disclose the *Ex Parte* Annexes; (b) lift all redactions applied to the Redacted Annexes, or to limit the redactions to what is “strictly necessary for ensuring the protection of witnesses”; and, (c) “re-submit any investigator’s submissions amongst these annexes with an appropriate affirmation of the truth”.⁶
11. On 12 May 2016, the Chamber shortened the deadline to respond to the Defence Request to Monday, 16 May 2016, at 16:00.⁷

Confidentiality

12. This filing is classified as “Confidential, *EX PARTE* – only available to the Prosecution and Victims and Witnesses Unit” pursuant to regulation 23*bis*(1), as it refers to 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.⁸ The Prosecution will file a confidential, *ex parte*, version of these submissions that will be made available to the Defence. The Prosecution will also file a public redacted version of this filing.

Prosecution’s Submissions

13. The Prosecution opposes the Defence Request in its entirety.

I. The Ex Parte Annexes

14. The *Ex Parte* Annexes submitted by the Prosecution in support of its Submissions comprise: (a) ten Prosecution summaries of the Accused’s non-privileged conversations from the Detention Centre,⁹ which it obtained after requesting the

⁶ ICC-01/04-02/06-1315-Conf-Exp-Corr, pp. 6-7.

⁷ E-mail from Trial Chamber VI, dated 12 May 2016, at 10:49.

⁸ ICC-01/04-729-Conf-Exp.

⁹ *Ex parte* annexes C, D, E, G, H, I, J, K, L and O.

judicial assistance of Pre-Trial Chamber I,¹⁰ and (b) three documents that complement the Prosecution's analysis of the Accused's calls from the Detention Centre.¹¹

15. The Prosecution opposes the Defence's request for the disclosure of the *Ex Parte* Annexes, for the following reasons.

(a) Disclosing the Ex Parte Annexes would compromise the Prosecution's ongoing investigation into potential article 70 offences

16. The Prosecution opposes the disclosure of the *Ex Parte* Annexes to the Defence, because this would compromise ongoing investigations related to potential article 70 offences.¹²

17. The Prosecution is actively taking steps at present to obtain information relevant to article 70 offences, not only potentially committed by the Accused himself, but also by [REDACTED] and other members of what appears to be a broader network of individuals involved in attempting to interfere with Prosecution witnesses and to coach potential Defence witnesses. Revealing the existence and contents of this investigation to the Accused would compromise the investigation and, at minimum, make it more difficult.

18. Whilst the Accused's communications are currently restricted and actively monitored, this does not exclude the risk that the Accused will attempt to disclose the fact that the Prosecution is investigating offences under article 70 to the very individuals who are the object of this investigation. Active monitoring is a resource-intensive exercise, and it is unrealistic to expect that all of the Accused's

¹⁰ ICC-01/04-638-Conf-Exp and ICC-01/04-729-Conf-Exp.

¹¹ *Ex parte* annexes F, M and N, respectively: (1) [REDACTED], (2) LUBANGA's list of non-privileged contacts and (3) [REDACTED]. These three documents contain information relevant to the Prosecution's analysis of the Accused's telephone conversations.

¹² As explained in its Submissions, the Prosecution submitted these annexes to the Chamber and the Victims and Witnesses Unit only, because "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" (ICC-01/04-02/06-1313-Conf-Exp, para. 7).

communications in which he seeks to pass on this information will be captured or interrupted in time.

19. In terms of the impact on the Prosecution's article 70 investigations, the Prosecution observes that [REDACTED].
 20. [REDACTED] Accordingly, if the Accused reveals [REDACTED] the fact that the Prosecution is actively investigating pursuant to article 70, this would impact significantly on the Prosecution's ability to effectively investigate.
 21. The Prosecution has also sought records of the Accused's calls at the Detention Centre to analyse them, for the purposes of assessing evidence of potential offences pursuant to article 70, potentially committed by the Accused [REDACTED] or other individuals with whom the Accused has been in contact from the Detention Centre.
 22. Should the Chamber find that the *Ex Parte* Annexes are in principle disclosable, the Prosecution submits that their non-disclosure to the Defence at this stage is justified under rule 81(2) and providing them to the Defence would prejudice the ongoing investigation into the suspected commission of offences under article 70 by the Accused and/or his associates.
- (b) The Defence does not require access to the information contained in the Ex Parte Annexes, because it already has access to sufficient evidence to meaningfully respond to the allegations*
23. The Defence should not be granted access to the information contained in the *Ex Parte* Annexes, because that evidence is substantially similar to evidence previously disclosed that was relied upon by the Chamber in its decision to impose the original restrictions to the Accused's contacts. The Defence is sufficiently informed of the scope of the Prosecution's allegations to meaningfully respond.

24. The *Ex Parte* Annexes, which the Prosecution has submitted in support of its request that the restrictions to the Accused's contacts be maintained, consist of summaries of three conversations the Accused had from the Detention Centre,¹³ and one document that supports the Prosecution's analysis of those conversations.¹⁴ These conversations are very similar in nature and are from the same time period as other evidence that was already before the Chamber when it originally decided to impose the existing restrictions on the Accused's contacts. The Defence had access to this previous evidence, namely Annex 2 of the Registry's second report on the post-factum review of the Accused's phone conversations.¹⁵ Moreover, the Defence had an opportunity to comment upon that previous evidence. Non-disclosure of cumulative evidence does not place the Defence in a disadvantaged position vis-à-vis the restrictions ordered by the Chamber.

25. Further, the Defence is well aware of the Prosecution's position that the current restrictions to the Accused's contacts must be maintained because the Accused has attempted, through his contacts from the Detention Centre, to interfere with the testimony of Prosecution witnesses and to coach potential Defence witnesses. It is also well aware of the core of the evidence that the Prosecution has submitted to the Chamber in support of its allegations. Finally, the Defence is informed of the entirety of the evidence the Prosecution put forward regarding the period subsequent to the imposition of restrictions to the Accused's contact, namely the evidence of continued attempts to interfere with at least three of its witnesses, and the Defence has the opportunity to respond to them.

26. As demonstrated below, the only evidence that the Defence was not informed of, namely the *Ex Parte* Annexes, does not expand the scope of the Prosecution's

¹³ ICC-01/04-02/06-1313-Conf-Exp-AnxC, ICC-01/04-02/06-1313-Conf-Exp-AnxD, and ICC-01/04-02/06-1313-Conf-Exp-AnxE.

¹⁴ ICC-01/04-02/06-1313-Conf-Exp-AnxF.

¹⁵ ICC-01/04-02/06-607-Conf-Exp-Anx2.

allegations, but merely provides additional examples of the Accused's conduct or supports allegations the Defence is already aware of and able to respond to. In this regard, the Prosecution sets out its detailed analysis of the 13 *Ex Parte* Annexes below.

Annexes C, D, E and F

27. Annex 2 of the Registry's second report, which the Prosecution relied upon in support of its original application for restrictions to the Accused's contacts, and Annexes C and D that were attached to the Prosecution's recent Submissions to maintain those restrictions, all include summaries of conversations that the Accused had with [REDACTED] and several unauthorised individuals through the latter's telephone, between [REDACTED]. During these recorded conversations – both those disclosed to the Defence and the more recent ones provided only to the Chamber – the Accused and his interlocutor speak in Kihema, in an apparent attempt to circumvent the Court's monitoring of the Accused's calls, and discuss issues relevant to the Accused's judicial case. The conversations involving [REDACTED] and others contained in *Ex Parte* Annexes C and D of the recent Submissions therefore do not expand the scope of the Prosecution's allegations of witness coaching, but simply provide additional examples of the same conduct to which the Prosecution referred in its original application for restrictions on contacts. This evidence has already led the Chamber to find 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 a manner as described by Mr Ntaganda and the necessity of synchronising the stories".¹⁶

28. In addition, the Prosecution has also disclosed evidence related to two further examples, in its Submissions, of attempts to coach potential witnesses, namely

¹⁶ ICC-01/04-02/06-758-Conf-Exp and ICC-01/04-02/06-758-Red, para. 57.

incidents reported by Prosecution Witnesses [REDACTED] and [REDACTED].¹⁷ These incidents as disclosed to the Defence are also of a nature similar to the evidence contained in Annexes C, D and E, as the individuals who according to Witnesses [REDACTED] and [REDACTED] attempted to influence their prospective evidence in a way that would be helpful to the Accused are the same individuals the Accused was in contact with from the Detention Centre, namely [REDACTED].

29. Accordingly, the only “new” evidence that the Defence is not aware of are three additional examples of alleged witness coaching, an allegation well-known to the Defence, that are similar in nature and are from the same time period as other evidence that was already communicated to the Chamber and the Defence. The Prosecution further notes that the Defence chose not to address the allegation of coaching of potential Defence witnesses in its final submissions on the Prosecution’s request to impose restrictions to the Accused’s contacts, in August 2015.¹⁸

Annexes G, H, J, I, K and L

30. The Prosecution refers to six of the *Ex Parte* Annexes¹⁹ in support of its submission that [REDACTED] may be using a false identity. Although the Defence has not received the summaries of the five conversations between the Accused and this individual, nor the Prosecution’s analysis of those conversations, it is aware of the Prosecution’s allegation that [REDACTED] is not the [REDACTED].²⁰ The Defence should be able to dispute the allegations regarding this individual’s identity without access to these five summaries; for example, by supplying a birth certificate or other proof of kinship or identity.

¹⁷ ICC-01/04-02/06-1313-Conf-Exp and ICC-01/04-02/06-1313-Conf-Exp-Red, paras. 46-48.

¹⁸ See ICC-01/04-02/06-759-Conf-Exp and ICC-01/04-02/06-785-Conf-Exp, para. 56.

¹⁹ Annexes G, H, I, J, K and L.

²⁰ ICC-01/04-02/06-1313-Conf-Exp-Red, para. 53.

31. Moreover, the Prosecution relied in support of its arguments regarding the potential false identity of [REDACTED] on the prior example where one of the Accused's contacts had used a false identity. As indicated in the Prosecution's Submissions,²¹ for several years, [REDACTED] was listed as an authorised contact for NTAGANDA under a false identity, namely [REDACTED]. The Defence is aware of the Prosecution's allegation with respect to [REDACTED] and had an opportunity to respond to it.

Annexes M, N and O

32. Lastly, the Prosecution appended three annexes²² to support its allegation that [REDACTED] was, for several years, listed as a contact for the Accused and LUBANGA. Whilst it is the first time the Prosecution submits evidence that this individual was on LUBANGA's list, the Defence was already aware of the Prosecution's allegation that [REDACTED] was a contact for the Accused under a false identity.

(c) The Ex Parte Annexes are not otherwise disclosable under rule 77 or pursuant to article 67(2)

33. As explained above, the *Ex Parte* annexes contain evidence regarding conversations between the Accused and various interlocutors, which supports the Prosecution's allegations warranting the continued restriction of the Accused's contacts.

34. This evidence does *not* concern the incidents that took place in 2002 to 2003 that underlie the facts of the Accused's case. Rather, it relates to a separate and independent criminal activity, falling under the ancillary jurisdiction of the Court and postdating by more than a decade the criminal acts underlying of the charges against the Accused. Accordingly, the evidence is not material to the preparation

²¹ *Ibid.*

²² Annexes M, N and O.

of his defence in relation to the facts underlying the charges, which date from 2002 and 2003, as it would not “significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case”.²³ It follows that the evidence is not disclosable to the Defence pursuant to rule 77, or article 67(2).

35. In *Bemba*, Trial Chamber III rejected, in the main case, a broad Defence request for the disclosure of “all material in the Prosecution's possession relevant to the credibility of Defence witnesses in the Bemba case”, including materials that were collected in the context of the Prosecution's investigation into offences under article 70 within the context of the *Bemba et al.* case, and held that the responsibility for determining whether evidence is material for the preparation of the defence, which requires a fact-specific assessment, lies with the Prosecution.²⁴ In *Lubanga*, Trial Chamber I considered that evidence relevant to the credibility of Defence witnesses and defence lines should be disclosed; but in that case there was no counter-vailing consideration, as in that case the evidence was not obtained through a separate and ongoing, article 70 investigation and did not relate to separate criminal activity.²⁵ Moreover, both the *Bemba* and *Lubanga* decisions were rendered after the Defence had communicated its list of witnesses to the Prosecution;²⁶ indeed, in the *Bemba* case, the decision was rendered after the close of the Defence case.²⁷

36. If and when the Prosecution intends to rely on this evidence for the purposes of the main trial, either as supplementary evidence (with the leave of the Chamber)

²³ ICC-01/04-01/06-2624, para. 16.

²⁴ ICC-01/05-01/08-3336.

²⁵ ICC-01/04-01/06-2624, para. 18.

²⁶ The decision was rendered on 12 November 2010. The *Lubanga* Defence had communicated its list of witnesses to the Prosecution in mid to late 2009. See ICC-01/04-01/06-2192, para.2 (decision dated 19 November 2009). The first witness called by the *Lubanga* Defence appeared in January 2010.

²⁷ The decision was rendered on 9 March 2016, shortly before the Trial Chamber rendered its judgment in the case.

or during the cross-examination of Defence witnesses, the Defence will receive proper disclosure at that time.

37. Finally, an accused cannot engage in criminal conduct aimed at interfering with the course of justice and subsequently claim that he has a right to advance notice as to whether his conduct has been discovered in the form of disclosure. The Accused by his personal participation in the conversations is fully aware of their content. Defence Counsel is already aware of allegations against the Accused of calls relating to witness interference and witness coaching. Nothing prevents the Defence from seeking access to the records of the Accused's conversations directly from the Registry, should they view these as generally relevant to their preparation.

38. The Chamber is effectively being asked to balance the interest of the Accused in terms of the number and scope of his communications with friends and family (his right to private and family life, which is not absolute);²⁸ against the interests in protecting witnesses and preserving the integrity of the proceedings. The balance must be exercised in favour of protecting witnesses and preserving the integrity of the proceedings.

39. Moreover, the Prosecution observes that applications from both Defence and Prosecution are routinely assessed by Chambers of this Court on an *ex parte* basis without the other side being effectively granted the right to be heard or to have access to the materials in question. For instance Pre-Trial Chamber II has determined that the mere fact a decision is "taken *inaudita altera pars* cannot *per se* be held as significantly affecting the fairness of the proceedings".²⁹

²⁸ ICC-01/04-02/06-785-Red, para. 39.

²⁹ See ICC-01/05-01/13-51, p. 4.

(d) Alternatively, the Prosecution would withdraw its reliance upon the Ex Parte Annexes

40. The Prosecution submits that, even without the *Ex Parte* Annexes, there is sufficient evidence before the Chamber to warrant the continued restriction of the Accused's contacts until the end of the Defence case.

41. However, should the Chamber find that the Defence *is* entitled to the disclosure of all or some of the *Ex Parte* Annexes, the Prosecution would, with a view to protecting the confidentiality of its investigation, withdraw its reliance upon them and request that they not be communicated to the Defence. There is no requirement to communicate the evidence to the Defence if the Chamber does not rely upon it for its assessment of the need to maintain restrictions on the Accused's contacts, even if that evidence has been before the Chamber. As professional judges, the Chamber is able to discount the evidence that has been before it, in its subsequent assessment of whether restrictions should be maintained. The Prosecution submits that the need for withdrawal of such *Ex Parte* Annexes should be a last resort; because, for all the reasons as submitted, the Chamber can rely on this evidence without ordering its disclosure to the Defence.

II. The Redacted Annexes

42. The Redacted Annexes are an investigation note³⁰ and a statement³¹ related to Prosecution Witness [REDACTED]. The Prosecution has provided these annexes to the Defence with standard redactions justified by the need to protect the relevant witness, namely Witness [REDACTED], his family members, as well as innocent third parties.³²

³⁰ ICC-01/04-02/06-1313-Conf-Exp-AnxA-Red, DRC-OTP-2090-0124.

³¹ ICC-01/04-02/06-1313-Conf-Exp-AnxB-Red, DRC-OTP-2092-0087.

³² ICC-01/04-02/06-411-AnxA, paras. 15-17, 20-23 and 24-27.

43. In addition to these standard redactions, the Prosecution has applied redactions to information in Witness [REDACTED]'s statement³³ that reveals that the Prosecution is conducting an investigation into offences under article 70 and that reveals specific leads it is pursuing in this context. The disclosure of such information would prejudice the Prosecution's ongoing investigation. Therefore, the Prosecution submits that these redactions are justified pursuant to rule 81(2) of the Rules.

44. The information in Witness [REDACTED]'s statement that is redacted with a view to preserving the confidentiality of the Prosecution's investigation³⁴ is neither disclosable under article 67(2) or rule 77; nor is the Defence otherwise entitled to know this information, because it is irrelevant to the allegations made by the Prosecution in its Submissions. Indeed, the redacted information concerns the Prosecution's investigation into possible money transfers that may have been made to potential witnesses³⁵ and the identity of certain individuals who appear to have a connection or information relevant to this aspect of the ongoing investigation.³⁶

45. The Prosecution intends to request the Chamber to authorise these redactions as non-standard redactions, prior to the formal disclosure of the two documents in accordance with the E-Court Protocol.³⁷

46. Accordingly, the Prosecution has provided the Defence with as much information as it could possibly provide without prejudicing its ongoing investigation into offences committed under article 70 of the Statute.

³³ The redactions applied to the *investigation note* related to [REDACTED] (DRC-OTP-2090-0124) are all standard redactions.

³⁴ These redactions are applied to the following parts of [REDACTED]'s statement: DRC-OTP-2092-0087, at 0091, paras. 24 (last sentence), 26-27, 32-35, and 37-41.

³⁵ See ICC-01/04-02/06-1313-Conf-Exp-AnxB, DRC-OTP-2092-0087, paras. 24 (last sentence), and 26-27.

³⁶ See ICC-01/04-02/06-1313-Conf-Exp-AnxB, DRC-OTP-2092-0087, paras. 32-35 and 37-41.

³⁷ The Prosecution has not made such a request prior to filing its submissions, because neither the E-Court Protocol (ICC-01/04-02/06-47-Anx1), nor the Redaction Protocol (ICC-01/04-02/06-411-AnxA) are applicable to documents filed in the case record.

III. The coaching of potential Defence witnesses

47. The Defence argues that the Prosecution's allegations of witness coaching "must be viewed in light of the scope of witness preparation"³⁸ and lists a number of practices permitted under the witness preparation protocol.³⁹ Whilst the Prosecution notes that this argument does not seem to be relevant to the Defence Request, and addresses the substance of the Prosecution's allegations, the Prosecution responds as follows.
48. It is both legally and factually incorrect to assert that the actions and events described in the Prosecution allegations of witness coaching, a serious offence under article 70(c) of the Statute, would somehow fall within the scope of the preparation of witnesses prior to their testimony, a practice authorised by the Chamber.
49. Indeed, the Chamber authorised witness preparation in this case with a view to "ensur[ing] that the witness gives relevant, accurate and structured testimony" and "[f]or the calling party to assess and clarify the witness's evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings". The witness preparation protocol explicitly states that "[w]itness preparation should not be conducted for the purpose of seeking new evidence or continuing the calling party's investigations". Importantly, witness preparation is to be conducted "after witness statements have been taken and disclosed to the opposing party" and "by the lawyer of the calling party who will question the witness in court".⁴⁰

³⁸ ICC-01/04-02/06-1315-Conf-Exp-Corr, para. 6.

³⁹ The practices listed by the Defence at ICC-01/04-02/06-1315-Conf-Exp-Corr, paragraph 6, lines 10 to 15, which the Prosecution submitted are appropriate in the context of witness preparation (See the Prosecution motion regarding witness preparation, ICC-01/04-02/06-444, para. 32) are indeed listed under Part VI "Required and Permissible Conduct" of the Witness preparation protocol (ICC-01/04-02/06-652-Anx), at paragraphs 20-24.

⁴⁰ Witness preparation protocol, ICC-01/04-02/06-652-Anx, paras. 1(a) and (b), 2, 6 and 10.

50. The witness preparation protocol is therefore wholly irrelevant to the allegations made by the Prosecution, as well as the Chamber's findings, 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".⁴¹

IV. Request for the re-submission of an investigation note with an "affirmation of truth"

51. The Defence requests that the Prosecution be ordered to accompany an investigation note submitted by the Prosecution in support of its Submissions⁴² with an "attestation that the contents thereof are true and accurate to the best of the investigator's knowledge", arguing that "[i]f the Prosecution urges the Chamber to accept such factual assertions as true, then the maker of those statements should at least be required to affirm that to be the case".⁴³

52. The Prosecution has submitted investigation notes similar to the one appended to its observations in this instance, on numerous prior occasions, in particular within the context of the litigation regarding the restrictions to the Accused's contacts,⁴⁴ without prompting any complaint from the Defence.

53. The Defence's request should be rejected. It is neither appropriate, nor necessary in the specific context of the litigation regarding the restrictions imposed on the Accused's contacts, for a Prosecution investigator to attest that the information

⁴¹ ICC-01/04-02/06-785-Conf-Exp and ICC-01/04-02/06-785-Red, para.57.

⁴² ICC-01/04-02/06-1313-Conf-Exp-AnxA-Red.

⁴³ ICC-01/04-02/06-1315-Conf-Exp-Corr, paras. 8-9.

⁴⁴ See, for instance, annexes B, D and E to the Prosecution's initial request for measures under regulation 101(2) of the Regulations of the Court (ICC-01/04-02/06-349-Conf-AnxB-Red, ICC-01/04-02/06-349-Conf-AnxD-Red and ICC-01/04-02/06-349-Conf-AnxE-Red) and annex A to the "Prosecution's Submission of Additional Evidence in Support of "Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court"" (ICC-01/04-02/06-371-Conf-AnxA-Red).

provided by a Prosecution witness is “true and accurate to the best of the investigator’s knowledge”.

54. This is not appropriate, because an investigator is not in a position to attest to the truth of information provided by a Prosecution witness. The investigation note appended to the Prosecution’s submissions as Annex A is a record of the information provided by a witness to two Prosecution staff members, an investigator and a protection strategy assistant, during a telephone call. The source of the information contained in this note is therefore the witness and it is neither possible, nor appropriate for another person to attest that this information is true.
55. Prosecution investigators are bound to behave professionally by existing codes of conduct, both the Office of the Prosecutor’s and the Court’s.⁴⁵ Accordingly, investigators are required to record information provided by witnesses accurately to the best of their knowledge and recollection; and are not entitled to knowingly provide false information.
56. Further, the Defence’s request for an attestation of the truth is not necessary. Investigator’s notes recording information from witnesses are simply documentary evidence that the Chamber can assess as it does any other documentary evidence. There may be an issue of the relative weight to be attributed to a document that does not contain an attestation of the truth. However, the Prosecution recalls that in the context of a request under regulation 101 of the Regulations of the Court, the Chamber has held that “the standard of ‘reasonable grounds to believe’ [...] can be appropriately applied to the Chamber’s assessment” of a request to impose restrictions to the Accused’s contacts. Accordingly, information provided by a witness and recorded in an investigation

⁴⁵ Code of conduct for investigators, Section 4; Code of Conduct for the Office of the Prosecutor, Chapter 2.

note can sufficiently support the Prosecution's allegations and it is not required to provide, in this context, a signed statement or sworn testimony.

57. In any event, the Prosecution observes that the contents of this particular investigation note are largely replicated in the signed statement of Witness [REDACTED], which is appended to the Prosecution's submissions as Annex B and is therefore available to the Defence.

Conclusion

58. For these reasons, the Prosecution requests that the Chamber dismiss the Defence Request.



Fatou Bensouda
Prosecutor

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