



Original: **English**

No.: ICC-01/04-02/06
Date: **19 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 “Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order Setting certain Deadlines regarding the Presentation of Evidence by the Prosecution and the Defence case”, ICC-01/04-02/06-1683-Conf”, 15 December 2016,
ICC-01/04-02/06-1684-Conf**

Source: 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. Trial Chamber VI (“Chamber”) should reject the Defence request for reconsideration (“Defence Request”)¹ of the order to provide a preliminary witness list by 16 December 2016 and the order on the length of the eighth evidentiary block.² The Defence fails to demonstrate either a clear error of reasoning or that an injustice would result should it provide a preliminary list of witnesses to the Chamber on an *ex parte* basis, or sit in one evidence block. Although the Prosecution’s position is that the Defence Request does not meet the test for reconsideration, given that the eighth block will be shorter than expected, the Prosecution does not oppose a new order to commence the eighth evidentiary block on 23 January 2017.

2. On the first issue, the allegations of coaching by the Accused and his associates, including certain relevant telephone conversations, have been disclosed to the Accused and the Defence team since before the start of trial. The Chamber made clear findings that the Accused may have engaged in serious attempts to coach witnesses in March 2015. Undoubtedly, the Defence has investigated and compiled its witness list accordingly, and has engaged in serious consultations with the Accused. The Defence should be in a position to provide a preliminary list of witnesses to the Chamber on an *ex parte* basis by 16 December 2016, as ordered. As the Chamber has not yet issued a decision on the deadline for provision of the final witness list to the parties and participants, or the start of the Defence case, the Defence will have time to further assess and finalize its witness list. No unfairness or injustice would result from proceeding in this way and it will ensure the efficiency of the proceedings.

3. As for the Defence request to postpone the start of the eighth evidentiary block to 23 January 2017 and to sit in two blocks instead of one, the Prosecution will

¹ ICC-01/04-02/06-1683-Conf.

² ICC-01/04-02/06-1588.

submit its forthcoming witness list by 16 December 2016. There are currently nine witnesses on the list for the eighth evidentiary block. These nine witnesses can be heard in one block, ending mid-February 2017. Accordingly, the Prosecution does not oppose starting the block on 23 January 2017.

Confidentiality

4. 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

5. On 8 August 2014, the Prosecution requested restrictions to the Accused’s non-privileged contacts pursuant to regulation 101(2) of the Regulations,³ notified to the Defence.
6. On 8 December 2014, the Chamber imposed the first restrictions on the Accused’s contacts,⁴ 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.
7. On 10 March 2015, the Registry filed its first report on the *post factum* review of the Accused’s phone conversations (“First Report”).⁵
8. 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

³ 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.

⁴ 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.

⁵ 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.

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 Accused had breached the Detention Centre's instructions.⁶ On 18 March 2015, the Registry began actively monitoring the Accused's telephone communications.⁷

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

10. [REDACTED]¹⁰. [REDACTED].¹¹

11. [REDACTED].¹² [REDACTED].¹³ [REDACTED].¹⁴

12. On 29 June 2015, Trial Chamber VI ordered the active monitoring of Thomas Lubanga's calls¹⁵ and restricted all telephone communication between any individual in the Detention Centre and the 11 individuals named in the decision.¹⁶

13. 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-

⁶ ICC-01/04-02/06-508-Conf-Exp.

⁷ ICC-01/04-02/06-714-Conf-Exp, para.2. This report was communicated to the Prosecution on 16 July 2015.

⁸ 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.

⁹ ICC-01/04-02/06-635-Conf-Exp with confidential redacted version at ICC-01/04-02/06-635-Conf-Red.

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ ICC-01/04-02/06-683-Conf-Exp, paras.13-14.

¹⁶ ICC-01/04-02/06-683-Conf-Exp, para.11.

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.¹⁷

14. 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.¹⁸

15. On 19 October 2016, the Chamber set deadlines related to the end of the Prosecution's presentation of evidence.¹⁹ To facilitate expeditious case planning, the Chamber ordered the Defence to file a notice by 16 December 2016 as to whether it intends to call evidence and, if so, to provide the Chamber on the same date and on an *ex parte* basis with a preliminary witness list and time estimates.²⁰ It also preliminarily scheduled the eighth evidentiary block for 16 January to 3 March 2017.²¹

16. 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.²² 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*".²³

¹⁷ ICC-01/04-638-Conf-Exp.

¹⁸ ICC-01/04-02/06-781-Conf.

¹⁹ ICC-01/04-02/06-1588.

²⁰ ICC-01/04-02/06-1588, paras.10-11.

²¹ ICC-01/04-02/06-1588, para.16.

²² ICC-01/04-02/06-1616.

²³ ICC-01/04-02/06-1616, para.18.

17. On 14 November 2016, the Defence filed an urgent request for a stay of proceedings.²⁴ The Prosecution and the Legal Representatives of Victims responded on 15 November 2016.²⁵
18. On 16 November 2016, the Chamber issued an oral decision rejecting the Defence's request for an immediate adjournment of proceedings.²⁶
19. On 22 November 2016, the Defence sought leave to appeal the decision denying an immediate adjournment of proceedings.²⁷
20. On 14 December 2016 at 18:03, the Defence sent a courtesy copy of its expedited request for reconsideration of the Chamber's decision to provide a preliminary list of witnesses by 16 December 2016, to start the eighth evidentiary block on 23 January 2017 and to have two blocks instead of one.²⁸ The Chamber shortened the deadline for responses to 15 December 2016.²⁹

Prosecution's Submissions

21. 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."³⁰
22. The Defence fails to demonstrate a clear error of reasoning in the decision or establish that providing its preliminary witness list to the Chamber on an *ex parte* basis, or proceeding in one evidentiary block, would amount to an injustice.

²⁴ ICC-01/04-02/06-1629-Conf; ICC-01/04-02/06-1629-Red (public redacted version).

²⁵ ICC-01/04-02/06-1636-Conf; ICC-01/04-02/06-1635-Conf.

²⁶ ICC-01/04-02/06-T-159-CONF-ENG, p.2, line 12 to p. 7, line 24.

²⁷ ICC-01/04-02/06-1645.

²⁸ Courtesy copy sent by the Defence via email on 14 November 2016 at 18:03. The filing was formally notified on 15 December 2016: ICC-01/04-02/06-1683-Conf.

²⁹ Email from Trial Chamber VI on 15 November 2016 at 9:19.

³⁰ ICC-01/04-02/06-483, para.13.

(i) *The Defence Request to postpone provision of its witness list*

23. The Defence bases its request for reconsideration of the order to provide its witness list on 16 December 2016 on purported “new facts”.³¹ The purported new facts are not new, and reconsideration on this ground should not be granted. The Chamber has recently found that the Defence was on notice of the allegations that the Accused has attempted to coach witnesses, and of the potentially extensive impact to its investigation and to the presentation of its case, since before the start of trial.³² [REDACTED].³³

24. The Defence was sufficiently on notice since at least March 2015 that it had to ensure that its investigations, and presentation of evidence, were not tainted by witness coaching.

25. Since at least March 2015, and certainly since 7 November 2016, the Accused should have been assisting the Defence in understanding the content and context of his own telephone conversations and their impact – if any – to the list of witnesses he intends to present during his case. 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.”³⁴

26. Moreover, the Chamber’s decision is limited in scope. It ordered disclosure of a *preliminary* witness list to facilitate the expeditious planning of the case. The

³¹ Defence Request, paras.2-4, 6.

³² ICC-01/04-02/06-T-159-CONF-ENG, p.2, l. 12 – p.7, l.21.

³³ [REDACTED].

³⁴ ICC-01/04-02/06-785-Conf-Exp, para.56.

witness list is to be provided solely to the Chamber at this time. The Chamber acknowledged that the Defence may make further adjustments to its witness list thereafter: “[m]indful that the Defence’s notice will necessarily be based on the situation prevailing at that time, the Chamber emphasises that it will not consider the Defence bound by the contents of that list”.³⁵ Accordingly, the Defence will have an opportunity to further “review and analyse”³⁶ information in the disclosed material before it submits its final witness list.

27. The Defence Request fails to meet the test for reconsideration and should be rejected. Further, the order to provide a preliminary witness list to the Chamber on an *ex parte* basis in no way adversely affects the Accused’s fair trial rights.

(ii) Length of the eighth evidentiary block

28. The Defence also fails to meet the test for reconsideration regarding the length of the eighth evidentiary block, which the Chamber scheduled on a preliminary basis. The Prosecution’s witness list for the eighth block will include nine witnesses, which is less than the figure set out by the Defence in its request.³⁷ The eighth block will end in or before mid-February 2017.

29. Although the Prosecution’s position is that the Defence Request does not meet the test for reconsideration, the Prosecution does not oppose starting the eighth block on 23 January 2017 should the Chamber decide to issue a new and final order.

³⁵ ICC-01/04-02/06-1588, para.11.

³⁶ ICC-01/04-02/06-1683-Conf, para.14.

³⁷ ICC-01/04-02/06-1683-Conf, para.21.

Conclusion

30. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request. The Prosecution does not oppose, however, an order to start the eighth evidentiary block on 23 January 2017 given that the block will end in or about mid-February 2017.



Fatou Bensouda
Prosecutor

Dated this 19th day of December 2016
At The Hague, The Netherlands