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No.: ICC-01/04-02/06

Date: 14 March 2017

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 “Motion on behalf of Mr Ntaganda requesting access to *ex parte* material before the Chamber in Case ICC-01/04-02/06”, 17 February 2017, ICC-01/04-02/06-1790-Conf”, 27 February 2017, ICC-01/04-02/06-1807-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. The Defence request for access to all *ex parte* material on the Prosecution's allegations of witness coaching and interference in the *Ntaganda* case is overly broad and speculative, particularly as the issue of the Accused's interference in the case is peripheral to these proceedings. The sole request to which the Defence need respond is the Prosecution's request for additional Defence disclosure, and the Defence does not require access to "any and all" information in *ex parte* filings to do so. Nor, in any event, does the Defence justify its request for such access.
2. Moreover, the Defence is informed of the full scope of the interference allegations and the evidence that supports them. The Prosecution has, nonetheless, reviewed the redacted versions of its filings and will file lesser redacted versions that reflect the current state of disclosure.

Confidentiality

3. Further to Regulation 23*bis*(2) of the Regulations of the Court, the filing is classified as *Confidential* further to the classification level of the filing to which it responds. The Prosecution will file a public redacted version of this filing.

Background

4. On 17 February 2017, the Defence requested the disclosure of "any and all *ex parte* materials before the Chamber that concern, directly or indirectly, allegations of witness coaching against Mr Ntaganda or his associates and family", including "(a) [a]ll *ex parte* filings and judicial orders/decisions or parts thereof, as well as any *ex parte* underlying or supporting material referred to therein; (b) [a]ll transcript (sic) of *ex parte* hearings held before this Chamber and

[a]ll *ex parte* electronic correspondence between the Prosecution and the Chamber” (“Request”).¹

5. The Defence argues that disclosure of all *ex parte* materials is necessary for the Defence to assess the fairness of past proceedings and to safeguard the fairness of future trial proceedings.²

SUBMISSIONS

I. The interference allegations are peripheral to the charges

6. The Defence has been provided with the full extent of the Prosecution’s allegations of witness interference and coaching. Importantly, these allegations are not part of the charges against the Accused. The Defence does not demonstrate that it requires any further *ex parte* information in order to respond to the Prosecution’s request for additional Defence disclosure.
7. The Defence asserts that the disclosure of “any and all *ex parte* materials before the Chamber that concern, directly or indirectly, allegations of witness coaching against Mr Ntaganda or his associates and family” is required for it to “safeguard the fairness of future trial proceedings, and to assess the fairness of past trial proceedings”.³ This is incorrect.
8. *First*, this Court’s law on the use of *ex parte* submissions is clear. Chambers have “discretion” to “determine, within the framework of the applicable law, whether applications are kept *ex parte* [...] and whether or not to hold proceedings on an *ex parte* basis.”⁴ There may well be circumstances where it is “inappropriate” for a Party even to be aware of some applications, and such

¹ ICC-01/04-02/06-1790-Conf.

² ICC-01/04-02/06-1790-Conf, para.2.

³ Request, para.1-2.

⁴ *Lubanga* Rule 81 Appeal Decision, ICC-01/04-01/06-568 OA3, para. 66.

matters must “be determined on [their] own facts and consistently with internationally recognized human rights standards”.⁵ Thus, *ex parte* procedures should only be “used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the [C]ourt must ensure that their use is proportionate given the potential prejudice”.⁶ Even when the reasons for the *ex parte* proceeding no longer apply, it may not be appropriate to make available *inter partes* the entirety of the *ex parte* submissions.⁷

9. Indeed, *second*, where filings refer to sensitive information regarding Prosecution witnesses and their family members, it is appropriate for the Prosecution to withhold such information from disclosure to the Defence. This is in line with the protections provided for victims and witnesses by article 68 of the Statute and the restrictions on disclosure provided for by rule 81(4) of the Rules, which permit the non-disclosure of information “to protect the safety of witnesses and victims and members of their families”.
10. This Chamber has also recognised the need to exclude certain sensitive information from disclosure by adopting the “Protocol establishing a redaction regime”,⁸ which allows the parties to redact such information as recent contact information of witnesses, identifying and contact information of family members of witnesses or information about innocent third parties.
11. That the Prosecution has now disclosed that it conducted an investigation based, at least in part, on the provision of article 70,⁹ does not mean that the Defence should receive “*any and all*” information collected by the Prosecution or

⁵ *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”).

⁶ *Lubanga Ex Parte* Proceedings Decision, ICC-01/04-01/06-1058, para. 12.

⁷ *Lubanga Ex Parte* Proceedings Decision, ICC-01/04-01/06-1058, para. 14.

⁸ ICC-01/04-02/06-411-AnxA.

⁹ The Prosecution’s investigation into witness interference was initially solely based on the provision of article 68(1) of the Statute, which requires the Court to take “appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.

submitted to the Chamber in this context. Consequently, the Request is overly broad and should be rejected.

II. The Defence has access to the full extent of the Prosecution's allegations

12. The Request is also speculative as to the volume and nature of materials that remain *ex parte* in the case record. Indeed, the Defence has already been provided with the full extent of the Prosecution's allegations both of witness interference and witness coaching.

(a) Allegations of witness coaching

13. On 7 November 2016, the Prosecution disclosed to the Defence that it had conducted an investigation under article 70 of the Statute and, in this context, obtained the Detention Centre communications of the Accused and Thomas Lubanga ("Lubanga"). These communications were disclosed to the Defence on the same day.¹⁰

14. Subsequently, the Prosecution made available to the Defence¹¹ all Prosecution filings before the Pre-Trial Chamber and the Chamber in which this evidence was referred.¹² It also requested the re-classification of the Pre-Trial Chamber decisions providing the Prosecution and the Defence with access to the Detention Centre communications.¹³ Significantly, the Prosecution's filing

¹⁰ See ICC-01/04-02/06-1616.

¹¹ The Prosecution made these filings available to the Defence by filing confidential redacted versions or lesser redacted confidential versions, or by requesting their re-classification to "confidential".

¹² See "Request for judicial assistance to obtain evidence for investigation under article 70", ICC-01/04-638-Conf-Red; Prosecution's request to provide Bosco Ntaganda with access to evidence obtained pursuant to article 70, ICC-01/04-737; "Request for transfer of part of the case record to Pre-Trial Chamber II", ICC-01/04-02/06-781-Conf; "Prosecution's submissions on the restrictions to NTAGANDA's contacts", ICC-01/04-02/06-1313-Conf-Red2; "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", ICC-01/04-02/06-1318-Conf-Red2; "Response to the "Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention", ICC-01/04-02/06-1390-Conf.

¹³ See "Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under article 70", ICC-01/04-729-Conf; Decision on the "Prosecution's request to provide Bosco Ntaganda with access to evidence obtained pursuant to article 70", ICC-01/04-738.

containing the most comprehensive analysis of the Prosecution's evidence of witness coaching to date, namely the Prosecution's request for additional disclosure,¹⁴ was provided to the Defence entirely without redactions. There are no other redacted or *ex parte* filings on this matter before the Chamber.

15. Accordingly, the Defence is aware of all the submissions and allegations before the Chamber that pertain to the Accused's involvement in witness coaching.

(b) Allegations of witness interference

16. In support of its suggestion that Prosecution allegations before the Chamber remain undisclosed, the Defence refers to six redacted Prosecution filings.¹⁵ These filings all pertain to the Prosecution's requests for restrictions to the Accused's communications based on allegations that he was involved in a broad scheme to interference with Prosecution witnesses.¹⁶ The Prosecution has identified one additional *ex parte* filing and one additional redacted filing which are relevant to the Accused's involvement in a witness interference scheme.¹⁷

17. All allegations contained in these filings as well as the evidence filed in their support have been disclosed to the Defence. The Prosecution notes that several redactions are no longer necessary, since the underlying information was disclosed. Accordingly, the Prosecution will file lesser redacted versions of these filings to be consistent with the information that has been disclosed.

¹⁴ See "Prosecution's request for additional Defence disclosure", ICC-01/04-02/06-1783-Conf-Corr.

¹⁵ Request, para.9 and fn10.

¹⁶ See "Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court", ICC-01/04-02/06-349; "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" dated 8 August 2014", ICC-01/04-02/06-371; "Prosecution's provision of parameters for the post-factum review of Bosco Ntaganda's visitation and call records", ICC-01/04-02/06-422; "Prosecution's provision of updated parameters for the post-factum review of Bosco Ntaganda's Accused's visitation and call records", ICC-01/04-02/06-431; "Prosecution request for further restrictions to the Accused's communications", ICC-01/04-02/06-635; "Prosecution's submissions on the restrictions to NTAGANDA's contacts", ICC-01/04-02/06-1313.

¹⁷ See *below*, ICC-01/04-02/06-603-Conf-Exp and ICC-01/04-02/06-1506-Conf-Exp.

Additional Prosecution filings

18. The Prosecution has reviewed the *Ntaganda* case record and found two additional filings that are relevant to the Prosecution's allegations of witness interference and that may be provided to the Defence in redacted form, in order to reflect the current state of disclosure.
19. *First*, on 20 May 2015, the Prosecution filed its "Request for Access to Thomas Lubanga's List of Non-Privileged Contacts, Call Logs and Visitation Logs".¹⁸ This filing, which to date remains *ex parte*, refers to interference with Witnesses [REDACTED]¹⁹ as well as the potential involvement of Lubanga in the Accused's scheme.²⁰ Because the evidence supporting these allegations has long been disclosed to the Defence,²¹ the Prosecution will prepare a confidential redacted version of this filing, applying redactions strictly justified by the need to ensure the safety and security of Prosecution witnesses and their family.
20. *Second*, the Prosecution will request the re-classification from "confidential, *ex parte*" to "confidential" of the 14 September 2016 "Prosecution's response to the Defence's request for leave to appeal the decision reviewing restrictions placed on Mr Ntaganda's contacts", in which a general reference to the Prosecution's evidence obtained under article 70 remains redacted.²²

¹⁸ ICC-01/04-02/06-603-Conf-Exp.

¹⁹ ICC-01/04-02/06-603-Conf-Exp, paras. 27-45.

²⁰ ICC-01/04-02/06-603-Conf-Exp, paras. 46-48.

²¹ See [REDACTED].

²² ICC-01/04-02/06-1506-Conf-Exp, para.11.

CONCLUSION

21. Based on the forgoing, the Prosecution requests that the Chamber reject the Request.



Fatou Bensouda
Prosecutor

Dated this 14th day of March 2017
At The Hague, The Netherlands