

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 request pursuant to regulation 35 to submit evidence”, 3 February 2017, ICC-01/04-02/06-1769-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. Pursuant to regulation 35 of the Regulations of the Court (“RoC”), the Office of the Prosecutor (“Prosecution”) requests Trial Chamber VI (“the Chamber”) to grant a variation of the time limit from 3 February to 28 February 2017 in order to submit ten items of evidence from the bar table.¹ These ten items are transcripts and translations of relevant detention centre communications between the Accused and prospective Defence witnesses. The transcriptions / translations will only be finalised by 28 February 2017. The Prosecution prefers to seek admission of the fully transcribed and translated versions of the communications rather than summaries of the calls, which were prepared for investigation purposes.

2. The Prosecution has good cause to request the variation. As previously stated, the Prosecution “is in the process of fully transcribing and translating certain [...] conversations upon which it intends to rely.”² The process of narrowing down the number of calls relevant to the merits of the case has been time-consuming and resource intense. On 1 November 2016, the Prosecution requested transcription and translation of these calls. Due to the amount of time required to prepare and finalise translations and transcriptions, they cannot be completed by 3 February 2017.

3. The Prosecution intends to submit evidence that the Accused made attempts to coach and harmonise the testimony of potential Defence witnesses.³ Though the Prosecution’s review of the Accused’s recorded conversations from the Detention Centre also revealed serious and concerning attempts to interfere with

¹ ICC-01/04-02/06-1588, para. 5.

² ICC-01/04-02/06-1616, para. 16.

³ See *e.g.* DRC-OTP-2099-0670, at 0671-0672:

[REDACTED]

Prosecution investigations and witnesses, the Prosecution does not intend to submit such evidence at this time. As previously stated, “the Prosecution further reserves its 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 for sentencing, if applicable.”⁴

4. The evidence establishes the Accused’s attempts to influence the accounts of potential Defence witnesses prior to speaking to Defence Counsel and is relevant - together with other probative evidence – as it allows the Chamber to weigh and consider whether the Accused’s attempts at coaching potential Defence witness establish an attempt conceal the truth from the Chamber.

Confidentiality

5. This document is classified as “Confidential” pursuant to regulation 23*bis*(1) of the RoC since it reveals details concerning matters of potential Defence witnesses. The Prosecution will file a redacted version of this filing.

Procedural Background

6. On 13 August 2015, the Prosecution submitted a “Request for judicial assistance to obtain evidence for investigation under article 70”,⁵ in which it requested that Pre-Trial Chamber II order the Registry to provide the Prosecution with access to Ntaganda’s and Lubanga’s (i) non-privileged call logs; (ii) non-privileged visitor logs; and (iii) recordings of non-privileged telephone conversations, from 22 March 2013, the day Ntaganda entered the ICC Detention Centre, to date and on an on-going basis.

⁴ ICC-01/04-02/06-1616, para. 18.

⁵ ICC-01/04-638-Conf-Exp.

7. On 21 August 2015, the Presidency reassigned the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber I.⁶
8. On 3 September 2015, Pre-Trial Chamber I “designat[ed] Judge Cuno Tarfusser as the Single Judge of Pre-Trial Chamber I responsible for carrying out the functions of the Chamber with respect to the situation in the Democratic Republic of the Congo and any cases emanating therefrom.”⁷
9. On 18 September 2015, the Single Judge of Pre-Trial Chamber I (“Single Judge”) granted the Prosecution’s request to obtain recorded materials from the ICC Detention Centre.⁸
10. From 30 September 2015 onwards, the Registry provided the Prosecution with access to the relevant audio files and their corresponding call logs and metadata, *via* a folder in TRIM.
11. On 3 June 2016, in the context of its review of the restrictions placed on Ntaganda’s contacts, the Chamber noted “that Article 70 investigations cannot be permitted to continue indefinitely in a manner which could impact proceedings in the *Ntaganda* case” and “encouraged [the Prosecution] to conclude relevant portions of its investigations as promptly as possible and to disclose all resulting information which may be material to the preparation of the Defence as soon as possible.”⁹
12. On 7 September 2016, in its “[d]ecision reviewing the restrictions placed on Mr Ntaganda’s contacts”, the Chamber recalled “its prior guidance to the Prosecution that any Article 70 investigations should be concluded as expeditiously as

⁶ ICC-01/04-639.

⁷ ICC-01/04-728.

⁸ ICC-01/04-729-Conf-Exp.

⁹ ICC-01/04-02/06-1364-Conf-Exp, para. 22.

possible, and that any related applicable disclosure of information to the Defence be made as soon as possible.”¹⁰

13. On 19 October 2016, the Chamber set 3 February 2017 as the deadline for the submission of evidence from the bar table.¹¹

14. On 2 November 2016, the Prosecution requested the Single Judge to order the Registry to provide Ntaganda with immediate access to the TRIM folder containing his and Lubanga’s ICC Detention Centre call records and recordings (“Request”).¹²

15. On 4 November 2016, the Single Judge granted the Prosecution’s Request.¹³

16. On 7 November 2016, the Prosecution notified the Chamber about the disclosure of ICC Detention Centre non-privileged contact and visitors logs, and the recordings of non-privileged telephone conversations from 22 March 2013 onwards for NTAGANDA and Thomas Lubanga (“LUBANGA”), obtained pursuant to Article 70 of the Statute (“Prosecution Notice”).¹⁴

Prosecution submissions

The application is supported by good cause

17. Under regulation 35(2) of the RoC, a Chamber may extend time limits ordered by a Chamber or prescribed in the RoC “if good cause is shown”.¹⁵ The laborious

¹⁰ ICC-01/04-02/06-1494-Conf-Exp-Red, para. 24.

¹¹ ICC-01/04-02/06-1588-Corr, para.5 (“Order”).

¹² ICC-01/04-737-Conf-Exp.

¹³ ICC-01/04-738-Conf-Exp.

¹⁴ ICC-01/04-02/06-1616. For a detailed background of the issue see ICC-01/04-02/06-1616, paras.5-13.

¹⁵ The Appeals Chamber has held that “[s]uch reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability

process of the identifying and then transcribing and translating the calls substantiates good cause to vary the deadline for the submission of the evidence. The Prosecution's request will extend the deadline by three weeks only, and will still be within the 8th evidentiary block prior to the formal end to the Prosecution's case.

18. As of 26 January 2017, the Prosecution has obtained a total number of 8,394 Detention Centre communications, 3,823 of which are NTAGANDA's communications and 4,571 are LUBANGA's. The Prosecution has prepared summaries of 514 of NTAGANDA's communications and 81 of LUBANGA's communications. This represents just over seven percent of the total number of communications obtained by the Prosecution. The Prosecution reviewed approximately 13% of NTAGANDA's communications and 2% of LUBANGA's communications since 23 March 2013.

19. The process of reviewing the communications is time-consuming. First, the Prosecution selected hundreds of probable relevant calls out of the 8,394 communications. Next, the OTP Language Support Unit listened to and summarised 514 calls identified as likely being relevant to the investigation. Once the summaries were reviewed, codes deciphered, and a final selection of calls made, the Prosecution identified the 10 most relevant calls to be translated and transcribed as a priority for submission into evidence. The final translations and transcriptions of the final selection of evidence to be submitted were sent for priority transcription and translation on 1 November 2016 and will be completed on 28 February 2017 for submission in evidence.

20. The Accused will not be unduly prejudiced by the delay since summaries and audio copies of the communications are already in the possession the Defence.

of a party to comply with his/her obligations", ICC-01/04-01/06-834, para.7. The Appeals Chamber has further decided to extend a time limit where it was in the "interest of justice", ICC-01/04-01/10-505, para.11.

The Defence is in a position to respond to the submission of evidence or object to the admissibility of the evidence.¹⁶ Therefore, the variation of the time limit as requested will not “derail the proceedings from their ordained course”.¹⁷

The transcriptions and translations of the detention centre calls are admissible evidence

21. The summaries of the calls show a concerted effort to instruct potential Defence witnesses to tell certain information to the Accused’s Defence Counsel. In many cases, the Accused attempts to conceal the nature of his conversations by using codes and insisting on the use of Kihema,¹⁸ a language that he does not speak fluently, in order to conceal the nature of his conversations. However, despite the Accused’s attempts to conceal the nature of the conversations it is clear that the Accused “reminds” potential Defence witnesses of information,¹⁹ contradicts them when their accounts are inconsistent with his version,²⁰ hints at what the potential witnesses should tell his Counsel,²¹ unambiguously tells potential Defence witnesses what to tell his Counsel,²² and instructs potential Defence witnesses to influence other potential Defence witnesses.²³ In many of the calls, and notwithstanding the Accused’s ability in 2002-2003 to communicate in a variety of ways over long distances, the Accused appears to create an alibi and either “remind” potential witnesses of his location or tell them his location at the relevant times, perhaps believing that his physical location at the time of the charged crimes may be dispositive in resolving the issues of the case in his favour.

¹⁶ The relevant summaries can be found under the following ERNs: DRC-OTP-2099-0670; DRC-OTP-2099-0682; DRC-OTP-2099-0943; DRC-OTP-2099-1186; DRC-OTP-2099-1504; DRC-OTP-2099-1508 ; DRC-OTP-2099-1516 ; DRC-OTP-2099-1669; DRC-OTP-2099-1679; DRC-OTP-2099-1683.

¹⁷ ICC-01/04-01/07-653, para.6.

¹⁸ See e.g. DRC-OTP-2099-0670.

¹⁹ See e.g. DRC-OTP-2099-1679: [REDACTED].

²⁰ See e.g. DRC-OTP-2099-1679, at 1680: [REDACTED].

²¹ See e.g. DRC-OTP-2099-1508: [REDACTED].

²² See e.g. DRC-OTP-2099-1516, at 1518: [REDACTED].

²³ See e.g. DRC-OTP-2099-0943, at 0944: [REDACTED].

22. The proffered evidence is relevant as it allows the Chamber to weigh and consider whether the Accused's attempts at illicitly coaching potential Defence witness indicate attempts to conceal the truth from the Chamber. Further, considering the evidence that the Accused encouraged potential Defence witness to coach other potential witnesses, the evidence establishes for the record of trial the level of circumspection with which the Defence evidence must be viewed. If the evidence of coaching witnesses or influencing their accounts of the charged events is not admitted, the Chamber will not be in a position to fully and fairly evaluate the concrete attempts made by the Accused and the effects of his actions on the trial as a whole. Further, the admission of the evidence will allow the Chamber to weigh and consider evidence the plausibility or credibility of any claim of alibi or a defence of a similar nature.
23. Short of initiating charges under Article 70, the Prosecution and the Court have few tools to deter a determined accused from interfering with the testimony of witnesses. The admission of the evidence of attempts at witness tampering has the potential to create a deterrent effect and serve as a useful legal tool to discourage individuals from engaging the practice. If an accused knows that evidence of witness tampering may be used against him, he will be discouraged from risking such witness tampering in the first place.
24. Should the Chamber grant the request under regulation 35, the Prosecution will provide a detailed justification of the admissibility of the proffered evidence in its application on 28 February 2017.

Relief Requested

25. Based on the foregoing, and pursuant to regulation 35 of the RoC, the Prosecution requests that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 12th day of April 2017
At The Hague, The Netherlands