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**International
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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

**Prosecution's response to the Defence motion to suppress non-privileged
Detention Centre telephone conversations**

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. From 2013 to 2015 at the ICC Detention Centre, the Accused made a concerted effort to communicate his “strategy”¹ to several prospective witnesses, including former FPLC members, to “harmonise”² their accounts before they spoke to his lawyers.³ Now the Accused will call those same individuals as witnesses in support of his case.⁴ Anything short of a fair inquiry into the effect the Accused’s non-privileged communications may have had on the trustworthiness and independence of the testimony of implicated Defence witnesses would preclude Trial Chamber VI (“Chamber”) from freely and fairly evaluating Defence evidence.⁵

2. The Defence will call as many as 20 implicated witnesses in its case. Through its motion⁶ the Defence intends to exclude from the Chamber’s consideration whether and to what extent the Accused’s unlawful, furtively-communicated instructions, explanations, and reminders influenced the implicated Defence witnesses.

3. The Defence makes no pretence that the communications were anything other than lawfully obtained by judicial warrant, and the Defence motion fails to identify a sufficient legal basis to exclude, in their entirety, the use of the calls,

¹ Although the Defence now refers to the Accused’s communication of “strategy” as a means to explain the Accused’s misconduct, it previously left the issue unaddressed. ICC-01/04-02/06-785-Red, para. 56, “The Chamber notes that despite this statement by the Chamber and the submissions on coaching in the Prosecution Final Observations, the Defence has not addressed the allegations of coaching of witnesses in its final submissions.”

² DRC-OTP-2099-0670, at 0671-0672.

³ The Chamber previously found “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.” ICC-01/04-02/06-785-Red, para. 57.

⁴ ICC-01/04-02/06-1881-Conf-AnxA.

⁵ ICC-01/04-02/12-271-Corr.

⁶ ICC-01/04-02/06-1878.

which are relevant and probative to “*a fair evaluation the testimony of*” implicated Defence witnesses.⁷

4. The reliability and integrity of the trial depends on the Chamber’s ability to find the truth, which necessarily includes its ability to evaluate the credibility of evidence adduced. The Chamber should deny the Defence motion.

Procedural History

5. On 13 August 2015, the Prosecution submitted a “Request for judicial assistance to obtain evidence for investigation under article 70”,⁸ 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.
6. On 21 August 2015, the Presidency reassigned the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber I.⁹
7. 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.”¹⁰

⁷ Rome Statute, article 69(4).

⁸ ICC-01/04-638-Conf-Exp.

⁹ ICC-01/04-639.

¹⁰ ICC-01/04-728.

8. 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.¹¹
9. 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.
10. 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.”¹²
11. 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 possible, and that any related applicable disclosure of information to the Defence be made as soon as possible.”¹³
12. 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”).¹⁴

¹¹ ICC-01/04-729-Conf-Exp.

¹² ICC-01/04-02/06-1364-Conf-Exp, para. 22.

¹³ ICC-01/04-02/06-1494-Conf-Exp-Red, para. 24.

¹⁴ ICC-01/04-737-Conf-Exp.

13. On 4 November 2016, the Single Judge granted the Prosecution's Request.¹⁵
14. 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 Lubanga, obtained pursuant to Article 70 of the Statute ("Prosecution Notice").¹⁶
15. On 25 April 2017, the Defence filed a motion to suppress non-privileged Detention Centre telephone conversations.¹⁷

Prosecution's Submissions

Prohibiting the Prosecution from using relevant evidence to cross-examine Defence witnesses would constitute legal error

16. The lawfully-obtained recordings of the calls establish that the Accused influenced the accounts of the 20 implicated Defence witnesses in conversations recorded by the Registry, in which the Accused instructed witnesses on material facts about the case. The recordings contain information that is central to questions pertaining to the trustworthiness and independence of the implicated Defence witnesses and are thus relevant and probative to a fair evaluation of their testimonies.
17. The positive legal basis for the Prosecution's intended use of Detention Centre materials – whether in audio recording or written form – to question implicated Defence witnesses is found in Appeals Chamber jurisprudence. A majority of the Appeals Chamber in the final Judgment of *Prosecutor v. Ngudjolo* found that the

¹⁵ ICC-01/04-738-Conf-Exp.

¹⁶ ICC-01/04-02/06-1616. For a detailed background of the issue see ICC-01/04-02/06-1616, paras.5-13.

¹⁷ ICC-01/04-02/06-1878.

Trial Chamber erred by prohibiting the Prosecution from using similar impeachment evidence to question Defence witnesses – including a witness who had spoken to Mr Ngudjolo prior to his testimony.¹⁸ The majority of the Appeals Chamber found that

*the determination of the truth is a central aspect of any criminal trial to which not only the Prosecutor, but also a Trial Chamber is under an obligation to actively contribute. The Appeals Chamber further considers that a Trial Chamber's role in this regard is heightened in circumstances where the Chamber is aware of possible efforts to distort witness testimony or the truth finding process.*¹⁹

18. The majority of the Appeal Chamber found that by prohibiting the Prosecution from using the impeachment evidence of communications between Mr Ngudjolo and Defence witnesses, the Trial Chamber “placed undue weight on the need to protect Mr Ngudjolo’s rights” at the expense of establishing the truth.²⁰
19. The two dissenting Appeals Chamber Judges in the Ngudjolo Appeals Judgment went further and found that the Trial Chamber’s prohibition of the use of the impeachment evidence “inimically affected the search for the truth [...]”.²¹
20. In this case, there is no serious dispute that the Chamber is aware of “possible efforts to distort witness testimony or the truth finding process.”²² Under these circumstances the Chamber has “a heightened duty”²³ to scrutinise testimony that may have been coached, rehearsed, or influenced with a degree of circumspection – even scepticism. However, the Chamber’s scrutiny of the trustworthiness and independence of Defence evidence would be significantly blunted, or even

¹⁸ ICC-01/04-02/12-271-Corr, para. 276.

¹⁹ ICC-01/04-02/12-271-Corr, para. 275 (emphasis added).

²⁰ ICC-01/04-02/12-271-Corr, para. 276.

²¹ ICC-01/04-02/12-271-AnxA, para. 22.

²² ICC-01/04-02/06-785-Red, para. 57.

²³ ICC-01/04-02/12-271-Corr, para. 275.

rendered impossible, were the Chamber to prohibit the Prosecution's use of the impeachment evidence of the Detention Centre calls during the cross-examination of implicated Defence witnesses.

The Defence arguments fail to state a legal basis for exclusion of the entirety of the Accused's communications

21. The Defence does not challenge the lawfulness of the Prosecution's collection of the communications of the Accused. Rather, it urges the Chamber to ignore clear Appeals Chamber jurisprudence and instead to follow Trial Chamber II's erroneous decision which precluded the Prosecution from using similar impeachment evidence in *Ngudjolo*.²⁴ The majority of the Appeals Chamber found that Trial Chamber II's understanding that Detention Centre communications "could not be used at trial for evidentiary purposes [...] was incorrect and amounted to an error of law...".²⁵

22. The Defence acknowledges that the Accused was aware his calls would be recorded under the Regulations of the Registry.²⁶ However, the Defence claims that the Accused's ignorance of the possibility that the Prosecution could obtain his non-privileged Detention Centre conversations should bar their use at trial. Similar arguments were raised unsuccessfully by Mr Ngudjolo in the Prosecution's appeal reversing a Trial Chamber II decision to prohibit Prosecution access to Detention Centre recorded conversations.²⁷

23. Even if, *arguendo*, the Accused did not understand that his calls could be obtained by the Prosecution (at least before his admission in 2015 that he used codes because he knew the Prosecution could obtain his calls),²⁸ the Accused's

²⁴ ICC-01/04-02/06-1878, para. 37.

²⁵ ICC-01/04-01/07-1718, para. 44.

²⁶ ICC-01/04-02/06-1878, para. 43.

²⁷ ICC-01/04-01/07-1718, para. 32.

²⁸ ICC-01/04-02/06-759-Red2, para. 37.

ignorance of the law – that the Prosecution could obtain his non-privileged calls by judicial warrant - is irrelevant to the Chamber's resolution of the issue.²⁹ In any event, his claimed ignorance, at least by December 2013, is hardly plausible considering he could not have failed to notice the arrival of four co-detainees in pre-trial detention for Article 70 charges principally based on the Prosecution's lawful ability to seek a judicial warrant for Mr Bemba's detention calls.³⁰

24. The Defence does not dispute that the Accused told his witnesses his strategy. Nevertheless, the Defence boldly asserts that what the Prosecution alleges to be coaching is actually "a discussion of a truthful account of events" and therefore is not "suitable" to be challenged under cross-examination.³¹ It goes without saying that courts will rarely blindly accept one party's assertions alone that issues of material dispute are in fact true and therefore unchallengeable.
25. Since the Defence intends to call implicated Defence witnesses, it will ultimately be for the Chamber to decide whether, while facing a potentially lengthy sentence for his alleged crimes, the Accused gave heavily-coded instructions, explanations, and reminders about his "strategy" to Defence witnesses in his alleged attempt to ensure "a truthful account". Or, whether, as the Prosecution alleges, he unlawfully coached Defence witnesses in a rather transparently obvious attempt to ensure his own exoneration.
26. Whatever the strength of the Parties' arguments, the Chamber will need to know the extent of the Accused's discussions with the implicated Defence witnesses in order to evaluate their testimonies. Even if the Accused's instructions to implicated Defence witnesses could be established as true by the Defence's assertions alone, it would still be necessary to inquire into the conversations to determine the independence of the individual Defence witness accounts. The

²⁹ *Ignorantia juris non excusat*.

³⁰ ICC-01/05-46.

³¹ ICC-01/04-02/06-1878, para. 41.

Chamber will need to ensure that the witnesses' accounts are based on their personal knowledge and not on the instructions, explanations, or reminders from the Accused or others – even if they could be established as true.

27. It is instructive to view the issue through a different lens. If the Prosecution were to tell prospective witnesses its case strategy before investigators interviewed them and took their statements, Chambers of this Court would rightly be sceptical of the weight which could be accorded to such statements, and would unquestionably allow robust cross-examination of any testimony based on such a practice. The same logic should apply when it is the Accused who has told his witnesses his “strategy” in detail before an interview with his lawyers.³²

28. There is no infringement of the Accused's right to silence. The right to silence is not in issue in this litigation. The Detention Centre monitoring was not done in secret. The Accused was informed upon his arrival at the Detention Centre of the process. The Prosecution did not induce or coerce the Accused to instruct, explain, or rehearse his “strategy” to Defence witnesses. Instead, the Accused voluntarily initiated the conversations and chose to engage in that behaviour. After discovering the Accused's calls through lawful means, there is nothing inequitable in the Prosecution's intent to use the Accused's own voluntary words and conduct to cross-examine the implicated Defence witnesses.

29. The Defence indicates that the Prosecution did not comply with rules 111 and 112 of the Rules of Procedure and Evidence (“Rules”). However, those rules do not apply in a context where the Prosecution is not taking a statement from a witness or suspect. Laws regulating rights and warnings given to suspects, and procedural requirements for taking statements, are not relevant in the present

³² ICC-01/04-01/10-465-Red, para. 51. In *Prosecutor v. Mbarushimana* Pre-Trial Chamber I refused to confirm charges based on, at least in part, the fact that Prosecution investigators had on occasion asked leading questions of witnesses, a technique which is at least several steps removed from a scenario where a party tells a prospective witness its “strategy” in detail before an interview.

circumstances. If the Defence's reasoning was valid, no utterance of a suspect or accused – even words uttered during the commission of a crime - could ever be introduced in Court absent prior notice to the Accused that his words could be used against him. The Defence's argument has no basis in law or logic.

30. Finally, the Defence motion is overbroad and premature. The Chamber should rule on the relevance of the material requested to be used in cross-examination if and when the Prosecution files a substantiated request in accordance with the Chamber's previous decision.³³ In accordance with that decision, the Prosecution will use discretion in seeking such leave from the Chamber and will not seek to cross-examine witnesses who are not implicated in the coaching scheme. To issue a blanket ruling at this stage, however, would deprive the Prosecution of the ability to fulfil its duties under article 54(1) to establish the truth of the Accused's influence on Defence witnesses.

Use at trial of the lawfully-obtained evidence is probative and not unduly prejudicial

31. The general rule in this Court is that all relevant evidence is admissible, and thus subject to use during witness examinations, unless there is some express prohibition. Article 69 of the Statute and rules 63 and 64 of the Rules expressly and implicitly set out this principle. What is *not* contemplated in the Statute or the Rules is an *ex ante* general prohibition of any use at trial of an entire category of lawfully-obtained material.

32. The Statute and Rules establish that an accused's right to discussions about case strategy is protected, but only under the privilege of attorney-client communications. There is no recognised right or privilege for an accused to have secret communications about "strategy" with witnesses or others. The privileged communications of an accused under rule 73 of the Rules are limited to counsel,

³³ ICC-01/04-02/06-1883, para. 61.

physician, and clergy, or other similar types of professional relationships, but does not extend to witnesses. Thus, no matter how they are subsequently characterised, communications of “strategy” to witnesses prior to testimony do not benefit from any legal privilege.

33. Additionally, contrary to Defence claims that the use of the Accused’s communications would cause prejudice which would outweigh probative value, the communications are central to the credibility of the implicated Defence witnesses and therefore, highly material and probative to the credibility of their respective testimonies.

34. At its core, this is an issue of establishing the truth. The Prosecution, acting in the public interest, has a statutory duty to do so. If it is true that the implicated Defence witnesses were instructed, persuaded, or influenced through calls from the Accused, it would be a miscarriage of justice to not expose those facts through cross-examination. Any evaluation of their testimonies without these facts would be inherently flawed. For each of the implicated Defence witnesses, the Chamber must be in a position to evaluate the effect of the Accused’s words and conduct on the witness and his or her testimony. For each of those witnesses, such an evaluation would be impossible without assessing the possible effect of the calls between the Accused and such witness.

Conclusion

35. For the foregoing reasons, the Prosecution respectfully requests that the Chamber reject the Defence motion.



Fatou Bensouda
Prosecutor

Dated this 8th day of May 2017
At The Hague, The Netherlands