

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **21 November 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 redacted version of

**Decision on Defence request seeking certain material relating to review of
restrictions placed on Mr Ntaganda's contacts, 3 June 2016, ICC-01/04-02/06-1364-
Conf-Exp**

Decision 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 Bosco Ntaganda

Mr Stéphane Bourgon
Me Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of 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**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 21(3), 64, 67 and 68 of the Rome Statute ('Statute'), Rules 77 and 81 of the Rules of Procedure and Evidence ('Rules'), and Regulations 23*bis*, 24(5) and 101 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence request seeking certain material relating to review of restrictions placed on Mr Ntaganda's contacts'.

I. Procedural History

1. On 1 April 2016, in accordance with its 'Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts',¹ the Chamber invited submissions and observations on the restrictions imposed in relation to Mr Ntaganda's contacts, including on the removal of [REDACTED] ('Removed Person') from Mr Ntaganda's list of contacts. The Chamber ordered, *inter alia*, that: (i) the Registry file a report, by 29 April 2016, on the period of active monitoring of Mr Ntaganda's communications; and (ii) parties file any submissions, by 9 May 2016, on the inclusion of the Removed Person on Mr Ntaganda's contact list, and on the lifting or adjustment of other restrictions on Mr Ntaganda's contacts. The Chamber also stipulated that any responses to the submissions of the other party were to be filed by 16 May 2016 ('Response Deadline').²
2. On 29 April 2016, the Registry filed as confidential *ex parte*, available only to the Registry and defence team for Mr Ntaganda ('Defence'), the 'Fourth

¹ 18 August 2015, ICC-01/04-02/06-785-Conf-Exp ('Decision on Restrictions'), paras 65 and 70.

² Email communication from Legal Officer of the Chamber to the parties and Registry on 1 April 2016 at 20:56.

Report on the post-factum review of the phone conversations made by Mr Ntaganda' ('Registry Report').³

3. On 9 May 2016, the Defence filed as confidential *ex parte*, available only to the Registry, Defence and Office of the Prosecutor ('Prosecution'), the 'Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention' ('Defence Submissions').⁴
4. Also on 9 May 2016, the Prosecution filed as confidential *ex parte*, available only to the Victims and Witnesses Unit ('VWU'), the 'Prosecution's submissions on the restrictions to NTAGANDA's contacts' ('Prosecution Submissions'), including fifteen annexes, thirteen of which are *ex parte*, Prosecution and VWU only ('*Ex Parte Annexes*').⁵ On the same day, it filed a confidential *ex parte* version of the Prosecution Submissions, available to the Defence, including redacted versions of Annexes A and B ('*Inter Partes Annexes*').⁶
5. On 11 May 2016, the Defence filed 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' ('Request').⁷
6. On 12 May 2016, the Chamber shortened the deadline for responses to the Request to 16 May 2016, and suspended the Response Deadline until the Chamber has issued a ruling on the Request.⁸

³ ICC-01/04-02/06-1303-Conf-Exp, plus four annexes, also filed as confidential *ex parte*, available only to the Registry and Defence.

⁴ ICC-01/04-02/06-1312-Conf-Exp and ICC-01/04-02/06-1312-Conf-Exp-AnxA.

⁵ ICC-01/04-02/06-1313-Conf-Exp.

⁶ Prosecution's submissions on the restrictions to NTAGANDA's contacts, ICC-01/04-02/06-1313-Conf-Exp-Red, plus ICC-01/04-02/06-1313-Conf-Exp-AnxA-Red and ICC-01/04-02/06-1313-Conf-Exp-AnxB-Red. A public redacted version was filed on 17 May 2016 (ICC-01/04-02/06-1313-Red).

⁷ See ICC-01/04-02/06-1315-Conf-Exp-Corr (a corrected version of ICC-01/04-02/06-1315-Conf-Exp).

⁸ Email communication from Legal Officer of the Chamber to the parties on 12 May 2016 at 10:49.

7. On 16 May 2016, the Prosecution filed a response to the Request ('Response'), opposing it.⁹
8. On 18 May 2016, the Defence filed a request seeking leave to reply on six points ('Request for Leave to Reply').¹⁰
9. On 23 May 2016, the Prosecution responded, opposing it ('Response to Request for Leave to Reply').¹¹

II. Submissions

10. In its Request, the Defence seeks an order from the Chamber for the Prosecution to: (i) disclose without redactions, or only such redactions as are 'specifically justified', the *Ex Parte* Annexes; (ii) remove all redactions, or maintain only such redactions that are 'specifically justified', to the Prosecution Submissions and the *Inter Partes* Annexes; and (iii) re-submit any Prosecution Investigation Notes with an attestation 'that the contents thereof are true and correct under penalty of perjury'.¹²
11. The Defence argues that the Prosecution has failed to offer any *inter partes* justification for the non-disclosure of the *Ex Parte* Annexes, and challenges whether the redactions to the Prosecution Submissions and *Inter Partes* Annexes, and the classification of the *Ex Parte* Annexes, are consistent with the Chamber's previous finding that 'the Defence is entitled to know the scope of

⁹ 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-01/04-02/06-1315-Conf-Exp-Corr, ICC-01/04-02/06-1318-Conf-Exp. A confidential *ex parte* version, only available to the Prosecution, Defence and Victims and Witnesses Unit, was filed the following day (ICC-01/04-02/06-1318-Conf-Exp-Red).

¹⁰ Request on behalf of Mr Ntaganda seeking leave to reply to "Confidential, EX PARTE, 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'", ICC-01/04-02/06-1318-Conf-Exp", ICC-01/04-02/06-1322-Conf-Exp.

¹¹ Response to the Defence request for leave to reply to the "Confidential, EX PARTE, 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'", ICC-01/04-02/06-1318-Conf-Exp", ICC-01/04-02/06-1322-Conf-Exp, ICC-01/04-02/06-1331-Conf-Exp.

¹² Request, ICC-01/04-02/06-1315-Conf-Exp-Corr, para. 1. *See also* paras 3-9.

the allegations against Mr Ntaganda and to understand the evidence submitted to the Chamber'.¹³ To the extent that the *Ex Parte* Annexes contain allegations of witness coaching, the Defence avers that their disclosure to the Chamber on an *ex parte* basis 'may have an impact upon trial fairness as a whole', and it therefore seeks disclosure of this information to it 'unless there is a compelling and specific justification not to do so'.¹⁴

12. In its Response, the Prosecution argues that the *Ex Parte* Annexes ought not to be made accessible to the Defence because: (i) this would compromise the Prosecution's ongoing investigations into potential offences under Article 70 of the Statute;¹⁵ (ii) the Defence is sufficiently informed of the nature and scope of the Prosecution's allegations even in the absence of the *Ex Parte* Annexes, which merely provide additional examples of Mr Ntaganda's alleged actions regarding witness interference and coaching;¹⁶ and (iii) the material contained in the *Ex Parte* Annexes is not disclosable within the meaning of Rule 77 of the Rules nor Article 67(2) of the Statute, and, even if it were found to be disclosable, would be protected by Rule 81(2) of the Rules.¹⁷ The Prosecution argues in the alternative that, should the Chamber order that access be provided to the Defence to some or all of the *Ex Parte* Annexes, it would seek to withdraw reliance on them to ensure their non-transmission to the Defence.¹⁸

13. The Prosecution argues further that, with respect to redactions to the *Inter Partes* Annexes, it has provided as much material as possible to the Defence without prejudicing, *inter alia*, the security of Prosecution witnesses, their

¹³ Request, ICC-01/04-02/06-1315-Conf-Exp-Corr, para. 4, referring to 'Corrected version of "Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs" issued on 8 December 2014 (ICC-01/04-02/06-410-Conf-Exp)', 16 February 2015, ICC-01/04-02/06-410-Conf-Exp-Corr ('Decision of 8 December 2014'), erroneously referring to para. 45 (actually referring to para. 48).

¹⁴ Request, ICC-01/04-02/06-1315-Conf-Exp-Corr, para. 7.

¹⁵ Response, ICC-01/04-02/06-1318-Conf-Exp, para. 2. *See also* paras 16-22.

¹⁶ Response, ICC-01/04-02/06-1318-Conf-Exp-Red, para. 3. *See also* paras 23-32.

¹⁷ Response, ICC-01/04-02/06-1318-Conf-Exp, para. 4. *See also* paras 33-39.

¹⁸ Response, ICC-01/04-02/06-1318-Conf-Exp-Red, para. 5. *See also* paras 40-41.

family members, or innocent third parties.¹⁹ The Prosecution also avers that there is no requirement in the statutory framework for an attestation of truth of the Investigation Notes; nor is this required to support a finding of 'reasonable grounds to believe' that the restrictions need to remain in place.²⁰

III. Analysis

i. Request for Leave to Reply and response thereto

14. As a preliminary matter, regarding the Request for Leave to Reply, pursuant to Regulation 24(5) of the Regulations, the Chamber recalls that participants may only reply to a response with the leave of the Chamber. The Chamber does not consider that it would have been assisted by further submissions on any of the six identified issues. The Chamber therefore rejects the Request for Leave to Reply. Having so decided, the Chamber does not consider it necessary to further address the Response to Request for Leave to Reply. Nonetheless, the Chamber instructs the parties to refrain from making substantive submissions in requests for leave to reply and responses thereto.²¹

ii. Applicable law

15. The Chamber recalls the applicable law set out in its previous decisions relating to the placing of restrictions on Mr Ntaganda's contacts.²² While adjudicating only the Request at this stage, rather than deciding upon the ultimate issue of whether restrictions to Mr Ntaganda's contacts ought to be lifted or modified, the Chamber considers the law cited therein to be relevant to its assessment of the degree of accessibility to the Defence of the material

¹⁹ Response, ICC-01/04-02/06-1318-Conf-Exp-Red, para. 6. *See also* paras 42-46.

²⁰ Response, ICC-01/04-02/06-1318-Conf-Exp-Red, para. 7. *See also* paras 51-57.

²¹ *See, in this regard, The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', 13 February 2007, ICC-01/04-01/06-824 (OA 7), para. 68.

²² *See* Decision of 8 December 2014, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, paras 40-44 and Decision on Restrictions, ICC-01/04-02/06-785-Red, paras 39-42.

supporting the Prosecution Submissions, for the purposes of ensuring the litigation as a whole is conducted with due regard to the rights of the accused.

16. In this connection, the Chamber recalls that, when previously deciding on the issue of restrictions to Mr Ntaganda's contacts, it held that:

Without prejudice to the conditions set out in a future redactions regime, the Prosecution may redact such information as is strictly necessary for ensuring the protection of the witnesses, including, where appropriate, the identities of the witnesses and specific identity of the individuals alleged to have contacted them. However, the general nature of the allegations, including the timing, should be disclosed.²³

17. The Chamber affirms that, in respect of the present Request, in order to meaningfully respond to the Prosecution Submissions, the Defence 'is entitled to know the scope of the allegations against Mr Ntaganda'.²⁴

iii. Findings of the Chamber

18. The Chamber considers the Prosecution Submissions to contain sufficient information, available to the Defence, regarding certain allegations of witness interference that the Prosecution seeks the Chamber to rely upon to support ongoing restrictions on Mr Ntaganda's contacts, including in relation to Witnesses [REDACTED],²⁵ [REDACTED]²⁶ and [REDACTED].²⁷ The Chamber also considers there to be sufficient material available to the Defence in relation to allegations of witness coaching in connection with the telephone conversation of 12 January 2014 and with Witnesses [REDACTED].²⁸

²³ Decision of 8 December 2014, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para. 48.

²⁴ Decision of 8 December 2014, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para. 48.

²⁵ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, paras 26-29.

²⁶ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, para. 30, *referring to* Confidential redacted version of "Prosecution's additional request for in-court protective measures for [REDACTED]", 15 March 2016, ICC-01/04-02/06-1212-Conf-Exp, 16 March 2016, ICC-01/04-02/06-1212-Conf-Red, paras 29-41 and Transcript of hearing on 15 April 2016, ICC-01/04-02/06-T-82-CONF-ENG, page 81, line 24 to page 82, line 22.

²⁷ [REDACTED].

²⁸ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, paras 35-38, 46-49 and material in footnotes thereto.

19. With respect to the entirely-redacted paragraphs 40-45 of the Prosecution Submissions, and the *Ex Parte* Annexes referred to therein,²⁹ the Chamber notes that this material is *ex parte* on the basis that it relates to investigations regarding Mr Ntaganda and others with respect to potential offences committed under Article 70 of the Statute, and that its transmission to the Defence may compromise these investigations.
20. While the Chamber is mindful that this material is entirely withheld from the Defence, it notes that the allegations contained therein are of a very similar nature to the incidents for which the Defence has already been provided with specific details. The Chamber does not consider that transmission of this material to the Defence is therefore necessary for the Defence to understand and respond to the allegations of witness interference and coaching raised by the Prosecution in connection with the restrictions litigation. The Chamber notes, however, that the weight, if any, to be attached to this material – which pre-dates the Decision on Restrictions and some of which was prepared by a party to the proceedings – is a matter to be addressed in the Chamber’s ultimate decision on restrictions.
21. In so deciding, the Chamber emphasises that, being composed of professional judges, no prejudice will be occasioned to the accused, given the Chamber’s ability to consider paragraphs 45-50 of the Prosecution Submissions and the *Ex Parte* Annexes only for the limited purposes submitted, and to the extent considered necessary.
22. Further, to the extent that such information may be material to the preparation of the Defence, the Chamber considers that Rule 81 would justify non-disclosure at this stage. The Chamber, however, notes that Article 70

²⁹ *Ex Parte* Annexes C to F. While the Prosecution refers to Annex E at footnote 54 of the Prosecution Submissions, the Chamber considers this to be a typographical error and that this in fact refers to Annex F.

investigations cannot be permitted to continue indefinitely in a manner which could impact proceedings in the *Ntaganda* case. The Prosecution is therefore encouraged 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.

23. With respect to the Prosecution's observations on the inclusion of the Removed Person on the accused's list of contacts, which are contained at paragraphs 50-55 of the Prosecution Submissions, the Chamber considers that sufficient material is available to the Defence to provide a meaningful response to the Prosecution Submissions on the status of the Removed Person. The Chamber notes that the evidentiary material, contained at *Ex Parte* Annexes G to O, is unavailable to the Defence, and considers that this material may tend to reveal the existence of the Prosecution's investigations regarding Mr Ntaganda and others with respect of potential offences committed under Article 70 of the Statute, and therefore ought not to be revealed to the Defence.
24. Nonetheless, the Chamber considers the nature of the Prosecution's allegations in relation to the Removed Person to be readily apparent from the Prosecution Submissions, namely: (i) that the Prosecution believes that the Removed Person 'may be using a false identity and i[s] not [Mr Ntaganda's] [REDACTED]';³⁰ and (ii) that [REDACTED] was previously listed as an authorised contact for the accused under a false identity, which the Prosecution argues suggests that use of false identities to speak to detainees at the Court's Detention Centre 'is common practice'.³¹ Accordingly, the Chamber considers that the Defence has sufficient information to respond to the Prosecution Submissions, and that for the purposes of the present litigation it is neither necessary nor appropriate to order that *Ex Parte* Annexes

³⁰ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, para. 51.

³¹ Prosecution Submissions, ICC-01/04-02/06-1313-Conf-Exp-Red, para. 52.

G to O be transmitted to the Defence. The Chamber does not consider these *Ex Parte* Annexes to be otherwise disclosable under Article 67(2) or Rule 77.

25. Having reviewed the redactions applied to the *Inter Partes* Annexes, the Chamber considers the vast majority to be strictly necessary for ensuring the protection of the witnesses. However, the Chamber is of the view that, unless the Prosecution reverts to the Chamber with further and compelling reasons to maintain them, the following redactions could be lifted: (i) the final sentence of paragraph 1 of *Inter Partes* Annex A; and (ii) paragraph 15 of *Inter Partes* Annex A. [REDACTED].

26. The final issue raised in the Request is whether or not the Prosecution is required to submit Investigation Notes with an attestation 'that the contents thereof are true and correct under penalty of perjury'.³² The Chamber notes that, in the present circumstances, the Investigation Note contained in *Inter Partes* Annex A is accompanied by a signed witness statement, contained in *Inter Partes* Annex B, which, while post-dating the Investigation Note in *Inter Partes* Annex A by three months, attests to matters of the same nature as those adverted to in the Investigation Note in *Inter Partes* Annex A. In the present circumstances, the investigator in question would only be in a position to attest to the record of events and conversations rather than the accuracy of the statements of interviewees,³³ and noting that investigators of the Court are bound by relevant Codes of Conduct,³⁴ the Chamber does not find it necessary to order that the Investigation Note contained in *Inter Partes* Annex A be re-submitted with any form of attestation. The Chamber will consider the nature of any Investigation Note in deciding what weight to accord to it.

³² Request, ICC-01/04-02/06-1315-Conf-Exp-Corr, para. 1. *See also* paras 8-9.

³³ *See, in this regard*, Request, ICC-01/04-02/06-1315-Conf-Exp-Corr, paras 8-9 and Response, ICC-01/04-02/06-1318-Conf-Exp-Red, paras 53-54.

³⁴ *See* 'Code of Conduct for Investigators', Administrative Instruction ICC/AI/2008/005, dated 10 September 2008.

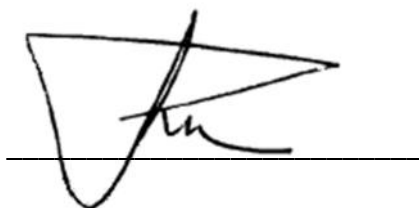
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Prosecution to lift the redactions to *Inter Partes* Annex A in accordance with paragraph 25 above, unless the Prosecution reverts to the Chamber with further and compelling reasons to maintain the redactions within two days of the issuance of this decision;

REJECTS all other requests; and

RESETS the Response Deadline to one week from the issuance of the present decision.

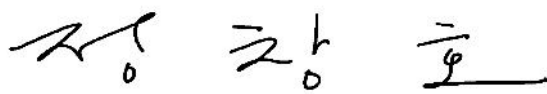
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 21 November 2016

At The Hague, The Netherlands