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No.: ICC-01/04-02/06
Date: 7 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

**Prosecution's Communication of the Disclosure of Evidence obtained
pursuant to Article 70**

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. The Prosecution notifies Trial Chamber VI (“Chamber”) of 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 both Bosco Ntaganda (“Ntaganda”) and Thomas Lubanga (“Lubanga”), obtained pursuant to Article 70 of the Statute.
2. The Prosecution’s review of approximately 450 of these telephone conversations reveals Ntaganda’s involvement in a broad scheme to pervert the course of justice, including by coaching potential Defence witnesses, obstructing Prosecution investigations and interfering with Prosecution witnesses.
3. The Prosecution assesses that these communications are material to the Defence’s preparation of its case, which is set to start in 2017, and to the selection of its witnesses. The Prosecution also intends to rely on these communications.
4. Accordingly, on 7 November 2016, the Prosecution disclosed to the Defence all records and recordings of Ntaganda’s and Lubanga’s non-privileged communications from 22 March 2013 onwards. The Prosecution will, as soon as possible, disclose summaries of these non-privileged telephone conversations and will disclose transcriptions and translations of certain conversations on a rolling basis, upon their completion.

Background

5. On 13 August 2015, the Prosecution submitted a “Request for judicial assistance to obtain evidence for investigation under article 70”,¹ 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.²
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.”³
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.⁴
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

¹ ICC-01/04-638-Conf-Exp.

² ICC-01/04-639.

³ ICC-01/04-728.

⁴ ICC-01/04-729-Conf-Exp.

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.”⁵

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.”⁶
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”).⁷
13. On 4 November 2016, the Single Judge granted the Prosecution’s Request.⁸

Disclosure of evidence obtained pursuant to Article 70

14. The Prosecution’s review of Ntaganda’s recorded conversations from the Detention Centre indicate serious and concerning attempts to interfere with Prosecution investigations and witnesses, and to coach potential Defence witnesses.
15. Accordingly, on 7 November 2016, the Prosecution disclosed to the Defence all records and recordings of Ntaganda’s and Lubanga’s non-privileged

⁵ ICC-01/04-02/06-1364-Conf-Exp, para. 22.

⁶ ICC-01/04-02/06-1494-Conf-Exp-Red, para. 24.

⁷ ICC-01/04-737-Conf-Exp.

⁸ ICC-01/04-738-Conf-Exp.

communications from 22 March 2013 onwards. In order to avoid any unnecessary delay resulting from the technical difficulties of registering over 20,000 audio recordings and associated metadata, the Prosecution has provided the Defence with access to the Registry TRIM folder containing all the materials, which ensures that the Defence has now been given access to the exact same database of audio recordings and related metadata to which the Prosecution has access.

16. The Prosecution summarised approximately 450 audio recordings of non-privileged telephone conversations of both Ntaganda and Lubanga, and is in the process of fully transcribing and translating certain of those conversations upon which it intends to rely. The Prosecution will, without delay, proceed to the disclosure of the approximately 450 summaries *via* its ordinary disclosure channel, namely Ringtail, together with their corresponding audio recordings, in accordance with the e-Court protocol. The Prosecution will also disclose to the Defence on a rolling basis, upon their finalisation, transcriptions and translations of certain conversations.

17. The evidence obtained and analysed by the Prosecution calls for appropriate measures to be taken to safeguard the integrity of the proceedings. The Prosecution will file a separate request to the Chamber to order such measures, which will include a request for enhanced disclosure by the Defence of information concerning the witnesses it intends to call, such as: (1) timely disclosure of witness identities and materials to allow for Prosecution investigations; (2) disclosure of signed witness statements, with an indication of the interview dates and who was present for the interview, including interpreters; (3) disclosure of records of all prior meetings with the witness by the (current and former) Defence team and who was present, including

interpreters; and (4) disclosure of a list of persons who facilitated the witness's contact with the Defence team.

18. 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.



Fatou Bensouda
Prosecutor

Dated this 7th day of November 2016
At The Hague, The Netherlands