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Original: **English** | No.: **ICC-01/04-02/06**
Date: **14 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 – Expedited Ruling Requested

Public redacted version of "Urgent Request for Stay of Proceedings" dated 14 November 2016

Source: **Defence Team of Mr Bosco Ntaganda**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Further to: (i) the *Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70* ("Notice");[1] Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Urgent Request for Stay of Proceedings

1. The Defence requests an immediate suspension of proceedings until the information described in the Prosecution Notice has been disclosed, and more information has been provided about the investigation. The immediate disclosure of this information is necessary to limit the ongoing prejudice caused by past non-disclosure and to allow the Defence to make informed submissions to the Trial Chamber concerning the impact of the investigation and the non-disclosure on the fairness of the proceedings.

2. The Notice alleges that certain unidentified prospective Defence witnesses have been coached as part of a "broad scheme to pervert the course of justice."[2] The Prosecution explains that this allegation is based on its review of Mr Ntaganda's telephone conversations, and those of Mr Thomas Lubanga, since the beginning of his detention. This information, as the Prosecution acknowledges,[3] is subject to disclosure pursuant to Rule 77.[4] The Defence, however, was not informed of the existence of this information until 7 November 2016; still has not received the information; and has received no indication that the Trial Chamber authorized the non-disclosure of this information under Rule 81(2). The lack of disclosure impacts not only on the selection of Defence witnesses and preparation and presentation of the Defence case, but also substantially affects the conduct of cross-examination of Prosecution witnesses. The Defence must know immediately, and should long ago have received disclosure of, the information foreshadowed in the Notice.

[1] ICC-01/04-02/06-1616.
[2] Notice, paras.2, 14.
[3] Notice, para.3.
[4] All references to "Rule" are to be understood as a reference to a rule of the ICC Rules of Procedure and Evidence.

3. The Notice raises serious questions about the fairness of these proceedings. The Prosecution has apparently been listening almost contemporaneously to Mr Ntaganda's telephone calls from the ICC Detention Centre during this trial. The Notice also reveals that an Article 70 case has been ongoing since 13 August 2015; that *ex parte* submissions have been made to, and decisions issued by, a separately constituted Pre-Trial Chamber; and that a certain number of *ex parte* submissions have been made to, and decisions rendered by, this Trial Chamber. The prosecution team in this case may, depending on the modalities of the investigation, have come into possession of information that concerns Defence strategy, witnesses or evidence. The Defence can only offer appropriate submissions to the Trial Chamber and seek remedial measures once all *ex parte* communications with this and any other Chamber have been disclosed, and the precise modalities of the investigation are disclosed.

4. No more witnesses should be heard until the foregoing disclosure is completed and the Defence has had a reasonable opportunity to make appropriate submissions. The Defence is very likely suffering ongoing prejudice. The urgency of the suspension arises not from any action of the Defence, but because the information in the Notice has been kept secret for more than 13 months. An immediate suspension of proceedings is required to give the Defence an opportunity to make proper submissions as to what remedial action is possible to salvage and safeguard the integrity of these proceedings.

I. A SUSPENSION OF PROCEEDINGS IS REQUIRED TO PREVENT ONGOING PREJUDICE IN RESPECT OF CROSS-EXAMINATIONS OF PROSECUTION WITNESSES

5. Whether Defence witnesses have been coached is not a matter that is material to the presentation of the Defence case only. Propositions put to Prosecution witnesses during cross-examination often depend on the matters that the Defence believes it can later establish through its witnesses. Information about

the credibility of Defence witnesses – especially the serious allegation that they are part of "a broad scheme to pervert the course of justice" – is therefore highly material to propositions that can and should be put to Prosecution witnesses. The Defence should, accordingly, have long ago received disclosure under Rule 77 of the information that is foreshadowed in the Notice.

6. No indication is provided in the Notice that non-disclosure was authorized under Rule 81(2). Such non-disclosure must, however, be specifically authorized by the Trial Chamber whose proceedings are potentially affected by the non-disclosure:

> where the Prosecution wishes to withhold disclosure on the basis of Rule 81(2), it must apply to the Chamber to receive authorisation to do so. While the Chamber notes the Prosecution's statement that it notified the Chamber of the existence of its Article 70 Investigation, the Prosecution did not *apply* to the Chamber for a ruling as to whether it must disclose relevant Rule 77 information or material or not. As such, the Chamber finds that insofar as the Prosecution was (i) in the possession of and (ii) did not disclosure Rule 77 information on the grounds that it could prejudice further or ongoing investigations without applying to the Chamber for authorisation, it failed to satisfy the requirements of Rule 81(2).[5]

7. The Prosecution appears to have possessed this information for a long period. Its review of Mr Ntaganda's and Mr Lubanga's telephone conversations started, apparently, on 30 September 2015.[6] This means that this prosecution trial team has had possession of this information for more than 13 months; that it must already have had a basis to suspect this "broad scheme or interference" as of that date; and that it has obtained this information entirely on the basis of *ex parte* submissions – *i.e.* orders issued without any judge being appraised of the potential dangers to the fairness of these trial proceedings or to the merits of the requests. These dangers are all the greater given that the judicial authorizations for investigations and subsequent non-disclosure have

[5] *Bemba*, Decision on 'Defence Request for Relief for Abuse of Process', ICC-01/05-01/08-3255, 17 June 2015, para.83.
[6] Notice, para.9.

apparently not been subject to the control of this Trial Chamber as the guardian under Article 64(2) of the fairness of these proceedings.[7]

8. This period of non-disclosure, even assuming that the Prosecution did at some point receive authorization from the Trial Chamber under Rule 81(2), has been excessive. Such investigations, as discussed below, have without exception been concluded and disclosed almost immediately at the ICTY and ICTR to ensure that a cloud of non-disclosure did not destroy the fairness of the trial.

9. Furthermore, there may be other investigative steps and information of which the Prosecution has still not informed the Defence or the Trial Chamber. For example, the Defence is not informed as to whether any members of the Defence team have at any time been telephonically surveilled or what information may have been obtained. Such information, whose existence or otherwise should now be confirmed or denied by the Prosecution, may be relevant to cross-examination in ways that are, as yet, unknown.

10. The appropriate remedy, given the *prima facie* indications of this long period of non-disclosure, is an immediate adjournment of proceedings. The purpose of the adjournment is to give the Prosecution time to disclose the information referred to in the Notice, and to give the Defence a reasonable opportunity to apprise itself of the content of that information. No further witnesses should be heard until disclosure has been completed and the Defence has had an opportunity to assess the information. The information that has not been disclosed may well have a pervasive, ongoing and immediate impact on Defence strategy and cross-examinations. Neither the interest of justice, nor the fairness of these proceedings, is served by requiring the Defence to proceed without being in a position to identify the prejudice that it is very likely

[7] The Notice does not indicate to what extent the Trial Chamber was given the opportunity to exercise oversight over the Article 70 investigation to ensure that any investigative steps – as legitimate as they might be from an Article 70 perspective – did not infringe the fairness of these proceedings. The Notice does indicate, however, that the Trial Chamber on at least two occasions urged the Prosecution to wrap up is investigations promptly out of concern for their potential impact on this trial. *See* Notice, paras.5-11.

suffering, or to conduct its cross-examinations without having disclosure of potentially vital information.

II. AN ADJOURNMENT OF PROCEEDINGS IS REQUIRED TO ALLOW THE DEFENCE TO ASSESS HOW TRIAL FAIRNESS HAS BEEN AFFECTED AND TO SEEK APPROPRIATE REMEDIES TO MINIMIZE PREJUDICE

11. There has been a secret parallel Article 70 investigation ongoing since before the start of trial in this case. The Defence has not yet been informed of the scope of this investigation or its modalities and, accordingly, is not yet in a position to offer submissions as to the nature and extent of the prejudice to the fairness of these proceedings or what remedies, if any, might be available to salvage or safeguard the fairness of these proceedings.

12. The least that can be said, however, is that the prosecuting team in this case appears to have been receiving, almost contemporaneously, recordings of all of Mr Ntaganda's non-privileged telephone calls from the ICC Detention Centre since almost the very beginning of this trial. It has also been provided all recordings of Mr Ntaganda's and Mr Lubanga's telephone calls since the beginning of the former's detention.[8] The number of recordings that have not been disclosed is said to exceed 20,000.

13. The Defence does not know whether any of the information provided to the prosecuting team in this case has been screened or filtered in any way. This means, for example, that the prosecuting team in this case may have received large volumes of information that could not be described as even remotely relevant to any Article 70 investigation, including *inter alia* legitimate discussions about Defence or Prosecution witnesses, or information concerning defence strategy.

[8] Notice, para.5.

14. One would normally expect such information – given its potential impact on the fairness of an adversarial trial – to be filtered by some independent entity. In most national or international systems, this function – if not the investigation and prosecution as a whole – would be carried out by an independent counsel, an *amicus curiae* or even, subject to stringent conditions, a separate and independent team within the prosecutorial authority. No indication has been provided that this occurred.

15. The involvement of the prosecuting trial team in an Article 70 case against the same accused has been specifically disapproved, although not categorically prohibited, by the ICC Appeals Chamber:

> The fact that staff members of the OTP who were already familiar with the *Bemba* case also carried out the initial phases of article 70 proceedings arising from that case does not, *on its own*, give rise to reasonable doubts as to the Prosecutor's impartiality. *However, despite the above finding, the Appeals Chamber wishes to underline that, notwithstanding any potential advantages of familiarity, it considers that it is generally preferable that staff members involved in a case are not assigned to related article 70 proceedings of this kind.*[9]

This statement from the Appeals Chamber was issued before the commencement of the Article 70 investigation in this case. This statement may be understood as applying not only to those formally assigned to a related Article 70 investigation, but also those who come into possession of information arising out of such an investigation.

16. No explanation has been provided as to what circumstances have justified the Prosecution departing from the Appeals Chamber's enunciation of best practice. The Appeals Chamber, though not finding that the involvement of the trial team is "on its own" categorically improper, implies that this arrangement

[9] *Bemba et al.*, Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff, ICC-01/05-01/13-648-Red3, 21 October 2014, (Public Redacted Version) para.40 (italics added).

is a cause for serious concern and should be avoided. The Prosecution has simply ignored this guidance. The extent to which ignoring this guidance has prejudiced trial fairness in the specific circumstances of this case is a question that can be assessed only based on he specific circumstances – of which the Defence has not yet been informed.

17. The specific circumstances of which the Defence needs to be immediately informed include, at a minimum, the following:

    (i) whether the conversations have been reviewed by the prosecuting team in this case, rather than an independent team;

    (ii) if not, whether any information has been shared with this prosecuting team and, if so, whether it has been subject to any screening for relevance or to exclude information that is otherwise sensitive, confidential, privileged or might otherwise affect the fairness of the proceedings;

    (iii) the timing of the transmission of this information to the prosecuting team in this case;

    (iv) the content of any and all conversations referred to in the Notice, as well as any summaries or transcripts thereof;

    (v) the existence of any information other than is referred to in the Notice that is subject to disclosure under Rule 77 or, in the alternative, a statement by the Prosecution that all such information has been disclosed;

    (vi) any *ex parte* submissions to, and any *ex parte* decisions issued by, this Trial Chamber in relation to this matter (or in the alternative, in the least redacted version consistent with the justifications defined in Rule 81(2));

(vii) any communications, other than formal submissions or decisions, in any medium by the Prosecution to the Trial Chamber or *vice versa* in relation to the Article 70 investigation;

(viii) any *ex parte* submissions in any medium to, and any *ex parte* decisions issued by, the Pre-Trial Judge; and

(ix) any justifications that might exist for not having revealed the existence of these *ex parte* communications and investigations earlier.

18. The *prima facie* impropriety of prolonged Article 70 investigations, accompanied by *ex parte* submissions, concurrent with a trial is illustrated by the practice of the ICTY and ICTR. Serious contempt allegations have been brought at these tribunals against accused persons and against the Defence and the Prosecution. Never, to the Defence's knowledge, has the Prosecution been permitted to pursue a secret investigation concurrent with a trial for more than a very short period. Trial Chambers have consistently instructed that such allegations be disclosed to the Defence promptly.[10] In many cases, the Prosecution has raised the allegations *inter partes* from the outset.[11]

19. The Trial Chamber has apparently been urging the Prosecution to promptly reveal its investigations to the Defence. On 3 June 2016, the Trial Chamber apparently advised the Prosecution "that Article 70 investigations cannot be permitted to continue indefinitely in a manner which could impact proceedings

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[10] *Simić et al.*, Judgement in the Matter of Contempt Allegations Against an Accused and His Counsel, 30 June 2000, paras.1-3 (describing how the Prosecution was required to disclose its allegations to the Defence within fifteen days of the first ex parte communication to the Trial Chamber); *Nyiramasuhuko et al.*, Decision on the Prosecutor's Further Allegations of Contempt, 30 November 2001, paras.1,17-22 (*ex parte* allegations revealed *inter partes proprio motu* by the Trial Chamber six days after the *ex parte* allegations made by the Prosecution); and *Lukić & Lukić*, Report of Presiding Judge of Trial Chamber III to Vice-President of Tribunal Pursuant to Rule 15(B)(i), 2 January 2009, para. 16 (all allegations disclosed to the Defence 63 days after they were first made on an *ex parte* basis to the Trial Chamber).

[11] *Ngirabatware*, Decision on Prosecution Oral Motion for Amendment of the Chambers Decision on Allegations of Contempt, 6 July 2010; *Ngirabatware*, Decision on Allegations of Contempt, 12 March 2010; *Nzabonimana*, Decision on the Prosecution's Urgent Motion Alleging Contempt of the Tribunal, 15 December 2009; *Ngeze*, Order Directing the Prosecution to Investigate Possible Contempt and False Testimony, 6 September 2005; *Ntakirutimana*, Decision on Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure Etc., 16 July 2001.

in the *Ntaganda* case."[12] This instruction appears in a paragraph of a decision that, in the version provided to the Defence, reads [REDACTED].[13] The Defence urgently needs to know whether there have been any similar instructions; the context of such other instructions; and the dates on which such instructions were issued.

20. Any assertion by the Prosecution that such disclosure was unnecessary because the accused is allegedly involved must be rejected. An accused has an inalienable right to a fair trial. Suspicions of misconduct cannot be used to engage in prolonged investigations whose consequence is to undermine the fundamental aspects of a fair trial, including full disclosure and maintaining the confidentiality of information. While secrecy in respect of an Article 70 investigation may be justified over a very short period, the Prosecution has apparently had access to all of Mr Ntaganda's telephone calls for more than 13 months – *i.e.* throughout most of this trial.

21. The scale and duration of the non-disclosure is unprecedented. The implication is that the Prosecution has not been seeking to obtain evidence about suspicions of *past* Article 70 offences, but has rather been waiting for indications of *future* Article 70 offences.

22. These measures, regardless of whether justified from an Article 70 perspective, are likely not compatible with a fair adversarial trial in this case. These measures have now been in place for a long period, and there is a possibility that no remedy will counter-act the prejudice that has already been caused to the fairness of these proceedings. Alternatively, measures need to be taken as quickly as possible to limit the prejudice that could otherwise be caused.

23. The Defence requires time to immediately review the disclosure foreshadowed in the Notice, and that has been requested at paragraph 17 above, in order to:

[12] Notice para.10.
[13] [REDACTED].

(i) offer submissions as promptly as possible concerning the impact on the fairness of these proceedings arising from the Article 70 investigation; and (ii) to suggest remedial measures, if any are possible, to counteract any such unfairness. Allowing the trial to continue in the absence of such submissions risks continuing trial under conditions that are fundamentally unfair.

24. The chilling effect of the Notice on the Defence also cannot be ignored. The Defence does not know the scope of the investigation; the witnesses suspected to have been tampered with; the nature of the alleged obstruction of Prosecution investigations;[14] or whether any past or current Defence team member is under suspicion. The Defence cannot conduct a proper defence without such information. As previously stated by the Trial Chamber in a similar context:

> [REDACTED].[15]

As urgent as that matter was, the Notice concerns matters of exponentially greater importance and urgency.

25. The interruption of proceedings, though unfortunate, is both necessary to preclude potential unfairness and squarely attributable to the Prosecution's decision to withhold disclosure for as long as it has.

CONFIDENTIALITY

26. Pursuant to Regulations 23*bis* (1) of the Regulations of the Court, this Request is classified as confidential, as it refers to confidential decisions.

CONCLUSION AND RELIEF SOUGHT

27. The Notice is a bombshell landing in the middle of these proceedings. The Defence requires time, before any further proceedings are held, to analyse the information foreshadowed in the Notice. This analysis is necessary so that the

[14] Notice, para.2.
[15] [REDACTED].

Defence can: (i) ensure that all future cross-examinations are conducted in light of this vital disclosure; and (ii) offer submissions as soon as possible concerning the impact of the Article 70 investigation on the fairness of these proceedings which may include proposing measures, if any are possible, that limit its prejudicial impact. The Defence simply cannot conduct a proper defence without this information, and the information that is requested in paragraph 17.

28. An immediate suspension of proceedings is requested until at least the beginning of the next evidential block, which is tentatively scheduled to commence on 16 January 2017.

RESPECTFULLY SUBMITTED ON THIS 14TH DAY OF NOVEMBER 2016

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands