

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 12 June 2017

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

**Request for Clarification of Decision on further matters related to the testimony
of Mr Ntaganda**

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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I. INTRODUCTION

1. The Prosecution seeks urgent clarification of two matters arising from the Decision on further matters related to the testimony of Mr Ntaganda,¹ regarding the scope of allowable communication between the Accused and his Counsel during the former's testimony. The Prosecution seeks clarity as to whether the Chamber prohibits Defence Counsel: (a) generally, from discussing the Accused's testimony with him during the course of such testimony; and (b) from discussing the Detention Centre calls on the Prosecution's list of items for cross-examination of the Accused, without specific leave of the Chamber. In the Prosecution's submission, clarity on these points will be of assistance to the Parties and participants, and in particular, to the Accused and his Counsel, and will ensure full compliance with the Chamber's order.

II. BACKGROUND

2. On 17 May 2017, the Chamber informed the Parties and participants that, following a request from the Defence team for the Accused,² the upcoming schedule for the presentation of Defence evidence would be amended, and that, *inter alia*, the second evidentiary block would run from 14 June until 16 June 2017 and from 27 June to 21 July 2017, for Mr Ntaganda's testimony.³
3. On 19 May 2017, the Chamber issued the 'Decision on Defence request to modify the schedule for the first two evidentiary blocks', in which it provided certain limited directions in relation to Mr Ntaganda's testimony.⁴
4. Further, on 19 May 2017, the Defence filed the 'Defence Request seeking Trial Chamber VI to take measures allowing for the testimony of Mr Ntaganda to take

¹ ICC-01/04/02/06-1945 ("Decision").

²² ICC-01/04-02/06-1903.

³ Email communication from the Chamber to the Parties and participants on 17 May 2017 at 15:05pm.

⁴ ICC-01/04-02/06-1914.

place in conditions which best favour the Chamber's truth seeking function' ("Defence Request").⁵

5. On 24 May 2017, as instructed by the Chamber,⁶ the Prosecution⁷ and Legal Representative for Victims⁸ filed their respective responses to the Defence Request.
6. On 26 May 2017, in accordance with the Chamber's instructions,⁹ the Prosecution filed a request for orders concerning Mr Ntaganda's testimony ("Prosecution Request"), seeking, *inter alia*, that the Chamber prohibit the Accused and his Defence team from communicating for the duration of the Accused's testimony.¹⁰
7. On 31 May 2017, the Chamber convened a hearing to discuss issues related to the Accused's upcoming testimony, including those arising from the Defence Request and Prosecution Request.¹¹
8. On 8 June 2017, the Chamber issued its 'Decision on further matters related to the testimony of Mr Ntaganda' ("Decision").¹²

III. SUBMISSIONS

9. The Prosecution seeks clarification from the Chamber regarding the scope of allowable communication between Mr Ntaganda and his Defence team during his testimony. Guidance is sought in particular in relation to the following areas:

⁵ ICC-01/04-02/06-1915.

⁶ Email communication from the Chamber to the Parties and participants on 22 May 2017 at 11:05am.

⁷ ICC-01/04-02/06-1921.

⁸ ICC-01/04-02/06-1922.

⁹ ICC-01/04-02/06-1914, para. 21.

¹⁰ ICC-01/04-02/06-1924-Red.

¹¹ See Transcript of hearing on 31 May 2017, ICC-01/04-02/06-T-208-CONF-ENG ET.

¹² ICC-01/04-02/06-1945.

(a) Prohibition on any discussions regarding the Accused's testimony

10. The Chamber's Decision is clear that Defence Counsel is not permitted to advise Mr Ntaganda as to how he ought to respond to a question or line of questioning.¹³ In reaching this conclusion, the Chamber relied upon Trial Chamber II's decision in *Katanga*¹⁴ that declined to preclude all communication between Defence Counsel and the Accused, but held that it was prohibited for Counsel to recommend how the Accused should respond to questions posed to him *and more generally*, it was prohibited to discuss his testimony with him while it was ongoing.¹⁵ The Prosecution seeks clarification as to whether the Chamber's Decision incorporated the totality of paragraph 15 of the *Katanga* decision, thereby prohibiting any discussions between the Accused and his Counsel or Defence team on the Accused's testimony during the course of that testimony.

11. In further support of this reading of the Chamber's Decision, the Chamber observed that any communication between the Accused and his team "should always be appropriate", and recalled the provisions of the Code of Conduct that require counsel to maintain the integrity of the evidence and to refrain from any kind of misconduct.¹⁶ The Chamber found that these provisions of the Code of Conduct require counsel to refrain from misconduct, "including from that referred to in paragraphs 28 and 29 of the Witness Preparation Protocol".¹⁷

12. Although the Chamber did not limit itself to paragraphs 28 and 29 of the Witness Preparation Protocol, these provisions alone go further than prohibiting counsel

¹³ Decision, para. 20,

¹⁴ Decision, para.19.

¹⁵ Decision, para. 20 footnote 29, in which the Chamber stated "See also in this regard, *Katanga* and *Ngudjolo* Decision, ICC-01/04-01/07-3171, para.15...". At para. 15, Trial Chamber II stated: "*La Chambre tient à souligner, comme le reconnaît d'ailleurs la Défense de Germain Katanga, qu'il est interdit au conseil d'un accusé qui témoigne sous serment de faire à ce dernier des recommandations sur la manière dont il doit répondre aux questions qui lui sont posées et, d'une manière plus générale, de discuter de son témoignage avec lui au cours de sa déposition*". (Emphasis added).

¹⁶ Decision, para. 20.

¹⁷ Decision, para. 15.

from advising the witness as to how he ought to respond to a question or line of questioning. Paragraphs 28 and 29 prohibit the examining lawyer from: (a) seeking to influence the substance of a witness' answer, either directly or *indirectly* (including, for instance, by informing the witness of the type of evidence that would assist the calling party's case, by suggesting whether or not the witness' answers are right, or leading the witness in an inappropriate way); and (b) training the witness or practicing with him or her the questions and answers expected during the witness' in-court testimony so that the witness memorises those questions and answers).

13. The Witness Preparation Protocol further prohibits an examining lawyer from: (a) seeking new evidence or continuing the calling party's investigations; (b) attempting to influence a witness to testify to factual events that the witness did not observe or perceive; (c) coaching, training or practicing. Moreover the Witness Preparation Protocol requires that witness preparation be carried out in good faith and in keeping with the applicable standards of professional conduct and ethics.
14. Even if Defence Counsel does not explicitly discuss a question or line of questioning with the Accused, any discussion related to the substance of the Accused's testimony risks potentially amounting to influencing, coaching, training or practicing of his responses.
15. It would be in the interests of clarity for all Parties and participants, and in particular for the Accused and his Counsel, if the Chamber makes it explicitly clear that it is adopting the same approach as Trial Chamber II in *Katanga and Ngudjolo*, so that Defence Counsel is not only prohibited from advising the Accused as to how he ought to respond to a question or line of questioning, but is further prohibited from discussing the Accused's testimony with him in a manner that

would be antithetical to the Witness Preparation Protocol during the course of his testimony.

(b) No discussion of any items on the List of Items during testimony

17. The Prosecution further seeks clarification that the Accused and his Defence Counsel are not permitted to discuss any Detention Centre communications on the Prosecution's list of its items for cross-examination ("List of Items") once the Accused testimony's has begun and until such time as it concludes.¹⁸ The Prosecution notes that the Chamber authorised the Accused to speak with his Counsel in relation to the Prosecution's notice of calls that it may use during cross-examination (notice provided on 26 and 31 May 2017) but this permission extends only to the period before the Accused commences testimony.

18. This is a logical interpretation of the Decision, as the Chamber held that for any *newly* notified Detention Centre communications it will decide *at that stage* whether to permit the Defence to provide and discuss these communications with the Accused. The Chamber's permission would not be required if the Defence were able to discuss previously selected items on the List of Items during the course of the Accused's testimony.

IV. CONCLUSION

19. For all the foregoing reasons, the Prosecution seeks clarification from the Chamber that the Defence is prohibited from:

(a) discussing the Accused's testimony with him once it commences; and

(b) discussing any items on the Prosecution's List of Items for cross-examination with the Accused during his testimony, unless for any newly

¹⁸ Decision, para. 21.

notified Detention Centre calls, the Defence has obtained specific leave of the Court.



Fatou Bensouda
Prosecutor

Dated this 12th day of June 2017

At The Hague, The Netherlands