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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

**Public redacted version of “Prosecution response to Defence’s
‘Urgent request for confidential documents in the *Katanga* case’,
ICC-01/04-02/06-737-Conf-Exp”, 24 July 2015, ICC-01/04-02/06-744-Conf-Exp**

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

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Introduction

1. In June 2015, Trial Chamber VI (“Chamber”) suspended Defence investigator Jean LOGO (“LOGO”) on an interim basis because it was gravely concerned by the evidence indicating that LOGO: (i) intentionally revealed the identity of two Prosecution witnesses and information contained in confidential decisions of the Chamber; (ii) suggested to potential Defence witnesses what they should say in their proposed interviews with Defence Counsel; and (iii) discussed paying witnesses, without Defence Counsel’s knowledge, as a strategy for ensuring the Accused’s release.¹ The allegations that triggered the suspension (“Suspension Request”)² concern LOGO’s conduct during a conversation – recorded by Witness P-0190 – that took place on 7 March 2015 (“Recorded Conversation”) and his contacts with Witness P-0190 and Witness P-0901 in this case.
2. In the Suspension Request, the Office of the Prosecutor (“Prosecution”) referred to LOGO’s “alleged improprieties” in *Katanga* (“Prior Alleged Improprieties”),³ which were similar to those alleged in this case. The Defence seeks access to any “materials relevant to the adjudication of allegations against Mr Logo in the *Katanga* case”.⁴ It posits that “previous allegations of misconduct are potentially (but not necessarily) relevant” to the allegations against LOGO in this case.⁵
3. All of the evidence of LOGO’s Prior Alleged Improprieties is already available to the Defence, with the exception of [REDACTED].⁶ The Prosecution does not object to the Defence obtaining access to it.
4. However, the Prosecution opposes the Defence request for access to other materials in the *Katanga* case (“Further *Katanga* Materials”)⁷ because they are – at

¹ ICC-01/04-02/06-667-Conf-Exp.

² ICC-01/04-02/06-658-Conf-Red.

³ ICC-01/04-02/06-658-Conf-Red, paras.42-45.

⁴ ICC-01/04-02/06-737-Conf-Exp, para.12. *See also* para.1.

⁵ ICC-01/04-02/06-737-Conf-Exp, para.8.

⁶ [REDACTED].

best – peripheral to the determination of the issues pending before the Chamber, which relate to LOGO's alleged interference with witnesses and dissemination of confidential information in *this* case. In particular, the Further *Katanga* Materials could not explain, mitigate or shed light on LOGO's conduct during the Recorded Conversation.

Confidentiality

5. This response is classified as “Confidential, *EX PARTE* – only available to the Prosecution, Defence and Registry”, pursuant to regulation 23*bis*(2) of the Regulations of the Court, in line with filings bearing the same designation. The Prosecution submits that it is appropriate to file a public redacted version of this filing.⁸

Procedural History

6. On 19 June 2015, the Prosecution requested that the Chamber suspend LOGO.⁹ It submitted that his conduct violated orders of the Chamber, article 55(1)(b) of the Statute, breached numerous provisions of the Code of Conduct for Investigators, and potentially fell within the scope of article 70(1)(c) of the Statute.¹⁰
7. On 23 June 2015, the Chamber suspended LOGO and took other urgent related measures on an interim basis, “including suspending his access to confidential case related materials, recovering any confidential case related materials currently in his possession and ensuring that he has no further contact with any

⁷ The Prosecution has identified the following materials as falling within the scope of the Defence Request: [REDACTED], [REDACTED]; [REDACTED], [REDACTED]; [REDACTED], [REDACTED]; [REDACTED], [REDACTED]; [REDACTED], [REDACTED]; [REDACTED], [REDACTED]; [REDACTED], [REDACTED]; [REDACTED], [REDACTED].

The Prosecution notes that for some of these materials, it only has access to redacted versions. Should the Chamber grant access to the Defence to unredacted or less redacted versions of these materials, the Prosecution submits that it too should have access.

⁸ ICC-01/04-02/06-725-Conf-Exp.

⁹ The Prosecution also sought other measures, including the suspension of Defence investigator [REDACTED].

¹⁰ ICC-01/04-02/06-658-Conf-Red, paras.4, 24, 48-50.

person at the Detention Centre until such time as the Chamber may otherwise direct" ("Interim Decision").¹¹

8. On 25 June 2015, the Defence filed a notice on the steps taken following the Interim Decision.¹²
9. On 2 July 2015, the Defence filed its *"Expedited motion on behalf of Mr Ntaganda seeking disclosure of necessary material; leave to engage [REDACTED] and Mr Logo concerning the allegations raised against them; and variation of the time limit for the purpose of responding to the 'Prosecution' urgent request for immediate suspension of Defence investigators and other measures"* ("Expedited Motion").¹³
10. On 9 July 2015, the Prosecution responded to the Expedited Motion.¹⁴
11. On 10 July 2015, the Defence filed a request for leave to reply to the Prosecution response to the Expedited Motion.¹⁵ The Chamber granted this request.¹⁶
12. On 14 July 2015, the Defence submitted its reply.¹⁷ It argued that the Prosecution should disclose all information obtained from Witness P-0190 at any time during the investigations and, in particular, the audio file and transcript of the interview conducted on 26 June 2015.
13. On 16 July 2015, the Chamber ordered the Prosecution to disclose the results of any investigation conducted on the authenticity of the Recorded Conversation.¹⁸
14. On 21 July 2015, the Defence filed its request for Further *Katanga* Materials.¹⁹

¹¹ ICC-01/04-02/06-667-Conf-Exp, *esp.* para.8.

¹² ICC-01/04-02/06-673-Conf-Exp.

¹³ ICC-01/04-02/06-691-Conf-Exp.

¹⁴ ICC-01/04-02/06-705-Conf-Exp.

¹⁵ ICC-01/04-02/06-711-Conf-Exp-Red.

¹⁶ E-mail from the Legal Officer of the Chamber to the Parties on 13 July 2015 at 10:15.

¹⁷ ICC-01/04-02/06-718-Conf-Exp.

¹⁸ ICC-01/04-02/06-731-Conf-Exp.

¹⁹ ICC-01/04-02/06-737-Conf-Exp.

15. On 21 July 2015, the Chamber shortened the deadline for any response to the Defence request for Further *Katanga* Materials to no later than 11 am on 24 July 2015.²⁰

Prosecution's Submissions

The Defence's access to the Katanga materials relied on in the Suspension Request

16. In the Suspension Request, the Prosecution referred to LOGO's "alleged improprieties" during the *Katanga* investigation and trial: (i) putting Germain Katanga in direct contact with third parties who were not on the Detention Centre's approved list of callers for Katanga, in violation of Detention Centre rules; (ii) providing confidential information about Prosecution witnesses to third parties; (iii) trying to obtain the locations and contact details of Prosecution witnesses who were known to be in the Court's Protection Programme; and (iv) misrepresenting his role by introducing himself to Defence and Prosecution witnesses as Katanga's lawyer, instead of as his investigator.²¹ The Prosecution only referred to the Prior Alleged Improprieties to demonstrate that LOGO's conduct had previously been called into question.²²
17. All of the evidence of LOGO's Prior Alleged Improprieties is already available to the Defence,²³ with one exception. The Prosecution referred to LOGO's having put Katanga in direct contact with third parties who were not on the Detention

²⁰ Email from the Legal Officer of the Chamber to the Parties at 19:02.

²¹ ICC-01/04-02/06-658-Conf-Red, paras.42-45.

²² ICC-01/04-02/06-658-Conf-Red, para.41.

²³ Either on the website of the Court or as annexes to the Suspension Request. *See*, in relation to each of the Prior Alleged Improprieties: (i) ICC-01/04-01/07-T-288-ENG-CT, p.7, lns.5-16 (open session) and ICC-01/04-01/07-T-290-Red-ENG-WT, p.33, ln.2 to p.35, ln.25 (open session), p.37, ln.3- to p.38, ln.5 (open session), available on the Court's website; (ii) ICC-01/04-02/06-658-Conf-Anx15 (DRC-OTP-1053-0201), para.36 (P-0538); (iii) ICC-01/04-02/06-658-Conf-Anx16, p.3 (P-0028) and ICC-01/04-02/06-658-Conf-Anx15 (DRC-OTP-1053-0201), para.35 (P-0538); and (iv) ICC-01/04-01/07-T-265-Red-ENG, p.44, lns.2-5 (D02-146) and ICC-01/04-01/07-T-284-Red-ENG-WT, p.7, lns.14-18 (open session) (D02-196), both available on the Court's website; and Confidential *Ex Parte* Annex 15, DRC-OTP-1053-0201, paras.33, 42 (P-0538).

The Prosecution also submitted that LOGO had acknowledged during his testimony that it is inappropriate to discuss details of the Defence case with potential Defence witnesses. *See* ICC-01/04-02/06-658-Conf-Red, para.44; and ICC-01/04-01/07-T-289-Red-ENG-WT, p.53, lns.3-8 (open session), available on the Court's website.

Centre's approved list of callers for Katanga as "a violation of the Detention Centre rules".²⁴ The footnote supporting that statement referred to [REDACTED].²⁵ The Prosecution has no objection to the Defence obtaining access to it.²⁶

The Chamber should reject the request for access to the Further Katanga Materials

18. The Prosecution submits that the Chamber should reject the Defence request for access to Further *Katanga* Materials. LOGO's conduct during the *Katanga* proceedings is not pending determination by the Chamber. The Interim Decision made no reference to the Prior Alleged Improprieties. The Chamber issued its urgent interim orders "[o]n the basis of the materials before it".²⁷ It expressed grave concern over "the content of the transcript of the recording" of the conversation that occurred on 7 March 2015.²⁸

19. In the Interim Decision, the Chamber deferred its decision on whether to (i) maintain its interim orders,²⁹ including LOGO's suspension and the bar on his access to case-related materials and contact with any person in the Detention Centre; and (ii) refer the matters raised in the Suspension Request to the Registrar and to the Disciplinary Board ("Pending Issues").³⁰ The Pending Issues thus relate to LOGO's alleged interference with witnesses in *this* case, and nothing in the Further *Katanga* Materials could explain, mitigate, or shed light on LOGO's conduct during the Recorded Conversation. Thus, the Further *Katanga* Materials are not material to the Defence's preparation.

²⁴ ICC-01/04-02/06-658-Conf-Red, para.42.

²⁵ [REDACTED].

²⁶ The Prosecution only has access to a redacted version of [REDACTED]. Should the Chamber decide to give the Defence access to an unredacted version of the report, the Prosecution submits that it too should have access.

²⁷ ICC-01/04-02/06-667-Conf-Exp, para.6. *See also* para.8: "...on the basis of the information before it..."

²⁸ ICC-01/04-02/06-667-Conf-Exp, para.8.

²⁹ ICC-01/04-02/06-667-Conf-Exp, pp.8-9.

³⁰ ICC-01/04-02/06-667-Conf-Exp, p.9, read together with para.5(vi) and Suspension Request, para.57.

20. The Prosecution submits that in order to rule on the Pending Issues, the Chamber need only turn to LOGO's conduct during the Recorded Conversation and to his contacts with Witness P-0190 and Witness P-0901 in this case. As submitted in the Suspension Request, LOGO's suspension is warranted based on his "behaviour in this case alone".³¹ The Suspension Request will thus succeed or fail on the basis of LOGO's conduct in that context alone.
21. The Prosecution submits that any materials relating to LOGO's conduct during the *Katanga* case beyond what the Prosecution relied on in the Suspension Request are, at best, peripheral to the Pending Issues. Granting access to additional material that does not form the basis of the Suspension Request can only serve to distract from the issues at hand, inundate the Chamber with extraneous and tangentially-relevant information, and to aimlessly meander into collateral matters which occurred over six years ago.
22. The Prosecution takes serious issue with the Defence claim that the Prosecution "selectively relies"³² on material from the *Katanga* proceedings by failing to mention that "those allegations (...) were rejected" by Trial Chamber II. The Suspension Request refers to LOGO's conduct as a "violation of the Detention Centre rules".³³ This assertion is supported by the finding [REDACTED]³⁴ cited by the Prosecution in footnote 59 of the Suspension Request.³⁵ Far from being rejected, as the Defence believes, the [REDACTED] was confirmed [REDACTED].³⁶ The paragraph of the *Katanga* Judgment cited in the Defence request for Further *Katanga* Materials, in support of the suggestion that "those

³¹ ICC-01/04-02/06-658-Conf-Red, para.41.

³² ICC-01/04-02/06-737-Conf-Exp, para.1.

³³ ICC-01/04-02/06-658-Conf-Red, para.42.

³⁴ [REDACTED].

³⁵ ICC-01/04-02/06-658-Conf-Exp, fn.59.

³⁶ [REDACTED].

allegations (...) were rejected”, relates to allegations concerning LOGO that the Prosecution did not invoke, or rely on, in the Suspension Request.³⁷

23. That [REDACTED] should be obvious. [REDACTED].

24. The fact that [REDACTED]³⁸ has no bearing on his conduct in this case, and in particular during the Recorded Conversation.

LOGO should not have access to confidential materials from the Katanga case

25. The Prosecution does not object to the Defence giving LOGO limited access to the confidential material strictly necessary to respond to the allegations of impropriety in this case. In particular, as submitted elsewhere,³⁹ the Prosecution does not object to the Defence liaising with LOGO regarding Witness P-0190 and Witness P-0901’s allegations against him, so long as he is only provided with limited access to the confidential material strictly necessary to respond to the allegations.

26. LOGO may also access the open session portions of the transcripts of his testimony in the *Katanga* case. These are readily available on the Court’s website. The Prosecution does, however, oppose giving LOGO access to closed session transcripts of his testimony because they were not relied on in the Suspension Request and they do not contain information about the Prior Alleged Improprieties. Furthermore, given the present allegations regarding LOGO’s conduct, the risks of allowing him unfettered access to confidential material is obvious. Were the Chamber inclined to grant the Defence request for Further *Katanga* Materials, the Prosecution would thus oppose giving LOGO access to those materials, certainly to the extent that they refer to confidential information,

³⁷ ICC-01/04-02/06-737-Conf-Exp, para.1.

³⁸ [REDACTED].

³⁹ ICC-01/04-02/06-705-Conf-Exp, paras.6, 36-37.

including but not limited to the individuals who brought the allegations against him in *Katanga*.

27. As apparent from the Recorded Conversation, LOGO revealed to third parties the identity of Prosecution witnesses in this case. The consequence of such preparedness to reveal sensitive information must be that he cannot be trusted to safeguard sensitive information contained in the Further *Katanga* Materials. Whether LOGO had access to the Further *Katanga* Materials in his role as a member of the *Katanga* Defence team is, in the Prosecution's submission, both uncertain - he may, or may not have had such access – and irrelevant. The Prosecution submits that prior access does not justify continued or renewed access to such materials, particularly given his recent alleged misconduct. LOGO had access to confidential, witness-related materials and/or information in the *Ntaganda* case, and the Chamber nevertheless found it necessary to withdraw that privilege, in light of his conduct in the Recorded Conversation.

Conclusion

28. For all the foregoing reasons, the Prosecution does not oppose giving the Defence access to the [REDACTED].

29. The Prosecution submits that the Defence request for Further *Katanga* Materials should be rejected. Should the Chamber grant the Defence access to the Further *Katanga* Materials, the Prosecution opposes granting access to LOGO. Defence Counsel represent the Accused. They do not represent LOGO.⁴⁰ The Chamber should provide the Defence access to information that is necessary to address the Pending Issues, specifically whether LOGO's conduct in *this* case warrants continuation of his suspension and the ban on his access to confidential

⁴⁰ ICC-01/04-02/06-731-Conf-Exp, para.29.

information and contacts with any persons at the Detention Centre, and referral to the Registry and the Disciplinary Board.

30. Should the Chamber be inclined to grant the Defence access to Further *Katanga* Materials, the Prosecution requests a brief opportunity to submit observations on whether they require redactions.



Fatou Bensouda, Prosecutor

Dated this 19th day of February 2021
At The Hague, The Netherlands