

1 International Criminal Court
2 Trial Chamber VI
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06
5 Presiding Judge Robert Fremr, Judge Kuniko Ozaki and Judge Chang-ho Chung
6 Trial Hearing - Courtroom 3
7 Thursday, 1 December 2016
8 (The hearing starts in open session at 9.38 a.m.)
9 THE COURT USHER: [9:38:59] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE FREMR: [9:39:28] Good morning.
13 Court officer, please call the case.
14 THE COURT OFFICER: [9:39:33] Thank you, Mr President.
15 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
16 versus Bosco Ntaganda, case reference ICC-01/04-02/06.
17 We are in open session.
18 PRESIDING JUDGE FREMR: [9:39:49] Thank you, court officer. Appearances,
19 Prosecution first.
20 MS SOLANO: [9:39:52] Your Honour, the Prosecution is represented by
21 Ms Nicole Samson, Ms Marion Rabanit, Ms Selam Yirgou, and I am Julieta Solano.
22 PRESIDING JUDGE FREMR: [9:40:05] Thank you, Ms Solano.
23 Defence, any changes compared to yesterday?
24 MS GRANDON: [9:40:10] (Interpretation) No changes, Mr President.
25 PRESIDING JUDGE FREMR: [9:40:11] Thank you. And Legal Representative of

1 Victims.

2 MS SOLANO: [9:40:14] (Interpretation) Thank you, Mr President. Former child
3 soldiers are represented by myself, Sarah Pellet, counsel at the OPCV.

4 MS GRABOWSKI: Good morning, Mr President. Today the victims of the attacks
5 are represented by myself, Anne Grabowski, and I am accompanied by Marine
6 Corhay, who is our intern. Thank you.

7 PRESIDING JUDGE FREMR: [9:40:38] Thank you, Ms Pellet. Thank you,
8 Ms Grabowski.

9 Before we invite Madam Witness to the courtroom, there are two issues we should
10 solve before that.

11 The first one is that we were told that the Defence would like to address the Chamber.

12 Ms Grandon, please. But we are in open session, could we remain in open session?

13 MS GRANDON: [9:41:00] I believe so.

14 PRESIDING JUDGE FREMR: [9:41:03] All right. So please proceed.

15 MS GRANDON: [9:41:07] (Interpretation) Yes, Mr President, Your Honours. Very
16 quickly, I just want to point out to you that I have taken good note of your oral
17 decision yesterday pertaining to maintaining the redactions on the document which
18 we discussed late last week and early this week. However, I would like to reserve
19 the right, mindful of the answers that may be provided by the witness, to ask that you
20 kindly reconsider your decision on certain aspects. So I just wanted to point this out
21 to you as a heads-up.

22 PRESIDING JUDGE FREMR: [9:41:46] All right. But at the moment our decision
23 remains in force, so please, and even I wanted to remind you that, but, yes, if there is
24 some new circumstances will arise, you can just come with new submission.

25 It was the first issue. And the second issue is that I would like to deliver another

1 oral ruling of our Chamber, and we can remain in open session for that.

2 It's oral ruling on Defence request for reconsideration.

3 On 25 November 2016 and notified on 28 November 2016, the Defence filed an urgent
4 request for reconsideration of the Chamber's oral decision of 16 November 2016
5 rejecting the Defence request for an immediate adjournment following the disclosure
6 of certain materials by the Prosecution.

7 The decision is contained at pages 2 to 7 of transcript 159, and for ease I shall refer to
8 it as "the impugned decision."

9 The Defence request for reconsideration of the impugned decision bears the filing
10 number 1655 and I shall refer to it as "the request."

11 On 28 November 2016, by way of email, the Chamber shortened the deadline for
12 responses to the request to 29 November. Accordingly, on 29 November,
13 the Prosecution responded by way of the filing bearing the number 1661 opposing the
14 request.

15 On 30 November, the Defence provided a courtesy copy of a short supplemental
16 filing relating to the request.

17 The Chamber will not summarise the parties' submissions here, save to the extent
18 necessary to address them in the reasoning which follows but will instead direct the
19 parties as per usual practice to file public redacted versions of the documents with
20 filing numbers 1655 and 1661 within four weeks from today.

21 In terms of the applicable law, the Chamber recalls that it has previously held that the
22 reconsideration is exceptional and should only be done if a clear error of reasoning
23 has been demonstrated or if it is necessary to do so to prevent an injustice. New
24 facts and arguments that have arisen since the decision in question was rendered may
25 be relevant to this assessment.

1 In the present circumstances and for the reasons that follow, the Chamber is of the
2 view that the applicable standard for reconsideration has not been met.

3 The Defence submits that three purported new facts have arisen warranting
4 reconsideration of the impugned decision.

5 The first of the purported new facts is that since its previous request for adjournment,
6 589 of the audio recordings were disclosed as incriminatory materials and thus, in the
7 submission of the Defence, are clearly relevant rather than peripheral to the charges in
8 the present proceedings.

9 In assessing this part of the request, the Chamber notes that the Prosecution indicated
10 in its disclosure notice of 7 November 2016, bearing filing number 1616, that it would
11 seek to rely upon certain of the disclosed materials. Therefore, at the time of the
12 notification of the request on 28 November 2016, the Chamber considers that
13 the Defence had already been on notice for some three weeks, that the Prosecution
14 may seek to use certain of the disclosed materials in the present case.

15 Such notice was similarly also in the Chamber's contemplation at the time of
16 rendering the impugned decision.

17 Accordingly, the Chamber does not consider it to be a new fact warranting
18 reconsideration of the impugned decision, that the Prosecution subsequently
19 disclosed on 24 November 2016 a number of these items as incriminatory materials as
20 reflected in annex A to filing 1649. Moreover, the fact that such items had been
21 added to the Prosecution's list of evidence as incriminatory does not mean that they
22 necessarily relate directly to the charges, rather than as indicated in the Prosecution
23 disclosure notice to the allegations of witness interference and coaching which
24 the Defence has been on notice of since prior to the commencement of the trial.

25 The second purported new fact is that the Defence is now aware that the Prosecution

1 has, with the exception of certain documents, never sought authorisation for
2 nondisclosure of the materials in the Ntaganda case.

3 The third and related new fact submitted by the Defence is that it is now aware that
4 ex parte annexes to a filing related to the restrictions litigation were not disclosed to
5 the Defence on the basis that they would have revealed the existence of the Article 70
6 investigation and that their disclosure to the Defence was opposed by the Prosecution
7 on the ostensible basis that doing so would compromise ongoing investigations
8 related to potential Article 70 offences.

9 In terms of these second and third factors put forward by the Defence in support of
10 the request, the Chamber was aware of both facts prior to issuing the impugned
11 decision.

12 In June 2016, in the context of the restrictions litigation, the Chamber ruled on the
13 withholding of certain of the materials pursuant to Rule 81 and the Chamber twice
14 urged the Prosecution to expeditiously complete any Article 70 investigations it was
15 carrying out and make relevant disclosure. This guidance is reflected in
16 the Chamber's decision contained at filing number 1364, at paragraph 22, and filing
17 number 1494, at paragraph 24.

18 It is also noted that the Defence did in fact make submissions on the issue of, in
19 particular, Rule 81(2) in its original request seeking an immediate adjournment and
20 therefore the Chamber does not consider that either new facts or new arguments have
21 been presented in the request.

22 In addition, the lengths of the nondisclosure was addressed in the impugned decision
23 whereby the Chamber found that the temporary nondisclosure of the materials did
24 not warrant immediate adjournment but, and I quote, "could be considered at the
25 time of arguing specific instances of concrete prejudice." Unquote.

1 Finally, the Chamber is not of the view that reconsideration is warranted in relation
2 to the Chamber's finding in the impugned decision that the Defence team has been on
3 notice of issues around witness interference since prior to the commencement of the
4 trial or its finding that Mr Ntaganda is best placed to advise the Defence team on such
5 issues.

6 The Chamber considers that the Defence arguments in support of this aspect of the
7 request merely repeat its submissions to the Chamber in its original request for
8 adjournment in terms of notice, volume, and the timing of disclosure of the materials
9 as well as the alleged related prejudice to the accused.

10 While recognising that the scope of disclosure extends beyond Mr Ntaganda's own
11 telephone calls, the Chamber considers that, as noted in the impugned decision, the
12 allegations of witness interference and coaching that the Defence was alerted to prior
13 the trial commencing provided adequate notice of the potential breadths of the issues
14 underlying the subsequently disclosed materials.

15 The Chamber does not consider it necessary for the Defence to have been provided
16 with more specific details in order to meaningfully discuss the issue of witness
17 coaching or the reliability of certain lines of defence with the accused. Indeed,
18 the Chamber reiterates that the accused is likely to be far better placed than anyone
19 else to himself expeditiously identify any relevant telephone calls for review, any
20 persons who may have been coached or any lines of coaching put forward if it should
21 be the case that this took place.

22 Moreover, the very fact that such potential issues were revealed in what the Defence
23 terms to be just a tiny subset of material, being the limited sample of Mr Ntaganda's
24 calls reviewed in the context of the restrictions litigation, should in itself have been
25 sufficient to alert the Defence to the fact that the broader sample of material could

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1 have revealed further such indents and to have prompted comprehensive discussion
2 of the matter with the accused.

3 In the absence of any new facts or arguments, the Chamber does not find that the
4 standard for reconsideration has been met. Accordingly, the request is rejected.

5 The Chamber is aware that the Defence request for leave to appeal the same
6 impugned decision contained in filing number 1645 has yet to be ruled upon and
7 indicates that it shall do so by way of written decision in the near future.

8 That concludes the Chamber's ruling.

9 And now we can move to cross-examination of our witness. So, court usher, please
10 escort Madam Witness into the courtroom.

11 (The witness enters the courtroom)

12 PRESIDING JUDGE FREMR: [9:56:00] Good morning, Madam Witness.

13 WITNESS: DRC-OTP-P-0883 (On former oath)

14 (The witness speaks Lingala)

15 THE WITNESS: [9:56:07] (Interpretation) Good morning.

16 PRESIDING JUDGE FREMR: [9:56:11] Madam Witness, what about your headache,
17 are you feeling better today?

18 THE WITNESS: [9:56:26] (Interpretation) I feel a little better.

19 PRESIDING JUDGE FREMR: [9:56:34] I am very glad to hear it. We will today
20 continue with your cross-examination by defence, which will be conducted by
21 Ms Grandon. And again, it is my duty to remind you that you are still under oath,
22 which means that you have to speak the truth and nothing but the truth, and as
23 concerns the technical issues, I can just refer to the fact that yesterday you made it
24 perfectly, you spoke into the microphone, you responded clearly, and you also
25 observed those pauses between the question and your answer. So I would just

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1 appreciate if you could just make it in the same way like yesterday.

2 Have you understood that?

3 THE WITNESS: [9:57:30] (Interpretation) Yes. I have understood.

4 PRESIDING JUDGE FREMR: [9:57:36] Now I am giving the floor to Ms Grandon

5 and I will -- I am asking you whether we can remain in open session or whether we

6 should move into private.

7 MS GRANDON: [9:57:57] Private session, Mr President.

8 PRESIDING JUDGE FREMR: [9:57:59] No problem.

9 Court officer, let's move into private session.

10 (Private session at 9.58 a.m.)

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- 20 (Open session at 11.06 a.m.)
- 21 THE COURT OFFICER: [11:06:33] We are in open session, Mr President.
- 22 PRESIDING JUDGE FREMR: [11:06:35] Thank you, court officer.
- 23 Now we take our regular 30 minutes break, which means that we will resume at
- 24 11.35.
- 25 THE COURT USHER: [11:06:45] All rise.

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- 1 (Recess taken at 11.06 a.m.)
- 2 (Upon resuming in open session at 11.40 a.m.)
- 3 THE COURT USHER: [11:41:02] All rise.
- 4 Please be seated.
- 5 PRESIDING JUDGE FREMR: [11:41:21] We are in open session.
- 6 And, Defence, Ms Grandon namely, will continue in cross-examination of our
- 7 witness.
- 8 And I assume, Ms Grandon, that we will have to move into private.
- 9 MS GRANDON: [11:41:43] (Interpretation) Yes, your Honour.
- 10 PRESIDING JUDGE FREMR: [11:41:45] Court officer, let's move into private session.
- 11 (Private session at private 11.41).
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8 (Upon resuming in open session at 2.32 p.m.)

9 THE COURT USHER: [14:32:30] All rise.

10 Please be seated.

11 PRESIDING JUDGE FREMR: [14:33:04] Good afternoon, everybody. Before we
12 continue with the rest of cross-examination, a brief inquiry about the issue of -- we
13 can call it disclosure. The Chamber encouraged the parties to solve this issue inter
14 partes. What is the result, Ms Grandon, about this -- or Ms Solano, if you want to --

15 MS SOLANO: [14:33:33] Your Honour, we received the Chamber's ruling very
16 shortly before the hearing so there has been no exchange between the parties so far,
17 but for our part we will of course reach out to the Defence in relation to --

18 PRESIDING JUDGE FREMR: [14:33:48] In fact then, I can simplify this thing
19 because, as I said, I really don't see a big issue behind that. But rather for our further
20 practice, really, if such a point arises at the last minute and if any party wants to use
21 such a document during the examination of the witness, then this party should
22 disclose this document to the counterparty. In this case, it was not just general
23 reference about some inquiry with VPRS but, if I am not wrong, Ms Grandon, you
24 quoted from this email. This email even if, frankly saying, to me doesn't seem so
25 much relevant, but for Prosecution it seems relevant, so it would be fair to provide

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1 them with this email. So, please, I believe it's impossible now provide them with this
2 email. Is it feasible?

3 MS GRANDON: [14:34:54] (Interpretation) The attachment, the document
4 attached to the email will be disclosed.

5 PRESIDING JUDGE FREMR: [14:35:00] And one warning, if there is some need to
6 redact part of this, you should have it in mind, but I believe that it was just general, or
7 were there any specific issues that should --

8 MS GRANDON: [14:35:12] (Interpretation) It was general in nature, your
9 Honour.

10 PRESIDING JUDGE FREMR: [14:35:16] Fine, then.
11 Now we will continue with cross-examination and I believe we will have again to
12 move into private session. Am I right, Ms Grandon?

13 MS GRANDON: [14:35:30] (Interpretation) Yes, your Honour.

14 PRESIDING JUDGE FREMR: [14:35:32] All right.

15 So now, court officer, let's move into private session.

16 (Private session at 2.35 p.m.)

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5 (Open session at 4.29 p.m.)

6 THE COURT OFFICER: [16:29:39] We are in open session, Mr President.

7 PRESIDING JUDGE FREMR: [16:29:46] Madam Witness, I thank you. It was a
8 long day. At least I have good news for you that tomorrow you will have to come
9 again but it will be for much shorter time, so the end of your testimony is getting
10 close.

11 It's my duty to remind you that in the meantime, till tomorrow you must not discuss
12 your testimony with anybody else. Do you understand that, Madam Witness?

13 THE WITNESS: [16:30:22] (Interpretation) Yes, I have understood.

14 PRESIDING JUDGE FREMR: [16:30:28] Thank you.

15 So now, court usher, please assist Madam Witness to leave the courtroom.

16 THE WITNESS: [16:30:42] (Interpretation) Thank you.

17 (The witness stands down)

18 PRESIDING JUDGE FREMR: [16:30:58] And for the sake of planning tomorrow,
19 update on timing, Ms Grandon, according our measuring, you so far have used
20 3 hours 49 minutes, so if you would like to take all time allotted to you, you still have
21 41 minutes, if I am counting well. At the moment what is your estimation? Do you
22 think you will need all that time?

23 MS GRANDON: [16:31:39] (Interpretation) I think so, Mr President.

24 PRESIDING JUDGE FREMR: [16:31:42] All right.

25 And just update on Ms Solano previous estimation, you still insist that you will need

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- 1 15 minutes for redirect?
- 2 MS SOLANO: [16:31:52] Yes, your Honour. I would hope to keep it within that
- 3 time.
- 4 PRESIDING JUDGE FREMR: [16:31:57] But we haven't decided on that, but all
- 5 right. Thank you for this warning.
- 6 And now we will adjourn and we will reconvene tomorrow, 9.30.
- 7 THE COURT USHER: [16:32:12] All rise.
- 8 (The hearing ends in 4.32 p.m.)