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No.: ICC-01/04-02/06
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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's response to the "Request for in-court protective measures for Witness D-0306" and request, pursuant to regulation 35, to oppose the use of rule 68(3) during Witness D-0306's testimony", 7 August 2019,
ICC-01/04-02/06-2378-Conf

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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. The Prosecution does not oppose the Defence's request for the implementation of in-court protective measures during Witness D-0306's testimony.
2. Pursuant to regulation 35 of the Regulations of the Court ("RoC"), the Prosecution requests the Chamber to grant a variation of the time limit to respond to the Defence's request to hear Witness D-0306 under rule 68(3) of the Rules of Procedure and Evidence ("Rules").
3. In light of important new information potentially affecting Witness D-0306's credibility, only made available by the Defence after the deadline set by the Chamber, there is good cause to allow the Prosecution an opportunity to oppose hearing the testimony of Witness D-0306 pursuant to rule 68(3) and to request that the entirety of his testimony, including direct-examination, be heard *viva voce*.

Confidentiality

4. This filing is classified as "Confidential" pursuant to regulation 23bis(1) and(2) of the RoC since it refers to information not yet available to the public and responds to filings bearing the same classification.

Procedural Background

5. On 8 July 2019, Trial Chamber VI (the "Chamber") convicted Bosco Ntaganda of 18 counts of war crimes and crimes against humanity.¹

¹ ICC-01/04-02/06-2359.

6. On the same day, the Chamber issued an order on the sentencing procedure (Sentencing Order).² The Parties and Legal Representatives of Victims (“LRVs”) were directed to file any requests to submit further evidence or to call witnesses by 29 July 2019. The requests were to provide the details of any documentary evidence intended to be submitted, the identities of any witnesses sought to be called, the estimated length of examination, a summary of anticipated testimony and any requests for protective measures, video-link testimony and/or admission of prior recorded testimony. The Parties and LRVs were further ordered to file any responses to these requests by 5 August 2019.
7. On 29 July 2019, the Prosecution and Defence filed their respective requests to submit further evidence and call witnesses.³ The Prosecution requested permission to call one *viva voce* expert witness and to admit the statements of four additional witnesses under rule 68(2)(b) of the Rules.⁴ The Prosecution requested protective measures for three of its proposed witnesses.⁵ The Defence requested authorisation to call three *viva voce* witnesses,⁶ including Witness D-0306, submit five statements pursuant to rule 68(2) of the Rules,⁷ and to admit 21 documents.⁸ The Defence proposed to hear the testimony of Witness D-0306 pursuant to rule

² ICC-01/04-02/06-2360.

³ ICC-01/04-02/06-2368-Conf and ICC-01/04-02/06-2369-Conf-Red.

⁴ ICC-01/04-02/06-2368-Conf, paras. 7-39.

⁵ ICC-01/04-02/06-2368-Conf, paras. 40-61.

⁶ D-0305, D-0306 and D-0047. *See* ICC-01/04-02/06-2369-Conf-Red, paras. 18-20 and ICC-01/04-02/06-2369-Conf-AnxA-Red, pp. 1-5. The Defence proposed to present their evidence pursuant to rule 68(3) of the rules or entirely *viva voce*. In the former case, direct examination would take 30 minutes; in the latter, it would take one hour (*see* ICC-01/04-02/06-2369-Conf-Red, paras. 34-35 and ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 1). The Defence also requested in-court protective measures for Witness D-0306 (ICC-01/04-02/06-2369-Conf-Red, para. 19) and authorisation for witnesses D-0306 and D-0047 to testify by way of audio-video link (ICC-01/04-02/06-2369-Conf-Red, para. 34).

⁷ D-0020, D-0302, D-0303, D-0304 and D-0308 (*see* ICC-01/04-02/06-2369-Conf-Red, paras. 21-24 and 26-30; ICC-01/04-02/06-2369-Conf-AnxA-Red, pp. 1 and 6-10).

⁸ *See* ICC-01/04-02/06-2369-Conf-Red, para. 25 and ICC-01/04-02/06-2369-Conf-AnxB-Red. Four documents (DRC-OTP-0086-0036, DRC-OTP-0004-0047, DRC-D18-0001-6753 and a document related to D-0308, which was not provided to the Prosecution) and 18 excerpts from six videos, namely DRC-OTP-0159-0477 (transcript DRC-OTP-2061-0651; translation DRC-OTP-2085-0468); DRC-OTP-0120-0294 (transcript DRC-OTP-2102-3468; translation DRC-OTP-2102-3557); DRC-D18-0001-0425 (translation DRC-D18-0001-5540); DRC-D18-0001-0436 (transcript DRC-D18-0001-5632; translation DRC-D18-0001-5632); DRC-OTP-0118-0002 (transcript DRC-OTP-2084-0092; translation DRC-OTP-2084-0041); and DRC-OTP-0127-0064 (transcript DRC-OTP-0165-0276; translation DRC-OTP-0165-0349).

68(3)⁹ and requested, without substantiating its request, “the implementation of the utmost in-court security measures” during his testimony.¹⁰

8. On 5 August 2019, the Prosecution responded to the Defence’s request for admission of sentencing evidence, opposing the Defence’s request for in-court protective measures for Witness D-0306, but not the Defence’s proposal to hear this witness pursuant to rule 68(3).¹¹
9. On the same day, seven days after the relevant deadline, the Defence submitted a detailed request for in-court protective measures for Witness D-0306 in the form of facial and voice distortion as well as the use of a pseudonym (“Request”).¹²

Response to the Defence’s request for in-court protective measures

10. The Prosecution notes that the Defence submitted its detailed Request for the implementation of in-court protective measures during the testimony of Witness D-0306 seven days after the deadline set by the Chamber, and that it has omitted to provide the Chamber with any explanation for this delay.¹³ Whilst the Chamber could reject this request, *in limine*, on that basis, the Prosecution does not oppose the requested measures.

Request pursuant to regulation 35

11. Under regulation 35(2) of the RoC, a Chamber may extend a time limit “if good cause is shown”.¹⁴ The Defence’s late provision of important new information

⁹ ICC-01/04-02/06-2369-Conf-Red, para. 34 and ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 2.

¹⁰ ICC-01/04-02/06-2369-Conf-Red, para. 19 and ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 2.

¹¹ ICC-01/04-02/06-2375-Conf, paras. 35-39 and 40.

¹² ICC-01/04-02/06-2372-Conf, paras. 1 and 11.

¹³ Whilst the Request asserts that D-0306 “expressed concerns during an interview with the Defence about his safety and security”, it fails to mention the date of this interview, so it is unclear whether or not they were able, with due diligence, to submit the request within the prescribed time limit. Request, para. 7.

¹⁴ The Appeals Chamber has held that “[s]uch reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with

about Witness D-0306 provides good cause to vary the deadline to submit a response to the Defence's request to hear this witness pursuant to rule 68(3).

12. The Prosecution carefully reviewed the information provided by the Defence on Witness D-0306 on 29 July 2019 and, as a result, initially decided not to oppose the use of rule 68(3) for this witness.
13. However, in the Request filed on 5 August 2019, the Defence provided important new information about D-0306's current role and occupation, which allowed the Prosecution to connect D-0306 to individuals allegedly engaged in witness interference and coaching in both the *Lubanga* and *Ntaganda* cases. As a result, this new information potentially affects Witness D-0306's objectivity and credibility and, in these circumstances, there is a greater need for appropriate scrutiny of this witness's testimony. The implications of allowing Witness D-0306 to provide his evidence-in-chief by way of a written statement, as opposed to *viva voce*, only became entirely clear as a result of the Defence's late disclosure. Had the Prosecution obtained this information on time, it would have opposed hearing this witness pursuant to rule 68(3) and requested, instead, that the entirety of his testimony, including direct-examination, be heard *viva voce*.
14. In these circumstances, it is in the interests of justice and the determination of the truth to vary the time limits to allow the Prosecution to oppose the Defence's request and to place the Chamber in a position to fully understand the potential implications of its decision on the Defence's request to hear Witness D-0306 pursuant to rule 68(3).

a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations", ICC-01/04-01/06-834, para. 7. The Appeals Chamber has further decided to extend a time limit where it was in the "interest of justice", *see* ICC-01/04-01/10-505, para. 11; *See also* ICC-01/04-01/07-2325, para. 15.

15. The Prosecution sets out below the relevant context for two critical pieces of new information provided by the Defence on 5 August 2019.

16. *First*, on 29 July 2019, the Defence presented D-0306 merely as “[REDACTED]”.¹⁵ However, in its 5 August 2019 Request, the Defence disclosed for the first time that Witness D-0306, in fact, “[REDACTED]”.¹⁶ That Witness D-0306 is and has, for over a decade, been [REDACTED] creates a heightened need for scrutiny of his evidence.

17. Indeed, [REDACTED],¹⁷ who was [REDACTED],¹⁸ and appears to have [REDACTED]. Importantly, as further described below, the Prosecution has received credible information that [REDACTED].

18. In [REDACTED],¹⁹ [REDACTED]. [REDACTED].²⁰

19. [REDACTED].²¹ [REDACTED].²² [REDACTED],²³ [REDACTED].²⁴ [REDACTED]²⁵ [REDACTED],²⁶ [REDACTED].²⁷

20. *Second*, in the Request of 5 August 2019, the Defence further disclosed that D-0306, [REDACTED], is [REDACTED].²⁸ This new information allowed the Prosecution to establish that D-0306 is mentioned²⁹ in several Detention Centre telephone conversations of 2013 and 2014 between Bosco Ntaganda and

¹⁵ ICC-01/04-02/06-2369-Conf-Red, para. 19 and ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 4.

¹⁶ ICC-01/04-02/06-2372-Conf, para. 6.

¹⁷ [REDACTED].

¹⁸ *See e.g.* [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ *See e.g.* [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ *See* [REDACTED].

²⁸ ICC-01/04-02/06-2372-Conf, para. 6.

²⁹ *See* [REDACTED].

[REDACTED].³⁰ The summaries of these conversations show that Bosco Ntaganda sought to secure D-0306's testimony at trial and that [REDACTED] was in contact with D-0306 for that purpose for at least one year.

21. As previously reported to the Chamber,³¹ there is significant evidence that, from 2013 to 2014, [REDACTED] was actively engaged in coaching potential Defence witnesses on Bosco Ntaganda's behalf. That Witness D-0306 was contacted by [REDACTED] as a potential witness during that same period raises the possibility that D-0306 was himself coached by [REDACTED]. This in turn increases the need for appropriate scrutiny of this witness's testimony.

22. The Prosecution recalls the Detention Centre conversations showing that, at the time, Bosco Ntaganda considered [REDACTED] *"the fundamental cornerstone of his case"* and discussed with [REDACTED] how, [REDACTED], [REDACTED].³² Further conversations show that Bosco Ntaganda insisted that potential witnesses meet with [REDACTED] prior to their interview by the Defence team. In one example of such calls, Bosco Ntaganda, referring to potential Defence witnesses, explains to [REDACTED] that *"[it] would not be good to meet them at the same time as [REDACTED]"* and that *"he should meet with them first and prepare them"*.³³ In a further conversation, Bosco Ntaganda tells [REDACTED] that *"[his] people"*, meaning his lawyers, *"will come next month"* and explains that *"[t]he only problem is that they will come before [REDACTED] has talked with [REDACTED]"* and

³⁰ See [REDACTED].

³¹ See e.g. Registry reports: ICC-01/04-02/06-634-Conf-Exp-Anx, p. 5; ICC-01/04-02/06-607-Conf-Exp-Red2, para. 24; Prosecution submissions: ICC-01/04-02/06-738-Conf-Exp, para. 31; ICC-01/04-02/06-1224-Conf-Exp, paras. 6-10; ICC-01/04-02/06-1313-Conf-Exp, paras. 36-43, 47-48; ICC-01/04-02/06-1390-Conf, para. 16; ICC-01/04-02/06-1783-Conf-Corr, paras. 14, 16, 17-22, 25-28; ICC-01/04-02/06-1916-Conf-Exp, paras. 22, 31-35; CC-01/04-02/06-2010-Conf, para. 22; ICC-01/04-02/06-2044-Conf, paras. 28, 31, 35.

³² See [REDACTED].

³³ See [REDACTED].

"[REDACTED] was supposed to [...] give him the details so that he can be prepared to meet them".³⁴

23. [REDACTED] continued to engage in witness coaching at least until the end of 2014. In one conversation in the second half of 2014, [REDACTED] updates Bosco Ntaganda, explaining that: *"there are things being done to make sure people do well in that football match"; "[t]he coach [...] is training them on a regular daily basis" and is "teach[ing] them how to play football in the morning, at noon and in the afternoon".³⁵* In another conversation, Bosco Ntaganda explains that *"[f]ootball players shouldn't play if they haven't been trained"*, and instructed [REDACTED] to *"speak with [REDACTED] and tell him to keep training them"*, as *"it would not be good for them to play randomly".³⁶* In a further telling example of Bosco Ntaganda's instructions, dated 6 December 2014, the Accused refers to [REDACTED] and instructs [REDACTED] to *"[t]ell him to get closer to them before they meet with KAGABA's people"* a reference to his Defence team, adding: *"[h]e has to train them so that they play football very well [...] [h]e knows how to do it because he is a coach".* [REDACTED] confirms: *"You're right. He has the habit of doing it".³⁷*

24. That [REDACTED] indeed met with potential witnesses in advance of their interviews by the Defence, attempted to influence their testimony or facilitated their coaching by Bosco Ntaganda himself, is corroborated by Prosecution Witness testimony, further Detention Centre conversations between Bosco Ntaganda and potential Defence witnesses,³⁸ as well as Bosco Ntaganda's own testimony.³⁹ For instance, [REDACTED], [REDACTED],⁴⁰ [REDACTED].⁴¹

³⁴ See [REDACTED].

³⁵ See [REDACTED].

³⁶ See [REDACTED].

³⁷ See [REDACTED].

³⁸ See ICC-01/04-02/06-1313-Conf-Exp, paras. 42 ([REDACTED]), 43 (unidentified individual); ICC-01/04-02/06-1783-Conf-Corr, paras. 14 ([REDACTED]), 16 ([REDACTED], [REDACTED] and [REDACTED]), 17

25. The Chamber, having reviewed a sample of Bosco Ntaganda's Detention Centre communications, including conversations with [REDACTED], found that there is *"reason to believe that Mr Ntaganda instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell, stressing the need to tell the story in the manner as described by Mr Ntaganda and the necessity of synchronising the stories"*.⁴² In relation to one conversation between Bosco Ntaganda and [REDACTED], the Chamber *"note[d] with concern that in places Mr Ntaganda appears to be coaching his counterpart on certain factual matters pertaining to the case"*.⁴³ As a result, the Chamber also ordered the Registry to restrict all telephone calls by any individual at the Detention Centre with [REDACTED].⁴⁴

26. Given the risk that Witness D-0306 may have been influenced by [REDACTED] and/or [REDACTED], the Chamber should not dispense with any opportunity to assess D-0306 testimony. It is essential for the Chamber to hear the entirety of his testimony, including his direct examination by the Defence, *viva voce*, in order to be able to appropriately evaluate his credibility. Indeed, it would be unsafe in the circumstances to admit, under rule 68(3), a statement that may well have been the product of witness coaching *in lieu* of *viva voce* evidence. The Prosecution also notes that the use of rule 68(3) for this witness would only save 30 minutes,⁴⁵ and thus the time saved does not justify the risks involved. Accordingly, the Chamber should not allow the use of rule 68(3) in respect of this witness.

([REDACTED]); ICC-01/04-02/06-1916-Conf-Exp, para. 35 ([REDACTED]) ; ICC-01/04-02/06-2044-Conf, paras. 28-30 ([REDACTED]).

³⁹ D-300:T-239, pp.58-91 and T-242, pp. 63-67.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² ICC-01/04-02/06-785-Red, para. 57.

⁴³ ICC-01/04-02/06-710-Conf-Exp-Red, para. 13.

⁴⁴ ICC-01/04-02/06-683-Conf-Exp, para. 11.

⁴⁵ ICC-01/04-02/06-2369-Conf-Red, para. 34 and ICC-01/04-02/06-2369-Conf-AnxA-Red, p.1.

Relief Requested

27. Based on the foregoing, the Prosecution requests the Chamber to grant its request pursuant to regulation 35 and to reject the Defence's request to call Witness D-0306 pursuant to rule 68(3).



Fatou Bensouda
Prosecutor

Dated this 17th day of September 2019
At The Hague, The Netherlands