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TRIAL CHAMBER VI

Before :
Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

**Response on Behalf of Mr Ntaganda
to Prosecution's Proposed Protocol on the Handling of Confidential Information
During Investigations and Contact Between a Party and Witnesses of the
Opposing Party**

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 the submission of the *“Prosecution’s Proposed Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Opposing Party”* on 31 October 2014 (“the Proposed Protocol”), Counsel representing Mr Ntaganda (“Defence” or “Mr Ntaganda”) hereby submit this:

**Response on behalf of Mr Ntaganda
to Prosecution’s Proposed Protocol on the Handling of Confidential Information
During Investigations and Contact Between a Party and Witnesses of the
Opposing Party
 (“Defence Response”)**

OVERVIEW

1. As directed by the Trial Chamber, the Defence has entered into bona fide consultation with the Prosecution with the aim of agreeing on the content of the Proposed Protocol.
2. As a result of these consultations, the Defence agrees to implement most of the Proposed Protocol as submitted by the Prosecution with the exception of four provisions (“Four Provisions”).
3. The Defence respectfully posits that the Four Provisions are not necessary as the aim for which they are sought is already achieved either in other provisions of the Proposed Protocol or in other instruments applicable to members of the Defence.
4. More importantly, if adopted, the Four Provisions will significantly hinder the Defence’s ability to pursue every possible avenue of investigation in relation to witnesses and the charges laid against Mr Ntaganda.
5. Nonetheless, the Defence takes the view that parts the Four Provisions can be modified with the aim of limiting the potential prejudice to the Defence and making them acceptable.

SUBMISSIONS

6. As a preliminary comment, the Defence recalls that it is already bound by several instruments concerning the handling of confidential information and contact with witnesses of the other parties. This includes, *inter alia*, the Code of Professional Conduct for Counsel which applies to all members of the Defence team and the Code of Conduct for Investigators. In addition, Mr Ntaganda's Counsel, Co-Counsel and two Legal Assistants are also bound by their respective national codes of conduct as members of Bar associations.
 7. Moreover, Mr Ntaganda wishes to stress that the protection of witnesses is of the utmost importance for the Defence.
 8. Nevertheless, a balance must be established between the protection of witnesses and the rights of the Accused, in particular Mr Ntaganda's right to full answer and defence which includes the right to investigate the charges he is facing.
 9. In this regard, the Defence respectfully submits that the Four Provisions unduly restrict Mr Ntaganda's right to full answer and defence.
- I. The Requirement to Apply to the Chamber in Order to Use Photographs Depicting Witnesses.**
10. The Proposed Protocol contains several provisions limiting the use of photographs during investigations. Paragraphs 5 and 6 limit the use of confidential material in general, setting out in which circumstances such material can be shown to the public. Paragraph 7 also contains specific provisions related to the use of photographs. In particular, it provides that when showing a photograph depicting a witness, the investigating party shall not reveal the involvement of the witness with the Court. In addition, paragraphs 18 and 19 limit the disclosure of the identity of a witness to situations where it is necessary for the purpose of investigations. Furthermore, if the investigating party finds out that a member of the public was able to establish that someone is

a witness, it must inform the recipient of the information that he or she must not disclose this information and inform VWU.¹

11. It necessarily follows that the requirement to request permission from the Chamber in order to use photographs depicting witnesses is unnecessary. More importantly, the Defence underscores that this requirement seriously impedes on the right of Mr Ntaganda to investigate the charges he is facing.
12. In the present case, many photographs disclosed by the Prosecution to the Defence depict witnesses. This is all the more the case considering that many Prosecution witnesses are alleged former high level UPC members and/or political leaders. However, very few of the photographs, if any, reveal the involvement of witnesses with activities of the Court.
13. Presenting a request to the Chamber each and every time a party intends to use a photograph seriously impacts on its ability to investigate. Photographs are an integral part of investigations and represent a large part of the material disclosed to the Defence by the Prosecution. To date, 1005 photographs have been disclosed to the Defence. Many of the photographs depict witnesses. Nevertheless, it appears that very few, if any of them, make it possible for members of the public to understand that the person photographed is cooperating with the Court.
14. This constitutes a grave interference in the ability of the Defence to investigate. What is more, it will likely lead to extensive litigation and serious delays.
15. In practice, it is not possible for the Defence to present a request to the Chamber in order to use all photographs depicting a witness. Defence investigations are spontaneous and unpredictable. While in the field, the Defence cannot submit a request to the Chamber and wait for its Decision. Moreover, due to its limited resources, Defence investigations in the field are limited and meeting a specific

¹ Paragraph 23 of the Proposed Protocol.

person if often a one-time opportunity. Presenting a request to the Chamber to use a photograph might very well result in losing a potential witness and/or source.

16. The Defence respectfully submits that it will exercise caution in showing any photographs during the course of its investigation. In particular, when photographs depict witnesses, the Defence is bound not to associate them with the activities of the Court. For instance, photographs will not be used in isolation but together with other photographs for the specific purpose of avoiding any association of the person depicted with the Court. VWU and Trial Chamber II in the *Katanga* case have recognised that this practice could diminish the risk that a witness will be associated with the Court.²
17. In these circumstances, the aim of the Prosecution to make it compulsory for the Defence to seek leave from the Trial Chamber before using a picture goes way too far.
18. Consequently, the Defence requests that the phrase “In order to use such material, the investigating party should present a request to the Chamber.” be deleted from paragraph 7 of the Proposed Protocol.

II. The Restriction on Sharing Inadvertently Disclosed Material with the Accused

19. In paragraph 20 of its submission, the Prosecution requests the inclusion at paragraph 11 of the Proposed Protocol concerning inadvertent disclosure, of the words “[...] including with the accused.” In other words, the Prosecution aims at prohibiting Counsel from sharing material inadvertently disclosed with the Accused.
20. In paragraph 24 of its submission, the Prosecution suggests in support of its request, that Counsel and Defence team members cannot share any confidential

² ICC-01/04-01/07-2148, para.10.

information, including the identity of protected victims and witnesses with the Accused.

21. Under his/ her national codes of conduct, every attorney has a duty of loyalty with his/ her client and thus to share with him any information relevant to his case. This is an essential element of the attorney-client trust relationship.
22. Moreover, the Accused and his team are bound by Article 70 which makes it an offence for any recipient of confidential information to disclose such information to the public.
23. The Defence strongly disagrees with the Prosecution's argument and interpretation of Article 8 of the Code of Conduct.
24. The Accused is the object of the proceedings instituted against him before the Court. In relation to these proceedings, the Accused and his Counsel are one and the same and suggesting that the Accused is a third party displays a profound misunderstanding of the attorney-client relationship.
25. Under Article 67(1)(d), Mr Ntaganda is entitled to conduct his defence in person or through legal assistance of his choosing. As such, Counsel representing the Accused and his team are merely the intermediaries and the voice of the Accused before the Court.
26. Under Article 67(1)(a), Mr Ntaganda is entitled to be informed promptly and in detail of the nature, cause and content of the charges. Thus, when disclosing material to the Defence, the Prosecution is in fact disclosing it to Mr Ntaganda. Hence, Mr Ntaganda certainly cannot be considered as a third party in relation to the Defence.
27. It follows from the above that upon accepting material disclosed by the Prosecution - on behalf of the Accused - Counsel has an obligation to transmit the same without delay. In case of inadvertent disclosure of information which

should have been redacted, it is likely, if not certain, that this material will already have been shared with the Accused by the time the Defence is informed of the Prosecution's oversight.

28. Thus, imposing on the Defence an obligation not to share certain material with the Accused is not only contrary to Counsel's obligations toward his client, it is also impractical and almost impossible to implement.
29. Consequently, the Defence respectfully requests that this proposition be rejected by the Chamber.

III. The need to inform VWU when it is necessary to disclose the identity of a witness in the ICCPP or who has otherwise been relocated with the assistance of the Court

30. The Proposed Protocol imposes on the parties the obligation to inform VWU when it is necessary to disclose the identity of a witness in the ICCPP.³
31. As it stands, paragraph 21 of the Proposed Protocol reflects the provision as adopted by the Single Judge at the Pre-Trial stage.⁴ It is important as the initial proposition of the Prosecutor was the following:

21. Should the investigating party need to disclose the identity of a witness who is in the ICCPP or of a person otherwise protected by the Victims and Witnesses Unit ("VWU"), the VWU Head of Protection shall be informed of such intention as soon as possible. Additionally, the way disclosure will take place will be discussed with VWU.

32. As a preliminary remark, the Defence highlights the fact that it will investigate on every single witness the Prosecution intends to call to testify against Mr Ntaganda in the present case, including the ICCPP witnesses. Such investigations will necessarily lead to mentioning the names of witnesses. This is all the more the case when witnesses of the Prosecution are alleged former senior military commanders of the UPC or former political leaders in the region.

³ Paragraph 21 of the Proposed Protocol.

⁴ ICC-01/04-02/06-185.

33. The Defence is opposed to the following words being included in paragraph 21: “of a person otherwise protected by the Victims and Witnesses Unit”.⁵ This wording is too broad and could include any witness who, at one point or another during the procedure, has received any form of protection.
34. The Proposed Protocol already contains several provisions related to disclosure of the identity of a witness. In particular, paragraph 20 forbids the parties to link a person with the Court’s activities. Moreover, the parties have to limit the disclosure of the identity of witnesses to situations where it is directly and specifically necessary for the purpose of investigation or research.
35. In these circumstances, paragraph 21 of the Proposed Protocol does not provide any additional protection either to ICCPP witnesses or to “persons otherwise protected by VWU”.
36. However, paragraph 21 hinders the ability of the Defence to conduct investigation.
37. Paragraph 21 does not take into account the high degree of un-predictability of Defence investigations. It is not possible for the Defence to know before a mission when, where and to whom it might have to possibly disclose the name of a specific witness. Moreover, it will be impossible to liaise with VWU every time the name of a witness needs to be mentioned -especially during an investigation in the field- and to wait for its feedback. This would lead to extensive delays in the conduct of Defence investigations and useless expenditure of the scarce resources available. In this regards, the Defence underscores that it has very limited means and occasions to conduct investigations in Ituri and to meet with potential witnesses and sources.

⁵ ICC-01/04-02/06-398-Conf, para.5.

38. The only case where a similar provision was adopted is in the *Banda and Jerbo* case. Importantly, the security situation in Sudan is far more complicated and dangerous than the situation in Ituri.⁶
39. Notwithstanding the above and further to *inter partes* consultations with the Prosecution, the Defence informed the Prosecution that it was ready to implement paragraph 21 of the Proposed Protocol in its earlier version, before it was altered by the Single Judge.
40. While paragraph 21 in its present form is unacceptable to the Defence, Mr Ntaganda now takes the view that its earlier version represents a compromise which is acceptable despite its negative impact on the conduct of Defence investigations.
41. Consequently, the Defence respectfully requests that paragraph 21 of the Proposed Protocol be rejected.
42. Alternatively, the Defence suggests that the Chamber adopts paragraph 21 as initially worded by the Prosecution.⁷

IV. The Need not to Reveal that a Person has Suffered Sexual and/or Gender Based Crimes to Family Members or to Persons who will Communicate the Information to Family Members, when it is Apparent that a Witness has not Discussed the Violence with Members of his or her Family.

43. Paragraph 27 of the Proposed Protocol prohibits the Defence from *inter alia* revealing that a person has suffered sexual and/or gender based crimes to family members or to persons who will communicate the information to family members of that person, when it is apparent that the person has not discussed the violence with members of his or her family.
44. As a preliminary remark, the Defence stresses that it whole heartedly supports the need to exercise caution when investigating victims of sexual or gender

⁶ ICC-02/05-03/09-451, para.12.

⁷ See *supra* para.31.

based violence. This is all the more important where a witness - and alleged victim of such a crime - has not discussed the violence with members of his or her family.

45. Nonetheless, the Defence must have the ability to investigate the alleged crime.
46. In this regard, the prohibition to reveal the information revealed by the victim to family members, and especially to other persons who will communicate the information to family members - if it is apparent that the victim has not discussed the violence with members of his or her family - constitutes a serious impediment on the conduct of Defence investigations
47. Consequently, the Defence opposes paragraph 27 of the Proposed Protocol in its present form.
48. Significantly, in the *Katanga and Ngudjolo, Bemba, Gbagbo and Kenyatta* cases, where the accused also faced sexual crimes charges, the similar protocols in place did not include any restriction similar to that found in paragraph 27.⁸ Moreover, the Prosecution has not given any reason to depart from the protocols adopted in those cases.
49. Sexual violence allegations are often supported by the testimony of very few, if not a single, witness. Thus, it is essential for the Defence to investigate the credibility and reliability of the available witnesses who often provide the sole evidence supporting the material facts. Thus, investigating the relatives of witnesses, in particular if the witness is an alleged victim, is an important part of those investigations. The Defence must have the opportunity - within the boundaries already set in the Protocol and all the other instruments related to the disclosure of confidential information - to question the relatives of witnesses of sexual violence on the factual allegations.

⁸ ICC-01/04-01/07-2007-Anx1; ICC-01/05-01/08-813-Red; ICC-02/11-01/11-49-Anx and ICC-01/09-01/11-469-Anx.

50. This is all the more important in this case, considering that 4 of the 18 charges brought against Mr Ntaganda are for sexual and/or gender based crimes.
51. Notwithstanding the above, the Defence wishes to adopt a constructive approach which will achieve the aim of paragraph 27 without excessively hindering its ability to conduct investigations.
52. This requires in the Defence's view, limiting the prohibition in paragraph 27 to immediate family members.
53. Consequently, the Defence proposes the following wording:

Where a witness has stated that she or he has been a victim of ~~suffered~~ sexual and/or gender based crimes and that he or she ~~it is apparent that the witness~~ has not discussed the violence with members of his or her immediate family, the investigating party or participant must exercise real caution in investigating the allegations to protect the privacy, dignity and well-being of the witness. It shall not reveal this information to these immediate family members ~~or to persons who will communicate the information to family members~~ and any inquiries it undertakes must be done so as to ensure the confidentiality of the information.⁹ Where there are no suitable alternative investigative avenues available, the investigating party or participant may communicate the information that the witness has been a victim of ~~suffered~~ sexual or gender based crimes to those immediate family members ~~individuals~~ that the witness has stated she or he has informed or has confirmed are aware of the sexual and gender based crimes allegedly suffered, provided that in doing so the investigating party or participant does not reveal that she or he is a witness with the ICC.

⁹ As approved by the Single Judge – ICC-01/04-02/06-185, para.21.

RELIEF SOUGHT

54. In light of the above submissions, Mr Ntaganda respectfully requests the Chamber to:

DENY the adoption of the following provisions of the Proposed Protocol or modify these provisions in accordance the Defence's proposition where applicable:

In paragraph 7: "In order to use such material, the investigating party should present a request to the Chamber."

In paragraph 11: "including with the accused"

Paragraph 21 in its entirety

In paragraph 27: "It shall not reveal the information to these family members or to persons who will communicate the information to family members and any inquiries it undertakes must be done so as to ensure the confidentiality of the information."

ADOPT the remaining parts of the Protocol.

RESPECTFULLY SUBMITTED ON THIS 14th DAY OF NOVEMBER 2014

A handwritten signature in dark ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands