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

Date: **7 April 2015**

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

**Response on behalf of Mr Ntaganda to Prosecution request for authorisation of
non-disclosure of five documents obtained pursuant to article 54(3)(e)**

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 “*Confidential redacted version of ‘Prosecution request for authorisation of non-disclosure of five documents obtained pursuant to article 54(3)(e), 13 March 2015, ICC-01/04-02/06-509-Conf-Exp’*” filed by the Office of the Prosecutor (“Prosecution”) on 13 March 2015 (“Prosecution Request”),¹ Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda to Prosecution request for
authorisation of non-disclosure of five documents obtained pursuant to
article 54(3)(e)**

OVERVIEW

1. As a result of the scarce information provided, the Defence is unable to effectively respond to the merits of the Prosecution Request. The Prosecution Request also fails to provide Trial Chamber VI (“Chamber”) with sufficient information to assess whether the rights of the Accused can be fully respected – taking into consideration the Prosecution’s obligation to disclose exculpatory evidence in its possession as well as other evidence material to the preparation of the defence – in the event the non-disclosure of the five documents is authorised.
2. In these circumstances, the Defence respectfully submits that the Chamber should delay adjudication of the Prosecution Request, order the Prosecution to provide the Chamber and the Defence with additional information and provide the Defence with a further opportunity to respond.
3. In the name of efficiency and with a view to minimizing the expenditure of the Parties’ valuable time and resources, the missing information could and should have been provided in the Prosecution Request.²

¹ The Defence was notified of the Prosecution Request on 16 March 2015 (Email of Court Management-Court Records, 16 March 2015 at 10:31). A public redacted version of the Prosecution Request was notified to the Defence on the same day.

² In particular, the Defence notes that no information is provided as to when the Prosecution was informed of the provider(s)’ refusal to consent to the Prosecution’s disclosure of the five documents to the Defence.

SUBMISSIONS

I. Insufficient information is provided to the Defence

4. The Prosecution requests authorization not to disclose to the Defence five documents obtained from (an) unknown provider(s) pursuant to Article 54(3)(e) of the Statute.
5. Regarding the first four documents – one main document and three annexes – the subject matter and the material substance remain unknown to the Defence. The date(s) of any event or material issue referred to in the documents is also unknown as well as the date(s) on which the documents were created.
6. As for the proposed substitute evidence – which would allow for the protection of the rights of the Accused despite the non-disclosure of these documents – scarce information is provided other than the fact that a non-identified document which purportedly covers the same or substantially the same information as that contained in the four documents, has been disclosed to the Defence on a date unknown in 2013.
7. Indeed, the Prosecution even omitted to identify the “[o]ther material containing information analogous to the Rule 77 Material in these four documents”³ disclosed to the Defence, which might have allowed to respond to its arguments.
8. In addition, no information is provided regarding the identity of the provider as well as the reasons for the provider’s refusal to consent to the Prosecution’s disclosure of the four documents to the Defence. Any relationship existing between the Prosecution and the provider – for example, whether the provider is cooperating with the Prosecution in its investigations – is equally unknown.

³ Prosecution Request, para.9.

9. It necessarily follows that the Defence is not in a position to respond effectively as to whether the material disclosed by the Prosecution constitutes an adequate substitute, sufficient to protect the rights of the Accused.
10. Regarding the fifth document – typed notes taken by an unknown author who reviewed various reports – very little information is provided. The Prosecution Request provides references to two reports previously disclosed to the Defence that purportedly contain some of the Rule 77 Material mentioned in the document and which appear to be the original evidence seen by the unknown author of the document.⁴ However, the number of reports covered in the unknown author’s notes, the purpose of the author in taking these notes, the date(s) on which the notes were produced, the events and material issues contained in the notes which were used by the Prosecution as lead evidence and the dates of the same, are unknown to the Defence.
11. As for the proposed substitute evidence – which would allow for the protection of the rights of the Accused despite the non-disclosure of the fifth document – no information is provided other than the fact that non-identified “analogous evidence” would have been previously disclosed to the Defence.
12. In addition, no information is provided regarding the identity of the provider as well as the reasons for the provider’s refusal to consent to the Prosecution’s disclosure of the fifth document to the Defence. Any relationship existing between the Prosecution and the provider – for example, whether the unknown author or the provider is cooperating with the Prosecution in its investigations – is equally unknown.
13. It necessarily follows that the Defence is not in a position to respond effectively as to whether the material disclosed by the Prosecution constitutes an adequate substitute, sufficient to protect the rights of the Accused.

⁴ Prosecution Request, para.10.

14. By analogy with the “*Protocol establishing a redaction regime in the case of The Prosecutor v. Bosco Ntaganda*”,⁵ the material previously disclosed to the Defence should, at a minimum, have been clearly identified, which could have possibly saved valuable time and resources.

II. Insufficient information is provided to the Chamber

15. The Defence respectfully submits that insufficient information is provided to allow the Chamber to adjudicate the Prosecution Request.
16. It stems from Article 54(3)(e) of the Statute that the Chamber must be provided, at a minimum, with the following: (i) confirmation from the Prosecution that the documents it seeks authorisation not to disclose have been and will be used solely for the purpose of generating new evidence; (ii) the identity of the provider(s) as well as the reasons for which the provider(s) refuse to consent to the Prosecution’s disclosure of the documents to the Defence; (iii) sufficient information to determine the relevance and usefulness of the content of the documents for the Defence, such as *inter alia* the nature of the relationship between the Prosecution and the provider(s); (iv) sufficient information concerning the extent of exculpatory evidence and/or evidence material to the preparation of the defence comprised in the documents; and (v) sufficient information regarding any proposed substitute evidence allowing for the protection of the rights of the Accused in the event non-disclosure of the documents is authorised.
17. In the present case, the Chamber is provided with much more information than the Defence, including the subject matter of the five documents, the identity of the provider(s) and the proposed substitute evidence. However, it is significant that the Chamber is not provided with a confirmation from the Prosecution that the documents it seeks authorisation not to disclose have been and will be used solely for the purpose of generating new evidence.

⁵ ICC-01/04-02/06-411-AnxA, para.49. *See also* ICC-01/04-02/06-481, paras.12-13.

18. In addition, the Prosecution Request provides no information allowing to assess the validity of the provider(s)' concerns to refuse consenting to the Prosecution's disclosure of the documents and/or the details of the Prosecution's agreement(s) not to disclose the five documents to the Defence.
19. More importantly, the Chamber is not provided with: (i) any information concerning the relevance and usefulness of the content of the documents for the Defence, including the nature of the relationship between the Prosecution and the provider(s); and (ii) the extent of exculpatory evidence and/or evidence material to the preparation of the defence comprised in the documents. The Defence notes in this regard that in the end, whether evidence is exculpatory and/or material to the preparation of the defence is a determination to be made by the Chamber.⁶

RELIEF SOUGHT

20. In light of the above submissions and arguments, the Defence respectfully requests the Chamber to:
 - i. **DELAY** adjudication of the Prosecution Request;
 - ii. **ORDER** the Prosecution to provide the Chamber and the Defence with the additional information described above; and
 - iii. **PROVIDE** the Defence with a further opportunity to respond on the merits of the Prosecution Request.

RESPECTFULLY SUBMITTED ON THIS 7th DAY OF APRIL 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

⁶ Article 67(2) of the Statute.