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Date: **7 August 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
With Public Annex A**

Public redacted version of “Response on behalf of Mr Ntaganda to ‘Prosecution request for an order giving effect to conditions to testimony of United Nations staff’”, 4 August 2015, ICC-01/04-02/06-762-Conf

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 request for an order giving effect to conditions to testimony of United Nations staff”* by the Office of the Prosecutor (“Prosecution”) on 10 July 2015 (“Prosecution Request”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution request for an order giving effect to conditions to testimony of United Nations staff”

“Defence Response”

INTRODUCTION

1. The Defence hereby responds to the Prosecution Request, in which the Prosecution moves Trial Chamber VI (“Chamber”) to issue an order which would give effect to certain conditions stipulated by the United Nations for four Prosecution witnesses to have their immunity from legal process waived in order to testify before the International Criminal Court (“Court”).
2. The Defence opposes the Prosecution Request in part, insofar as some of the conditions requested by the Secretary-General adversely impact Mr Ntaganda’s fair trial rights.

SUBMISSIONS

I. Preliminary remarks

3. At the outset, the Defence underscores that its ability to respond meaningfully to the Prosecution Request is impaired by the fact that it does not have access to most of the decisions cited by the Prosecution in support of its Request,² as these decisions – which were all issued in the *Lubanga* case – are classified as confidential. The Defence is nevertheless in a position to provide a response to the Prosecution Request, albeit limited in scope.

¹ ICC-01/04-02/06-713-Conf. The Defence was notified of the Prosecution Request on 13 July 2015. A public redacted version was submitted on the same day.

² Namely: ICC-01/04-02/06-602-Conf; ICC-01/04-02/06-1999-Conf; ICC-01/04-01/06-T-204-CONF-ENG ET, pp.5-11.

4. In any event, the Defence wishes to emphasize that the Prosecution's reliance on these interlocutory decisions is a clear illustration of the relevance of all confidential decisions issued by Trial Chamber I in the *Lubanga* case to its preparations for trial.³ Indeed, not only do these decisions appear to articulate legal principles applicable to the testimony of United Nations officials in general, they also set the conditions of testimony for two Prosecution witnesses who testified in the *Lubanga* case and who are expected to testify in the instant case, namely Prosecution Witnesses P-0046 and P-0075. As such, these decisions are essential for the Defence in understanding the proceedings related to these witnesses with a view to preparing for their cross-examination.

II. The presence of a representative of the Secretary-General of the United Nations during the oral testimony of Prosecution Witnesses P-0046, P-0317 and P-0075

5. The Defence notes that both the ICC-UN Relationship Agreement⁴ and the MONUSCO Memorandum of Understanding,⁵ contemplate the *possibility* for a United Nations official who appears as a witness before the Court to be *assisted* by a representative of the United Nations.⁶ The Defence further notes that other trial chambers of the Court have authorised the presence of a representative of the United Nations during the testimony of a staff member of the organisation.⁷
6. Accordingly, the Defence does not oppose a representative of the Secretary-General of the United Nations being present in the courtroom for the purpose

³ In this regard, the Defence recalls that it has sought access to all *inter partes* confidential material in the *Lubanga* case, in particular all confidential decisions issued by Trial Chamber I, on the basis that it will materially assist it in understanding *inter alia* "the proceedings related to the testimony of experts and witnesses who testified in the *Lubanga* case and whom the Prosecution intends to call in the case against Mr Ntaganda": ICC-01/04-02/06-721, para.22(b).

⁴ ICC-ASP/3/Res.1 ("ICC-UN Relationship Agreement").

⁵ ICC-01/04-01/06-1267-Anx2 ("MONUSCO Memorandum of Understanding").

⁶ ICC-UN Relationship Agreement, art.16(2); MONUSCO Memorandum of Understanding, art.12.

⁷ See *Lubanga* case, ICC-01/04-01/06-T-37-FR [15nov2006 ET WT], p.3, ll.19-24; *Katanga* case, "Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537)", ICC-01/04-01/07-1590, 3 November 2009 ("*Katanga* Decision"), paras.20-22.

of assisting Prosecution Witnesses P-0046, P-0317 and P-0075 during their oral testimony.

7. However, in line with the jurisprudence of the Court and with a view to preserving the fairness of the proceedings, such assistance must be subject to safeguards. In any event, considering that the nature of the testimony of a United Nations official is fundamentally different from that of a witness subject to self-incrimination pursuant to Rule 74 of the Rules of Procedure and Evidence, the assistance provided by the Secretary-General's representatives must not be conflated with the role and duties of counsel assigned covered by Rule 74.
- A. **Permission for a representative of the Secretary-General to be present during the oral testimony of Prosecution Witnesses P-0046, P-0317 and P-0075 and to consult with these witnesses in the course of their testimony**
8. The Secretary-General of the United Nations has decided to waive the immunity from legal process enjoyed by Prosecution Witnesses P-0046, P-0317 and P-0075 in order to allow these persons to testify "freely" in the case against Mr Ntaganda.⁸
9. With a view to giving full effect to the Secretary-General's decisions and ensuring that the testimony of Prosecution Witnesses P-0046, P-0317 and P-0075 is indeed free, the Defence submits that the interventions of the representatives of the Secretary-General should be kept to a minimum.
10. More specifically, in order to ensure that the presence of a representative of the Secretary-General does not disrupt the testimony of Prosecution Witnesses P-0046, P-0317 and P-0075, said representative should not be allowed to interrupt the witnesses or to communicate directly with the witnesses in the courtroom, without prior leave of the Chamber.⁹ Similarly,

⁸ ICC-01/04-02/06-713-Conf-Anx1, p.3; ICC-01/04-02/06-713-Conf-Anx3, p.3; ICC-01/04-02/06-713-Conf-Anx5, p.3.

⁹ *Katanga* Decision, para.22.

the representative should request permission before addressing the Chamber, preferably at the beginning or end of any particular session.¹⁰

B. Permission for representatives of the Secretary-General to make submissions to the Chamber

11. The Secretary-General subjects his decision to waive the immunity enjoyed by Prosecution Witnesses P-0046, P-0317 and P-0075, to his representatives being permitted to make submissions to the Chamber on the questions that may be asked to these three witnesses. In particular, the Secretary-General requests that his representatives be allowed to argue that the witness may not be required to answer a question or to supply certain information if doing so would either: (i) endanger the safety or security of current or former United Nations personnel or of other persons; (ii) prejudice the security or proper conduct of any current or future operation/activity of the United Nations; or (iii) breach an obligation of confidentiality which it is incumbent upon the United Nations to respect.
12. The Defence does not oppose the Secretary-General's representatives being authorised, as a matter of principle, to make observations on the questions put by the parties and the Legal Representatives of Victims ("LRVs") to Prosecution Witnesses P-0046, P-0317 and P-0075 during their testimony, provided that, *a priori*, such observations have no bearing on the scope of Defence cross-examinations and the manner in which the Defence conducts the same.
13. However, the Defence takes issue with the further letters addressed to the Prosecution in which the Secretary-General expresses his understanding that:
 - A. The Prosecution shall not ask any questions of Witnesses P-0046, P-0317 and P-0075 the answering of which would require that they disclose:

¹⁰ *Katanga* Decision, para.22.

- i. in open session, information the public disclosure of which would endanger the safety or security either of current or former United Nations personnel or of other persons; and
- ii. in open or closed session, information the disclosure of which to any person, in particular the accused, would endanger the safety or security either of current or former United Nations personnel or of other persons.

B. Answering to the Prosecution's questions shall not require Prosecution Witnesses P-0046, P-0317 and P-0075 to disclose:

- i. in open or closed session, the identity of persons, groups or organizations that provided information to these three witnesses on condition that their identities remain confidential and not be disclosed; and
- ii. in open session, information that was provided to these three witnesses on the understanding that it should remain confidential and not be disclosed.

C. In conducting the examination and any re-examination of Prosecution Witnesses P-0046, P-0317 and P-0075, the Prosecution shall not ask any questions of these witnesses that might "naturally and foreseeably" lead to the Defence asking of the witnesses during their cross-examination any questions the answering of which would require them to disclose information of any of the kinds described above in the circumstances there described.¹¹

14. While the Letters of Understanding have no direct bearing on the Defence, they may well have far-reaching consequences on the Defence's ability to

¹¹ ICC-01/04-02/06-713-Conf-Anx2, pp. 2-3; ICC-01/04-02/06-713-Conf-Anx4, pp. 2-3; ICC-01/04-02/06-713-Conf-Anx6, pp. 2-3 (collectively, "Letters of Understanding").

properly test the evidence provided by Prosecution Witnesses P-0046, P-0317 and P-0075.

15. Firstly, the categories set out in the Letters of Understanding are, for some, overly broad and vague (e.g. information provided on the “understanding” that it should remain confidential) or go beyond the scope of protection of confidential information as provided for in Article 64(6)(c) of the Statute. For instance, information the disclosure of which *would* endanger the safety or security either of current or former United Nations personnel or of other persons, is not necessarily confidential information within the meaning of Article 64(6)(c) of the Statute.
16. Secondly, the Secretary-General’s understanding that no Prosecution’s question should require Witness P-0046, P-0317 and P-0075 to provide information the disclosure of which to any person – *in particular the Accused* – would endanger the safety or security of United Nations personnel or of other persons, is groundless. The Secretary-General provides no compelling reasons that would justify hiding from Mr Ntaganda any information known to Witnesses P-0046, P-0317 and P-0075.
17. Thirdly, and more importantly, the Letters of Understanding – to the extent that the Prosecution deems to be bound by them – are likely to result in information known to Prosecution Witnesses P-0046, P-0317 and P-0075 (and otherwise relevant to the present case) being hidden from the Defence.
18. Indeed, while the Chamber made it clear in its “*Decision on the conduct of proceedings*” that the cross-examining party “may go beyond matters previously discussed in the examination-in-chief [of a witness] and may address, in accordance with Rule 140(2)(b) of the Rules, other matters relevant to the case, including those affecting the credibility of the witness”,¹² the fact that the Prosecution will not address with Witnesses P-0046, P-0317 and P-

¹² ICC-01/04-02/06-619, para.28.

0075 topics which would require these witnesses to disclose information falling in one of the categories described above, is likely to adversely impact the Defence's ability to fully cross-examine the narrative put forward by these witnesses. Indeed, cross-examination of a witness rests mainly on information provided during examination-in-chief.

19. Consequently, the Defence respectfully requests the Chamber to hold that the Secretary-General's understanding expressed in his letters addressed to the Prosecution concerning the testimony of Prosecution Witnesses P-0046, P-0317 and P-0075 – contrary to the expressed conditions found in the Secretary-General's letters waiving the immunity of these three witnesses – is not binding on the Prosecution. Should either of Witnesses P-0046, P-0317 or P-0075 decline to answer to a question, the Chamber at the appropriate juncture shall resolve the matter.
20. In any event, the Defence respectfully requests the Chamber to make clear that, in the event Prosecution Witnesses P-0046, P-0317 and P-0075 decline to answer any question put to them, the Chamber will take this into consideration when determining the appropriate weight to be accorded to their testimony.¹³

III. The prohibition to reveal to the public the fact that [REDACTED]

21. The Defence opposes the Secretary-General's additional conditions that: (i) the Prosecution and "other organs of the Court" shall take all necessary steps to prevent it from becoming known to the public that [REDACTED] may be going to provide testimony, is providing testimony or has provided testimony to the Court ("[REDACTED]"); and (ii) in the event the Prosecution, the Defence, the LRVs or the Chamber may wish to disclose (or cause to disclose) the fact that [REDACTED], the part or parts of the proceedings in which such disclosure may take place be held in "closed session" and

¹³ *Katanga* Decision, para.21.

unredacted transcripts/recordings of such part/parts be restricted to the Prosecution, the Defence, the LRVs and the Chamber (“[REDACTED]”).

22. The Defence opposes these two additional conditions to the extent that they amount to prohibiting any public reference to [REDACTED] in the course of [REDACTED] testimony before the Chamber. The Secretary-General insufficiently substantiates his request in this regard and provides no compelling reasons that could allow the Chamber to conclude that such conditions are warranted.
23. Indeed, the Secretary-General’s decision waiving [REDACTED] merely refers to [REDACTED]¹⁴ as a basis for his vague contention that the disclosure of the fact that [REDACTED] may be going to provide testimony, is providing testimony or has provided testimony to the Court would prejudice the [REDACTED].¹⁵ The Secretary-General neither specified what these prevailing circumstances are, nor explained how the disclosure of [REDACTED] to the public in the course of [REDACTED] testimony may prejudice the [REDACTED].
24. Absent any actual or sufficiently identified potential prejudice to [REDACTED], the Chamber’s order giving effect to the conditions requested by the Secretary-General for the testimony of [REDACTED] should not include the [REDACTED] Additional Conditions.
25. In any event, the Defence notes that [REDACTED] was disclosed publicly.¹⁶ In such circumstances, the Defence fails to understand the Prosecution’s assertion that “Trial Chamber I granted [the] same request in relation to [REDACTED] in the *Lubanga* case”.¹⁷

¹⁴ ICC-01/04-02/06-713-Conf-Anx1, p.3.

¹⁵ ICC-01/04-02/06-713-Conf-Anx1, p.3.

¹⁶ [REDACTED].

¹⁷ Prosecution Request, para.11. The Defence recalls that it has not access to the decision referred to by the Prosecution in support of its contention, and is not thus in a position to meaningfully respond to the same.

IV. Conditions requested by the Secretary-General for the testimony of Prosecution Witness P-0810

26. Without prejudice to any objections the Defence may raise in relation to Prosecution Witness P-0810's report, and bearing in mind the arguments outlined above regarding the questions that may be put to United Nations officials, the Defence does not oppose the conditions requested by the Secretary-General for the testimony of Witness P-0810.

CONFIDENTIALITY

27. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is submitted on a confidential basis as it responds to a filing bearing the same classification. A public redacted version of the Defence Response will be filed separately.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

ISSUE an order giving effect to the conditions requested by the Secretary-General of the United Nations for the purpose of waiving the immunity from legal process of Prosecution Witnesses P-0046, P-0317 and P-0075 subject to the observations found in paragraphs 7, 9, 10, 12, 19, 20, 24 and 26; and

HOLD that the Secretary-General's understanding expressed in his letters addressed to the Prosecution concerning the testimony of Prosecution Witnesses P-0046, P-0317 and P-0075, is not binding on the Prosecution.

RESPECTFULLY SUBMITTED ON THIS 7TH DAY OF AUGUST 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands