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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 "Observations on behalf of Mr Ntaganda on the Second Report on the *post-factum* review of the phone conversations made by Mr Ntaganda", ICC-01/04-02/06-625-Conf-Exp, 4 June 2015

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 by the Registry of its *Second Report on the post-factum review of the phone conversations made by Mr Ntaganda* along with twenty annexes on 22 May 2015 (“Second Report” and “Annexes”)¹ and the *Decision on reclassification of the Registry’s report on post-factum review* rendered by the Trial Chamber VI (“Chamber”) on 29 April 2015 (“Decision on reclassification”),² Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submit these:

**Observations on behalf of Mr Ntaganda on the Second Report on
the *post-factum* review of the phone conversations made by Mr Ntaganda**

“Defence Observations”

INTRODUCTION

1. As directed by the Chamber, the Defence hereby submits its observations on redactions to be applied to the Second Report as well as to Annex 7 of the First Report.
2. Having carefully reviewed the Second Report and Annexes, the Defence respectfully submits that significant redactions need to be applied to the Second Report as well as to all Annexes. The same conclusion applies to Annex 7 of the First Report.
3. The proposed redactions are set out below.

CONFIDENTIALITY

4. These Defence Observations are submitted under the classification “Confidential *ex parte*, only available to the Chamber, Registry and Defence”, pursuant to Regulation 23bis (2) of the Regulations of the Court – as they refer to the Registry’s Second Report and Annexes, which were submitted under the same classification.

¹ ICC-01/04-02/06-607-Conf-Exp.

² ICC-01/04-02/06-578-Conf-Exp.

SUBMISSIONS

5. On 29 April 2015, the Chamber ordered the Registry to file the Second Report on the *post-factum* review by 22 May 2015 and make Annex 7 to the First Report available to the Defence.
6. The Chamber also directed the Defence to inform the Chamber whether it considers that the Second Report and Annexes as well as Annex 7 to the First Report contain any information that should not be disclosed to the Prosecution, and if so, to provide redaction proposals by 4 June 2015.
7. The Defence conducted its review of the Second Report and Annexes, as well as Annex 7 to the First Report on the basis of the directives issued by the Chamber.
8. In this regard, the Defence recalls the Chamber's holding that to ensure that the Registry's *post-factum* review was proportionate, the Registry's report "shall not mention any (parts of) conversations solely of a private and/or affective nature, but only address any potential impact on witnesses or on the proceedings".³
9. It is significant in this regard that many of the conversations referred to in the Second Report for which English transcripts are provided in the Annexes are solely of a private and/or affective nature. Accordingly, as set out below, these conversations should be redacted in their entirety and not be given to the Prosecution.
10. The Defence also recalls that in its Decision on reclassification the Chamber directed that portions of the conversations found in the Annexes to the First

³ Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs, 8 December 2014, ICC-01/04-02/06-Conf-Exp-Red ("Decision on Restrictive Measures"), para. 56.

Report be redacted on the basis that they related solely to the Defence case, or Defence investigations, with no relevance to the present litigation.⁴

11. It is significant in this regard that most of the conversations referred to in the Second Report for which English transcripts are provided in the Annexes relate solely to the Defence case or Defence investigations and/or has no relevance to the present litigation. The same conclusion applies to Annex 7 to the First Report. Accordingly, as set out below, these conversations should be redacted in their entirety and not be given to the Prosecution.⁵
12. While the conversations listened to and analysed by the Registry ought to correspond to the parameters provided by the Prosecution, it is nonetheless essential that the Registry's selection of conversations to be included in the Report complies with the Chamber's directives. The Defence respectfully submits that this is not the case with respect to the Second Report and Annexes.
13. It appears from the Second Report that the Registry focused on the use of coded language and the fact that Mr Ntaganda had conversations with persons who are not on his authorised telephone contacts list. While the use of the codes might be considered as inappropriate and having conversations with unauthorized persons is contrary to the "rules of detention" this is not the aim of the current litigation.
14. It is the understanding of the Defence that the rationale for the *post-factum* review of Mr Ntaganda conversations is to investigate potential circumstances regarding alleged disclosures of confidential information and interference with Prosecution witnesses.

⁴ Decision on reclassification, para. 7.

⁵ While Annex 5 to the Second Report appears to relate to Defence matters or Defence investigations, the Defence is not seeking that it be redacted at this time due to its different format and the absence of an English transcript (see comments under Annex 5 below).

15. It follows that conversations which do not reveal instances of disclosure of confidential information and/or attempts to interfere with Prosecution witnesses, especially if they are solely related to the Defence case or Defence investigations and/or are of a private/affective nature should not be included in the Registry's Reports.
16. In this case, the Defence respectfully submits that 19 of the 20 Annexes attached to the Second Report do not meet the necessary criteria and for this reason should be redacted in their entirety and not be provided to the Prosecution.
17. As for the Report in and of itself, extracts and footnotes found therein that refer to Annexes – which the Defence submits should be redacted in their entirety – must also be redacted.⁶
18. Lastly, the Defence wishes to emphasize that the review of the Second Report and Annexes with Mr Ntaganda and the analysis of the same necessitated no less than 30 Counsel hours, 60 Legal Assistant hours, in addition to the time invested by Mr Ntaganda himself.
19. In light of the date set by the Chamber for the beginning of the Prosecution's case, the Defence is presently doing its utmost to prepare for trial. Bearing in mind the contents of the First and Second Reports and considering that as a result of the measures put in place by the Chamber, Mr Ntaganda is not in a position to disclose confidential information and/or interfere with witnesses, the Defence respectfully submits that the Chamber has been provided with sufficient information and that the Prosecution's request for restrictive measures, submitted on 8 August 2014, is ripe for adjudication.⁷

⁶ A copy of the Second Report with the proposed redactions is enclosed in Annex A.

⁷ Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court, 8 August 2014, ICC-01/04-02/06-349-Conf-Exp.

I. Proposed redactions to be applied to the Second Report

20. [REDACTED] should be redacted as follows:

- (i) The word [REDACTED]. This word relates solely to the Defence case [REDACTED]. It is also found in [REDACTED] which the Defence submits should be redacted in its entirety ([REDACTED]).
- (ii) [REDACTED] should be redacted as it refers to [REDACTED] which the Defence submits should be redacted in its entirety.
- (iii) [REDACTED], including footnotes [REDACTED], 12 and 13. This segment relates solely to the Defence case and Defence investigations. It also refers to [REDACTED] which the Defence submits should be redacted in its entirety.

21. [REDACTED] should be redacted as follows:

- (i) Footnote 14 should be redacted as it refers to Annex 3 which the Defence submits should be redacted in its entirety (see comments under Annex 3 below).
- (ii) [REDACTED]. This segment relates solely to the Defence case and Defence investigations.
- (iii) [REDACTED]. This segment is of no potential relevance to this litigation.

22. [REDACTED] should be redacted as follows:

- (i) [REDACTED]. This segment relates solely to the Defence case and Defence investigations. It also refers to [REDACTED] which the Defence submits should be redacted in its entirety ([REDACTED]).

23. Page 8, paragraph 11, footnotes 16 and 17 should be redacted as follows:

- (i) Footnote 16 should be redacted as it refers to Annex 5 which in the submission of the Defence should not be addressed by the Chamber until an

English transcript is produced and therefore not be given to the Prosecution (see comments under Annex 5 below).

- (ii) Footnote 17 should be redacted as it refers to Annex 6 which the Defence submits should be redacted in its entirety as it relates solely to the Defence case and Defence investigations (see comments under Annex 6 below).

24. [REDACTED] should be redacted as follows:

- (i) [REDACTED]. This segment relates solely to the Defence case and Defence investigations.
- (ii) Footnotes [REDACTED] and 20 which refer to Annexes [REDACTED] and 6 respectively, which the Defence submits should be redacted in their entirety ([REDACTED]).

25. [REDACTED] should be redacted as follows:

These [REDACTED] refer to Annexes 6, 9, [REDACTED] which the Defence submits should be redacted in their entirety ([REDACTED]).

26. [REDACTED] should be redacted as follows:

- (i) [REDACTED] refer to [REDACTED] respectively, which the Defence submits should be redacted in their entirety ([REDACTED]).
- (ii) [REDACTED] refers to [REDACTED] which in the submission of the Defence should not be addressed by the Chamber until a proper English transcript is produced and therefore not be given to the Prosecution ([REDACTED]).

27. Page 12, footnotes 30 and 31 should be redacted as follows:

Footnotes 30 and 31 refer to Annexes 15, 17, 18 and 9 respectively, which the Defence submits should be redacted in their entirety (see comments related to these Annexes below).

28. **[REDACTED] and paragraph 22, [REDACTED] should be redacted as follows:**

- (i) [REDACTED] refers [REDACTED] which the Defence submits should be redacted in its entirety ([REDACTED]).
- (ii) Paragraph 22 should be redacted in its entirety as it relates solely to the Defence case and Defence investigations (as acknowledged by the Registry in the last line of the paragraph).
- (iii) [REDACTED] refers to [REDACTED] which the Defence submits should be redacted in its entirety ([REDACTED]).

29. **Page 14, paragraph 23, [REDACTED] should be redacted as follows:**

- (i) Paragraph 23 should be redacted in its entirety as it relates solely to the Defence case and Defence investigations (as acknowledged by the Registry in the penultimate line of the paragraph).
- (ii) [REDACTED] refers to [REDACTED] which the Defence submits should be redacted in its entirety ([REDACTED]).

II. Proposed redactions to be applied to the Annexes to the Second Report

30. **[REDACTED] should be redacted as follows:**

[REDACTED] which relates solely to the Defence case or Defence investigations. [REDACTED].

31. **Annex 2 should be redacted as follows:**

Annex 2 to the Second Report involves a conversation between Mr Ntaganda and [REDACTED], which relates solely to the Defence case or Defence investigations. Annex 2 should therefore be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that during this conversation Mr Ntaganda switches language (for example to Ruhima) and

speaks with persons who are not on his authorised telephone contacts list is of no potential relevance to this litigation.

32. **[REDACTED] should be redacted as follows:**

[REDACTED], which relates solely to the Defence case or Defence investigations. [REDACTED] should therefore be redacted in its entirety and not be provided to the Prosecution. In this regard, [REDACTED].

33. **[REDACTED] should be redacted as follows:**

[REDACTED] The rest of the conversation relates solely to the Defence investigations. [REDACTED] should therefore be redacted and not be provided to the Prosecution. It is significant in this regard, that the Registry recognizes that the conversation deals with Defence matters. Moreover, [REDACTED].

34. **Annex 5 should be redacted as follows:**

Annex 5 to the Second Report refers to two conversations between Mr Ntaganda and [REDACTED]. Unlike the other Annexes to the Second Report, this Annex is a summary and not an English transcript of a conversation which took place in a different language, in which specific words are attributed to persons involved.

As a result, Mr Ntaganda is not able to link the summaries to the actual conversations he had with [REDACTED]. However, Mr Ntaganda remembers well that both conversations dealt precisely with defence matters, including: (i) how evidence referred to by the Prosecution publicly shows that he did no wrong; and (ii) requests to find Defence evidence to support his case.

Consequently, the Defence respectfully requests the Chamber to defer ruling on which parts, if any, of this Annex can be given to the Prosecution, until an English transcript is produced and Mr Ntaganda is given an opportunity to

provide observations. Only then will the Defence be able to determine, if any part of this conversation can be given to the Prosecution.

35. **Annex 6 should be redacted as follows:**

Annex 6 to the Second Report involves a conversation between Mr Ntaganda and [REDACTED]. This conversation relates solely to Defence matters and investigations. Annex 6 should therefore be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda uses coded language and informs [REDACTED] that their conversation is not secure is of no potential relevance to this litigation.

36. **[REDACTED] should be redacted as follows:**

[REDACTED]. This conversation is of a private nature with the exception of [REDACTED] which deal with a different topic. This segment contains Defence related information concerning [REDACTED] who has suddenly expressed a keen interest in testifying in favour of Mr Ntaganda.

Consequently, [REDACTED] should therefore be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda uses coded language such as [REDACTED] in the segment of the conversation which relates to Defence matters is of no potential relevance to this litigation.

37. **[REDACTED] should be redacted as follows:**

[REDACTED]. This conversation is of private nature with the exception of [REDACTED] which deal with Defence matters.

In particular, the private part of the conversation deals with matters such as [REDACTED]. As for the segment dealing with Defence matters, it contains information [REDACTED].

Consequently, [REDACTED] should therefore be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda uses coded language such as [REDACTED] in the segment of the conversation which relates to Defence matters is of no potential relevance to this litigation.

38. **Annex 9 should be redacted as follows:**

Annex 9 to the Second Report is a conversation between Mr Ntaganda and [REDACTED]. This conversation is solely of a private nature. The issues discussed in this conversation relate to [REDACTED].

Consequently, Annex 9 should be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda uses coded language such as [REDACTED] is of no potential relevance to this litigation.

39. **[REDACTED] should be redacted as follows:**

[REDACTED] is a duplicate of [REDACTED] to the Second Report. The reason beyond the duplication is unclear. Accordingly, [REDACTED] should be redacted in its entirety and not be provided to the Prosecution.

40. **[REDACTED] should be redacted as follows:**

[REDACTED], which relates solely to the Defence investigations.

Consequently, [REDACTED] should be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda uses coded language such as [REDACTED] is of no potential relevance to this litigation.

41. **Annex 12 should be redacted as follows:**

Annex 12 to the Second Report involves a conversation between Mr Ntaganda and [REDACTED], which relates solely to Defence case and investigations.

Consequently, [REDACTED] should be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda uses coded language such as [REDACTED] is of no potential relevance to this litigation.

42. **[REDACTED] should be redacted as follows:**

[REDACTED] is a duplicate of [REDACTED] to the Second Report. The reason beyond the duplication is unclear. Accordingly, [REDACTED] should be redacted in its entirety and not be provided to the Prosecution.

43. **Annex 14 should be redacted as follows:**

Annex 14 to the Second Report is a conversation between Mr Ntaganda and [REDACTED]. This conversation is solely of a private/and or affective nature. As such, it is of no potential relevance to this litigation. Consequently, it should be redacted in its entirety and not be provided to the Prosecution.

44. **Annex 15 should be redacted as follows:**

Annex 15 to the Second Report is a conversation between Mr Ntaganda and [REDACTED]. This conversation is solely of a private nature. More particularly, the issue addressed in this conversation [REDACTED]. The Registry suggestion that the word [REDACTED] could possibly refer to witnesses is unfounded and not supported by a reading of the conversation as whole.

Consequently, Annex 15 should be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda spoke with a person not registered on his authorised telephone contacts list ([REDACTED]) and that [REDACTED] is of no potential relevance to this litigation.

45. **Annex 16 should be redacted as follows:**

Annex 16 to the Second Report is a conversation between Mr Ntaganda and [REDACTED]. This conversation is solely of a private nature. More particularly, the issue addressed in this conversation [REDACTED]. The Registry analysis of the conversation and possible interpretation “[REDACTED]” is unfounded and not supported by a reading of the conversation as whole.

Consequently, Annex 16 should be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda spoke with a person not registered on his authorised telephone contacts list ([REDACTED]) is of no potential relevance to this litigation. Moreover, the Defence respectfully submits that the Registry’s analysis of this conversion, aiming to find evidence of interference with witnesses in Mr Ntaganda’s conversations, is farfetched.

46. Annex 17 should be redacted as follows:

Annex 17 to the Second Report is a conversation between Mr Ntaganda and [REDACTED]. This conversation is solely of a private nature. More particularly, the issue addressed in this conversation deals with [REDACTED].

Consequently, Annex 17 should be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that Mr Ntaganda spoke with two persons not registered on his authorised telephone contacts lists is of no potential relevance to this litigation.

47. Annex 18 should be redacted as follows:

Annex 18 to the Second Report is a conversation between Mr Ntaganda and [REDACTED]. A reading of this conversation reveals that it is solely of a private and/or affective nature. Moreover, the Registry’s reference to the use of the word [REDACTED] as a possible reference to witnesses is unfounded.

Consequently, Annex 18 should be redacted in its entirety and not be provided to the Prosecution.

48. **[REDACTED] should be redacted as follows:**

[REDACTED] dealing specifically with Defence matters. The conversation relates to [REDACTED]. Although Mr Ntaganda [REDACTED].

Consequently, [REDACTED] should be redacted in its entirety and not be provided to the Prosecution.

In this regard, the fact that Mr Ntaganda and [REDACTED] use coded language such as [REDACTED] has no impact on witnesses for the Prosecution and does not alter the fact that this information should not be disclosed to the Prosecution.

49. **[REDACTED] should be redacted as follows:**

[REDACTED]. The object and content of this conversation is the same as the conversation referred to in [REDACTED].

Consequently, [REDACTED] should also be redacted and not be provided to the Prosecution.

III. Proposed redactions to be applied to [REDACTED] to the First Report

50. [REDACTED], which relates solely to the Defence case or Defence investigations. A reading of the conversation as a whole, bearing in mind the context, [REDACTED] does not have the meaning suggested by the Registry.

51. Consequently, [REDACTED] should be redacted in its entirety and not be provided to the Prosecution. In this regard, the fact that this conversation refers to [REDACTED] is yet another reason not to disclose this conversation to the Prosecution.

RESPECTFULLY SUBMITTED ON THIS 12th DAY OF JANUARY 2016

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

Mr Stéphane Bourgon, Counsel for Bosco Ntaganda
The Hague, The Netherlands