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

Date: **26 May 2016**

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 "Response on behalf of Mr Ntaganda to 'Prosecution's Application for Defence Disclosure of Information related to Witness P-0800's Security'", 5 April 2016, ICC-01/04-02/06-1250-Conf-Exp

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: (i) the *“Prosecution’s Application for Defence Disclosure of Information related to Witness P-0800’s Security”* submitted by the Office of the Prosecutor (“Prosecution”) on 18 March 2016 (“Prosecution Application”);¹ and (ii) Trial Chamber VI (“Chamber”)’s order of 24 March 2016 shortening the deadline for responses to the Prosecution Application to 5 April 2016, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s Application for Defence Disclosure of Information related to Witness P-0800’s Security”

“Defence Response”

INTRODUCTION

1. The Prosecution requests the Chamber to order the Defence to provide to the Prosecution and to the Chamber: (i) the identity and backgrounds of the persons who told the Defence that [REDACTED]; and (ii) any information indicating the basis of their knowledge (“Requested Information”).² In the alternative, the Prosecution asks that the Requested Information be provided “at minimum” to the Chamber and Victims and Witnesses Unit (“VWU”).³
2. For the reasons set out below, the Prosecution’s request for provision of the Requested Information should be rejected. However, the Defence does not object to providing the Chamber and VWU with the Requested Information.

¹ ICC-01/04-02/06-1219-Conf.

² Prosecution Application, para.1.

³ Prosecution Application, paras.6, 28.

SUBMISSIONS

I. Preliminary observations

3. In its Application, the Prosecution notes that the Defence has not responded to date to the 'repeated' requests made by the Prosecution to provide the Requested Information.⁴ The Prosecution further adds that "the Defence's failure to provide the information sought prevents the Prosecution from taking, or seeking, appropriate measures to protect the integrity of the proceedings".⁵
4. The absence of reaction on the part of the Defence to the emails sent by the Prosecution on 19 and 25 February 2016 should not be construed in any way as a refusal to provide the Requested Information. Rather, it results from an unfortunate oversight.
5. Indeed, heavy workload existed at the time and Lead Counsel regrettably did not single out the above-mentioned e-mails amongst his voluminous incoming correspondence. In this regard, the Defence underscores that, contrary to the practice usually followed by the Parties in their *inter partes* communications – whereas e-mails are usually addressed at a minimum to Lead Counsel and the case manager, as well as regularly to other Defence team members⁶ – the two Prosecution emails were addressed solely to Lead Counsel and no other member of the Defence team was copied. As a result, nobody of the Defence team could draw Lead Counsel's attention to the Prosecution's request for communication of the Requested Information.
6. Lead Counsel apologises to the Prosecution for the unfortunate oversight and pledges to pay closer attention to incoming electronic correspondence.

⁴ Prosecution Application, para.4. *See also* Prosecution Application, paras.9, 10.

⁵ Prosecution Application, paras.6, 19.

⁶ Among all emails exchanged between the Prosecution Senior Trial Lawyer and Lead Counsel during the period from 15 to 29 February 2016, only the two-above mentioned emails were solely addressed to Lead Counsel.

Nonetheless, the Defence deems necessary to highlight that there were other means available to Prosecution to address the matter with the Defence before raising it before the Chamber, either by addressing it in person following a Court session or by contacting Lead Counsel by phone.⁷

II. Merits of the Prosecution Application

A. Background

7. On 14 October 2015, arguing that publicly revealing Witness P-0800's identity would risk compromising "his safety, privacy and his physical and psychological well-being", the Prosecution requested, on behalf of the witness, the implementation of in-court protective measures in the form of facial and voice distortion and the use of a pseudonym.⁸
8. On 9 February 2016, the Chamber granted the requested in-court protective measures, finding that "an objectively justifiable risk exists with respect to [Witness P-0800's] security and well-being that warrants the protection of the [w]itness's identity".⁹
9. On 17 February 2016, the Defence cross-examined Witness P-0800. As part of its challenges to Witness P-0800's credibility, the Defence put to the witness certain questions aimed at establishing that, in fact, no risk existed to his safety, if only because [REDACTED]. In this regard, the Defence referred to information in its possession that "[REDACTED]".¹⁰

⁷ The Defence notes that during the same time-period, regular contacts took place between Defence Lead Counsel and the Prosecution Senior Trial Lawyer.

⁸ "Corrected version of 'Fifth request for in-court protective measures', 14 October 2015, ICC-01/04-02/06-900-Conf-Exp-Corr", 15 October 2015, ICC-01/04-02/06-900-Conf-Corr-Red, para.14, as supplemented by "Additional submissions for protective and special measures concerning Prosecution Witness P-800", 11 January 2016, ICC-01/04-02/06-1074-Conf-Red.

⁹ "Confidential redaction version of 'Decision on Prosecution's request for in-court protective and special measures for Witness P-0800'", 9 February 2016, ICC-01/04-02/06-1160-Conf-Red.

¹⁰ T-69-CONF-ENG, p.11, ll.21-22.

B. Providing the Requested Information will be of no assistance to the Prosecution in discharging its duty of protection of witnesses

10. Contrary to what the Prosecution argues, the Requested Information is not necessary to assess the nature and scope of the risks, if any, posed to Witness P-0800 and his family.
11. The Prosecution Application is premised on the assumption that the risks of retaliation against Witness P-0800 are increased because his testimony would be known to people in the [REDACTED].
12. In so suggesting, the Prosecution misrepresents the purpose the Defence sought to achieve in relying on information pointing to [REDACTED] Witness P-0800's testimony.
13. Indeed, far from evidencing the existence of an increased risk to the safety of Witness P-0800, the information which the Defence placed on the record during cross-examination of Witness P-0800 shows that, despite his request for his testimony not to be known, the witness [REDACTED], thereby suggesting that he does not actually fear that his safety is at risk should it be known that he testified in these proceedings.

C. Providing the Requested Information to the Prosecution will prejudice the Accused

14. The Prosecution erroneously contends that communication of the Requested Information will not prejudice the Accused as such communication "will not reveal any detailed information regarding the Defence strategy for the case".¹¹
15. The Requested Information clearly falls within the purview of Rule 81(1) of the Rules of Procedure and Evidence, which acknowledges the privileged character of information related to the internal investigation or preparation of

¹¹ Prosecution Application, para.27.

a party's case¹² by excluding from disclosure reports, memoranda or other internal documents prepared by a party, its assistants or representatives 'in connection with' such investigation or preparation. In this regard, the Defence underscores that: (i) the Requested Information was obtained during Defence investigations; (ii) no statement or investigation note was taken following contacts between the Defence representative and the individuals who provided information regarding Witness P-0800; and (iii) these individuals are likely to be contacted again by the Defence during its ongoing investigations in the area with a view to obtaining relevant information on various aspects of the case against Mr Ntaganda, including the credibility of Prosecution witnesses.

16. Consequently, in such circumstances, there is neither any requirement nor obligation to provide the Prosecution with the name of the individuals met by the Defence representative present in the [REDACTED]. The investigation leads that the Defence wishes to explore with these individuals could be irretrievably undermined if the Prosecution were to contact them.
17. It follows from the above that if there is any balance to strike between the need to further protect Witness P-0800 and the interests of the Accused, such balance clearly favours not communicating the Requested Information to the Prosecution. Should the Prosecution deem appropriate to verify whether it is indeed [REDACTED], or should the Prosecution deem necessary to take further measures to fulfil its statutory protection obligations toward Witness P-0800 now that he has completed his testimony, it has the available resources to adequately investigate the matter in the field and does not require the Requested Information for that purpose.

¹² Cf. ICTY, *Blagojevic and Jokic* case, "Decision on Vidoje Blagojevic's Expedited Motion to Compel the Prosecution to Disclose its Notes from Plea Discussions with the Accused Nikolic & Request for an Expedited Open Session Hearing", 13 June 2003, IT-02-60-T.

D. The Defence does not object to providing the Requested Information to the Chamber and VWU on an *ex parte* basis

18. The Defence hereby provides the Requested Information to the Chamber. Considering its neutral posture with respect to witness-related matters, the Defence does not object to the Requested Information being also provided to VWU.

19. [REDACTED].¹³

CONFIDENTIALITY

20. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is classified as confidential, *ex parte* – only available to the Chamber, VWU and Defence, as it: (i) responds to a filing classified as confidential; and (ii) contains information related to the conduct of Defence investigations. The Defence will submit a confidential redacted version of its Response separately.

RELIEF SOUGHT

21. In light of the above submissions, the Defence respectfully requests the Chamber to **REJECT** the Prosecution's request for communication of the Requested Information.

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF MAY 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

¹³ [REDACTED].