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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 “Reply on behalf of Mr Ntaganda to ‘Prosecution’s response to the ‘Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963’”, 7 April 2016, ICC-01/04-02/06-1255-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: (i) *“Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963”* submitted by Counsel representing Mr Ntaganda (“Defence”) on 1 April 2016 (“Defence Expedited Request”);¹ (ii) the *“Prosecution’s response to the ‘Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963’”* submitted by the Office of the Prosecutor (“Prosecution”) on 5 April 2016 (“Prosecution Response”);² (iii) the *“Request on behalf of Mr Ntaganda seeking leave to reply to ‘Prosecution’s response to the ‘Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P- 0963’”* submitted by the Defence on 6 April 2016 (“Defence Request for Reply”);³ and (iv) Trial Chamber VI (“Chamber”)’s order authorizing the Defence to submit a concise reply on the first issue identified in the Defence Request for Reply by 14h30 on 7 April 2016,⁴ the Defence hereby submits this:

Reply on behalf of Mr Ntaganda to “Prosecution’s response to the ‘Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963’”

“Defence Reply”

1. As authorised by the Chamber, the Defence hereby replies to an issue raised for the first time in the Prosecution Response, namely the applicability of Rule 77 of the Rules of Procedure and Evidence (“Rules”) as a basis for adjudicating the Defence Expedited Request.
2. The Prosecution does not challenge that it disclosed a signed statement and the transcript of the audio-recording of an interview conducted with Witness P-0963 on [REDACTED] as ‘incriminatory’ material.⁵ However, the

¹ ICC-01/04-02/06-1242-Conf.

² ICC-01/04-02/06-1251-Conf.

³ ICC-01/04-02/06-1252-Conf.

⁴ Email from a Legal Officer of the Chamber to the parties and participants, 07h45, 7 April 2016.

⁵ Prosecution Response, paras.7, 20.

Prosecution argues that whether the audio-recording of the [REDACTED] interview should be disclosed to the Defence is an issue that must be assessed against the ‘materiality’ test under Rule 77 of the Rules, merely because the [REDACTED] interview is related to Witness P-0963’s purported [REDACTED] and not with the charges faced by Mr Ntaganda.⁶

3. At the outset, the Defence notes that the Prosecution regards ‘incriminatory’ material and Rule 77 material as two different categories of disclosable material, with two distinct legal foundations.⁷ The Defence recalls that the Prosecution opted to disclose the statement and the transcript of the audio-recording of the [REDACTED] interview under the latter category, not under Rule 77 of the Rules.⁸
4. The fact that the Chamber assessed the Prosecution’s late disclosure of a [REDACTED] interview of Witness P-0901 in light of Rule 77 of the Rules does not necessarily mean that all issues pertaining to disclosure of witness [REDACTED] material must be dealt with under this Rule, in particular when the Prosecution opts to disclose such material as ‘incriminatory’ material. In this regard, the Defence notes that the Prosecution specifically disclosed the transcript (as well as the audio-recording) of Witness P-0901’s [REDACTED] interview under Rule 77, and not as ‘incriminatory’ material.⁹

⁶ Cf. Prosecution Response, paras.20, 22.

⁷ See “Prosecution’s Communication of the Disclosure of Evidence”, 14 December 2015, ICC-01/04-02/06-1054, para.1: “The Office of the Prosecutor (‘Prosecution’) provides notice of the disclosure of **incriminating evidence pursuant to articles 64(3)(c) and 67(1) and (b) of the Rome Statute** (‘the Statute’), evidence pursuant to article 67(2) of the Statute, as well as **material falling within rule 77 of the Rules of Procedure and Evidence** (‘the Rules’).” (emphasis added)

⁸ Compare Disclosure Package 61 – 11 December 2015 (entitled “Disclosure of Incriminating Evidence”) (ICC-01/04-02/06-1054-Conf-AnxA, p.2) which comprises the statement and transcript of the audio-recording of the [REDACTED] interview, with Disclosure Package 51 – 11 December 2015 (entitled “Disclosure of Rule 77”) (ICC-01/04-02/06-1054-Conf-AnxA, p.8). The incriminatory character of the [REDACTED] interview is further highlighted by the fact that the statement and the transcript of the interview appear on the Prosecution’s “List of items that may be used during the testimony of P-0963”, sent by e-mail on 4 April 2016.

⁹ Email from Ms Nicole Samson to the Chamber, 15 September 2015, 14h25 (“However, after further review, the Prosecution has decided to disclose these additional materials [the audio-recording and transcripts related to the interview of [REDACTED] with Witness P-0901] under Rule 77 of the Rules of Procedure and Evidence to the Defence.”) (referred to in “Decision on Defence requests seeking

5. Accordingly, whether or not the Defence has identified any 'specific areas of concern' as to the accuracy of the transcript of the [REDACTED] interview¹⁰ is an irrelevant consideration in assessing the need for disclosing the audio-recording of the [REDACTED] interview.
6. In any event, even if Rule 77 were to apply to the requested disclosure, the Defence notes that in its Decision on Defence Requests for Disclosure Orders, the Chamber regarded disclosure of the transcript and the audio-recording of the interview with Witness P-0901 *as a whole* and not in a compartmented manner, as the Prosecution does with the material related to the [REDACTED] interview. The Defence underscores that the Prosecution did not oppose the issue of 'materiality' when it disclosed the transcript of the interview with Witness P-0901 *along with* its audio-recording.
7. As regards the potential duplicative character of the audio-recording, which would highlight the absence of 'materiality' of the audio-recording,¹¹ the Defence recalls its previous submission that the transcript of an interview, on the one hand, and the audio-recording of the interview, on the other hand, serve two different disclosure purposes, the latter being the only available tool to verify the accuracy of the former in case of doubt.¹²
8. The issue at stake is whether the Prosecution can withhold, without any compelling reason, the audio-recording of an interview when it has already disclosed the transcript of this interview. The Defence submits that the burden rests with the Prosecution, as the disclosing party, to establish persuasive reasons not to disclose the audio-recording. The Prosecution Response provides no cogent reasons in this regard.

disclosure orders in relation to witness P-0901 and seeking the postponement of the witness's cross-examination", 18 September 2015, ICC-01/04-02/06-840-Conf-Exp ("Decision on Defence Requests for Disclosure Orders", para.20). *Contra* Disclosure Package 53 – 17 September 2015, ICC-01/04-02/06-862-Conf-AnxA.

¹⁰ Prosecution Response, para.29.

¹¹ *Cf.* Prosecution Response, para.24.

¹² Defence Expedited Request, para.8.

9. In fact, the Defence genuinely fails to understand the Prosecution's opposition to disclose the audio-recording of the [REDACTED] interview. If it were for logistical reasons associated with the need to apply redactions to the audio-recording, the Defence stresses that very limited information remain redacted in the transcript, a situation which should not overburden the Prosecution in reviewing the audio-recording of the [REDACTED] interview for the purpose of its disclosure.

CONFIDENTIALITY

10. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Reply is classified as confidential, as it responds to a filing bearing the same classification.

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF MAY 2016



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