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

Date: **22 July 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 “Application on behalf of Mr Ntaganda seeking disclosure of the identity of Prosecution intermediary P-0154”,
4 July 2016, ICC-01/04-02/06-1435-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: (i) Prosecution disclosure of material related to Intermediary P-0154; and (ii) cross-examination of Witness P-0018 on 28 and 29 June 2016,¹ the Defence hereby submits this:

**Application on behalf of Mr Ntaganda seeking disclosure of the identity of
Prosecution intermediary P-0154**

“Defence Application”

INTRODUCTION

1. Three Prosecution witnesses who all added allegations [REDACTED] in their second statements to the Prosecution were handled by an unidentified intermediary known as P-0154. The three Prosecution witnesses are P-0018, P-0019 and P-0113. During her testimony, P-0018 appeared to deny that [REDACTED],² and denied having [REDACTED],³ *inter alia*, P-0019 and P-0113. The Prosecution’s own disclosures concerning P-0154’s activities indicate that [REDACTED].⁴ This disclosure also reflects Prosecution suspicions that P-0154 sought to exploit his position to obtain improper personal benefit,⁵ and apparent suspicions of wrongdoing amongst the witnesses for whom the intermediary was acting.⁶
2. These indications of wrongdoing and inter-witness contamination already constitute a sufficient and necessary basis for disclosure of P-0154’s identity according to the standards set out by the *Lubanga* Trial Chamber. The necessity of disclosure is compounded by the concrete demonstration of the impact of non-disclosure on the cross-examination of P-0018, and the likelihood of repetition during the cross-examination of P-0019 and P-0113 in respect of

¹ ICC-01/04-02/06-T-111-CONF-ENG and ICC-01/04-02/06-T-112-CONF-ENG.

² ICC-01/04-02/06-T-111-CONF-ENG-RT p.55 l.4 to p.57 l.9.

³ ICC-01/04-02/06-T-112-CONF-ENG-RT p.24 l.18 to p.25 l.8, p.29 l.20 to p.30 l.16 and p.31 l.10 to p.32 l.3.

⁴ DRC-OTP-2092-0319: “[REDACTED]” (*see also* DRC-OTP-2092-0321, DRC-OTP-2092-0321, DRC-OTP-2092-0323 and DRC-OTP-2092-0325).

⁵ DRC-OTP-2090-0407.

⁶ DRC-OTP-2090-0408; DRC-OTP-2090-0409.

similar allegations. Not knowing P-0154's identity substantially curtails, for example, the follow-up questions that can be asked of a witness who, as was the case with P-0018, simply [REDACTED]. Regardless of whether protection concerns for P-0154 can be established to some threshold of risk, the non-disclosure of this person's identity will undermine, and already has undermined, trial fairness. If there are legitimate protection concerns – upon which the Defence will be unable to comment, incidentally, since the Prosecution has already announced its intention to make any such submissions *ex parte* – then those must be addressed by way of measures other than non-disclosure.

SUBMISSIONS

3. Disclosure of the identity of intermediaries, according to the *Lubanga* Trial Chamber, is to be assessed on a case-by-case basis.⁷ A sufficient basis for disclosure exists, even in the absence of any indications of wrong-doing by the intermediary, when the evidence of witnesses with whom the intermediary has been in contact has been materially called into question, for instance by internal contradictions or by other evidence.⁸
4. *A fortiori*, direct indications of wrongdoing by the intermediary must also constitute a compelling and necessary reason for disclosure of the witness' identity.
5. The *Lubanga* Trial Chamber, for example, ordered disclosure of Intermediary P-0143's identity on the basis that he had contact with five Prosecution witnesses whose evidence was contradicted by other Prosecution or Defence witnesses. Direct indications of wrongdoing by P-0316 and P-0321 required not only disclosure of their identities to the Defence, but also their appearance as witnesses to explain their conduct. The Defence is not seeking this remedy at this

⁷ ICC-01/04-02/06-2434-Conf-Red-Corr, para.139(a).

⁸ ICC-01/04-02/06-2434-Conf-Red-Corr, para. 8.

stage in respect of P-0154, but reserves its right to do so at a later stage should further indications of wrongdoing emerge.

6. The *Lubanga* Trial Chamber did not suggest that the existence of witness protection trump the requirement of disclosure. On the contrary, the *Lubanga* Trial Chamber only stated that any such concerns should be referred to VWU before such disclosure takes place so that appropriate measures could be put in place.⁹ In other words, non-disclosure is not an appropriate measure to mitigate risk. Any other approach would unacceptably sacrifice trial fairness. Even worse, the Defence is precluded from offering any submissions on the legitimacy of P-0154's supposed concerns, let alone whether those concerns are so serious as to justify non-disclosure of his identity, because the Prosecution has already indicated that it will file its submissions on this issue *ex parte*. All manner of allegations will presumably be included in these submissions without the Defence having any opportunity to comment or respond.
7. Conversely, Intermediary P-0154 has been in contact with P-0018, P-0019, [REDACTED], P-0113, [REDACTED]. The Prosecution itself has asserted in internal correspondence that P-0154 acted improperly by, [REDACTED].¹⁰ The Prosecution investigators characterized this as "[REDACTED]".¹¹ Other Investigation Notes similarly suggest that Intermediary P-0154 is suspected of seeking financial advantage from his cooperation with the Prosecution.¹²
8. P-0154 has also, as indicated by the [REDACTED] brought witnesses into contact with one another.¹³ This in itself should be considered as highly improper and, it must be hoped, was done against instructions by the Office of the Prosecutor.

⁹ ICC-01/04-02/06-2434-Conf-Red-Corr, para .139(d).

¹⁰ DRC-OTP-2090-0407.

¹¹ DRC-OTP-2090-0407.

¹² DRC-OTP-2090-0408 ; DRC-OTP-2090-0409 ; DRC-OTP-2092-0319 ; DRC-OTP-2090-0409.

¹³ DRC-OTP-2092-0319; DRC-OTP-2092-0321; DRC-OTP-2092-0323; DRC-OTP-2092-0325.

One investigation note [REDACTED] suggests that he was meeting with the witnesses [REDACTED].¹⁴

9. P-0018's denial that she even knows P-0154 raises a serious concern that someone told her not to reveal her association with P-0154. The person who would have the greatest motivation to give such instructions, of course, is P-0154 himself or herself.
10. Finally, P-0018, P-0019 and P-0113 have all added curiously similar allegations of [REDACTED] for the first time in the course of their second interview with the OTP. A reasonable suspicion arises from the coincidence of these three allegations – arising for the first time ten years after the events – that the intermediary has had some role in these allegations. At the very least, the Defence should have a reasonable opportunity to test this hypothesis – which is substantially obstructed by the non-disclosure of this intermediary's identity.
11. Non-disclosure has a concrete impact on the Defence's capacity to explore the potential influence of P-0154 on P-0018, P-0019 and P-0113. The Defence is, in the absence of such disclosure, unable to squarely identify the person in question to the witnesses in order to test the extent of the witnesses' willingness to lie; to directly exclude the possibility of a future Prosecution argument – untenable as it may be – that the witness confused the intermediary with someone working for the OTP; and, most importantly in the face of a witness's denial of the intermediary's existence, to ascertain the exact role of the intermediary. The absence of this information directly and concretely interferes with cross-examination.

CONFIDENTIALITY

12. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Application is classified as confidential, as it refers to confidential information

¹⁴ DRC-OTP-2090-0409.

related to Prosecution witnesses and information elicited in private session. The Defence will submit a public redacted version of its Application.

RELIEF SOUGHT

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

ORDER the Prosecution to disclose the identity of Intermediary P-0154.

RESPECTFULLY SUBMITTED ON THIS 22nd DAY OF JULY 2016

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands