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

Date: **10 October 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

With confidential, *ex parte* Annexes A and B – only available to the Chamber and Defence

Public redacted version of “Response on behalf of Mr Ntaganda to the ‘Prosecution’s submissions on the restrictions to NTAGANDA’s contacts’”, 13 June 2016, ICC-01/04-02/06-1391-Conf-Exp-Red

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 *“Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention”* submitted by Counsel representing Mr Ntaganda (“Defence”) on an *ex parte* basis – only available to Trial Chamber VI (“Chamber”), Registry, Office of the Prosecutor (“Prosecution”) and Defence, on 9 May 2016 (“Defence Observations”);¹ (ii) the confidential redacted version of the *“Prosecution’s submissions on the restrictions to NTAGANDA’s contacts”* submitted by the Prosecution on an *ex parte* basis – only available to the Prosecution, Defence and Victims and Witnesses Unit, on 9 May 2016 (“Prosecution Observations”);² and (iii) the confidential redacted version of the *“Decision on Defence request seeking certain material relating to review of restrictions placed on Mr Ntaganda’s contacts”* issued by the Chamber on an *ex parte* basis – only available to the Prosecution, Defence and Registry, on 3 June 2016 (“Decision on Access to Materials”),³ which reset the response deadline to the Defence and Prosecution Observations to one week from the issuance of the Decision,⁴ the Defence hereby submits this:

Response on behalf of Mr Ntaganda to the “Prosecution’s submissions on the restrictions to NTAGANDA’s contacts”

“Defence Response”

1. The Prosecution’s request that the restrictions currently imposed on Mr Ntaganda’s contacts with the outside world be continued in full until the end of the Defence case, as set out in the Prosecution Observations,⁵ must be dismissed. The Prosecution misrepresents the applicable standard under Regulation 101(2) of the Regulations of the Court (“RoC”) and significantly fails to point to any actual ‘reasonable grounds to believe’ that Mr Ntaganda

¹ ICC-01/04-02/06-1312-Conf-Exp, with confidential, *ex parte* Annex A – only available to the Chamber, Registry and Defence.

² ICC-01/04-02/06-1313-Conf-Exp-Red, with confidential, *ex parte* Annexes A-B – only available to the Prosecution, Defence and Victims and Witnesses Unit. The filing was notified on 10 May 2016.

³ ICC-01/04-02/06-1364-Conf-Exp-Red.

⁴ Decision on Access to Materials, p.12.

⁵ Prosecution Observations, para.2.

would engage in witness interference, dissemination of confidential information and/or witness coaching should restrictions on his contacts be lifted. Moreover, from the perspective of Mr Ntaganda's fundamental right to privacy and family life, the relief sought by the Prosecution is inconceivably disproportionate to the actual risk – in light of the measures currently enforced on Mr Ntaganda's contacts – that Mr Ntaganda might engage in any form of misconduct proscribed under Regulation 101(2).

2. The Defence further challenges the Prosecution's contention that [REDACTED] may be using a false identity and is not [REDACTED] – a contention relied upon by the Prosecution in opposing the inclusion of [REDACTED] on Mr Ntaganda's list of contacts.⁶
3. In the absence of a showing on the part of the Prosecution that 'reasonable grounds to believe' exist that Mr Ntaganda would use, today, his non-privileged phone calls and/or visits to achieve any of the purposes listed under Regulation 101(2) RoC, the Defence respectfully submits that Mr Ntaganda's non-privileged contacts should be reinstated in full or, at a minimum, the restrictions thereto should be substantially reduced as *per* the proposal set out in the Defence Observations.

SUBMISSIONS

I. Preliminary remarks

4. As a preliminary matter, the Defence deems necessary to underscore the Chamber's holding that the weight, if any, to be attached to the material that is entirely withheld from the Defence in connexion with the restrictions litigation *and which pre-dates the Decision on Restrictions*, is a matter to be addressed in the Chamber's ultimate decision on restrictions.

⁶ Prosecution Observations, para.5.

5. In this regard, the Defence posits that the premise underlying the Prosecution Observations is flawed.
6. Indeed, the Prosecution's request for the restrictions presently imposed on Mr Ntaganda to be continued in full until the end of the Defence case rests on the argument/allegation that any interference and/or 'coaching' attempt reported by any witness in this case is the result of Mr Ntaganda's alleged conduct prior to the Decision on Restrictions.
7. First, there is no evidence of such a connexion.
8. Second, the Prosecution's request amounts to the imposition of punishment on Mr Ntaganda – pursuant to Regulation 101(2) RoC – for his alleged conduct more than two years ago during the confirmation stage of the proceedings against him.
9. The object and purpose of Regulation 101(2) RoC is not to impose punishment on persons detained at the Court's detention centre.
10. The aim of Regulation 101(2) RoC is to impose measures, including restrictions on the communication rights of persons detained, to *inter alia* prevent them from interfering with witnesses. Consequently, when the situation has changed – as in the present case – and the aim of Regulation 101(2) RoC has been achieved, *i.e.* preventing Mr Ntaganda from *inter alia* interfering with witnesses, there is no longer a need to maintain in place the full set of restrictions presently imposed on Mr Ntaganda.
11. If the Prosecution wishes to proceed further on the basis of its allegations, it can only do so by instituting contempt proceedings against Mr Ntaganda.

II. Prosecution's allegations of continued witness interference

12. Significantly, the Prosecution's claim of 'continued' witness interference since the imposition of restrictions on Mr Ntaganda's contacts only concerns

[REDACTED] Prosecution witnesses and exclusively revolves around 'alleged associates of the Accused'.⁷ Beyond mere speculation, the Prosecution adduces no evidence that Mr Ntaganda is responsible, either directly or indirectly, of any of these alleged instances of witness intimidation.

A. Witness [REDACTED]

13. The Defence is not in a position, due to its limited investigative resources and the extensive redactions applied to Annexes A and B to the Prosecution Observations, to investigate the merits of the uncorroborated allegations raised by Witness [REDACTED], which learns of for the first time. In line with the Chamber's Decision on Access to Materials,⁸ the Defence will address, for the purposes of responding to the Prosecution Observations, the nature and timing of the Prosecution's allegations rather than their particulars.
14. With respect to the 'threatening' calls Witness [REDACTED] purportedly received following [REDACTED] testimony in The Hague,⁹ the Defence observes that nothing in the witness's account indicates that these calls related to his involvement with the Court.¹⁰ Moreover, the fact that Witness [REDACTED] did not provide [REDACTED] to the Prosecution when meeting with the investigators on [REDACTED],¹¹ or anytime thereafter,¹² makes it impossible to corroborate the witness's account and, as such, raises serious doubts as to the plausibility of the allegations put forward by the witness.
15. More importantly, the Prosecution provides no evidence that any of the individuals who allegedly contacted and/or visited Witness [REDACTED]

⁷ Prosecution Observations, paras.25, 30.

⁸ Decision on Access to Materials, paras.15-17.

⁹ Prosecution Observations, para.29.

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² Email from Ms Dianne Luping to Me Stéphane Bourgon, [REDACTED] ("The Prosecution does not possess the telephone records of [REDACTED] or telephone records that corroborate or contradict [REDACTED] previous statements at [REDACTED] to filing 1313-Conf-Exp-Red.")

during [REDACTED]¹³ or the witness [REDACTED] upon his return to [REDACTED]¹⁴ learned of the witness's testimony from Mr Ntaganda or acted pursuant to his directions.

16. Contrary to what the Prosecution implies,¹⁵ the Chamber's finding that Mr Ntaganda disclosed in [REDACTED] the identity of Witness [REDACTED] to unauthorised persons does not provide, in and of itself, a basis to conclude that as a result, other people – in particular those referred to in [REDACTED] – became aware of the witness's testimony before the Court. For instance, according to Witness [REDACTED] own statement, it is [REDACTED] who "[REDACTED]" further to [REDACTED] at [REDACTED] prior to [REDACTED].¹⁶
17. Furthermore, no evidence establishes, let alone suggests, the involvement of Mr Ntaganda in the plot purportedly orchestrated by the [REDACTED] against Witness [REDACTED].¹⁷
18. With respect to the Prosecution's allegation that [REDACTED] Witness [REDACTED] – [REDACTED]¹⁸ – the Defence observes that this allegation solely rests on what an individual (whose identity is redacted to the Defence) would have reported to Witness [REDACTED] in [REDACTED].¹⁹ The Defence challenges the truthfulness of this vague and incongruous allegation, founded on double hearsay and uncorroborated evidence. Significantly, the individual provided Witness [REDACTED] with no details about the alleged [REDACTED] nor the source from whom he obtained the information.²⁰ In any event, even if proven, this allegation has no relevance to the issue at

¹³ Prosecution Observations, para.28.

¹⁴ Prosecution Observations, para.29.

¹⁵ Prosecution Observations, para.26.

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ Prosecution Observations, para.28.

¹⁹ Witness [REDACTED] statement of [REDACTED], DRC-OTP-2087-1836, paras.5-7.

²⁰ Witness [REDACTED] statement of [REDACTED], DRC-OTP-2087-1836, para.6.

stake: (i) there is no link between Mr Ntaganda and the alleged plan; and (ii) the allegation predates the Decision on Restrictions.²¹

B. Witnesses [REDACTED] and [REDACTED]

19. With reference to information provided in requests for in-court protective measures, the Prosecution contends that [REDACTED] other Prosecution 'insider' witnesses – namely, [REDACTED] and [REDACTED] – were the targets of 'recent' and 'repeated' pressure and threats by alleged associates of Mr Ntaganda.²²
20. The Defence underscores the witnesses' own account²³ reveal no direct, let alone indirect, involvement of Mr Ntaganda in these incidents.
21. Moreover, the Prosecution's suggestion that those who have allegedly interfered with Witness [REDACTED] would have learned of his cooperation with the Prosecution from Mr Ntaganda²⁴ is mere speculation.²⁵ In this regard, it is significant that none of these individuals has ever appeared on Mr Ntaganda's list of non-privileged contacts.²⁶

C. Conclusion

22. It follows from the above that no 'reasonable grounds to believe' exist that Mr Ntaganda has been involved in any of the alleged 'continued' attempts to interfere with Prosecution witnesses since the imposition of restrictions on his contacts, or that such attempts are the direct result of Mr Ntaganda's prior conduct. The Prosecution fails to establish, on this basis, a continued need for the restrictions enforced on Mr Ntaganda's contacts to remain as such.

²¹ "Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts", 18 August 2015, ICC-01/04-02/06-785-Conf-Exp ("Decision on Restrictions").

²² Prosecution Observations, para.30.

²³ ICC-01/04-02/06-1224-Conf-Red2, paras.6-14; ICC-01/04-02/06-1212-Conf-Red, paras.29-41; ICC-01/04-02/06-T-82-CONF-ENG ET, p.81, l.24 to p.82, l.22.

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ See ICC-01/04-02/06-471-Conf-Exp-Anx3, p.2.

III. Prosecution's allegations of 'coaching' of potential Defence witnesses

23. Based on what it purports to be 'increasing' evidence suggesting that Mr Ntaganda may have attempted to 'coach' potential Defence witnesses and instruct his alleged associates to 'coach' witnesses,²⁷ the Prosecution requests that the restrictions on Mr Ntaganda's contact should be "maintained and extended" until the end of the Defence case.²⁸
24. The Defence does not intend to discuss in this Response the Chamber's finding that there exist reasons to believe that Mr Ntaganda instructed his interlocutors to 'coach' witnesses.²⁹ As indicated in its Response,³⁰ the Defence is currently reviewing the Registry's transcripts, translations and/or summaries of Mr Ntaganda's phone conversations with a view to identifying discrepancies therein that might warrant the Chamber's reconsideration of its finding. For the purposes of this Response, the Defence will focus on the 'witness coaching' allegations as raised by the Prosecution in its Observations.
25. At the outset, the Defence underscores that there exist no rule prohibiting an accused person, or his Defence team, to be in touch with individuals who could potentially appear as witnesses during the Defence case. Significantly, the Prosecution does not provide a clear definition of what it considers to be 'witness coaching' in this context. The Prosecution appears to equate 'witness coaching' with the offences listed under Article 70(1)(c) of the Statute,³¹ namely: "corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence". It follows that the Prosecution's allegations regarding 'witness coaching' must be assessed in this light, in particular whether the said

²⁷ Prosecution Observations, para.36.

²⁸ Prosecution Observations, para.35.

²⁹ Decision on Restrictions, para.57.

³⁰ Defence Observations, paras.7-11.

³¹ [REDACTED]

‘coaching’ was aimed at “destroying, tampering with or interfering with the collection of evidence”.

26. With respect to Witness [REDACTED] testimony about his interactions with the Defence team in [REDACTED],³² the Defence underscores that the witness’s account does not reveal any such ‘tempering’ or ‘interference’. In particular, Witness [REDACTED] testimony does not indicate that the briefings he purportedly received from [REDACTED]³³ or [REDACTED]³⁴ prior to his meeting with [REDACTED] were aimed at instructing him to provide certain answers in response to the questions to be asked by [REDACTED].³⁵ Moreover, beyond Witness [REDACTED] subjective perception,³⁶ there is no evidence that [REDACTED] intended, by his mere presence during Witness [REDACTED] interview by [REDACTED], to interfere with the questioning. The Defence posits that Witness [REDACTED] account of his dealings with the [REDACTED] in [REDACTED] suggests, at most, a subjective discomfort with [REDACTED].
27. As regards the Prosecution’s allegation that Witness [REDACTED] has been ‘urged’ by [REDACTED] to give a false testimony,³⁷ the Defence notes that such allegation is based on uncorroborated hearsay provided in an unsigned investigation note.³⁸
28. Furthermore, given the unavailability of the supporting material, the Defence is not in a position to comment whether there is, as purported by the Prosecution, ‘increasing’ evidence suggesting that Mr Ntaganda may have

³² Prosecution Observations, para.47.

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ In the absence of specific evidence regarding the contents of the ‘briefing’ sessions (*see* [REDACTED], where the witness remains evasive as to the nature of his ‘briefings’), Witness [REDACTED] assertion that he answered the questions of [REDACTED] does not provide a sufficient basis to conclude that the answers of the witness had been tampered.

³⁶ [REDACTED].

³⁷ Prosecution Observations, para.48.

³⁸ *See* DRC-OTP-2078-2328. *See also* Decision on Access to Materials, para.26 (“The Chamber will consider the nature of any Investigation Note in deciding what weight to accord to it.”)

attempted to ‘coach’ potential Defence witnesses or pointing to a ‘broader scheme’ of witness ‘coaching’. In line with the Chamber’s Decision on Access to Materials,³⁹ the Defence will address, for the purposes of responding to the Prosecution Observations, the nature and timing of the Prosecution’s allegations rather than their particulars. Allegations not specifically addressed in this Response must not be construed in any way as an acknowledgement of their truth.⁴⁰

29. In this regard, the Defence notes that the Prosecution’s allegations regarding witness ‘coaching’ addressed above, as well as the newly raised *ex parte* allegations,⁴¹ pre-date the Decision on Restrictions. The Prosecution merely extrapolates these allegations – as well as the Chamber’s finding that there exist reasonable grounds to believe that Mr Ntaganda attempted to coach potential Defence witnesses during the [REDACTED] conversation – beyond their temporal scope.
30. The absence of evidence that since the issuance of the Decision on Restrictions, potential Defence witnesses were ‘coached’ by individuals linked to Mr Ntaganda, or Mr Ntaganda himself, lends support to the Defence’s submission that no reasonable grounds to believe exist that Mr Ntaganda would engage in any form of misconduct proscribed under Regulation 101(2) RoC, including witness tampering, should restrictions on his contacts be lifted.

³⁹ Decision on Access to Materials, paras.15-17.

⁴⁰ For instance, the Defence notes that during their meeting with Witness [REDACTED] in [REDACTED] – the aim of which was to “[REDACTED]” ([REDACTED]) – the Prosecution investigators questioned the witness *proprio motu* about an event not related to his purported security concerns, but which Witness [REDACTED] reported during his [REDACTED] of [REDACTED], namely [REDACTED] having told the witness that [REDACTED]. Significantly, this allegation is not referred to in the Prosecution Observations. Even if such allegation was founded – which the Defence challenges – the Defence notes that there is no established link between the alleged wrongful conduct of [REDACTED] and [REDACTED].

⁴¹ Decision on Access to Materials, para.20.

IV. Prosecution's allegations regarding the identity of [REDACTED]

31. Contrary to what the Prosecution alleges,⁴² [REDACTED] – whose name appears on Mr Ntaganda's list of non-privileged contacts – is not using a false identity. Furthermore, contrary to the Prosecution's contention,⁴³ [REDACTED] *is* [REDACTED].
32. [REDACTED]:
- a. [REDACTED];⁴⁴
 - b. [REDACTED];⁴⁵
 - c. [REDACTED];⁴⁶ and
 - d. [REDACTED];⁴⁷
33. [REDACTED].⁴⁸
34. Consequently, the Prosecution's suggestion that the use of false identities to speak with detainees at the Court's detention centre is 'common practice'⁴⁹ evidently does not apply to the situation of [REDACTED].
35. As regards the circumstances which led the Registry to remove [REDACTED] from Mr Ntaganda's list of non-privileged contacts – on the basis of which the Prosecution opposes the reinstatement of [REDACTED]⁵⁰ – [REDACTED]:
- a. [REDACTED];⁵¹
 - b. [REDACTED];⁵² and

⁴² Prosecution Observations, para.51.

⁴³ Prosecution Observations, para.51.

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ Prosecution Observations, para.53.

⁵⁰ Prosecution Observations, para.50.

⁵¹ [REDACTED].

c. [REDACTED].⁵³

36. The Defence submits that when considered in the proper context, [REDACTED], the [REDACTED] does not reveal any attempt – whether by Mr Ntaganda or by [REDACTED] – to circumvent the restrictions put in place by the Chamber on Mr Ntaganda's contacts to engage in any form of misconduct under Regulation 101(2) RoC. [REDACTED].⁵⁴

37. In such circumstances, the Defence respectfully submits that no compelling reasons exist not to reinstate [REDACTED] on Mr Ntaganda's list of non-privileged contacts.

V. The relief sought by the Prosecution in contrast to the aim initially sought to be achieved by the imposition on restrictions to Mr Ntaganda's contacts

38. The restrictions regime imposed on Mr Ntaganda's contacts with the outside world has now been in force for 15 months,⁵⁵ with further restrictions enforced in August 2015.⁵⁶ The Chamber found the measures to be necessary to “ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings”.⁵⁷ As set out in the Defence Observations, the measures put in place amount to Mr Ntaganda being virtually cut off from the outside and his fundamental right to privacy and family life being substantially reduced.⁵⁸ The Prosecution now requests that these restrictions be maintained in full until the end of the Defence case.⁵⁹

39. When there is a less harsh measure, or set of measures, that are sufficient to achieve the desired result – in this case, protecting the witnesses from any interference and/or ‘coaching’ on the part of Mr Ntaganda – the Defence

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ “Order instructing the Registry to put in place additional temporary restrictions on contact”, 13 March 2015, ICC-01/04-02/06-508-Conf-Exp (“Interim Order”).

⁵⁶ Decision on Restrictions.

⁵⁷ Decision on Restrictions, para.44. *See also*, para.66.

⁵⁸ Defence Observations, para.27.

⁵⁹ Prosecution Observations, para.34.

posits that the proportionality principle demands that such measures be implemented.

40. In determining whether restrictions that were imposed on a detainee's contacts with the outside world in order to protect the integrity of proceedings are still necessary to achieve this aim, the European Court of Human Rights held that the passage of time as well as the severity of the consequences of these measures on the detainee call for a 'careful review' of the necessity of the measures.⁶⁰
41. Given the expected length of this trial, and in the absence of any 'reasonable grounds to believe' that Mr Ntaganda would engage in any form of misconduct under Regulation 101(2) RoC (as set out above), maintaining the existing restriction regime until the end of the Defence case would contrary to the well-established proportionality principle.
42. In an analogous case before the ECHR, it was held that while the 'continuing danger' that a detainee might re-establish contact with his associates is a possibility that has to be taken into account, the "continued, routine and indiscriminate application of the full range of measures that the authorities were obliged to apply" for two years and nine months was found not necessary for maintaining prison security and incompatible with Article 3 of the European Convention on Human Rights.⁶¹
43. [REDACTED] highlights the severity of the restrictions imposed on Mr Ntaganda, who has not seen in family since March 2013 and has not been able to have a private conversation with his wife since March 2015. Based on [REDACTED] and the unproven allegations put forward by the Prosecution, the Defence respectfully submits that private visits and his wife should be reinstated, albeit subject to measures of control [REDACTED].

⁶⁰ ECHR, *Baginski v. Poland*, Application no 37444/97, 11 October 2005, para.96.

⁶¹ ECHR, *Piechowicz v. Poland*, Application no 20071/07, 17 April 2012, para.169.

CONFIDENTIALITY

44. Pursuant to Regulations 23*bis* (1) and (2) RoC, this Defence Response and its Annexes are classified as confidential, *ex parte* – only available to the Chamber and Defence, in line with the classification of the present litigation and [REDACTED]. A confidential redacted version of the Defence Response will be submitted separately.

RELIEF SOUGHT

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

REJECT the Prosecution's observations;

CONSIDER this Defence Response; and

MODIFY the regime as suggested in the Defence Observations.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF OCTOBER 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands