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No.: ICC-01/04-02/06
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TRIAL CHAMBER VI

Before: Judge Chang-ho Chung, Presiding Judge
Judge Robert Fremr
Judge Olga Herrera Carbuca

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 the 'Prosecution's Response to the Defence's expedited motion to vary the time limit to respond to the 'Prosecution's urgent request for immediate suspension of Defence investigators and other measures'", 14 July 2015, ICC-01/04-02/06-718-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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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Further to: (i) the *“Prosecution’s Response to the Defence’s expedited motion to vary the time limit to respond to the ‘Prosecution’s urgent request for immediate suspension of Defence investigators and other measures’”* filed by the Prosecution on 9 July 2015 (*“Prosecution Response”*);¹ (ii) the *“Request on behalf of Mr Ntaganda seeking leave to reply to the ‘Prosecution’s Response to the Defence’s expedited motion to vary the time limit to respond to the ‘Prosecution’s urgent request for immediate suspension of Defence investigators and others measures’”* filed by the Defence on 10 July 2015 (*“Defence Request”*),² and; (iii) the email received from Trial Chamber VI (*“Chamber”*) on 13 July 2015 granting the Defence Request in part, Counsel representing Mr Ntaganda (*“Defence”*) hereby submit this:

Reply on behalf of Mr Ntaganda to the *“Prosecution’s Response to the Defence’s expedited motion to vary the time limit to respond to the ‘Prosecution’s urgent request for immediate suspension of Defence investigators and other measures’”*

“Defence Reply”

INTRODUCTION

1. The Defence hereby replies to the Prosecution Response pursuant to the Chamber’s instructions.³
2. The Defence respectfully submits that it is necessary for the Chamber to order the Prosecution to disclose any information obtained from Witness P-0190 – in the context of any contact between members of the Office of the Prosecutor and P-0190 during the Prosecution’s investigations in this case – as this information is necessary for the purpose of challenging the Prosecution’s far reaching allegations which cast doubt on the integrity of Defence investigations.
3. The Defence also posits that disclosing any information obtained from Witness P-0190 falls squarely within the Prosecution’s disclosure obligations.

¹ ICC-01/04-02/06-705-Conf-Exp.

² ICC-01/04-02/06-711-Conf-Exp.

³ Email received from the Chamber on 13 July 2015.

4. In this regard, the Defence underscores that it does not question the Prosecution's good faith when assessing what information is disclosable. The Defence firmly disputes, however, the Prosecution's understanding of its disclosure obligations on the basis of which it claims to be acting in good faith.

SUBMISSIONS

It is necessary for the Chamber to order the Prosecution to disclose any information obtained from Witness P-0190

5. As a preliminary matter, the Defence deems it necessary to emphasise that the Prosecution Response does not challenge the Defence's submission regarding the consequences of the Prosecution's allegations directed at Mr Logo and [REDACTED] on the integrity of Defence investigations during the last five months as well as, more importantly, on the ability of the Defence to effectively represent Mr Ntaganda and to protect his right to a fair trial in these circumstances.
6. Indeed, the Prosecution cannot raise such far reaching allegations and expect – now that the Chamber has provisionally suspended Mr Logo and ordered measures against Mr Logo and [REDACTED] – the proceedings against Mr Ntaganda to proceed as normal without the Chamber assessing the merits of these allegations.
7. The Defence submits that this requires the Chamber to evaluate the evidence adduced by both parties pursuant to a balance of probabilities standard, and to pronounce on whether Mr Logo and [REDACTED] did engage in the alleged misconduct; thereby addressing the question whether the integrity of all Defence investigation was in fact affected.
8. Considering that the Prosecution's allegations rest on information obtained mostly from Witness P-0190 and to a lesser extent from Witness P-0901, it is essential for the Prosecution to disclose any and all information obtained from

P-0190 and P-0901 with a view to allowing the Defence to effectively challenge the Prosecution's allegations based *inter alia* on the reliability of the information they provided and more particularly their credibility.

9. Indeed, in light of the Defence's on-going analysis of the material provided in support of the Prosecution's allegations – which does not appear to establish that Mr Logo and [REDACTED] would have engaged at least in all of the alleged misconduct – the credibility and the reliability of the information obtained from Witnesses P-0190 and P-0901 take all their importance.
10. This is all the more the case in respect of P-0190 considering that the purported transcript of the conversation between Mr Logo, [REDACTED] and P-0190, does not appear to show, in and of itself, that Mr Logo would have engaged in conduct warranting suspension.
11. In these circumstances, it is paramount for the Defence to gain access to any and all information obtained by the Prosecution from P-0190, at least from 12 February 2015 – the date of the alleged first contact between P-0190 and a member of the Office of the Prosecutor during which P-0190 reported having been threatened by a Defence investigator, namely [REDACTED] – and 26 June 2015, the date of P-0190's last statement provided to the Prosecution.
12. The Defence notes that the last statement obtained by the Prosecution from P-0190 on 26 June 2015, was only brought to its attention in the Prosecution Response of 9 July 2015 and disclosed on 10 July 2015. More importantly, the Defence underscores that although this statement – which results from an interview conducted by members of the Office of the Prosecutor with P-0190 that lasted some 5 hours – was audio recorded, the corresponding audio file and transcript have not yet been disclosed to the Defence. This material must be disclosed.

13. It appears from the material disclosed by the Prosecution that members of the Office of the Prosecutor and P-0190 would have been in contact only three times during the period from 12 February to 26 June 2015, namely on 12 February (initial complaint), on 24 March (date of the first interview) and 26 June 2015 (date of the second interview).
14. Bearing in mind *inter alia*: (i) the inadvertent contact between Mr Logo and P-0190 reported on 7 March 2015; (ii) the nature and gravity of the Prosecution's allegations linked to contacts between Mr Logo, [REDACTED] and P-0190; (iii) the information brought to the attention of the Defence by the Prosecution during this period – in particular on 11 and 27 March 2015; (iv) the fact that P-0190 is a witness under VWU management and that he had at least two contacts during this period with VWU – which as a general principle shares its information with the Prosecution⁴ – the Defence respectfully submits that additional contacts must have taken place during this period between members of the Office of the Prosecutor and P-0190, whether in person, by telephone or via other means.
15. It is significant in this regard that the Prosecution neither denies having had additional contacts with P-0190 during this period nor having obtained more information from him during this period.
16. Accordingly, at a minimum, any information obtained by the Prosecution from P-0190 during this period must be disclosed to the Defence forthwith.
17. The same applies to information obtained by the Prosecution from P-0190 at any other time during its investigations, as this information is relevant to P-0190's credibility and the reliability of the information he provided.

Disclosing any information obtained from Witness P-0190 falls squarely within the Prosecution's disclosure obligations

⁴ Prosecution-Registry, Article 7 of Joint Protocol on the Mandate, Standards and Procedure for Protection, 21 March 2011

18. The Prosecution opposes the Defence Request to obtain any information obtained from Witness P-0190, during any contact with him, during its investigations, on the basis that the disclosure regime at the International Criminal Court (“ICC” or “Court”) is not an open file or *dossier system*.
19. Strikingly, the corollary of the Prosecution’s argument is that the Prosecution could have contacts with and obtained information from its witnesses during its investigations, which would not be subject to disclosure to the Defence. Of course, such a corollary is not supported by the ICC disclosure regime.
20. In this regard, the Defence respectfully submits that whether in a ‘*dossier*’ or a statutory system, information obtained from a witness which is relevant either to his credibility or to the Prosecution’s investigations must be disclosed to the Defence. This is a fundamental tenet of due process.
21. Hence, the Prosecution’s understanding of its disclosure obligations, which also rests on an erroneous *stricto sensu* definition of the word “statement”, is plainly wrong.
22. The Court statutory scheme and jurisprudence take particular care to ensure that *prior remarks of witnesses* the Prosecution intends to call to trial are disclosed to the Defence.⁵
23. The Appeals Chamber has also reasoned that “the ordinary meaning of ‘statement’ as used in Rule 76 of the Rules is broad and requires the Prosecutor to disclose any prior statements, *irrespective of the form in which they are recorded*”.⁶
24. Indeed, as conceded by the Prosecution, the ordinary and legal use of the term “statement” does not differentiate between a written and oral recording

⁵ ICC-01/09-01/11-743-Red, *Prosecutor v. Ruto and Sang*, Decision on Defence Request to be provided with screening notes and Prosecution’s corresponding request for redactions, 20 May 2013, para. 20.

⁶ ICC-01/09-01/11-743-Red, *Prosecutor v. Ruto and Sang*, Decision on Defence Request to be provided with screening notes and Prosecution’s corresponding request for redactions, 20 May 2013, para. 20 (emphasis added).

of a witness's words, or between a narrative of events and a question-and-answer transcription of an interview.

25. This is supported by the jurisprudence of the Special Court for Sierra Leone which provides that a witness statement under Rule 66(A)(i) of the Rules of Procedure and Evidence of this Court, should be defined as "any statement or declaration made by a witness in relation to an event he or she witnesses and recorded in any form by an official in the course of an investigation".⁷
26. This indication is sufficiently broad, for purposes of disclosure, to include records of information provided by a trial witness during an interview, regardless of the question, whether such a record would technically qualify as a "statement" of the witness for purposes of impeachment on the stand or submission under Rule 68 of the Rules.⁸
27. This is precisely why, in the *Ruto and Sang* case, the Prosecution's argument that is not obligated to disclose full screening notes of all his trial witnesses was rejected on the basis of Rule 76.⁹
28. The Appeals Chamber has also held that it was wrong for a trial chamber to equate 'statement' under the Rule 76 with only those records of statements prepared pursuant Rule 111 as, *inter alia*, there might be statements that are otherwise recorded or given which would also be subject to disclosure.¹⁰
29. It follows that if the Prosecution has obtained information from P-0190 – other than (i) the formal statements he provided to the Prosecution in the course of

⁷ SCSL, *Prosecutor v. Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, July 16, 2004, para.23.

⁸ ICC-01/09-01/11-743-Red, *Prosecutor v. Ruto and Sang*, Decision on Defence Request to be provided with screening notes and Prosecution's corresponding request for redactions, 20 May 2013, para. 20.

⁹ ICC-01/09-01/11-743-Red, *Prosecutor v. Ruto and Sang*, Decision on Defence Request to be provided with screening notes and Prosecution's corresponding request for redactions, 20 May 2013, para. 20.

¹⁰ ICC-02/05-03/09-295 A02, *Prosecutor v. Banda and Jerbo*, Judgement on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 17 February 2012, para.23.

its trial investigations;¹¹ (ii) the statement and recorded interview of 24 March 2015; and (iii) the statement and recorded interview of 26 June 2015 – at any other time during its investigations, it must be disclosed to the Defence.

30. Although the notes taken by an investigator during such contacts are not subject to disclosure pursuant to Rule 81(1), investigators have a duty in such circumstances to prepare a proper investigation note, which is subject to disclosure.
31. This is what was done on 12 February 2015 when information was obtained from P-0190 during a telephone conversation.¹²
32. All such investigation notes prepared in the context of the Prosecution's investigations must be disclosed to the Defence pursuant to Rule 76; the Prosecution cannot arbitrarily decide which of these investigation notes it will disclose.
33. In a common law system, all such information is found in the investigation report which is disclosed to the Defence.
34. In a '*dossier*' system all such information is included in the '*dossier*' prepared by the investigative judge or prosecutor ("*Parquet*") and made available to the judge and the Defence.
35. Before the ICC, all such information must be disclosed to the Defence pursuant Rule 76.
36. Lastly, as submitted in the Expedited Defence Motion,¹³ even if the Chamber was to conclude that information other than formal statements obtained from

¹¹ DRC-OTP-2069-2143 ; DRC-OTP-2075-0652 ; DRC-OTP-2075-0671 ; DRC-OTP-2075-0691 ; DRC-OTP-2075-0712 ; DRC-OTEP-2075-0733 ; DRC-OTP-2075-0753 ; DRC-OTP-2075-0772 ; DRC-OTP-2075-0792 ; DRC-OTP-2075-0810 ; DRC-OTP-2075-0827 ; DRC-OTP-2075-0850 ; DRC-OTP-2075-0874 ; DRC-OTP-2075-0896 ; DRC-OTP-2075-0915 ; DRC-OTP-2075-0936 ; DRC-OTP-2075-0955 ; DRC-OTP-2075-0974.

¹² ICC-01/04-02/06-658-Conf-Anx8.

¹³ ICC-01/04-02/06-691-Conf-Exp ("*Expedited Defence Motion*").

P-0190 – in the context of any contact between members of the Office of the Prosecutor and P-0190, during the Prosecution’s investigations in this case – is not subject to disclosure, this information would have to be disclosed to the Defence under Rule 77.

37. Indeed, such information is material to the preparation of the Defence both in the context of the Prosecution’s urgent request for immediate suspension of Defence investigators¹⁴ and the Defence preparation for the cross examination of P-0190 at trial.
38. Consequently, the Defence respectfully submits that the Prosecution, acting in good faith, must inform the Chamber and the Defence whether it had any other contacts with P-0190, at any time during its investigations, and disclose to the Defence any information obtained from P-0190 in the context of these contacts.

CONFIDENTIALITY

39. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, the present Defence Reply is submitted on an *ex parte* basis – only available to the Chamber, the Prosecution, the Registry and the Defence – as it refers to submissions bearing the same confidentiality level.

RELIEF SOUGHT

40. In light of the above the Defence respectfully request the Chamber, without prejudice to any other relief sought in the Expedited Defence Motion, to:

DISREGARD the argument put forward in the Prosecution Response;

ORDER the Prosecution to inform the Chamber and the Defence whether it had any other contacts with P-0190, at any time during its investigations, and

¹⁴ ICC-01/04-02/06-658-Conf-Exp.

disclose to the Defence any information obtained from P-0190 on such occasions; and

ORDER the Prosecution to disclosure the audio file and transcript of the interview conducted with P-0190 on 26 June 2015;

RESPECTFULLY SUBMITTED ON THIS 19TH DAY OF FEBRUARY 2021

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands