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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 “Further Submissions on Behalf of Mr Ntaganda”,
ICC-01/04-02/06-379-Conf-Exp, 26 September 2014**

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 *Application on Behalf of Mr Ntaganda Seeking Leave to Submit Further Submissions*¹ filed on 17 September 2014 (“Defence Application”) and the *Decision on the Defence Request to Make Further Submissions*² issued by Trial Chamber VI on 24 September 2014 (“Decision on Defence Application”), Counsel representing Mr Ntaganda hereby submits these *Further Submissions on Behalf of Mr Ntaganda* (“Further Defence Submissions”).

INTRODUCTION

1. In its Decision on Defence Application, Trial Chamber VI (“Chamber”) authorised the Defence to file further submissions exclusively on the four issues mentioned at paragraph 4 of the Defence Application.
2. These Further Defence Submissions address all four issues – albeit in a slightly different order – focussing on the applicable due process requirements which the Prosecution erroneously downplays.
3. It is paramount that Mr Ntaganda be duly and properly informed of the allegations brought against him and that he be afforded the necessary time to respond to the same.
4. Even though these Further Defence Submissions are limited to four issues, Mr Ntaganda takes this opportunity to recall that he nevertheless takes issue with many of the other submissions found in the Prosecution’s Reply including *inter alia*, the submissions related to the ‘reasonable grounds to believe’ standard to be applied in the context of an application pursuant to Regulation 101(2) of the Regulations of the Court (“RoC”).³

¹ ICC-01/04-02/06-370-Conf-Exp.

² ICC-01/04-02/06-378-Conf.

³ ICC-01/04-02/06-360-Conf-Exp, para.3 and 23-27 (“Defence Response”); ICC-01/04-02/06-368-Conf, para.23-29. (“Prosecution’s Reply”).

SUBMISSIONS

1. **The Prosecution's Mischaracterization of its Application Pursuant to Regulation 101(2) as an Administrative Proceeding**
5. The Prosecution's mischaracterization of its application pursuant to Regulation 101(2) RoC and its corollary - that as a result the Prosecution has little, if any, disclosure obligations, other than to inform Mr Ntaganda that there are allegations of improper disclosure of confidential information and/or interference with Prosecution witnesses against him⁴ - are untenable.
6. Firstly, while the Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court⁵ ("Prosecution's Application") will not lead to a verdict of not guilty or guilty, it is significant that it could nonetheless lead to the imposition of restrictions which would affect both Mr Ntaganda's fundamental rights as well as his ability to prepare and present his defence against the charges laid against him. Moreover, it must be borne in mind that the allegations raised by the Prosecution against Mr Ntaganda could lead to the institution of contempt proceedings against him.
7. The Prosecution fails to recognize that its application – focussing on allegations made by witnesses whom the Prosecution intends to call at trial - is part and parcel of the proceedings instituted against Mr Ntaganda. Yet, at footnote 18 of its Reply, the Prosecution states "it is important to note that, even if certain information is obtained further to a request under Regulation 101(2), it could be used in trial proceedings", which actually underscores the direct link between the Prosecution's Application and the proceedings instituted against Mr Ntaganda.
8. Mr Ntaganda has not yet been tried for the charges laid against him and he still benefits from the presumption of innocence. In this regard, the Prosecution's

⁴ ICC-01/04-02/06-368-Conf, para.10-22.

⁵ ICC-01/04-02/06-349-Conf-Red.

request that restrictions be imposed on Mr Ntaganda based on allegations of disclosure of confidential information and interference with Prosecution witnesses is highly prejudicial. More importantly, it impacts directly on the upcoming proceedings / trial by indirectly submitting to the Chamber – even before the trial begins – bad character evidence concerning Mr Ntaganda.

9. If only for this reason, Mr Ntaganda must be fully informed of the allegations against him so that he may respond to the same. As it stands, Mr Ntaganda has not been fully informed and he is not in a position to provide meaningful observations. As soon as he is informed of the details of the allegations brought against him by the Prosecution, Mr Ntaganda will be in a position to provide observation within a relatively short period of time.
10. Lastly, notwithstanding the above – i.e. the direct link between the Prosecution's Application and the proceedings instituted against Mr Ntaganda – and even if the application was considered to be distinct from the upcoming trial as well as somehow administrative in nature, full disclosure obligations as well as due process requirements would apply.⁶

II. The Prosecution's Misunderstanding of the Nature of the Information which Must Be Provided in Accordance with Regulation 101(3)

11. In order for Mr Ntaganda to be in a position to provide the Chamber with concrete observations – the aim of which being to allow the decision-maker to have a complete picture as well as all necessary information, from both sides, to determine whether there are indeed reasonable grounds to believe that the Accused did or did not engage in improper conduct – it is necessary that all material supporting the allegations raised by the Prosecution be disclosed to him in a timely manner, including an un redacted version of the application.

⁶ *May. v. Ferndale Institution*, [2005] 3 S.C.R. 809, para.92-93. ("May Case"); *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, p.659 ("Cardinal Case").

12. This is all the more important if the witnesses relied upon by the Prosecution to support its application are witnesses that will be called at trial.
13. Such information must include more than general allegations and/or summaries of what these witnesses reported to the Prosecution. The required information must allow the Accused to understand at a minimum when, where, and how he would have engaged in improper behaviour. The identity of the witnesses as well as that of any other person directly or indirectly involved must be disclosed with the aim of allowing the Accused to respond to the allegations.
14. More importantly, there is no justification why information is provided by the Prosecution to the decision-maker, i.e. the Chamber, without disclosing the same to the Accused. Indeed, it would not be possible for the Chamber to provide a reasoned decision on the basis of information never disclosed to the Defence.
15. In this regard, the Prosecution misreads the Supreme Court of Canada decision⁷ referred to by the Defence which makes it clear that stringent disclosure and due process requirements apply even in the case of an accused - who has been tried, convicted and who is serving a sentence of imprisonment - the authorities wish to transfer from one detention facility to another.⁸
16. As stated in the *May Case* "the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. [...] Therefore, the fact that *Stinchcombe* does not apply does not mean that the respondents have met their disclosure obligations. As we have seen, in the administrative law context, statutory obligations and procedural fairness may impose an informational burden on the respondents."⁹

⁷ ICC-01/04-02/06-368-Conf, para.14.

⁸ *May Case*.

⁹ *May Case*, p.813.

17. The Prosecution also misunderstands the *Cardinal Case* which fully supports the position that procedural fairness is required when imposing restrictions on a detainee. Here again, the Prosecution's position suggesting that it has very little, if any, disclosure obligations in the context of an application where the guilt or innocence of an accused is not at stake, is entirely at odds with the jurisprudence cited by the Defence.
18. The Prosecution's reference to the Pre-Trial Chamber I Single Judge's Decision in the *Katanga* and *Ngudjolo* case is also incorrect. It is significant in this regard, contrary to the Prosecution's Reply,¹⁰ that the Single Judge in that case did in fact require the Registry to notify the Defence of the Prosecution's Application and the Registry's Observations.¹¹
19. Nevertheless, the Defence observes that in a later Decision in the same case, the Single Judge rejected the Prosecution's application and revoked the provisional measures previously ordered on the basis that the Prosecution had not provided any concrete evidence to support its allegation and that the Prosecution's allegations were purely speculative.¹²
20. The fairness of the proceedings strongly militates in favour of communicating all information in support of the Prosecution's allegations as soon as possible in order to allow Mr Ntaganda to make effective observations.

III. The Prosecution's Erroneous Arguments that Article 67 and Rules 76 and 77 Apply Exclusively to Trials on Guilt and Innocence

21. Firstly, to the extent that the Prosecution's Application relies on the same witnesses the Prosecution intends to call at Trial, all disclosure obligations under Article 67(2), Rules 76 and 77, continue to apply and the Prosecution must fulfil its obligation without delay.

¹⁰ ICC-01/04-02/06-368-Conf, para.17.

¹¹ ICC-01/04-01/07-187, p.4.

¹² ICC-01/04-01/07-322, p.10.

22. By way of example, pursuant to Rules 76 and 77, the Prosecution has an obligation to disclose all material related to witness [REDACTED], including information obtained by Prosecution investigators *inter alia* on three occasions they had contact with him after [REDACTED].¹³ The Prosecution's obligations regarding witness [REDACTED] remain in force in the context of the Prosecution's Application and the Prosecution must fulfil its obligation without delay.
23. This also applies to other Prosecution witnesses referred to in paragraph 27 of the Prosecution's Application. The Defence has not received any note or transcript related to these witnesses. Thus, the Prosecution must disclose as soon as possible any material related to these witnesses, regardless of the Prosecution's Application.
24. Secondly, as for the application of Article 67(2), Rules 76 and 77 to applications filed pursuant to Regulation 101(2), the Defence observes that these provisions are but a reflection of due process requirements.
25. As such, considering that due process requirements must be abided by in the context of applications filed pursuant to Regulation 101(2), the Defence posits that by analogy, Article 67(2), Rules 76 and 77 also apply in this context.
26. In the *Banda case*, the Appeals Chamber has emphasised that "the disclosure process is essential in ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms".¹⁴ It necessarily follows that with a view to ensuring the fairness of the proceedings pursuant to Regulation 101(2), the Prosecution has a duty to disclose all necessary information material to the preparation of Mr Ntaganda's observations. This includes the communication of the un redacted Prosecution's Application under Regulation 101(2).

¹³ ICC-01/04-02/06-349-Conf-Red, para.24.

¹⁴ ICC-02/05-03/09-501, para.34.

IV. The Prosecution's Flawed Submissions that the Restrictions Requested in its Application Are "Provided by Law" and that "the Provision of the Requested Contact Lists, and Reports Concerning the Monitored Phone Calls, to the Prosecution [...] is also Justified as a Reasonable and Proportionate Restriction on the Accused's Right to Private Life".

27. The Prosecution's submission that the restrictions requested in its application are "provided by law" is incorrect.
28. While Regulation 101(2) RoC provides that the Chamber may "prohibit, regulate or set conditions for contact between a detained person and any other person", this does not mean that any and all restrictions requested by the Prosecution are provided by law.
29. In particular, the Prosecution's request to obtain contacts lists and reports concerning monitored phone calls involving Mr Ntaganda are not a restriction provided by law. No provision applicable before the Court allows the Prosecution to obtain such information and the Prosecution has suggested none.
30. Moreover, the Prosecution failed to demonstrate how gaining access to the requested lists and reports constitutes a reasonable and proportionate restriction on the Accused's right to private life.
31. Consequently, as set out in the Defence Response, all Prosecution requests aimed at obtaining confidential contact lists and reports protected by Mr Ntaganda's right to private life must be denied.

RELIEF SOUGHT

32. In light of these Further Defence Submissions, Mr Ntaganda respectfully requests the Chamber to:

CONSIDER these Further Defence Submissions; and

GRANT the relief sought in the Defence Response.

RESPECTFULLY SUBMITTED ON THIS 12TH DAY OF JANUARY 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands