



Original: **English**

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

Date: **12 August 2015**

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 “Response on behalf of Mr Ntaganda to Prosecution Request to vary the time limit for disclosure of [REDACTED]’s supplementary interview”, 29 June 2015, ICC-01/04-02/06-682-Conf

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin
Me Chloé Grandon

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

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 Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Further to the *“Prosecution’s request pursuant to regulation 35 to vary time limit for disclosure of [REDACTED]’s supplementary interview”* filed by the Office of the Prosecutor (“Prosecution”) on 5 June 2015 (“Prosecution Request”), Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda to Prosecution Request to vary the time limit
for disclosure of [REDACTED]’s supplementary interview
 (“Defence Response”)**

INTRODUCTION

1. The Defence hereby responds to the Prosecution Request.
2. The Prosecution Request is submitted outside the time limit and does not fulfil the conditions of Regulation 35(2) of the Regulations of the Court (“RoC”), as the Prosecution fails to show good cause.
3. Accordingly, the Prosecution Request must be denied.
4. The Defence understands from Trial Chamber VI’s (“Chamber”) oral decision¹ on the *“Prosecution request to amend its List of Evidence”*² and the Chamber’s *“Decision on the Defence request for reconsideration”*,³ that the Prosecution may add to its list of evidence, the audio recording of the interview conducted with Witness [REDACTED] on [REDACTED] and the related transcript.
5. Nevertheless, the Defence will object to any Prosecution request to rely on this material at trial.
6. In this respect, the Defence notes that the Prosecution has not even attempted to demonstrate that the audio recording of the interview conducted with

¹ ICC-01/04-02/06-T-19-ENG, p.11-12.

² ICC-01/04-02/06-524.

³ ICC-01/04-02/06-611.

Witness [REDACTED] on [REDACTED] and the related transcript fulfil the applicable criteria for late addition of new incriminatory evidence.

PROCEDURAL BACKGROUND

7. On 9 October 2014, the Chamber set 2 June 2015 as the commencement date for the trial.⁴
8. On 9 October 2014, the Chamber also ordered the Prosecution to disclose to the Defence: (i) all material currently already in the Prosecution's possession, for which delayed disclosure is not requested and authorised not later than 31 January 2015;⁵ and (ii) all remaining incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and provision of all Rule 77 material for inspection to the Defence by 2 March 2015, save where delayed disclosure has been specifically requested and authorised.⁶
9. Finally, on 9 October 2014, the Chamber ordered the Prosecution to file any application for delayed disclosure relating to Prosecution witnesses including "any request for redactions that, pursuant to the Redaction Protocol, require approval by the Chamber" **no later than 16 February 2015**.⁷
10. On 16 February 2015, the Prosecution filed an application for delayed disclosure⁸ and a request for redactions.⁹ The former filing did not request the delayed disclosure of any material related to Witness [REDACTED].

⁴ Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382-Corr ("Scheduling Order"), para. 9.f.

⁵ Scheduling Order, para. 9.d.

⁶ Scheduling Order, para. 9.d.

⁷ Scheduling Order, para. 9.b (emphasis added).

⁸ Confidential redacted version of "Prosecution application for delayed disclosure", ICC-01/04-02/06-461-Conf-Red.

⁹ ICC-01/04-02/06-462-Conf-Red.

11. Between 23 February 2015 and 2 March 2015, the Prosecution submitted no less than five additional requests for *inter alia* delayed disclosure.¹⁰
12. In its Request, the Prosecution contends that it would have informed the Chamber on 2 March 2015 that it planned to meet Witness [REDACTED] for a supplementary interview but that the interview could not take place before that date.
13. The Defence is unaware whether such information was indeed transmitted to the Chamber. To the extent the Chamber was informed, this is yet another example of the Prosecution's documented history of over redactions.
14. The Defence notes however that on 2 March 2015 it was made aware of the Prosecution request for a variation of time limit to disclose the transcription of "Radio Candip" broadcasts.¹¹
15. On [REDACTED], the Prosecution conducted a supplementary interview with Witness [REDACTED], who was first interviewed between 29 November and 1 December 2006.

SUBMISSIONS

16. As recognized by the Prosecution, under Regulation 35(2) RoC, a Chamber may extend a time limit "if good cause is shown" and if it can be demonstrated that

¹⁰ "Prosecution withdrawal of request for redactions in relation to P-0109", 23 February 2015, ICC-01/04-02/06-470 ("Prosecution P-0109 Submission"); "Prosecution request for authorization to provide a summary of P-0901's statement", 25 February 2015, ICC-01/04-02/06-473-Conf-Red ("Prosecution P-0901 Request"); "Prosecution withdrawal of its application for delayed disclosure in relation to P-0758, P-0761, P-0773, P-0887, P-0898, P-0907, P-0914 and P-0918", 26 February 2015, ICC-01/04-02/06-475-Conf-Red ("Prosecution Withdrawal"); "Prosecution request for redactions to P-0882's statement", 2 March 2015, ICC-01/04-02/06-486 ("Prosecution P-0882 Request"); "Prosecution proposed redactions to three documents relevant to P-0911", 2 March 2015, ICC-01/04-02/06-493 ("Prosecution P-0911 Request").

¹¹ Public redacted version of "Prosecution's request pursuant to regulation 35", ICC-01/04-02/06-489-Red.

the extension of the time limit could not be sought prior to its expiration for reasons outside a participant's control.¹²

17. The Prosecution conducted a first interview with Witness [REDACTED] between 29 November and 1 December 2006, almost eight years ago. This interview was disclosed to the Defence as material containing information of a potentially exculpatory nature and/or information material to the Defence's preparation, on 27 May, 24 September 2013 and on 10 January 2014.
18. The Prosecution argues that it was not possible to conduct a second interview with Witness [REDACTED] before May 2015 for the following reasons:
 - Witness [REDACTED] and arranging a meeting with the witness [REDACTED] would have required extensive planning [REDACTED];
 - While meeting with Witness [REDACTED] on [REDACTED], Witness [REDACTED] would have expressed his willingness to meet with the Prosecution but only after [REDACTED] and [REDACTED];
 - While meeting again with Witness [REDACTED] on [REDACTED], the Prosecution limited itself to securing his consent to testify and confirming his continued willingness to meet for a focused supplementary interview. The Defence notes that the Prosecution does not justify why the interview did not take place at that time.
 - Due to logistical issues related to [REDACTED], it would have taken time to determine an appropriate location for the supplementary interview.
19. Firstly, the Defence posits that the 2 March 2015 filing of the Prosecution regarding [REDACTED] was submitted after the applicable deadline set by the

¹² Prosecution Request, para. 11.

Chamber. Indeed, any application for delayed disclosure relating to Prosecution witnesses had to be filed no later than 16 February 2015.¹³

20. Contrary to the argument made by the Prosecution in its *“Prosecution’s reply to the “Corrected version of ‘Response on behalf of Mr Ntaganda to Prosecution Request to vary the time limit for disclosure of [REDACTED]’s recent interview”*”,¹⁴ the wording of the Scheduling Order makes it clear that paragraph 9.b. of the said order was not limited to the delayed disclosure of the identity of witnesses.
21. In that respect, it cannot be argued that “delayed disclosure” would not have been a proper basis for requesting an extension of time limit to disclose and add to the list of the evidence the Prosecution intends to rely on at trial, the audio recording of the interview conducted with [REDACTED] on [REDACTED] and the related transcript.¹⁵ Indeed, it is significant that in its *“Prosecution application for delayed disclosure”* filed on time, on 16 February 2015, the Prosecution requested the delayed disclosure of the material related to Witnesses P-0901, P-0907, P-0911, P-0914 and P-0918 until 30 April 2015.¹⁶
22. From [REDACTED], the Prosecution knew that it might not be able to meet the 2 March 2015 deadline regarding the additional evidence of Witness [REDACTED]. It was thus incumbent on the Prosecution to immediately file a request for delayed disclosure – before the 16 February 2015 deadline – as it did for many witnesses on its list¹⁷ but not for Witness [REDACTED].

¹³ Scheduling Order, para. 9.b.

¹⁴ ICC-01/04-02/06-627-Conf.

¹⁵ Prosecution’s reply to the *“Corrected version of the ‘Response on behalf of Mr Ntaganda to Prosecution Request to vary the time limit for disclosure of [REDACTED]’s recent interview”*, ICC-01/04-02/06-627-Conf, para. 4.

¹⁶ Confidential redacted version of *“Prosecution application for delayed disclosure”*, ICC-01/04-02/06-461-Conf-Red.

¹⁷ See *supra*, paras.10 and 11.

23. Secondly, the Defence posits that the reasons given by the Prosecution do not justify why it only met with Witness [REDACTED] on [REDACTED], knowing that it had to meet a deadline for final disclosure of evidence on 2 March 2015.
24. It is noteworthy that the Prosecution does not provide any evidence supporting its allegation that “a meeting with the witness [REDACTED] required extensive planning with [REDACTED]”.¹⁸
25. It follows that the Prosecution Request neither demonstrates that the extension of the time limit could not be sought prior to its expiration nor shows good cause to have this time limit extended.
26. What the Prosecution Request does establish however is that despite the deadline imposed by the Chamber for final disclosure of its evidence on 2 March 2015, it has been continuing to investigate and looking for new evidence in support of its case.
27. Consequently, the Prosecution Request must be denied.
28. Nonetheless, the Defence understands from the Chamber’s oral decision¹⁹ on the *“Prosecution request to amend its List of Evidence”*²⁰ and the Chamber’s *“Decision on the Defence request for reconsideration”*²¹ that the Prosecution may add to its list of evidence, the audio recording of the interview conducted with Witness [REDACTED] on [REDACTED] and the related transcript, as this does not require obtaining leave from the Chamber.
29. However, the Defence will object to any Prosecution request to rely on this material at trial.

¹⁸ Prosecution Request, para. 15.

¹⁹ ICC-01/04-02/06-T-19-ENG, p.11-12.

²⁰ ICC-01/04-02/06-524.

²¹ ICC-01/04-02/06-611.

30. In this respect, the Defence notes that the Prosecution has not even attempted to demonstrate that the audio recording of the interview conducted with Witness [REDACTED] on [REDACTED] and the related transcript fulfil the applicable criteria for late addition of new incriminatory evidence.
31. Indeed, as previously recognized by the Prosecution,²² the first of the two criteria governing the late addition of new incriminatory evidence provides that: “the new material [should] either [be] significantly more compelling than other items of evidence already disclosed to the Defence, or [bring] to light a previously unknown fact which has a significant bearing upon the case”.²³
32. In this regard, the only information provided by the Prosecution regarding the supplementary interview of Witness [REDACTED] is that “[REDACTED] confirmed and clarified certain aspects of his 2006 interview and provided additional detail relevant to the Ntaganda case”.²⁴
33. The Prosecution did not attempt to demonstrate that the supplementary interview of Witness [REDACTED] is either significantly more compelling than other items of evidence already disclosed to the Defence, or brings to light a previously unknown fact which has a significant bearing upon the case.
34. Significantly, the burden to meet the necessary criteria to be authorised to rely on late incriminatory evidence rests on the Prosecution.

²² Prosecution’s request pursuant to regulation 35 to vary the time limit for disclosure of [REDACTED]’s recent interview, ICC-01/04-02/06-598-Conf, para. 9.

²³ Cf. Decision on the Prosecution Motion for leave to disclose and add the investigator’s report concerning Witness P-268 to the List of Incriminating Evidence, ICC-01/04-01/07, para. 15.

²⁴ Prosecution Request, para. 19.

RELIEF SOUGHT

35. In the light of the above arguments, the Defence respectfully requests the Chamber to:

- a. **DENY** the Prosecution Request;
- b. **ORDER** the Prosecution to disclose to the Defence the transcript of the audio recording of the interview conducted with Witness [REDACTED] on [REDACTED]; and
- c. **CONFIRM** that while the Prosecution may add the audio recording of the interview conducted with Witness [REDACTED] on [REDACTED] and the related transcript on its list of evidence, it is not authorised to rely on this evidence at trial.

CONFIDENTIALITY

36. The Defence requests that this Defence Response be received as “Confidential”, pursuant to Regulations 23*bis*(1) and (2) RoC, as it responds to the Prosecution Request, which was filed with the same designation. The Defence will file a public redacted version of this filing.

RESPECTFULLY SUBMITTED ON THIS 12th DAY OF AUGUST 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands