



Original: **English**

No.: **ICC-01/04-02/06**
Date: **4 September 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 “Request on behalf of Mr Ntaganda seeking
disclosure orders in relation to Witness P-0901”,
ICC-01/04-02/06-800-Conf-Exp, 28 August 2015**

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

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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Pursuant to Articles 64(3)(c), 67(1)(a), 67(1)(e) and 67(2) of the Statute and Rules 76 and 77 of the Rules of Procedure and Evidence (“Rules”), Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Request on behalf of Mr Ntaganda seeking disclosure orders
in relation to Witness P-0901**

INTRODUCTION

1. The Defence respectfully requests Trial Chamber VI (“Chamber”) to order the Prosecution to disclose, pursuant to Article 67(2) and Rules 76(1) and 77 of the Rules, three categories of information in its possession, namely: (i) any statements, in whatever form, of Witness P-0901, including any statement pertaining to his security concerns; (ii) any statements contained in and/or information related to (a) any preliminary assessment or “screening notes” of Witness P-0901; and (b) any proofing or preparation session in relation to the upcoming testimony of Witness P-0901; and (iii) a complete record of payments and benefits, including: (a) administrative documents, receipts, correspondence or expenditure of payments made to, or on the behalf of, Witness P-0901, (b) any and all benefits related to any protective measures conferred to Witness P-0901; and (c) any agreement that the Prosecution entered in with Witness P-0901 in relation to his testimony in this case.
2. Witness P-0901 is scheduled to testify second in the first evidentiary block beginning on 15 September 2015.¹ To this date, the Defence considers that the Prosecution has breached its duty to disclose all material in its possession concerning Witness P-0901, including, *inter alia*: (i) all statements of P-0901, (ii) all information in its possession, concerning P-0901, that is material to the preparation of the Defence and; (iii) all material in its possession or control, concerning P-0901 or information provided by P-0901, that shows or tends to

¹ Email from the Prosecution to the Chamber, parties and participants, 14 August 2015, 14:26.

show the innocence of the accused, or mitigate his guilt, or which may affect the credibility of Prosecution evidence

3. In the light of the Prosecution's refusal to disclose the requested material² – or its excessive tardiness to do so – an order from the Chamber is warranted at this stage to facilitate disclosure, to guarantee fairness of the trial and to ensure that the trial will not be disrupted due to disclosure litigation.

PROCEDURAL BACKGROUND

4. On 17 February 2015, the Prosecution requested delayed disclosure of material concerning Witness P-0901 in order to allow [REDACTED] to implement protective measures.³
5. On 2 March 2015, a summary of Witness P-0901's interview conducted pursuant to Article 55(2) was disclosed to the Defence *in lieu* of a redacted version of the transcripts of this interview.⁴
6. On 19 March 2015, the Prosecution withdrew its application for delayed disclosure of material related to Witness P-0901.⁵ On 20 March 2015, the Defence was informed of Witness P-0901's identity.
7. On 26 March 2015, the following material related to Witness P-0901 was disclosed: (i) 4 audio-recorded interviews;⁶ (ii) 19 transcriptions of these interviews;⁷ (iii) one hand-written note;⁸ and (iv) one investigation note related to Witness P-0901's security concerns.⁹

² See ICC-01/04-02/06-795-Red and its annexes.

³ ICC-01/04-02/06-461.

⁴ DRC-OTP-2080-0608 to 0640.

⁵ ICC-01/04-02/06-523-Conf.

⁶ DRC-OTP-2077-0857-R01 to 0860-R01.

⁷ DRC-OTP-2079-1549-R01 to 1991-R01.

⁸ DRC-OTP-2077-0855.

⁹ DRC-OTP-2078-2328-R01 to 2331-R01.

8. On 23 June 2015, the Chamber ordered the Prosecution to submit *ex parte*, available to the Defence, the “[REDACTED]” (“[REDACTED]”).¹⁰ On 26 June 2015, the Prosecution submitted a redacted version of the [REDACTED], including sixteen annexes.¹¹ While six of these annexes contained statements provided by Witness P-0901,¹² only one was previously disclosed.¹³
9. On 2 July 2015, the Defence requested disclosure of a number of documents, including “[REDACTED]”,¹⁴ which were referred to in one of the five previously undisclosed documents related to Witness P-0901.
10. On 3 July 2015, further to the Defence Expedited Motion, the Prosecution disclosed [REDACTED].¹⁵
11. Between 3 June 2015 and 2 July 2015, the Defence and the Prosecution exchanged correspondence on disclosure of: (i) witness statements;¹⁶ (ii) all documents related to payments to witnesses;¹⁷ (iii) protective measures;¹⁸ and (iv) agreements entered in by the Prosecution with its witnesses.¹⁹
12. To this day, the Prosecution has not disclosed any documents related to Witness P-0901 pursuant to these requests.
13. On 21 August 2015, the Prosecution further disclosed, in relation to Witness P-0901, two documents previously annexed to its [REDACTED],²⁰ the Kinyarwanda translation of the transcription of Witness P-0901’s audio-recorded 4-days interview²¹ and a corrected version of transcriptions.²²

¹⁰ ICC-01/04-02/06-667-Conf-Exp.

¹¹ ICC-01/04-02/06-658-Conf-Red.

¹² *Id.*, Annexes 1, 7, 8, 9, 10, 11.

¹³ *Id.*, Annex 7.

¹⁴ ICC-01/04-02/06-691, para.12 (“Defence Expedited Motion”).

¹⁵ ICC-01/04-02/06-701-Conf-Exp; DRC-OTP-2083-0254 to 0260.

¹⁶ ICC-01/04-02/06-795-Conf-Exp, Annexes A to D

¹⁷ *Id.*, Annexes E, H, K, N.

¹⁸ *Id.*, Annexes F, I, L, O.

¹⁹ *Id.*, Annexes G, J, M, P.

²⁰ DRC-OTP-2083-0199-R01, DRC-OTP-2083-0333-R01.

²¹ DRC-OTP-2087-0069-R01 to 0543.

14. On 25 August 2015, the Defence filed its “Request on behalf of Mr Ntaganda for disclosure orders pursuant to Rule 76 and 77 of the Rules of Procedure and Evidence”²³ (“Disclosure Request”).

SUBMISSIONS

15. The Defence refers to its extensive submissions on the applicable law contained in its Disclosure Request.²⁴

16. The Defence submits that the following material has to be disclosed by the Prosecution and, in the event that no such material exists in relation to Witness P-0901, the Prosecution has to explicitly state that fact.

A. Disclosure of all statements made by Witness’s P-0901 in relation to his security concerns

17. The Prosecution has officially disclosed four documents in relation to Witness’s P-0901 security concerns, and annexed two other documents to one of its request.

18. The latest disclosed statement made by Witness P-0901 regarding his security concerns is dated 31 March 2015.²⁵ Significantly, on 17 August 2015, the Prosecution requested in-court protective measures for Witness P-0901²⁶ thereby indicating follow-up action by the Prosecution after 31 March 2015. The temporal gap between Witness P-0901’s last statement and the date of submission of the Prosecution Request for In-Court Protective Measures raises sufficient indicia that undisclosed security statements made by Witness P-0901 are in the possession and/or the control of the Prosecution.

²² DRC-OTP-2079-1855.

²³ ICC-01/04-02/06-795-Red.

²⁴ *Id.*, para. 4-12, 26-30.

²⁵ DRC-OTP-2083-0333 to 0334.

²⁶ ICC-01/04-02/06-782-Conf-Exp (“Prosecution Request for In-Court Protective Measures”).

19. The Defence respectfully requests the Chamber to order the Prosecution to disclose *all* documents containing statements from Witness P-0901 in relation to his security concerns, irrespective of the form in which such information is recorded.

B. Disclosure of preliminary assessments or “screening notes” of Witness P-0901

20. To this day, the Prosecution has not disclosed any preliminary assessment or “screening note” in relation to Witness P-0901.

21. Witness statements are usually contained in such documents; they are thus disclosable pursuant to Rule 76 of the Rules. Even in the absence of any statement therein, such documents are disclosable pursuant to Article 67(2) or Rule 77 of the Rules, as they evidently contain information material to the preparation of the Defence and/or which may affect the credibility of Prosecution evidence.

22. The Prosecution has already disclosed a number of preliminary assessments or “screening notes” concerning other witnesses. In such circumstances, there are sufficient indicia that undisclosed preliminary assessments and/or “screening notes” of Witness P-0901 are in the possession and/or the control of the Prosecution.

23. The Defence requests the Chamber to order the Prosecution to disclose *all* preliminary assessments or “screening notes” in relation to Witness P-0901, irrespective of the form in which such information is recorded.

C. Disclosure of any notes that would have been taken during proofing or preparation sessions conducted with Witness P-0901

24. To this day, the Prosecution has not disclosed any note that would have been taken during proofing or preparation sessions conducted with Witness P-0901.

25. Witness statements are usually contained in such documents; they are thus disclosable pursuant to Rule 76. Even in the absence of any statement therein, such documents are disclosable pursuant to Article 67(2) or Rule 77 of the Rules, as they evidently contain information material to the preparation of the Defence and/or which may affect the credibility of Prosecution evidence.

26. Witness P-0901 is scheduled to testify in less than a month. Prior to a witness's testimony, a party often meets with the prospective witness to "proof" and/or prepare his/her testimony. In such circumstances, there are sufficient indicia that undisclosed documents related to proofing or preparation sessions conducted with Witness P-0901 are in the possession and/or the control of the Prosecution.

27. The Defence respectfully requests the Chamber to order the Prosecution to disclose *all* notes that would have been taken during proofing or preparation sessions conducted with Witness P-0901, irrespective of the form in which such information is recorded.

D. Disclosure of administrative documents, receipts, correspondence, or records of expenditures or payments made to, or on behalf of, Witness P-0901, for the purpose of meeting with him

28. To this day, the Prosecution has not disclosed any administrative documents, receipts, correspondence, or records of expenditures or payments made to, or on behalf of, Witness P-0901, for the purpose of meeting with him.

29. Such documents are disclosable pursuant to Article 67(2) and Rule 77 of the Rules, as they evidently contain information material to the preparation of the Defence and/or which may affect the credibility of Prosecution evidence.

30. Witness P-0901 met Prosecution investigators at least twice for the purpose of being interviewed.²⁷ When meeting with a witness, the Prosecution

²⁷ December 2014 and [REDACTED].

reimburses or makes payments to cover travel, accommodation, sustenance, communications and possibly lost of income. There are compelling indicia that undisclosed administrative documents, receipts, correspondence, or records of expenditures or payments made to, or on behalf of, Witness P-0901, for the purpose of meeting with him are in the possession and/or the control of the Prosecution

31. The Defence respectfully requests the Chamber to order the Prosecution to disclose *all* administrative documents, receipts, correspondence, or records of expenditures or payments made to, or on behalf of, Witness P-0901, for the purpose of meeting with him, irrespective of the form in which such information is recorded.

E. Disclosure of any and all documents related to benefits received by Witness P-0901 in relation to any protective measures implemented for him

32. To this day, the Prosecution has not disclosed any benefit received by Witness P-0901 in relation to any protective measures implemented for him.

33. Such documents are disclosable pursuant to Article 67(2) and Rule 77 of the Rules, as they evidently contain information material to the preparation of the Defence and/or which may affect the credibility of Prosecution evidence.

34. In the Prosecution Request for In-Court Protective Measures, the Prosecution indicated that Witness P-0901 benefited from “[REDACTED]”²⁸. This demonstrates compelling indicia that undisclosed documents related to benefits received by Witness P-0901 in relation to any protective measures implemented for him, are in the possession and/or the control of the Prosecution.

35. The Defence respectfully requests the Chamber to order the Prosecution to disclose *all* documents related to benefits received by Witness P-0901 in

²⁸ CC-01/04-02/06-782-Conf-Exp, para.10.

relation to any protective measures implemented for him, irrespective of the form in which such information is recorded.

F. Disclosure of any agreement that the Prosecution would have entered into with Witness P-0901 in relation to his testimony in this case

36. To this day, the Prosecution has not disclosed any agreement it would have entered into with Witness P-0901 in relation to his testimony in this case.

37. Such documents are disclosable pursuant to Article 67(2) and Rule 77 of the Rules, as they evidently contain information material to the preparation of the Defence and/or which may affect the credibility of Prosecution evidence.

38. In response to the Defence disclosure request for *all* agreements the Prosecution entered into with its witnesses, the Prosecution stated that “P-0017, P-0038, P-0067 and P-0055 are the only Prosecution witnesses who signed [‘statements of limited use’]”, that “six of [those] have already been disclosed” and that another such statement will be disclosed shortly.²⁹ On 2 July 2015, the Prosecution further stated that it will “review [its] records” in relation to other agreements entered into with its trial witnesses.³⁰

39. Witness P-0901, being [REDACTED] witness who was interviewed pursuant to Article 55(2), he is included in the category of witnesses likely to enter into an agreement with the Prosecution. Witness P-0901 himself referred to this possibility during his interview.³¹ In such context, there are sufficient indicia that undisclosed agreements the Prosecution would have entered into with Witness P-0901 in relation to his testimony in this case are in the possession and/or the control of the Prosecution.

40. It is also significant in this regard that no other types of agreement has been disclose by the Prosecution.

²⁹ ICC-01/04-02/06-795-Conf-Exp, Annex J.

³⁰ *Id.*, Annex P.

³¹ DRC-OTP-2079-1552, ll. 122-125, DRC-OTP-2079-1553, ll. 126-138.

41. The Defence respectfully requests the Chamber to order the Prosecution to disclose *all* agreements the Prosecution would have entered into with Witness P-0901 in relation to his testimony in this case, irrespective of the form in which such information is recorded.

G. Other disclosure requests

42. In addition to the above, the Defence underscores that the Prosecution has yet to disclose the audio recording and the transcripts of the interview conducted with Witness P-0901 on [REDACTED].³²

43. The Defence further underscores that the Prosecution has not disclose Witness P-901's handwritten notes, which would have been made during his interview of December 2014.³³

44. The Defence respectfully requests the Chamber to order the Prosecution to disclose the documents mentioned in paragraph 42 and 43.

CONFIDENTIALITY

45. Pursuant to Regulation 23*bis* (1) and (2) of the Regulations of the Court, these submissions are submitted on a confidential *ex parte* basis. A public redacted version will be filed separately.

CONCLUSION

46. Full disclosure of all material the Prosecution has the obligation to disclose in relation to Witness P-0901 is necessary with a view to ensuring that the testimony of this witness may proceed swiftly without the need for additional litigation.

³² See DRC-OTP-2083-0200, para. 2.

³³ See DRC-OTP-2079-1623-R01, ll. 244-247. "*Il y avait ... [REDACTED] je l'ai déjà écrit*".

47. That being said, this Defence Request should not be understood as being exhaustive, nor does it exclude the possibility of further disclosure litigation in relation to matters not discussed therein.

RELIEF SOUGHT

48. The Defence respectfully requests the Chamber to issue orders as set out above in paragraphs 19, 23, 27, 31, 35, 41 and 44, or such other orders as necessary to compel disclosure by the Prosecution in a manner deemed appropriate by the Chamber.

RESPECTFULLY SUBMITTED ON THIS 4TH DAY OF SEPTEMBER 2015

A handwritten signature in dark ink, appearing to read 'StB-' with a stylized flourish.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands