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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

**Request on behalf of Mr Ntaganda seeking leave to reply to
“Prosecution response to the Defence request seeking
disclosure orders in relation to Witness P-901”**

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 submission of the *“Prosecution response to the Defence request seeking disclosure orders in relation to Witness P-901”* by the Office of the Prosecutor (“Prosecution”) on 7 September 2015 (“Prosecution Response”)¹ and 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 leave to reply to
“Prosecution response to the Defence request seeking
disclosure orders in relation to Witness P-901”**

(“Request for Leave to Reply”)

INTRODUCTION

1. The Defence respectfully requests leave to reply to the Prosecution’s response to its *“Request on behalf of Mr Ntaganda seeking disclosure orders in relation to Witness P-0901”*.² The Prosecution Response: (i) misrepresents jurisprudence concerning the alleged permissibility of withholding audio-recordings and transcripts of Prosecution interviews with Defence witnesses;³ (ii) ignores or misunderstands its obligation to comprehensively disclose its notes of witness statements;⁴ (iii) demonstrates that the Prosecution has already breached, and inconsistently applied, its obligation to disclose witness statements;⁵ and (iv) demonstrates that undisclosed records of payments go far beyond “the ordinary requirements of subsistence.”⁶
2. Many of the positions that have now been set out – and the concrete examples of non-disclosure that have now been acknowledged – by the Prosecution, were unknown and unforeseeable by the Defence at the time of the Request. A reply is therefore justified in order to be able to address with particular, and for the first

¹ ICC-01/04-02/06-808-Conf-Exp, 7 September 2015 (“Response”).

² ICC-01/04-02/06-800-Conf-Exp. *See also* ICC-01/04-02/06-800-Red (“Request”).

³ Response, para. 61.

⁴ *Id.*, para. 62.

⁵ *Id.*, paras. 43, 51-52.

⁶ *Id.*, para. 49, 54-59.

time, how these positions are erroneous, and how they indicate substantial past and ongoing disclosure violation.

CONFIDENTIALITY

3. The Defence notes that the Prosecution classified its Response as confidential, *ex parte* – only available to the Prosecution, Defence and VWU, “because it contains confidential information related to witness security.”⁷ With the aim of favouring the publicity of proceedings and having avoided any reference to specific security issues, the Defence files its Request for Leave to Reply as public.

APPLICABLE LAW

4. Parties are permitted, pursuant to Regulation 24(5) of the Regulations of the Court, to file a reply “with the leave of the Chamber” upon a showing of “good cause.” Past jurisprudence has clarified the circumstances in which a Chamber “may benefit from the Defence’s views”⁸ by way of reply:

- “new issues” were raised in the response;⁹
- information is relied on in the response that “was not available to the defence at the time of the request”;¹⁰

⁷ Response, para. 6.

⁸ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Consolidated Response to the Defence Requests’”, ICC-01/05-01/08-3049, 17 April 2014, para. 5; *Bemba et al.*, Decision on the “Demande d’autorisation de répliquer à la ‘Prosecution Response to the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’ of 16 December 2013 and its Addendum of 7 January 2014 (ICC-01/05-01/13 and ICC-01/05-01/13-69)”, ICC-01/05-01/13-112, 20 January 2014, p. 3 (considering that good cause exists when it “would be beneficial for the Chamber to receive further submissions prior to its disposal of the matter under consideration.”)

⁹ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Consolidated Response to the Defence Requests’”, ICC-01/05-01/08-3049, 17 April 2014, para. 5; *Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC-01/04-01/10-61, 24 February 2011, p. 3 (granting the Prosecution’s leave to reply where the Defence Response raised “new and distinct issues of law and fact, which the Prosecutor had not had the opportunity to address”); *Bemba et al.*, Decision on the “Demande d’autorisation de répliquer à la ‘Prosecution Response to the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’ of 16 December 2013 and its Addendum of 7 January 2014 (ICC-01/05-01/13 and ICC-01/05-01/13-69)”, ICC-01/05-01/13-112, 20 January 2014, p. 3 (holding that good cause exists “when one or more issues arising from the response could not have been anticipated in [the] initial submissions.”)

¹⁰ *Bemba*, Decision on defence request for leave to reply to “Prosecution’s Response to ‘Defence

- arguments are made in response that were not reasonably foreseeable at the time of the request;¹¹
- a new explanation or solution to a problem is raised in the response;¹²
- “the interests of completeness of the judicial record” require additional submissions;¹³
- the responding party has “misinterpret[ed] the applicable law and misrepresents the facts in an unanticipated way”;¹⁴ or
- the issue in question is “novel or of particular importance”.¹⁵

5. The scope of the leave granted to reply may be limited by: (i) imposing a low page-limit;¹⁶ (ii) limiting the subject-matter that may be addressed;¹⁷ or (iii) directing that the reply be brief and focused.¹⁸

Request for Interim Relief”, ICC-01/05-01/08-2985, 19 February 2014, para. 6 (“considering the defence’s assertion that part of the information relied upon by the prosecution was not available to the defence at the time of its request, the Chamber is of the view that it might benefit from the defence’s views on the four discrete issues set out in paragraph 3 above. Leave to reply will therefore be granted.”)

¹¹ *Banda and Jerbo*, Order on the defence’s application for leave to reply, ICC-02/05-03/09-261, 24 November 2011, para. 5 (granting the defence leave to reply where the Prosecution’s response raised certain legal issues that were – as argued by the Defence – unforeseeable and warranted a reply).

¹² *Bemba*, Public Redacted Version of the Chamber’s 10 November 2011 Order granting leave to reply, ICC-01/05-01/08-1899-Red, 15 November 2011, para. 4.

¹³ *Ruto and Sang.*, Decision granting the Government of Kenya leave to reply, ICC-01/09-01/11-757, 30 May 2013, para. 8.

¹⁴ *Banda and Jerbo*, Order on the defence’s application for leave to reply, ICC-02/05-03/09-261, 24 November 2011, para. 5 (granting a leave to reply in response to a Defence application that argued *inter alia* that the Prosecution’s response “raises various new issues of law, misinterprets the applicable law and misrepresents the facts in an unanticipated way”); *Situation in the Democratic Republic of the Congo*, Decision on the Prosecution’s Application for Leave to Reply, ICC-01/04-110-tEN, 1 February 2006, p. 2 (granting a leave to reply to “clarify what seems to be a misinterpretation of the Prosecution’s submissions”).

¹⁵ *Katanga*, Decision granting leave to reply, ICC-01/04-01/07-3382, 6 June 2013, para. 8; *Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC- 01/04-01/10-61, 24 February 2011, p. 4 (finding good cause in light of the importance and the potential effect of the issues raised).

¹⁶ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Prosecution’s Response to “Further Defence Request for Disclosure””, ICC-01/05-01/08-3279, 6 August 2015, para.7(c) (imposing a page limit of 8 pages).

¹⁷ *Bemba*, Decision on defence request for leave to reply to “Prosecution’s Response to ‘Defence Request for Interim Relief’”, ICC-01/05-01/08-2985, 19 February 2014, para.7(a).

¹⁸ *Bemba*, Decision on “Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence

SUBMISSIONS

- (i) *The Prosecution erroneously asserts that it can withhold audio-recordings and transcripts of witness interviews based on the unprecedented and dangerous theory of “equivalent” disclosure*

6. The Prosecution acknowledges that it has not disclosed – and insists that it *will* not disclose – certain audio-recordings and transcripts of statements of Witness P-0901.¹⁹ The Prosecution’s reasoning appears to proceed in two steps: (i) Rule 76(1), despite its plain wording, does not require disclosure of all statements, but only those statements that are deemed by the Prosecution as being “relevant to issues that will arise in [a witness’s] testimony”;²⁰ (ii) disclosure of other information provided by a Prosecution witness can be made in substitute form which, in practice, means that:

there is no need to provide both an audio-recording of an interview as well as a separate signed written statement where the same information is contained in both.²¹

7. If granted the opportunity to reply, the Defence would show that the Prosecution’s position has no jurisprudential support. The decisions cited by the Prosecution at footnotes 71 and 72 in no way support the proposition asserted. On the contrary, the Appeals Chamber in *Banda & Jerbo* merely stated that when a witness interview is audio- or video-recorded, there is no requirement of producing a formal statement.²² This proposition in no way supports the opposite

request for a stay of proceedings and request for further disclosure”, ICC-01/05-01/08-3272, 23 July 2015, para. 4 (imposing a page limit of fifteen pages but requiring, without further specificity, that the “reply must be narrowly tailored to only address new issues raised in the Defence Response”).

¹⁹ Response, para. 61 (“[t]he audio recording and transcript of this security witness statement have not been disclosure, because the signed witness statement containing the same information has already been disclosed.”)

²⁰ Response, para. 33.

²¹ Response, para. 61.

²² *Banda & Jerbo*, Judgment 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”, ICC-02/05-03/09-295, 17 February 2012, para. 26 (“the Appeals Chamber considers that an additional signed and written record of a witness’s statements prepared pursuant to rule 111 is not required when such statements are audio- or video-

practice – i.e. disclosing a formal statement prepared by a Prosecution investigator in place of the original recording. The Prosecution’s misrepresentation of this precedent falls squarely within the justifications for a reply, as described above in the “Applicable law” section.

8. If granted the opportunity to reply, the Defence would also address the Prosecution’s unduly narrow interpretation of its Rule 76(1) obligations. The Prosecution improperly seeks to re-write its obligation to disclose “any prior statements” to “any prior statements that are relevant to issues that will arise in his or her testimony.”²³ While there are scattered ICTY decisions that include this description of the statements under discussion, there is no indication that this description was meant as a pre-condition for disclosure of the statements; indeed, just as many ICTY and ICTR decisions offer no such qualification. In any event, the reference in Rule 76(1) to “any” is clear and unambiguous and should not to be curtailed according to the Prosecution’s subjective view of what it considers to be “relevant to issues that will arise in his or her testimony”. This, with the greatest respect, is not something that can be assessed by the Prosecution without constituting a dangerous and substantial curtailment of the Prosecution’s disclosure obligations.
9. The Defence would also address the Prosecution’s erroneous understanding that Rule 76(1) is curtailed by Rules 81 and 82.²⁴ On the contrary, there is no overlap between Rule 76(1) on the one hand, and (at least in the circumstances presented here) Rules 81 and 82 on the other.
10. If granted the opportunity to reply, the Defence would also show that the Response confirms, for the first time, the existence of documents that the Prosecution has in its possession but refuses to disclose, including: (i) the audio-recording and transcripts of the 25 March 2015 interview of Witness P-0901 by

recorded prepared pursuant to rule 112.”) The *Lubanga* decision cited in footnote 72 following “see also” provides no support for the Prosecution’s claim.

²³ Response, para. 33.

²⁴ Response, para. 34.

Prosecution investigators; and (ii) Witness P-0901's hand-written notes apparently written down prior to his interview with Prosecution investigator's in December 2014.²⁵ The Prosecution's acknowledgement of the existence of these documents confirms that prior statements of Witness P-0901 have not been disclosed.

(ii) *The Prosecution has ignored or misunderstood its obligation to disclose notes and records, in whatever form, that contain witness statements*

11. The Prosecution seems to acknowledge that it has an obligation to disclose "notes made by the Prosecution" during meetings with witnesses.²⁶
12. If given the opportunity to reply, the Defence will demonstrate that there are indications that the Prosecution has not applied this understanding consistently, or that the Prosecution misunderstands this obligation as applying only to notes formally prepared for disclosure. Prosecution investigators have had numerous discussions with Witness P-0901 and yet not a single non-formal notation has been provided to the Defence. The only disclosure that has been received are highly formalized "investigator's notes". The Prosecution's understanding of the term "notes" must, accordingly, be limited to only formal notes or memoranda prepared for the express purpose of disclosure. This is an impermissible and unjustified curtailment of the Prosecution's disclosure obligations. The Reply would ensure that the Chamber is aware that the Prosecution has adopted a narrow understanding of the term "notes" that is inconsistent with its disclosure obligations pursuant Rule 76(1), in particular as the term "statement" has been consistently interpreted at other international tribunals applying an identical obligation.

²⁵ In this regard, while the Prosecution stated that no other handwritten notes of P-0901 exists – except the undisclosed one related to his security concerns – it does not explain why the information referred to by the witness as being written down is not contained in the disclosed handwritten note. *See* Request, fn. 33.

²⁶ Response, para. 21 ("The Prosecution will disclose the written notes made by the Prosecution of the preparation session with P-0901.")

(iii) *The recent disclosure of investigator's notes by the Prosecution constitutes a tacit recognition that the Prosecution has already violated its disclosure obligations*

13. On 4 September 2015, after the submission of the Request, the Prosecution has disclosed six investigator's notes of interviews with Witness P-0901.²⁷ The earliest of these notes is dated 12 January 2015.²⁸ The Prosecution indicates that these statements have been disclosed not under Rule 76(1), but rather pursuant to Rule 77. None of this information was available at the time of the Request, justifying giving the Defence the opportunity to reply.

14. If so permitted, the Defence would submit by way of reply that this disclosure constitutes an unexplained disclosure violation which, in itself and viewed in conjunction with sub-sections (i) and (ii) above, demonstrate that the Prosecution is not fully discharging its disclosure obligations, to Mr Ntaganda's prejudice. The Prosecution has offered no explanation, let alone expressed regret, for its failure to have previously disclosed the witness statements that were disclosed only following the Request. Contrary to the Prosecution's submissions, its Rule 77 obligations do not depend on any request by the Defence. The Prosecution has a continuous obligation to identify and disclose Rule 77 material without any requests from the Defence. The late disclosure of the six documents demonstrates a failure to properly discharge that obligation.

(iv) *The extent of payments that the Prosecution wishes to shield from disclosure is inconsistent with a fair trial*

15. The Prosecution propounds a long list of payments to witnesses that it says should not be subject to disclosure to the Defence, including payments for: (i) "reasonable loss of income"; (ii) "care of dependents during absence from home"; (iii) "reasonable out-of-pocket costs or expenses such as copying of

²⁷ Response, fn. 59.

²⁸ DRC-OTP-2083-0327.

documentary evidence provided”; (iv) “transport” to meetings with the OTP; (v) “transporting referred witnesses to VWU assessment meetings”; (vi) “accommodation”; (vii) “phone credit”; (viii) “moderate medical expense for a medical condition that might affect the witness’s fitness for interview”; and (ix) “related costs of individuals that must travel with the witness to the interview.”²⁹ In addition, the Prosecution asserts that payments from the VWU should be categorically excluded from disclosure.³⁰ The Defence had no knowledge of the full scope of payments that the Prosecution believed should not be subject to any disclosure to the Defence.

16. The Defence, if given the opportunity to reply, would comment on the implications of the wide-ranging exception to disclosure suggested by the Prosecution. The Prosecution, by way of these supposedly “routine” expenses could well offer relatively large sums to a witness without those sums being subject to disclosure. Whether such payments could have an impact on a witness’s testimony is a matter that should be assessed by the Trial Chamber, not by a party concealing those payments from disclosure through broad and flexible rules of non-disclosure. Shifting such matters into the unilateral assessment of the Prosecution goes to the heart of trial fairness.

17. The Defence, if given the opportunity to reply, would argue that VWU payments must be part of disclosure because the critical issue for assessment is the cumulative effect that payments might have on the testimony of a witness. Witnesses are also unlikely to rigorously distinguish in their minds between the Prosecution and VWU; indeed, they would correctly infer that the existence and even the scope of such payments depend on their attractiveness as witnesses to the OTP. No assessment of the cumulative effect of payments on witnesses can be made unless disclosure is provided of all such payments.

²⁹ Response, para. 49.

³⁰ Response, paras. 54-59.

RELIEF SOUGHT

18. The Defence respectfully requests leave to file a reply, not to exceed 10 pages, on the foregoing issues.

RESPECTFULLY SUBMITTED ON THIS 8TH DAY OF SEPTEMBER 2015

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands