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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 “Urgent request on behalf of Mr Ntaganda seeking postponement of Witness P-0901’s cross-examination”

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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Pursuant to Articles 64(2) and 64(3)(c), 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:

**Urgent request on behalf of Mr Ntaganda seeking postponement of
Witness P-0901’s cross-examination**

INTRODUCTION

1. The Defence respectfully requests the postponement of Witness P-901’s cross-examination. The Prosecution has now admitted¹ that it possesses transcripts and recordings of statements of P-901 that it has not disclosed, and that it refuses to disclose. The Prosecution Response also demonstrates a disregard of its obligation under Rule 76(1) to disclose notes of any and all conversation that its investigators have had with the witness, as well its obligations under Rule 77 and Article 67(2) to disclose other relevant and potentially exculpatory materials as well. The disclosure in question should have been completed long ago. The Defence’s capacity to cross-examine P-901 is severely compromised, as are Mr Ntaganda’s rights to a fair trial. The only suitable remedy in the circumstances is postponement of the witness’s cross-examination. The Defence would not oppose, however, hearing the witness’s examination-in-chief as currently scheduled, in the interests of minimizing the disruption to proceedings.

PROCEDURAL BACKGROUND

2. The Prosecution was required to complete disclosure in this case in accordance with the Trial Chamber’s order of 9 October 2014, requiring disclosure by no later than 2 March 2015.² Any requests for delayed disclosure were to be filed by

¹ Prosecution response to the Defence request seeking disclosure orders in relation to Witness P-901, ICC-01/04-02/06-808-Conf-Exp, 7 September 2015, para. 61 (“Prosecution Response”).

² ICC-01/04-02/06-382-Corr, para. 9(d) (“The Chamber directs that disclosure should take place on a rolling basis and that all material currently already in the Prosecution’s possession, for which delayed disclosure is not requested and authorised, should be disclosed not later than **31 January 2015**. Disclosure by the Prosecution to the Defence of all remaining incriminatory material in the form of

16 February 2015.³ On the basis of this schedule, the Trial Chamber set the commencement of trial for 2 June 2015.⁴

3. On 17 February 2015, the Prosecution requested delayed disclosure for Witness P-901 in order, *inter alia*, to allow [REDACTED] to implement protective measures.⁵ This application was retracted on 19 March 2015, protective measures having been put in place for the witness.⁶
4. A summary of an interview with Witness P-901 was disclosed on 2 March 2015 *in lieu* of a redacted version of the transcripts of this interview.⁷ On 20 March 2015, the Defence was informed of Witness P-901's identity.
5. On 26 March 2015, the Prosecution disclosed (i) 4 audio-recorded interviews;⁸ (ii) 19 transcriptions of these interviews;⁹ (iii) one hand-written note prepared by Witness P-0901;¹⁰ and (iv) one investigation note related to Witness P-0901's security concerns.¹¹
6. On 2 April 2015, the Defence requested postponement of the presentation of the Prosecution's case until 2 November 2015.¹² The Defence founded its request on, *inter alia*, "the exceptional volume of material disclosed by the Prosecution since 15 January 2015"¹³.

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 shall be completed by **2 March 2015**, save where delayed disclosure has been specifically requested and authorised. These directions are without prejudice to the ongoing nature of the Prosecution's disclosure obligations for material obtained after that date" (footnotes omitted, emphasis in the original)).

³ *Id.*, para. 9(b).

⁴ *Id.*, p. 9.

⁵ ICC-01/04-02/06-461.

⁶ ICC-01/04-02/06-523-Conf.

⁷ DRC-OTP-2080-0608 to 0640.

⁸ DRC-OTP-2077-0857-R01 to 0860-R01.

⁹ DRC-OTP-2079-1549-R01 to 1991-R01.

¹⁰ DRC-OTP-2077-0855.

¹¹ DRC-OTP-2078-2328-R01 to 2331-R01. Advance copies of these materials had been provided on 20 March 2015.

¹² ICC-01/04-02/06-541-Conf-Exp.

¹³ *Id.*, para. 15. *See also id.*, paras. 16-31 (the Defence stressed, amongst other things, that 29 new witnesses were added to the Prosecution list and that 5.201 items were disclosed, including videos

7. On 14 April 2015, the Prosecution opposed the requested five months delay.¹⁴ It proposed to either start on 2 June 2015 at a reduced pace or to delay the start of trial to 2 September 2015. The Prosecution also requested the disclosure deadlines to be extended to three months prior to any new trial date.
8. On 22 April 2015, the Chamber orally granted the request in part, postponing the commencement of trial until July.¹⁵ The Chamber rejected the Prosecution request for a concomitant postponement of disclosure deadlines on the basis that “permitting disclosure of substantial further material would compromise the ability of the Defence to adequately prepare”¹⁶
9. On 23 June 2015, the Chamber ordered the Prosecution to submit *ex parte*, available to the Defence, the “[REDACTED]” (“[REDACTED]”).¹⁷ On 26 June 2015, the Prosecution submitted a redacted version of the [REDACTED], including sixteen annexes.¹⁸ While six of these annexes contained statements provided by Witness P-0901,¹⁹ only one was previously disclosed.²⁰
10. On 26 June 2015, the Defence submitted its request seeking adjournment of the proceedings, based on the fact that in the Defence’s view, the necessary conditions to ensure a fair trial did not exist in light, inter alia, of the Prosecution allegations [REDACTED].²¹

whose total duration were 104 hours and 31 minutes) and paras. 36-46 (the Defence explained the impact of the scope and format of Prosecution disclosure).

¹⁴ ICC-01/04-02/06-557-Conf-Exp.

¹⁵ ICC-01/04-02/06-T-19-ENG, p. 6, lines 20-24 (“Therefore, nothing mainly the logistical difficulties presented by the Registry and to a lesser extent the Defence submissions that it would not be in a position to commence trial as scheduled, including on the basis of certain delays in completion of full disclosure by the Prosecution, the Chamber is minded to postpone the trial commencement date for a limited period”).

¹⁶ *Id.*, p. 7, lines 22-25.

¹⁷ ICC-01/04-02/06-667-Conf-Exp.

¹⁸ ICC-01/04-02/06-658-Conf-Red.

¹⁹ *Id.*, Annexes 1, 7, 8, 9, 10, 11.

²⁰ *Id.*, Annex 7.

²¹ ICC-01/04-02/06-677-Conf-Exp-Corr.

11. On 2 July 2015, the Defence requested disclosure of a number of documents, including “[REDACTED]”,²² which were referred to in one of the five previously undisclosed documents related to Witness P-0901.
12. On 3 July 2015, further to the Defence Expedited Motion, the Prosecution disclosed [REDACTED].²³
13. Between 3 June 2015 and 2 July 2015, the Defence and the Prosecution exchanged correspondence on disclosure of: (i) witness statements;²⁴ (ii) all documents related to payments to witnesses;²⁵ (iii) information related to the implementation of protective measures;²⁶ and (iv) agreements entered in by the Prosecution with its witnesses.²⁷
14. On 3 July 2015, the Chamber modified the schedule of trial, while being “persuaded that the Defence’s current situation affects its ability to prepare for the start of trial.”²⁸ The opening statements were scheduled for 2 to 4 September 2015 and the first evidentiary block was scheduled for 15 September 2015.
15. On 21 August 2015, the Prosecution further disclosed, in relation to Witness P-0901, two documents previously annexed to its [REDACTED],²⁹ the Kinyarwanda translation of the transcription of Witness P-0901’s audio-recorded 4-days interview³⁰ and a corrected version of transcriptions.³¹

²² ICC-01/04-02/06-691, para.12 (“Defence Expedited Motion”).

²³ ICC-01/04-02/06-701-Conf-Exp; DRC-OTP-2083-0254 to 0260.

²⁴ ICC-01/04-02/06-795-Conf-Exp, Annexes A to D.

²⁵ *Id.*, Annexes E, H, K, N.

²⁶ *Id.*, Annexes F, I, L, O.

²⁷ *Id.*, Annexes G, J, M, P.

²⁸ ICC-01/04-02/06-T-22-CONF-ENG, p. 4, line 25 to p. 5, line 1.

²⁹ DRC-OTP-2083-0199-R01, DRC-OTP-2083-0333-R01.

³⁰ DRC-OTP-2087-0069-R01 to 0543.

³¹ DRC-OTP-2079-1855.

16. On 25 August 2015, the Defence submitted its “Request on behalf of Mr Ntaganda for disclosure orders pursuant to Rule 76 and 77 of the Rules of Procedure and Evidence”³².
17. On 28 August 2015, the Defence submitted its “Request on behalf of Mr Ntaganda seeking disclosure orders in relation to Witness P-0901”.³³
18. On 31 August 2015, the Defence submitted its “Request of behalf of Mr Ntaganda seeking a declaration confirming the Prosecution’s duty to record the content of all contacts with its witnesses”.³⁴
19. On 4 September 2015, the Prosecution disclosed six “Investigation notes” concerning security concerns of Witness P-0901.³⁵
20. On 7 September 2015, the Prosecution submitted its response to the Defence Disclosure Request on Witness P-0901.³⁶
21. On 8 September 2015, the Defence submitted its request for leave to reply to the above-mentioned Prosecution’s response.³⁷

APPLICABLE LAW

22. A Trial Chamber possesses the authority and obligation to control the presentation of evidence to ensure compliance with the Statute and the Rules, as well as to ensure the overall fairness of such proceedings. Trial Chambers have the express authority under the Rules to postpone the commencement date of

³² ICC-01/04-02/06-795-Red (“Disclosure Request”).

³³ ICC-01/04-02/06-800-Conf-Exp. (“Disclosure Request on Witness P-0901”).

³⁴ ICC-01/04-02/06-803-Conf-Exp.

³⁵ DRC-OTP-2083-0327 (“Investigation note”m dated 12 January 2015), DRC-OTP-2079-1443 (“Investigation note”, dated 17 February 2015), DRC-OTP-2082-2716 (“Investigation note”, dated 10 March 2015), DRC-OTP-2086-0516 to 0517 (“Investigation note” dated 30 April 2015), DRC-OTP-2086-0943 (“Investigation note”, dated 9 June 2015), DRC-OTP-2087-0016 (“Investigation note”, dated 13 July 2015).

³⁶ ICC-01/04-02/06-808-Conf-Exp. *See* Email from the Chamber on 31 August 2015 at 10:46 am.

³⁷ ICC-01/04-02/06-810.

trial proceedings as a whole;³⁸ *a fortiori*, Chambers must possess the same authority in respect of the lesser remedy of postponing the appearance of a specific witness. Indeed, the Kenyatta Trial Chamber has expressly referred to postponements of proceedings to deal with “difficulties in scheduling witnesses.”³⁹

23. Such postponements “may be necessitated by a range of practical as well as legal factors”⁴⁰ including ensuring that proceedings are conducted “in a fair and expeditious manner”.⁴¹ One accepted justification for postponing the commencement of proceedings is to give the Defence more time to investigate following late disclosure by the Prosecution.⁴² ICTY and ICTR jurisprudence has repeatedly affirmed that late disclosure of information regarding a particular witness, in particular tardy disclosure of statements of a witness, is a reason for deferring their testimony.⁴³

³⁸ Rule 132(1). *Kenyatta*, Decision on Prosecution’s applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, paras. 76-80.

³⁹ *Id.*, para. 77.

⁴⁰ *Id.*

⁴¹ *Id.*, paras. 76.

⁴² *Id.*, para. 77. *See also Ruto & Sang*, Decision concerning the start date of trial, ICC-01/09-01/11-642, 8 March 2013, para. 13-15, 18 (the Chamber considered that “[i]t is therefore appropriate to grant the Defence additional time to continue its investigations and prepare for trial”, after delayed disclosures by the Prosecution); *Kenyatta*, Public redacted version of ‘Decision on commencement date of trial’ ICC-01/09-02/11-763-Red, 20 June 2013, para. 37-38 (“Likewise, the Chamber agrees that the Defence is entitled to a limited amount of additional time for the review of transcripts of follow-up interviews the Prosecution conducted after 9 January 2013 with nine of its trial witnesses and one other individual. According to the Defence, these interviews were conducted, and the transcripts thereof disclosed to the Defence, after the disclosure deadline of 9 January 2013. Accordingly, the Chamber considers that the Defence should be entitled to several additional weeks preparation time, on top of the three months period previously determined by the Chamber, to compensate for the time expended on completing the disclosure of the audio files and the review of the transcripts of the follow-up interviews conducted after 9 January 2013”).

⁴³ *Bagosora et al*, ICTR-98-41-T, Decision on Defence Motion to Preclude Portions of the Anticipated Testimony of Prosecution Witness DCH, for the Postponement of DCH’s Testimony, and for the Appointment of Defence Counsel for DCH, 29 March 2004 (denying the motion on the basis that “Witness DCH is not scheduled to testify during the upcoming trial session”, at para. 7, thus implying that an adjournment would have been ordered based on the late disclosure of the witness’s statement if he had been scheduled to testify in the next trial session); *Gatete*, ICTR-2000-61-PT, Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial, 13 October 2009, para. 43; *Karadžić*, IT-95-5/18-T, Decision on Accused’s Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, para. 43.

SUBMISSIONS

(i) *The expressly acknowledged non-disclosure*

24. The Prosecution has now expressly acknowledged that it has not disclosed, and will not disclose, statements in its possession of P-901. The acknowledged non-disclosure is of an audio-recording and transcript of an interview conducted by agents of the Office of the Prosecutor with P-901 on [REDACTED].⁴⁴

25. The Prosecution claims that no disclosure is required because “the same information” was provided by way of a signed witness statement prepared by the Prosecution investigators conducting the interview.⁴⁵ If this is the case, then what is the possible justification for not providing disclosure of the same information recorded *verbatim*?

26. This unprecedented doctrine of substitute disclosure, aside from having no legal basis, is concretely prejudicial. When confronted with an investigator-prepared statement, a witness can always claim that the investigator’s did not record his previous statement correctly; when confronted with a transcript or recording, this is not possible. Given the Prosecution’s claim that the statement contains “the same information” as the transcript, the effect of non-disclosure has only one consequence: to prejudice the Defence.

27. In any event, it is not up to the Prosecution to unilaterally withhold disclosure of disclosable information. As stated in *Bagosora et al*, where the Trial Chamber “censur[ed]” the Prosecution:

Therefore, the Prosecution should have complied with its disclosure obligation in respect of unprotected witnesses 60 days before 2 April 2002. Moreover, the Prosecution’s attempt to justify any delay by the need to preserve ongoing investigations cannot stand, for Rule 66(C) does not allow the Prosecution to withhold unilaterally statements subject to disclosure. Rather, only a Chamber may decide to relieve

⁴⁴ Prosecution Response, para. 61.

⁴⁵ *Id.*

the Prosecution from its obligation, under the conditions set forth in Rule 66(C).⁴⁶

28. A meaningful remedy is required not only to remove the prejudice to Mr Ntaganda, but also to provide an incentive to the Prosecution to scrupulously abide by its disclosure obligations.

(ii) *The tacitly acknowledged non-disclosure*

29. The Prosecution has failed to respond to the Defence requests⁴⁷ and motions⁴⁸ requesting disclosure of investigator's notes recording P-901's statements. The Prosecution's conspicuous failure to address this issue in its Response, combined with its apparent failure to disclose any such notes whatsoever, strongly implies that the Prosecution possesses, but has not disclosed, such material. The failure to address this issue suggests that the Prosecution would prefer this issue to remain in the shadows, rather than being adjudicated by the Trial Chamber. Meanwhile, the volume of material in question may be substantial. It is also likely to include material of substantial significance for the cross-examination of P-901.

30. The Defence has, in particular, repeatedly questioned whether P-901's credibility may be affected by the amount of money or other benefits that have been provided to him by the Prosecution. If P-901 has made requests to Prosecution investigators for money, or if he has even reported circumstances that appear designed to elicit assistance from the Prosecution and/or the VWU, then this information is highly relevant to the witness's credibility. The Prosecution should not be permitted to shield this material – which is categorically disclosable under Rule 76(1) and likely disclosable under Rule 77 and Article 67(2) as well – from disclosure to the Defence. Even worse, the Prosecution should not be permitted to take advantage of its substantial delays in addressing this issue, let alone

⁴⁶ *Bagosora et al.*, ICTR-98-41-T, Decision on the Defence for Bagosora's Motion for Postponement or Quashing of the Testimonies of Witnesses Ruggiu, XAM and ZF, 30 September 2002, para. 12.

⁴⁷ ICC-01/04-02/06-795-Conf-Exp, Annexes A and C.

⁴⁸ Disclosure Request, para. 13-23 ; Disclosure Request on Witness P-0901, para. 17-19.

disclosing the information, by having Witness P-901 testify without the Defence being able to prepare its cross-examination based on this material.

31. Further indications of the Prosecution's defective disclosure is provided by its belated disclosure, on 4 September 2015, of six previously undisclosed new "investigation notes." These "investigation notes" appear to have been prepared for the express purpose of disclosure, and contains new, previously undisclosed, information.⁴⁹ The Defence considers some of that information to be highly relevant to its preparations. No excuse or justification has been provided by the Prosecution for the late disclosure of this information.

32. The Prosecution's meetings with this witness, meanwhile, go back to late 2014⁵⁰ and the Prosecution has announced its intention to continue meeting with the witness.⁵¹ The likelihood of inconsistencies in these various statements is therefore a matter of ongoing and substantial importance in the preparation of P-901's cross-examination.

(iii) *The non-disclosure and late disclosure substantially prejudices the Defence's cross-examination*

33. The non-disclosure of the aforementioned material, which has been in the Prosecution's possession for many months, would be unacceptable and require a robust remedy even under ideal conditions of Defence investigations. This need is amplified by the substantial damage to the Defence's capacity to investigate that is directly attributable to the Prosecution's [REDACTED].⁵² The Defence has had no investigators since [REDACTED], and has only recently been able to engage a new investigator. The consequence of the Prosecution's late disclosure of [REDACTED] is that the Defence is left with little capacity to conduct

⁴⁹ An individual referred to as "Bosco's 'chargé de mission'". See DRC-OTP-2083-0327 ("Investigation note" dated 12 January 2015) and DRC-OTP-2086-0516 ("Investigation note" dated 30 April 2015), at 0517, para. 7 to 10.

⁵⁰ *Supra*, fn. 9. These interviews were conducted from 14 to 18 December 2014.

⁵¹ Prosecution Response, para. 21.

⁵² [REDACTED]

investigations in relation to information disclosed late – or, for that matter, since June 2015. The prejudice caused by disclosure of a witness's prior statements only a few days before the witness's appearance is, accordingly, amplified by the general circumstances facing the Defence.

34. Even setting this consideration aside, the volume and likely importance of the information – combined with the Prosecution's continued refusal to make disclosure – constitute compelling reasons to defer the witness's appearance. The prejudice, in light of the Prosecution's ongoing refusal to provide disclosure, should be presumed to be substantial. The circumstances suggest, in any event, that the prejudice is, in fact, substantial and irremediable. The Defence will have only one opportunity to determine its cross-examination strategy, and only one opportunity to implement that strategy. Cross-examination is not an *à la carte* exercise, but requires a holistic understanding of the content of the witness's previous statements in order to be effective and meaningful, and to avoid pursuing irrelevant or unnecessary lines of inquiry.

35. A reasonable measure to ensure the fairness of proceedings is to require the Prosecution to affirm that it has disclosed all prior statements of P-901, and all other disclosable material in relation to his testimony, no later than thirty days before the witness's appearance. The deadline would, of course, be without prejudice to the disclosure of any information generated, or coming into the possession of the Prosecution, exceptionally only after this deadline.

(iv) *The Defence does not request, in the interests of efficiency, postponement of the witness's examination-in-chief*

36. The Defence does not request an adjournment of the witness's examination-in-chief. While the Defence will be somewhat prejudiced by starting the witness's testimony in the absence of full disclosure, the essence of the prejudice can be avoided by deferring the cross-examination only. Nevertheless, the Defence

would not oppose adjourning the entirety of the witness's testimony until the Prosecution has discharged its disclosure obligations.

CONFIDENTIALITY

37. Pursuant to Regulation 23*bis* (1) and (2) of the Regulations of the Court, these submissions are submitted on a confidential *ex parte* basis, as it refers to certain information contained in submissions bearing the same level of confidentiality. A public redacted version will be filed separately.

RELIEF SOUGHT

38. The Defence respectfully requests that the Chamber postpone Witness P-901's cross-examination until no earlier than thirty days prior to an affirmation by the Prosecution that it has disclosed all witness statements, and otherwise conscientiously and diligently fulfilled all of its other disclosure obligations in relation to the witness.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF SEPTEMBER 2015

A handwritten signature in dark ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands