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**International
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Court**

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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 “Prosecution’s Response to Mr Ntaganda’s urgent request to postpone Witness P-901’s cross-examination”, 11 September 2015,
ICC-01/04-02/06-817-Conf-Exp**

Source: Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Defence request to postpone the testimony of Witness P-901, or postpone his cross-examination (“Application”).¹
2. The Defence is essentially requesting a postponement of P-901’s testimony because of: (a) nine pages contained in six investigator notes about [REDACTED] disclosed one week ago (“Investigator Notes”) – and an unfounded, speculative assertion that there are other undisclosed investigator notes;² and, (b) the non-disclosure of the audio-recording and related transcript of P-901’s security-related interview, even though the written statement from that security meeting was already disclosed in June 2015 (“25 March 2015 Statement”).³
3. None of these documents amount to prior statements within the meaning of rule 76 of the Rules of Procedure and Evidence (“Rules”). The Investigator Notes and 25 March 2015 Statement were disclosed under rule 77. The information contained in these materials does not relate to the charges but is relevant to the [REDACTED] made by P-901 and others, of which the Defence has been well aware since at least 26 June 2015, [REDACTED] (“Prosecution Request”).⁴ All of the rule 76 prior statements of P-901 have been disclosed.
4. This is not a valid basis for the Defence’s request to postpone P-901’s testimony. P-901 has arrived in The Hague, his witness familiarisation and preparation is underway and he is ready to proceed to give his testimony in full. Postponing P-901’s testimony, or delaying his cross-examination, will have a negative impact

¹ ICC-01/04-02/06-815-Conf-Exp.

² ICC-01/04-02/06-815-Conf-Exp, paras.29-31. Several of these Investigator Notes are only half a page in length. They are attached to this filing as Confidential, *ex parte* – only available to the Prosecution, Defence and VWU Annex A.

³ ICC-01/04-02/06-815-Conf-Exp, paras.24-28.

⁴ ICC-01/04-02/06-658-Conf-Red.

on his well-being and security, and runs counter to the efficient and expeditious conduct of the proceedings.

Confidentiality

5. This filing and its annexes are classified as Confidential, *EX PARTE* – only available to the Prosecution, Defence and Victims and Witnesses Unit (“VWU”), pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, because they refer to certain information contained in submissions bearing the same level of confidentiality and contain confidential information related to P-901’s witness security.⁵ The Prosecution will file a redacted version of this filing.

Procedural Background

6. On 9 October 2014, Trial Chamber VI (“Chamber”) ordered the Prosecution to disclose the evidence on which it relies by 2 March 2015.⁶ Requests for delayed disclosure needed to be made by 16 February 2015.⁷
7. On 16 February 2015, the Prosecution requested delayed disclosure of material regarding Witness P-901, amongst other witnesses, [REDACTED].⁸
8. On 2 March 2015, the Prosecution disclosed a summary of P-901’s interview to the Defence.⁹
9. On 19 March 2015, the Prosecution withdrew its application for delayed disclosure of material related to Witness P-901 because [REDACTED].¹⁰

⁵ See ICC-01/04-02/06-816-Conf-Exp, paras.3-4.

⁶ ICC-01/04-02/06-382-Corr, para.9(d).

⁷ ICC-01/04-02/06-382-Corr, para.9(d).

⁸ ICC-01/04-02/06-461-Conf-Exp; see ICC-01/04-02/06-461-Red2.

⁹ DRC-OTP-2080-0608.

¹⁰ ICC-01/04-02/06-523-Conf; see ICC-01/04-02/06-523-Red.

10. On 20 March 2015, the Defence was informed of Witness P-901's identity. On that day, the Prosecution disclosed advance copies of 19 transcripts of the interview with P-901 conducted by the Prosecution in [REDACTED].¹¹ These transcripts were formally re-disclosed on 26 March 2015, together with: (a) one handwritten note made by P-901 during his [REDACTED] Interview;¹² (b) one investigation note related to Witness P-901's security concerns (the disclosable information from the otherwise confidential standard security assessment undertaken by the Prosecution in [REDACTED]);¹³ and (c) the audio-recordings of the [REDACTED] Interview.¹⁴ ;
11. On 2 April 2015, the Defence requested postponement of the presentation of Prosecution's case until 2 November 2015.¹⁵ The Prosecution opposed the request on 14 April 2015, proposing either starting on 2 June 2015 at a reduced pace or to delay the start of trial to 2 September 2015.¹⁶
12. On 22 April 2015, the Chamber orally granted the request for postponement in part, by postponing the commencement of trial until July 2015.¹⁷
13. On 24 April 2015, the Defence sought leave to appeal the Chamber's decision on its request for a postponement of the Prosecution's case,¹⁸ which was not

¹¹ DRC-OTP-2079-1549, DRC-OTP-2079-1557, DRC-OTP-2079-1583, DRC-OTP-2079-1591, DRC-OTP-2079-1616, DRC-OTP-2079-1641, DRC-OTP-2079-1669, DRC-OTP-2079-1693, DRC-OTP-2079-1716, DRC-OTP-2079-1741, DRC-OTP-2079-1770, DRC-OTP-2079-1798, DRC-OTP-2079-1824, DRC-OTP-2079-1855, DRC-OTP-2079-1876, DRC-OTP-2079-1899, DRC-OTP-2079-1921, DRC-OTP-2079-1946, DRC-OTP-2079-1972.

¹² DRC-OTP-2077-0855.

¹³ DRC-OTP-2078-2328; ICC-01/04-02/06-658-Conf-Exp-Anx7.

¹⁴ DRC-OTP-2077-0857, DRC-OTP-2077-0858, DRC-OTP-2077-0859, DRC-OTP-2077-0860.

¹⁵ ICC-01/04-02/06-541-Conf-Exp.

¹⁶ ICC-01/04-02/06-557-Conf-Exp.

¹⁷ ICC-01/04-02/06-T-19-ENG, p.6, lns.20-24, p.7, lns.22-25.

¹⁸ ICC-01/04-02/06-572, paras.37-40.

granted.¹⁹ On the same day, the Defence submitted its notice regarding difficulties encountered in relation to the conduct of investigations.²⁰

14. Moreover, on 26 June 2015, the Prosecution disclosed documents as annexes to the redacted version of its application to [REDACTED] ("Prosecution Request"), including six documents related to P-901's security situation:²¹ (a) P-901's witness statement of [REDACTED] related to [REDACTED];²² (b) a second investigation note regarding security issues concerning P-901;²³ (c) the previously disclosed investigator note with information extracted from P-901's confidential standard security assessment form;²⁴ and (d) three other investigator notes detailing security issues [REDACTED].²⁵ Two of the previously undisclosed documents were formally disclosed *via* ringtail on 21 August 2015,²⁶ and the other three on 10 September 2015.²⁷

15. On 26 June 2015, the Defence requested an adjournment of the proceedings based in part on the issues relating to the [REDACTED].²⁸

16. On 2 July 2015, the Defence requested disclosure of a number of documents, including [REDACTED],²⁹ which were referred to in P-901's [REDACTED] Statement.

¹⁹ ICC-01/04-02/06-604.

²⁰ ICC-01/04-02/06-555-Conf-Exp-Red, paras.2-3.

²¹ See ICC-01/04-02/06-658-Conf-Red.

²² DRC-OTP-2083-0199; ICC-01/04-02/06-658-Conf-Exp-Anx9.

²³ DRC-OTP-2083-0333; ICC-01/04-02/06-658-Conf-Exp-Anx11.

²⁴ DRC-OTP-2078-2328; ICC-01/04-02/06-658-Conf-Exp-Anx7.

²⁵ DRC-OTP-2082-2713/ICC-01/04-02/06-658-Conf-Exp-Anx1; DRC-OTP-2079-1104/ICC-01/04-02/06-658-Conf-Exp-Anx8; DRC-OTP-2082-2711/ICC-01/04-02/06-658-Conf-Exp-Anx10.

²⁶ DRC-OTP-2083-0199/ICC-01/04-02/06-658-Conf-Anx9; DRC-OTP-2083-0333/ICC-01/04-02/06-658-Conf-Anx11.

²⁷ DRC-OTP-2079-1104/ICC-01/04-02/06-658-Conf-Anx8 ; DRC-OTP-2082-2711/ICC-01/04-02/06-658-Conf-Anx10 ; DRC-OTP-2082-2713/ICC-01/04-02/06-658-Conf-Anx1; One of the investigator notes was re-disclosed in a lesser redacted form on 4 September 2015 with formal re-disclosure of this lesser redacted form on 10 September 2015 (DRC-OTP-2083-0333/ICC-01/04-02/06-658-Conf-Exp-Anx11).

²⁸ ICC-01/04-02/06-677-Conf-Exp-Corr.

²⁹ ICC-01/04-02/06-691-Conf-Exp, para.12.

17. On 3 July 2015, as requested, the Prosecution disclosed seven photographs of the [REDACTED] pursuant to rule 77 of the Rules.³⁰
18. Between 3 June 2015 and 2 July 2015, the Defence and the Prosecution exchanged correspondence on disclosure related to: (a) witness statements;³¹ (b) all documents related to payments to witnesses;³² (c) protective measures;³³ and (d) any agreements entered into by the Prosecution with its witnesses.³⁴
19. On 3 July 2015, the Chamber modified the schedule of trial: opening statements were scheduled for 2 to 4 September 2015 and the first evidentiary block was scheduled to commence on 15 September 2015.³⁵ The Defence sought leave to appeal the decision not to grant the request to adjourn the proceedings as requested,³⁶ which was denied.³⁷
20. On 21 August 2015, the Prosecution further disclosed: (a) the 19 transcripts of P-901's [REDACTED] Interview translated into Kinyarwanda³⁸; and (b) a corrected version of one of the interview transcripts.³⁹ As stated, two documents previously made available to the Defence as annexes to the Prosecution's Request were formally disclosed *via* ringtail that same day.⁴⁰

³⁰ ICC-01/04-02/06-701-Conf-Exp; DRC-OTP-2083-0254, DRC-OTP-2083-0255, DRC-OTP-2083-0256, DRC-OTP-2083-0257, DRC-OTP-2083-0258, DRC-OTP-2083-0259, DRC-OTP-2083-0260.

³¹ ICC-01/04-02/06-795-Conf-Exp-Anx-A to D.

³² ICC-01/04-02/06-795-Conf-Exp-Anx-E, H, K, N.

³³ ICC-01/04-02/06-795-Conf-Exp-Anx-F, I, L, O.

³⁴ ICC-01/04-02/06-795-Conf-Exp-Anx-G, J, M, P.

³⁵ ICC-01/04-02/06-T-22-Conf-Exp, p.4, ln.25-p.5, ln.1.

³⁶ ICC-01/04-02/06-709-Conf-Exp.

³⁷ ICC-01/04-02/06-760-Red.

³⁸ DRC-OTP-2087-0069, DRC-OTP-2087-0078, DRC-OTP-2087-0105, DRC-OTP-2087-0113, DRC-OTP-2087-0139, DRC-OTP-2087-0165, DRC-OTP-2087-0194, DRC-OTP-2087-0219, DRC-OTP-2087-0243, DRC-OTP-2087-0269, DRC-OTP-2087-0299, DRC-OTP-2087-0328, DRC-OTP-2087-0355, DRC-OTP-2087-0387, DRC-OTP-2087-0409, DRC-OTP-2087-0433, DRC-OTP-2087-0456, DRC-OTP-2087-0482, DRC-OTP-2087-0509, DRC-OTP-2087-0530.

³⁹ DRC-OTP-2079-1855.

⁴⁰ DRC-OTP-2083-0199, DRC-OTP-2083-0333.

21. On 25 August 2015, the Defence submitted its Prior Defence Request for disclosure orders pursuant to rule 76 and rule 77 of the Rules.⁴¹
22. On 28 August 2015, the Defence submitted the Defence request for disclosure orders specifically in relation to Witness P-901 ("P-901 Request").⁴²
23. On 31 August 2015, the Chamber ordered the Prosecution to file its response to the P-901 Request by 7 September 2015.⁴³
24. On 1 September 2015, the Defence submitted a notice in relation to the new Defence investigator and new Defence resource person observing that, although it was not requesting any adjournment or postponement, it may need to mitigate difficulties from the absence of investigative capacity of instance by seeking, *inter alia*, "leave to split the examination in chief and the cross-examination of certain Prosecution witnesses".⁴⁴
25. On 4 September 2015, the Prosecution disclosed advance copies of six Investigator Notes related to P-901's security situation, that were re-disclosed formally *via* Ringtail on 10 September 2015.⁴⁵
26. On 7 September 2015, the Prosecution filed its response to the P-901 Request.⁴⁶
27. On 8 September 2015, the Defence submitted its request for leave to reply to the Prosecution response to the P-901 Request.⁴⁷

⁴¹ ICC-01/04-02/06-795-Conf-Exp; see ICC-01/04-02/06-795-Red.

⁴² ICC-01/04-02/06-800-Conf-Exp.

⁴³ Email from the Chamber on 31 August 2015 at 10:46 am.

⁴⁴ ICC-01/04-02/06-807-Conf-Exp, paras.18-20.

⁴⁵ Annex A.1, DRC-OTP-2083-0327; Annex A.2, DRC-OTP-2079-1443; Annex A.3, DRC-OTP-2082-2716; Annex A.4, DRC-OTP-2086-0516; Annex A.5, DRC-OTP-2086-0943; Annex A.6, DRC-OTP-2087-0016.

⁴⁶ ICC-01/04-02/06-808-Conf-Exp.

⁴⁷ ICC-01/04-02/06-810-Conf-Exp.

28. On 9 September 2015, the Defence submitted its Application for postponement of P-901's cross-examination.⁴⁸
29. On 10 September 2015, the Prosecution filed its response to the request for leave to reply to the Prosecution response to the P-901 Request.⁴⁹
30. On the same day, the Chamber shortened the deadline for the Parties and participants to file a response to the Defence Application by Friday, 11 September 2015 by noon.⁵⁰

Prosecution's Submissions

31. The Prosecution submits that the Defence's Application should be rejected because it lacks any foundation or merit and because P-901's interests – in particular the need to protect his security and welfare - must also be taken into account.

(a) Unfounded request

32. The Defence has failed to establish a reasonable basis for granting a postponement of P-901's testimony, or to split his examination-in-chief and cross-examination by postponing the cross-examination.
33. Whilst the jurisprudence of this Court upon which the Defence relies does not relate to a request to postpone a specific witness's testimony, the Prosecution agrees that the Chamber indeed does have the authority to do so.⁵¹ For instance, although dealing with a request to postpone the trial proceedings as a whole,

⁴⁸ ICC-01/04-02/06-815-Conf-Exp.

⁴⁹ ICC-01/04-02/06-816-Conf-Exp.

⁵⁰ Email from the Chamber, 10 September 2015 at 10:38 am.

⁵¹ See e.g. ICC-01/09-02/11-908, paras.77-79.

Trial Chamber V(B), in *The Prosecutor v. Kenyatta*, referred as an example to adjournments due to difficulties in scheduling witnesses.⁵²

34. Nevertheless, the Prosecution submits that it is incumbent on the party seeking the adjournment to establish a reasonable basis for doing so.⁵³
35. The Defence has, unsuccessfully, made previous attempts to adjourn the start date of trial, citing, *inter alia*, concerns as to its own perceived lack of time to prepare adequately for the [REDACTED].⁵⁴ The Defence now seeks to rely on the recent disclosure of the six Investigator Notes and non-disclosure of the audio-recording and transcript from the [REDACTED] security interview to seek a postponement of P-901's testimony – [REDACTED].
36. The Prosecution submits that the request is unfounded and without merit, and is no more than another attempt by the Defence to gain more time to prepare for the [REDACTED], where its prior requests for more time were unsuccessful.
37. The decisions that the Defence relies upon to postpone P-901's testimony due to delayed disclosure are distinguishable from the present situation.
38. The Defence relies upon *The Prosecutor v. Ruto & Sang*, and *The Prosecutor v. Kenyatta*, where the Defence teams were granted short adjournments in the start dates of trial due to findings of late disclosure.⁵⁵ In *Ruto & Sang* the Chamber found that additional time was needed for the Defence due to “disclosure of a large amount of materials close to the scheduled commencement of trial.”⁵⁶ In *The Prosecutor v. Kenyatta*, the Chamber granted an adjournment due to late disclosure of materials

⁵² ICC-01/09-02/11-908, para.78, footnote 184.

⁵³ See e.g. ICC-01/09-02/11-908, para.80: Where the applicant was the Prosecution, Trial Chamber V(B) observed that it considered: “that any further adjournment without justifiable and compelling reasons could constitute undue delay contrary to the rights of the accused”.

⁵⁴ [REDACTED].

⁵⁵ ICC-01/04-02/06-815-Conf-Exp, para.23.

⁵⁶ ICC-01/09-01/11-642, paras.13-15.

from follow-up interviews with nine trial witnesses and another individual, shortly before start of trial.⁵⁷ Similarly, the Defence relies upon jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), where adjournments were sought due to late disclosure of witness statements.⁵⁸

39. However, as explained further below, the circumstances and documents at issue in those cases sharply contrast to the documents in question in this case: (a) the materials in question in this Application are not voluminous – they comprise nine pages in a format wherein the first half of each page is a log of the date, time, place and people present during the discussion; (b) the materials relate to [REDACTED], and not the charges in the main case; (c) there was no violation of disclosure obligations as they were disclosed as soon as they were assessed to be relevant under rule 77; and (d) the cases relied upon can be distinguished for other reasons, as set out below.

(i) The materials in question are not voluminous

40. In contrast to the cases relied upon by the Defence where adjournments were granted due to the late disclosure of large volumes of materials⁵⁹ – in this case, the Investigator Notes disclosed one week ago comprise only nine pages, and the non-disclosed audio-recording/transcript correspond to a previously disclosed six page statement. The Prosecution notes that in *The Prosecutor v. Rukuno*, the Appeals Chamber of the ICTR rejected a similar request made by the Defence to postpone cross-examination where a recently disclosed document contained only a few pages. The ICTR Appeals Chamber considered that the Trial Chamber was best placed to determine whether Counsel had sufficient time to prepare for

⁵⁷ ICC-01/09-02/11-763-Red, paras.28-40.

⁵⁸ ICC-01/04-02/06-815-Conf-Exp, para.23, footnote 43.

⁵⁹ See ICC-01/09-01/11-642, paras.13-15; ICC-01/09-02/11-763-Red, paras.28-40; *The Prosecutor v. 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.

cross-examination, observing that a document disclosed one hour before cross-examination was only five pages, and decided that the Accused was not prejudiced.⁶⁰

(ii) *The materials relate to [REDACTED] and not the charges in the case*

41. In contrast to the decisions relied upon by the Defence, the documents in question in the Defence's Application relate to [REDACTED] rather than to the substance of the charges brought in the case.

42. The six Investigator Notes provide additional details of a very similar nature to the [REDACTED] already disclosed to the Defence in the Prosecution's Request to [REDACTED],⁶¹ namely, *inter alia*: (i) [REDACTED];⁶² (ii) [REDACTED];⁶³ (iii) [REDACTED];⁶⁴ (iv) [REDACTED].⁶⁵ [REDACTED]; (v) [REDACTED];⁶⁶ (vi) [REDACTED].⁶⁷

43. Similarly, the six-page [REDACTED] Statement described P-901's security concerns [REDACTED],⁶⁸ [REDACTED].⁶⁹ As already mentioned, this document was disclosed in June 2015.

44. In addition to information about [REDACTED], one of the Investigator Notes contains a reference to an individual that appears to be [REDACTED].⁷⁰

⁶⁰ *The Prosecutor v Rukuno*, Appeals Chamber, Judgment, ICTR-2001-70-A, 20 October 2010, paras.137-140.

⁶¹ See ICC-01/04-02/06-658-Conf-Exp, Annexes 1, 7, 8, 9, 10, 11.

⁶² Annex A.1, DRC-OTP-2083-0327.

⁶³ Annex A.2, DRC-OTP-2079-1443.

⁶⁴ Annex A.3, DRC-OTP-2082-2716.

⁶⁵ Annex A.4, DRC-OTP-2086-0516.

⁶⁶ Annex A.5, DRC-OTP-2086-0943.

⁶⁷ Annex A.6, DRC-OTP-2087-0016.

⁶⁸ Annex A.4, DRC-OTP-2086-0516.

⁶⁹ ICC-01/04-02/06-658-Conf-Exp-Anx9; DRC-OTP-2083-0199.

⁷⁰ Annex A.4, DRC-OTP-2086-0516. [REDACTED].

(iii) The materials were disclosed as soon as they were assessed to be relevant under rule 77 and there is no outstanding disclosure

45. There has not been a violation of the Prosecution's disclosure obligations. The documents at issue in this Application – the Investigator Notes and audio-tape and transcript of the [REDACTED] Interview - are not "prior statements" within the meaning of rule 76.⁷¹
46. The Investigator Notes and the [REDACTED] Statement were disclosed instead as soon as they were assessed to be relevant, pursuant to rule 77. The Prosecution assessed the [REDACTED] Statement and Investigator Notes in light of its ongoing obligation to review materials relevant to the Defence under rule 77 of article 67(2) of the Statute.⁷²
47. Whilst at the time the Investigator Notes were made the information contained in them may not have been material to the Defence for the purposes of the case against the Accused, the Prosecution agrees that they are now; especially in light of the Chamber's conclusions regarding [REDACTED].⁷³ It is for that reason they have now been disclosed to the Defence. In particular, the Prosecution agrees with the Defence that [REDACTED] may be appropriate matters to address with relevant witnesses, including P-901.⁷⁴ The Prosecution considers upon further review that one of the Investigator Notes dated 30 April 2015 that contains additional rule 77 information, in addition to [REDACTED], could have been disclosed earlier. However, the information contained in this Investigator Note totaling 2 pages, that appears to relate to [REDACTED], does not warrant or require the postponement of P-901's testimony.⁷⁵

⁷¹ ICC-01/05-02/06-808-Conf-Exp, paras.23-25, 31-39, 43, 60-62.

⁷² ICC-01/04-02/06-810, para.14.

⁷³ ICC-01/04-02/06-785-Conf-Exp, paras.46-70.

⁷⁴ [REDACTED].

⁷⁵ Annex A.4, DRC-OTP-2086-0516.

48. The Prosecution re-iterates that contrary to the Defence's assertions,⁷⁶ there are no additional notes related to P-901 that have not already been disclosed, other than as explained in the Prosecution's Response; namely, the documents from the initial, routine confidential security assessment of P-901. Even there, any relevant information from that assessment was extracted and the investigator note disclosed in March 2015 pursuant to rule 77.⁷⁷ Moreover, the Prosecution repeats that all prior statements of P-901 have been disclosed pursuant to rule 76.⁷⁸

49. Furthermore, the rule 77 information provided by P-901 during the security meeting with him on [REDACTED] was disclosed shortly after that meeting by way of the written, signed statement. The Prosecution submits that it is not necessary to disclose the audio-recording and transcript of the meeting as the rule 77 information has already been disclosed in the form of P-901's signed written statement.⁷⁹

50. Accordingly, contrary to the Defence's assertions, all of the relevant, material information related to P-901 has been disclosed; and the recent disclosure of the Investigator Notes and non-disclosure of the audio-recordings and transcript from the [REDACTED] Interview do not give rise to any prejudice.⁸⁰

(iv) The case law relied upon can be distinguished for other reasons

51. Lastly, the Prosecution observes that the cases can be distinguished for other reasons: in the case of *Prosecutor v. Bagosora et al.*, on which the Defence relies, the Prosecution unilaterally withheld witness statements subject to disclosure, which

⁷⁶ ICC-01/04-02/06-815-Conf-Exp, paras.29-32.

⁷⁷ ICC-01/04-02/06-808-Conf-Exp, paras.41-42; DRC-OTP-2078-2328/ICC-01/04-02/06-658-Conf-Exp-Anx7.

⁷⁸ ICC-01/04-02/06-808-Conf-Exp, para.41.

⁷⁹ ICC-01/04-02/06-808-Conf-Exp, paras.60-61.

⁸⁰ ICC-01/04-02/06-815-Conf-Exp, para.34.

is not the case here.⁸¹ In another decision in the same case, even where there was late disclosure of a witness's statement – that clearly related to matters in the case, in contrast to this case – the Chamber concluded on the basis of the timing of disclosure that the Accused was not prejudiced by the late disclosure.⁸² In *Prosecutor v. Karadzic*, the Prosecution was found to have committed a “*stream of disclosure violations*” warranting postponement of witnesses' testimony.⁸³ There are no such cumulative disclosure violations in this case.

52. None of the cases cited by the Defence support its proposal to split P-901's testimony and postpone his cross-examination.

(a) Any decision to postpone must consider the witness's security and welfare

53. In any event, as Trial Chamber V(B) in *The Prosecutor v. Kenyatta* observed, any decision to adjourn must balance the competing interests. A decision “*whether or not to grant the requested adjournment is based on a weighing of the interests of justice in this case, including the rights of the accused and the interests of victims*”.⁸⁴

54. The Prosecution submits that article 68(1) further requires that a witness's interests be taken into account, because it requires that the Court protect a witness's safety, physical and psychological well-being, dignity and privacy.

55. Witness P-901 is in The Hague in the midst of his witness familiarisation and witness preparation, on the eve of trial. [REDACTED].⁸⁵ Furthermore,

⁸¹ *The Prosecutor v. Bagosora, Kabiligi, Ntabakuze, Nsengiyumva*, Case No. ICTR-98-41-T, Decision on the Defence for Bagosora Motion for Postponement or quashing of the testimonies of witnesses Ruggiu, Xam and ZF, 30 September 2002, para.12.

⁸² *The Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Defence Motion to Preclude Portions of the Anticipated Appointment of Defence Counsel for DCH, for the Postponement of DCH's Testimony, and for the Appointment of Defence Counsel for DCH, 29 March 2004, para.7.

⁸³ *The Prosecutor v. Karadzic*, IT-95-5/18-T, Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010, para.43.

⁸⁴ ICC-01/09-02/11-908, para.78.

⁸⁵ ICC-01/04-02/06-658-Conf-Exp.

[REDACTED] awaiting his return upon completion of his testimony. A postponement of his testimony, or a split between his examination-in-chief and cross-examination with postponement of his cross-examination, is not only unwarranted but would potentially expose him to [REDACTED], unacceptable security risk, and undermine his welfare and state-of-mind.

Conclusion

56. For the foregoing reasons, the Prosecution submits that the Defence's Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 29th day of September 2015

At The Hague, The Netherlands