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

Date: **26 May 2016**

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 “Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963”, 1 April 2016, ICC-01/04-02/06-1242-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

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**Unrepresented Applicants
(Participation / Reparation)**

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Victims**

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Section**

Further to electronic correspondence exchanged with the Office of the Prosecutor (“Prosecution”) on 21 and 22 March 2016 regarding disclosure of material related to Witness P-0963, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963

“Defence Expedited Request”

INTRODUCTION

1. Witness P-0963 is scheduled to testify second during the forthcoming evidentiary block.
2. On 11 December 2015,¹ the Prosecution disclosed to the Defence incriminatory material pursuant to Articles 64(3)(c) and 67(1)(a) and (b) of the Statute, including one statement² and three transcripts of an interview conducted with Witness P-0963 on [REDACTED].³
3. On 21 March 2016,⁴ as part of electronic correspondence exchanged with the Prosecution regarding disclosure of material related to Witness P-0963, the Defence informed the Prosecution that to the best of its knowledge, it had not received disclosure of the audio-recording of the [REDACTED] interview and requested, by the same token, disclosure of the same.
4. On 22 March 2016,⁵ the Prosecution responded that it had not disclosed the audio-recording of the [REDACTED] interview “because the entirety of its contents are already known to [the Defence] through the statement and transcripts”, with the exception of discrete remaining redactions to [REDACTED] and to Witness P-0963’s [REDACTED].

¹ Email from Mr Hendrik van der Werf to Me Stéphane Bourgon, 11 December 2015, 14h18. *See also* “Prosecution’s Communication of the Disclosure of Evidence”, 14 December 2015, ICC-01/04-02/06-1054.

² DRC-OTP-2086-0523.

³ DRC-OTP-2087-0673, DRC-OTP-2087-0699 and DRC-OTP-2087-0717.

⁴ Email from Me Stéphane Bourgon to Ms Nicole Samson, 21 March 2016, 11h35.

⁵ Email from Ms Nicole Samson to Me Stéphane Bourgon, 22 March 2016, 12h50.

5. For the reasons expressed below, the Defence respectfully requests Trial Chamber VI (“Chamber”) to order the Prosecution to disclose forthwith the audio-recording of the interview conducted with Witness P-0963 on [REDACTED].

SUBMISSIONS

6. In contending that it need not disclose the audio-recording of its interview with Witness P-0963 “because the entirety of its contents are already known to [the Defence] through the statement and transcripts”, the Prosecution misrepresents the scope of its disclosure obligations of incriminatory material pursuant to Articles 64(3)(c) and 67(1)(a) and (b) of the Statute.
7. The Defence underscores that nothing in these statutory provisions authorises the Prosecution to withhold from the Defence incriminatory material on the basis that its contents would already be ‘known’ to the Defence by other means. While two items may be similar in terms of contents, their respective disclosure may serve different purposes.
8. This is particularly the case with the audio-recording of an interview conducted pursuant to Article 55 and its related transcript. Although a transcript is intended to reflect the contents of the audio-recording, disclosure of the latter remains necessary, if only to provide the opposing party with the only available tool to verify the accuracy of the transcript in case of doubt – for instance in case of overlapping speakers or when words or sentences are marked as ‘inaudible’.⁶ On a general note, the Defence notes that under Rule 112(1) of the Rules of Procedure and Evidence, the audio-recording of an

⁶ See e.g. transcript of interview with Witness P-0963, [REDACTED], DRC-OTP-2085-0519, p.6, l.226; p.7, l.260; p.8, l.280; p.9, l.325; p.11, ll.398, 411, 425.

interview forms an integral part of the witness's statement,⁷ which is disclosable pursuant to Rule 76.⁸

9. Other than arguing the availability of the contents of the [REDACTED] interview through other means, the Prosecution provides no compelling reason for withholding the audio-recording of this particular interview. In this regard, the Defence notes that when it requests disclosure of a transcript for a witness interview, the Prosecution usually discloses the transcript along with the audio-recording without raising the issue of similarity of contents.
10. The Defence stresses that its Expedited Request is solely aimed at obtaining the audio-recording of the [REDACTED] interview, which is necessary to prepare for cross-examination of Witness P-0963. Considering that it is already privy to the contents of the [REDACTED] interview, the Defence does not request any postponement of Witness P-0963's testimony.
11. However, as explained above, the audio-recording of an interview between the Prosecution and a witness forms an intrinsic part of preparations for cross-examination of this witness. Consequently, the Defence respectfully requests that the Prosecution's violation of its disclosure obligations be remedied forthwith.

CONFIDENTIALITY

12. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Expedited Request is submitted as confidential, as it refers to confidential material related to Witness P-0963.

⁷ "Whenever the Prosecutor questions a person to whom article 55, paragraph 2, applies, [...] the *questioning* shall be audio- or video-recorded, in accordance with the following procedure: [...]" (emphasis added).

⁸ "[S]tatements, within the meaning of Rule 76 of the Rules, are made only when witnesses are '*questioned* about their knowledge of the case in the course of its investigation'." ("Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses", 16 October 2015, ICC-01/04-02/06-904, para.29) (emphasis added)

RELIEF SOUGHT

13. In light of the above submissions, the Defence respectfully requests the Chamber to **ORDER** the Prosecution to disclose forthwith the audio-recording of the interview conducted with Witness P-0963 on [REDACTED].

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF MAY 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands