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

Date: **3 March 2017**

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
Trial Chamber VI to recall Witness P-0290”, 25 February 2017,
ICC-01/04-02-06-1751-Conf**

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 testimony of Prosecution Witness P-0290 from 10 to 12 February 2016¹ and the “Corrigendum of ‘Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution’, 19 October 2016, ICC-01/04-02/06-1588”² issued by Trial Chamber VI (“Chamber”), Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Public redacted version of “Request on behalf of Mr Ntaganda seeking
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“Defence Request”

INTRODUCTION

1. Prosecution Witness P-0290 testified *viva voce* from 10 to 12 February 2016. He was questioned by the Prosecution for approximately nine hours.³
2. Good cause justifies recalling Witness P-0290 in full respect of Mr Ntaganda’s right to examine the witnesses against him and to assist the Chamber in its truth seeking function.
3. Indeed, in light of the very high importance for both parties of the issues raised during the examination-in-chief of Witness P-0290, it is imperative that the Accused be provided with a genuine opportunity to cross-examine Witness P-0290.
4. Due to exceptional circumstances, the Defence was not in a position to cross-examine Witness P-0290 following the Prosecution’s examination-in-chief and did not do so.
5. Compelling circumstances make it imperative to recall Witness P-0290 to protect the right of the Accused to a fair trial.

¹ ICC-01/04-02/06-T-65-Conf-ENG to T-67-Conf-ENG.

² ICC-01/04-02/06-1588-Corr.

³ ICC-01/04-02/06-T-65-Conf-ENG to T-67-Conf-ENG.

6. Recalling Witness P-0290 will not give rise to any prejudice, whether to the parties or participants. It is also in the interest of justice.
7. In the alternative, bearing in mind the importance of the additional evidence which can be provided by Witness P-0290, the Defence requests the Chamber to implement the necessary conditions allowing the Defence to call Witness P-0290 as a witness for the Defence.

APPLICABLE LAW

8. The Chamber has the authority to order the Prosecution to recall a previous witness in accordance with articles 21(1) and 69(3) of the Rome Statute.
9. In addition, the Chamber has the duty to ensure that the trial is conducted with full respect for the rights of the Accused as provided by articles 64(2) and 67.

SUBMISSIONS

I. Defence request to recall Witness P-0290

10. Recalling a witness requires a showing of good cause.⁴ In assessing whether good cause has been shown, the reasons why the witness was not questioned earlier on the matters for which the recall is requested as well as the purpose for which the witness will testify if recalled should be considered.⁵

⁴ ICC-01/05-01/08-3154-Red, para.27; ICC-01/05-01/08-3186-Red, para.18; and ICC-01/05-01/08-2924-Red, para.35 – which follows the general jurisprudence of the *ad-hoc* tribunals.

⁵ See: Prosecutor v. Bagosora et al. Case No. ICTR-98-41-T, Trial Chamber I, Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para.2; Prosecutor v. Gotovina et al., IT-06-90-T, Decision on Prosecution Motion to Recall Mark Rajcic, 24 April 2009, para.10; Prosecutor v. Karemera et al. ICTR-98-44-T, 23 July 2009, Decision on Joseph Nzirorera's motion to Recall Prosecution Witness BDW, para.3; and Prosecutor v. Nzabonimana, ICTR-98-44 D-T, 25 June 2010, Decision on Defence Motion for the Recall of Witness CNAI, para.11.

11. In addition, recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature.⁶

A. The existence of good cause

12. The Appeals Chamber has held that “reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.”⁷

1. The purpose for which Witness P-0290 should be recalled

13. Witness P-0290’s examination-in-chief lasted three days, comprising no less than nine hours. He was questioned in relation to several crucial topics for this case.
14. Witness P-0290 was a [REDACTED] working within [REDACTED] during the relevant period of the charges.
15. In addition, Witness P-0290 is the only [REDACTED] called by the Prosecution during the presentation of its case-in-chief.
16. The focus of his testimony was the: (i) [REDACTED]; (ii) [REDACTED]; as well as (iii) [REDACTED].⁸
17. [REDACTED] contain a total of [REDACTED].

⁶ ICC-01/05-01/08-3154-Red, para.27; ICC-01/05-01/08-3186-Red, para.18; and ICC-01/05-01/08-2924-Red, para.35 – which follows the general jurisprudence of the *ad-hoc* tribunals.

⁷ ICC-01/04-01/06-834, para. 7.

⁸ The ERN of [REDACTED] are: (i) [REDACTED]; and (ii) [REDACTED].

18. In these [REDACTED]: (i) [REDACTED] are attributed to Mr Ntaganda as [REDACTED]; (ii) [REDACTED] are attributed to Mr Ntaganda as [REDACTED]; and (iii) [REDACTED] were [REDACTED] to Mr Ntaganda [REDACTED].
19. As revealed by the Prosecution's Pre-Trial Brief⁹ and cross-examinations led by the Defence, it is evident that the content of [REDACTED] is of significant importance in order to assist the Chamber in the determination of the truth.
20. During the examination-in-chief of Witness P-0290, the Prosecution focussed on [REDACTED]¹⁰ and [REDACTED].¹¹
21. Several [REDACTED] concerning the acts and conducts of the Accused have not been touched upon in Witness P-0290's testimony.
22. In addition, due to [REDACTED], many issues concerning the reliability and probative value which can be attributed to [REDACTED] came to light during the testimony of Witness P-0290, more particularly, when the newly appointed cross-examining lawyer [REDACTED].¹²
23. These issues include, *inter alia*, the fact that [REDACTED].
24. These issues were not exhaustively addressed by the Prosecution.
25. What is more, essential issues related to [REDACTED] – in particular whether [REDACTED] – were not addressed by the Prosecution.
26. In these circumstances, the fairness of the proceedings demands that Witness P-0290 be recalled for the purpose of providing the Defence with a genuine opportunity to:

⁹ ICC-01/04-02/06-503-Conf-AnxA, see footnotes #[REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² ICC-01/04-02/06-T-65-Conf-ENG, p.71 l.12-15.

- (i) Address the [REDACTED] involving the Accused which were not addressed by the Prosecution; as well as
- (ii) Challenge the evidence of Witness P-0290 in relation to :
 - a. [REDACTED];
 - b. [REDACTED];
 - c. [REDACTED];¹³
 - d. The relevant times when Witness P-0290 was present at [REDACTED] in 2002-2003; and
 - e. Whether the [REDACTED] were [REDACTED], and if so, details concerning [REDACTED].

27. The above-mentioned topics on which the Defence intends to cross-examine Witness P-0290 must be addressed in order to have a thorough and accurate view of Witness P-0290's testimony as a whole.

28. In addition, should the Chamber consider that the issues on which Witness P-0290 testified could relate to, *inter alia*, the command responsibility, other modes of responsibility and/or to the Accused *mens rea*, the Defence should be entitled to further question Witness P-0290 in order to comply with basic principles of fairness and justice.

2. The exceptional circumstances leading to Witness P-0290 not being cross-examined earlier

29. The exceptional health situation of both the Associate and Lead Counsels as well as the preparation time in terms of investigations¹⁴ made it unrealistic

¹³ [REDACTED].

¹⁴ ICC-01/04-02/06-T-65-Red-ENG, p.8 l.25 to p.9 l.3: "Regarding investigations, Mr President, the Chamber knows from the number of notices that we have filed that we have just resumed exam -- our

and unfeasible to be in a position to conduct a thorough and meaningful cross-examination of Witness P-0290.

30. It is noteworthy that the inability to cross-examine Witness P-0290 is not due to a lack of preparation when [REDACTED] were disclosed, but rather on exceptional and unpredictable circumstances the Defence could not have foreseen.
31. On 27 November 2015¹⁵ – shortly after the end of the 2nd evidentiary block – the Defence was informed that Witness P-0290 would testify in the 3rd evidentiary block as the third witness and accordingly in the first weeks of February 2016.
32. The responsibility to prepare for the testimony and cross-examine Witness P-0290 was attributed to the Associate Counsel who was also responsible for the cross-examination of witnesses P-0790 and P-0800 – which consisted of 50% of the witnesses scheduled to testify in that evidentiary block.
33. This 3rd evidentiary block started on 18 January 2016.
34. On the same day, Witness P-0790 started his testimony.
35. On 20 January, the Associate Counsel was unable to attend the hearing due to serious health problems and cross-examination of Witness P-0790 was postponed to the following day.
36. The Associate Counsel's serious health problems¹⁶ led to a last-minute reorganization of the team as well as changes in persons responsible to cross-examine the upcoming witnesses.

investigations here a short while ago in January, and I can say, Mr President, that the information flowing in from this investigation is -- there's a lot of information flowing in that we need to consider."

¹⁵ Forthcoming Witness List received by way of electronic correspondence by the Prosecution.

¹⁶ ICC-01/04-02/06-T-65-Red-ENG, p.3 l.7-9: "*Maître Boutin has begun specialised treatment which will last a minimum of four weeks, which means that the soonest that he can be back with the Defence team would be the second week of March.*"

37. To begin with, the Lead Counsel had to prepare for and conduct the remaining cross-examination of Witness P-0790 – who was the first witness of the 3rd evidentiary block – from 21 to 25 January 2016.¹⁷ The Lead Counsel became *de facto* responsible to prepare and conduct the cross-examination of the five remaining witnesses for this 3rd evidentiary block.
38. On 25 January 2016, the Defence submitted a “Request on behalf of Mr Ntaganda seeking Trial Chamber VI to modify the schedule for evidentiary blocks 3 and 4”¹⁸ explaining the: (i) inability of the Defence to proceed with cross-examination of the remaining witnesses for the 3rd evidentiary block as scheduled; and (ii) difficulties encountered by the Defence in the conduct of investigations. The Defence also noted the lack of adequate time and facilities to prepare for trial before the beginning of the Prosecution’s case which impacted its preparations thereafter.
39. Upon completion of Witness P-0790’s testimony, the Lead Counsel prepared for the whole testimony of Witness P-0017, which commenced on 28 January 2016 and lasted until 4 February 2016.¹⁹
40. On 28 January 2016, the Chamber rendered its “Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks”²⁰ adopting a revised schedule – which had no impact on the scheduled testimony of Witness P-0290.
41. On 1 February 2016, the Defence filed its “Application on behalf of Mr Ntaganda seeking reconsideration of ‘Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks’”²¹ which was rejected on 3 February 2016.²²

¹⁷ ICC-01/04-02/06-T-56-Conf-ENG and ICC-01/04-02/06-T-57-Conf-ENG.

¹⁸ ICC-01/04-02/06-1102-Red.

¹⁹ ICC-01/04-02/06-T-58-Conf-ENG and ICC-01/04-02/06-T-63-Conf-ENG.

²⁰ ICC-01/04-02/06-1115-Red.

²¹ ICC-01/04-02/06-1122-Red.

²² ICC-01/04-02/06-1143-Red.

42. On 8 February 2016, the Lead Counsel – who took over the responsibility of Witness P-0290's testimony – experienced health problems and had to consult the Doctor at the medical centre.²³
43. The health problems of the Lead Counsel repeated themselves in the following days.²⁴
44. As a result of these exceptional events, the Defence had little to no-time to prepare for the cross-examination of such an important witness as Witness P-0290.
45. On 10 February 2016, Witness P-0290's testimony started.²⁵
46. Following the testimony of Witness P-0290, the Lead Counsel also had to assume the responsibility to prepare and cross-examine witnesses P-0800 (16-17 February 2016)²⁶ and P-0055 (23-29 February 2016).²⁷
47. Accordingly, the Defence submits that it was not in a position to meaningfully cross-examine Witness P-0290 due to the difficulties it was encountering and to the exceptional circumstances it was facing.

B. The existence of compelling circumstances

48. In addition to the above arguments which demonstrate good cause, compelling circumstances justify recalling Witness P-0290.
49. First, Witness P-0290 is the only Prosecution witness called to testify on crucial issues such as [REDACTED], in particular [REDACTED].

²³ ICC-01/04-02/06-T-64-Red-ENG, p.2 l.25 to p.3 l.3.

²⁴ ICC-01/04-02/06-T-65-Red-ENG, p.3 l.12-18: *"The second issue I wish to address with the Chamber this morning very briefly is of course my own medical situation. On Sunday I had a repeat of what happened to me in Court last Wednesday and it did not really alarm me. And I was attending -- I was planning to attend the court session on Monday afternoon. However, again it happened just shortly before the hearing, around lunch time on Monday, which prompted me to the clinic with the result that we have missed two days or at least a full day and a half of court hearing."*

²⁵ ICC-01/04-02/06-T-65-Red-ENG.

²⁶ ICC-01/04-02/06-T-68-Conf-ENG and ICC-01/04-02/06-T-69-Conf-ENG.

²⁷ ICC-01/04-02/06-T-70-Conf-ENG to ICC-01/04-02/06-T-74-Conf-ENG.

50. The Defence did not have a genuine opportunity to challenge this part of the evidence of the Prosecution's case.
51. Refusing to recall Witness P-0290 would therefore amount to denying the Defence the opportunity to meaningfully do so. It would also violate the right of the Accused to challenge the evidence adduced by the Prosecution.
52. Second, not only would the additional evidence elicited by the Defence not be of a cumulative nature, it would also be the only possibility to have this evidence admitted as part of the record.
53. [REDACTED]²⁸ and [REDACTED]. [REDACTED]. [REDACTED].
54. Not only did this impact the ability of the Defence to cross-examine Witness P-0290 following the Prosecution examination-in-chief, it demonstrates why it is in the interest of justice to recall Witness P-0290.
55. Third, the fact that Witness P-0290 was not cross-examined minimizes the probative value which can be attributed to his evidence, which in turns impacts the Chamber's truth seeking function.
56. Considering the testimony of Witness P-0290 without the Accused being given a genuine opportunity would also violate the right of Mr Ntaganda to a fair trial.
57. Fourth, recalling Witness P-0290 will give rise to no prejudice to the parties and participants as: (i) there remains some time available in the 8th evidentiary block during which Witness P-0290 could be recalled;²⁹ (ii) the Prosecution is already in contact with Witness P-0290; (iii) the Prosecution and participants do not need to prepare if Witness P-0290 is recalled; and (iv) the Prosecution will be in a position to examine Witness P-0290 if need be.

²⁸ [REDACTED].

²⁹ According to the Defence estimate – which considers the remaining witnesses for this 8th evidentiary block, namely witnesses P-0005, P-0043, P-0857, P-0317, P-0116, P-0551 and P-0067 – there are approximately 11 days left in this evidentiary block.

58. Fifth, for the same reasons, recalling Witness P-0290 at this stage will not impact the expeditious conduct of the proceedings.

59. Consequently, the Defence posits that there exists compelling circumstances to recall Witness P-0290. Moreover, it is noteworthy that the evidence that would be adduced through the cross-examination of Witness P-0290 is: (i) of significant probative value; and (ii) not of a cumulative nature.

II. In the alternative, the Defence requests the Chamber to implement the necessary conditions allowing the Defence to call Witness P-0290

60. While the Defence underscores the importance of Witness P-0290 being cross-examined by the opposing party, the Defence requests – in the alternative – that the Chamber implement the necessary conditions with a view to allowing the Defence to call Witness P-0290 as a Defence witness.

61. These conditions include, but are not limited to, ensuring that the Defence is in a position to: (i) communicate and meet with Witness P-0290 without having to produce and disclose a recording of its exchanges with the witness to the Prosecution; and (ii) add Witness P-0290 to its List of witnesses.

62. In addition, the Defence notes that the Chamber might, if necessary, have to issue a *subpoena* in order to summon Witness P-0290 to appear before the Court as a Defence witness.³⁰

CONCLUSION

63. The issue at stake is not whether the Defence should have been in a position to cross-examine Witness P-0290, but rather if the Defence has met the requirements to recall this witness.

64. These requirements – which must be assessed objectively – include: (i) whether good cause was shown by the Defence, which entails explaining

³⁰ Articles 64(6)(b) and 93(1)(l) of the Rome Statute.

why the witness was not questioned earlier and the purpose for which the witness needs to be recalled; as well as (ii) the existence of compelling circumstances to recall the witness which includes an assessment whether the evidence sought to be obtained is of significant probative value and not cumulative in nature.

65. The Defence posits that good cause has been shown and that there exists compelling circumstances to recall Witness P-0290.
66. In the alternative and considering the high importance of Witness P-0290's testimony both for the Prosecution's case against the Accused and the case for the Defence, the Defence requests the Chamber to implement the necessary conditions allowing the Defence to call Witness P-0290 – as an ultimate safeguard for the fairness of the proceedings.

CONFIDENTIALITY

67. Pursuant to Regulations 23bis (1) and (2) of the Regulations of the Court, this Defence Request is submitted on a confidential *ex parte* basis as it refers to [REDACTED].
68. A confidential redacted version will be made available to the party and participants as it refers to the testimony of Witness P-0290.

RELIEF SOUGHT

69. In light of the above submissions, the Defence respectfully request the Chamber to:

1. **ORDER** the Prosecution to recall Witness P-0290 before the end of the presentation of its case-in-chief; or, in the alternative
2. **IMPLEMENT** the necessary conditions allowing the Defence to call Witness P-0290 as a Defence witness.

RESPECTFULLY SUBMITTED ON THIS 3TH DAY OF MARCH 2017

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands