

**Cour
Pénale
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**International
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Court**

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Date: **14 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 "Prosecution's response to the 'Confidential redacted version of 'Request on behalf of Mr Ntaganda seeking Trial Chamber VI to recall Witness P-0290', ICC-01/04-02/06-1751-Conf-Red'", 6 February 2017, ICC-01/04-02/06-1775-Conf

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution opposes the Defence request to recall Witness P-0290.¹
2. The Defence has not demonstrated good cause or compelling circumstances justifying the exceptional remedy of recalling Witness P-0290. Chambers will not recall a witness where a party obtained material or information after completion of the witness's testimony, when it could have done so before through the exercise of reasonable diligence. Moreover, the Defence advances the same arguments now as it did in January-February 2016 when it sought to postpone Witness P-0290's cross-examination. There is nothing new, compelling, or that materially changes any of the facts that were before the Chamber when it decided that the Defence could, and should, cross-examine Witness P-0290 at that time.
3. Instead, the Accused, advised by his Defence counsel, made a conscious and deliberate decision to forego cross-examination of Witness P-0290 with full regard to the implications of that decision. The Chamber cautioned the Accused that *"by choosing not to have the witness cross-examined now he may lose his right to do so"*² and was equally clear that any request to recall Witness P-0290 would need to be supported by *"very, very strong"* reasons.³ Such is not the case, nor is recalling the witness warranted.
4. Nor should the Chamber grant the Defence's alternative request to call Witness P-0290 as a Defence witness.⁴ The Defence fails to provide any reasons justifying its request to proceed in this manner. It is an attempt to circumvent the Chamber's original decision to proceed with the examination of Witness P-0290 (by both Parties) in February 2016 and an attempt to circumvent the Chamber's orders on contact with witnesses of the opposing party.

¹ ICC-01/04-02/06-1751-Conf-Red ("Defence Request").

² ICC-01/04-02/06-T-67, p.40, lines 23-25.

³ ICC-01/04-02/06-T-67, p.40, lines 20-22; ICC-01/04-02/06-T-65, p.12, lines 4-5.

⁴ Defence Request, paras.7, 60-62.

Confidentiality

5. This filing is classified as “Confidential” pursuant to regulation 23*bis*(2) of the Regulations of the Court consistent with the classification of the Defence Request.

Background

6. On 27 November 2015, after consultation with the Defence, the Prosecution submitted the order of witnesses for the third evidentiary block.⁵ This notice was provided more than 7 weeks in advance of the start of the third evidentiary block and nearly 11 weeks before the start of Witness P-0290’s testimony.⁶
7. On 20 January 2016, co-counsel for the Defence fell ill during cross-examination of Witness P-0790 and could not continue to work during the third evidentiary block for medical reasons.⁷
8. On 25 January 2016, the Defence requested a modification of the schedule for the third and fourth evidentiary blocks.⁸ In particular, the Defence requested that Witnesses P-0963 and P-0055 be postponed to the fourth evidentiary block.
9. The Defence did not seek to postpone the testimony of Witness P-0290 to the fourth evidentiary block.
10. On 28 January 2016, the Chamber partially granted the Defence’s request and ordered the Prosecution to postpone either Witness P-0963 or Witness P-0055 to the fourth evidentiary block.⁹ The Chamber noted that Defence preparations should have already been conducted for Witness P-0055, as he was initially set to testify in the second evidentiary block.¹⁰ The Chamber also granted breaks

⁵ Email from the Prosecution, 27 November 2015 at 14:59.

⁶ Witness P-0290’s testimony began on 10 February 2016.

⁷ T-55, p.2, l.17- p.8, l.12 and p.8, l.17 – p.9, l.17.

⁸ ICC-01/04-02/06-1102-Conf.

⁹ ICC-01/04-02/06-1115-Conf; ICC-01/04-02/06-1115-Red.

¹⁰ ICC-01/04-02/06-1115-Conf, para.10.

between testimony, and, in relation to Witness P-0290, revised its schedule in accordance with the Defence request.¹¹

11. The Defence sought reconsideration of this decision.¹² It acknowledged that “*the revised schedule adopted by the Chamber in the Impugned Decision for the testimony of Witness P-0290 (starting on 8 February 2016, until approximately 12 February 2016) and P-0800 (commencing on 15 February 2016, until approximately 17 February 2016) mirrors that proposed by the Defence in its Request for Schedule Modifications*”.¹³ The Defence argued, however, that it made a mistake in its original request and actually needed more time between the testimony of the two witnesses (P-0290 and P-0800).¹⁴ The Defence asked the Chamber to reconsider its decision and to start Witness P-0290’s testimony one day later, on 9 February 2016.¹⁵ It stated in a footnote that the proposed schedule is not an acknowledgment that the Defence was ready to proceed with Witness P-0290 but acknowledged that Witness P-0290 was already in The Hague for testimony.¹⁶

12. The Chamber rejected the Defence request for reconsideration.¹⁷

13. Witness P-0017 completed his testimony on 4 February 2016. Witness P-0290’s testimony was scheduled to begin on 8 February 2016,¹⁸ but it was delayed to 10 February 2016 due to an unexpected medical issue afflicting Defence Counsel.¹⁹ On 10 February 2016, the Defence submitted that the Defence was not ready to cross-examine Witness P-0290 for two reasons: *first*, insufficient time to prepare following the end of the cross-examination of the previous witness; and *second*, incomplete Defence investigations regarding [REDACTED] and P-0290’s

¹¹ ICC-01/04-02/06-1115-Conf, para.12.

¹² ICC-01/04-02/06-1122-Conf.

¹³ ICC-01/04-02/06-1122-Conf, para.21.

¹⁴ ICC-01/04-02/06-1122-Conf, para.22.

¹⁵ ICC-01/04-02/06-1122-Conf, para.27.

¹⁶ ICC-01/04-02/06-1122-Conf, footnote 26.

¹⁷ ICC-01/04-02/06-1143-Conf.

¹⁸ ICC-01/04-02/06-1115-Conf, para.12.

¹⁹ ICC-01/02-04/06-T-64 and ICC-01/02-04/06-T-65.

evidence.²⁰ The Defence submitted, after consultation with the Accused, that it would not cross-examine Witness P-0290 at the end of his examination in chief but would ask to recall him at a later time.²¹

14. On the same day, the Chamber stated that it is responsible for guaranteeing a fair and expeditious trial and, in its view, the proceedings would still be fair if the cross-examination were conducted immediately after the examination in chief.²²

15. On 12 February 2016, at the conclusion of Witness P-0290's examination and chief and in consultation with the Accused, the Defence maintained that it was not in a position to cross-examine Witness P-0290 and would seek to recall him at a later time.²³ The Defence conceded that *"there aren't too many issues for us to address as a direct result of the examination-in-chief"* and that *"the issues addressed during the examination-in-chief could be addressed in cross-examination with limited preparation time"*.²⁴ Rather, the Defence argued that it was unable to put its case to the witness at that time.²⁵ It suggested that it did not have sufficient information about [REDACTED].²⁶ It also suggested that it hoped to show that parts of the witness's evidence were *"a complete fabrication"* regarding [REDACTED] and [REDACTED].²⁷ The Defence did not explain why it could not challenge the witness's evidence on these issues since they should be within the Accused's personal knowledge and since they arose from examination in chief, which the Defence conceded could be addressed with limited preparation time.

16. On the same day, the Chamber held that it *"does not, however, accept that an experienced counsel supported by his team and on notice for over two and a half months of the scheduling of the present witness testimony is not in a position to conduct the cross-*

²⁰ ICC-01/04-02/06-T-65, p.5, lines 2-18.

²¹ ICC-01/04-02/06-T-65, p.6, line 5 to p.7, line 2.

²² ICC-01/04-02/06-T-65, p.7, lines 10-25.

²³ ICC-01/04-02/06-T-67, p.23, lines 7-10.

²⁴ ICC-01/04-02/06-T-67, p.24, lines 5-8.

²⁵ ICC-01/04-02/06-T-67, p.24, lines 12-13.

²⁶ ICC-01/04-02/06-T-67, p.25, lines 17-21.

²⁷ ICC-01/04-02/06-T-67, p.26, lines 10-14.

examination".²⁸ The Chamber further did not consider there to be "*any material change in circumstances from when the Defence itself submitted the schedule, which included the examination of this witness*".²⁹ Moreover, the Chamber found that the investigative leads referred to by the Defence "*appear to have been on standing for some time*" and did not provide a basis for postponing the cross-examination.³⁰ It held that it was open to the Defence to proceed with cross-examination at that time and subsequently either seek to recall the witness if it could properly justify such a request or to present relevant information as part of its own Defence case.³¹ The Chamber noted that it could not force the Defence to cross-examine the witness as scheduled but "*found that the Defence should be in a position to proceed*".³²

17. The Chamber further stated that if the Defence decided not to cross-examine the witness, it must confirm that the Accused fully understood the potential consequence of this choice,³³ as the Accused's right to examine witnesses against him is discretionary and can be forfeited; choosing not to cross-examine can be construed as a waiver of the right to cross-examine.³⁴ The Chamber held that "*Mr Ntaganda risks losing the right to have the witness cross-examined*" and that while the Defence could make a later request to recall the witness, "*cogent reasons should exist to warrant such recalling and there is no guarantee that such a request would be granted by the Chamber*".³⁵

18. The Defence maintained its position that it was unable to cross-examine Witness P-0290 at that time.³⁶

19. On 25 January 2017, the Defence asked the Chamber to recall Witness P-0290.³⁷

²⁸ ICC-01/04-02/06-T-67, p.39, lines 12-14.

²⁹ ICC-01/04-02/06-T-67, p.39, lines 17-19.

³⁰ ICC-01/04-02/06-T-67, p.39, lines 20-22.

³¹ ICC-01/04-02/06-T-67, p.39, lines 22-25.

³² ICC-01/04-02/06-T-67, p.40, lines 6-14.

³³ ICC-01/04-02/06-T-67, p.40, lines 7-10.

³⁴ ICC-01/04-02/06-T-67, p.40, lines 15-18.

³⁵ ICC-01/04-02/06-T-67, p.40, lines 19-22.

³⁶ ICC-01/04-02/06-T-67, p.43, lines 9-10.

Prosecution's Submissions

(i) *The Defence fails to meet the standard to recall Witness P-0290*

20. For reasons of judicial economy, recalling a witness is an exceptional remedy and should only be granted in the “most compelling circumstances”.³⁸ The Chamber must consider whether good cause to recall the witness has been demonstrated.³⁹ A Chamber will not recall a witness “*simply because a party has obtained material after completion of the witness’s testimony that it could have obtained through the exercise of reasonable diligence before the testimony*”.⁴⁰
21. Good cause requires the existence of valid reasons for non-compliance with the procedural obligations of a party to the litigation. The exceptional nature of this remedy is reflected in the seven decisions cited by the Defence,⁴¹ where recall of a witness was granted in only two of seven cases. Critically, in every case cited by the Defence, a party sought to recall a witness *on a discrete issue*; these were not requests to conduct a full cross-examination after having deliberately chosen not to conduct it at the relevant time.
22. The Defence neither demonstrates good cause nor provides cogent and compelling reasons justifying the exceptional remedy of recalling Witness P-0290. The arguments advanced by the Defence now are the same arguments advanced in February 2016 when it made a request to postpone cross-examination: first, incomplete investigations and, second, the lack of ability to prepare due to the health conditions of Lead and Co- Defence Counsel.⁴²

³⁷ ICC-01/04-02/06-1751-Conf-Red.

³⁸ ICC-01/05-01/08-3154-Red, para.27.

³⁹ ICC-01/05-01/08-3154-Red, para.27.

⁴⁰ ICC-01/05-01/08-2924-Red, para.35.

⁴¹ ICC-01/04-02/06-1751-Conf-Red, footnotes 4- 6.

⁴² ICC-01/04-02/06-1751-Conf-Red; See the Chamber’s decision dated 12 February 2016 at ICC-01/04-02/06-T-67, p.38, lines 10-17: “*At the start of this witness testimony on Wednesday, the Defence indicated that it is, quote, ‘not in a position’ to cross-examine Witness p-290 at the end of the Prosecution examination. Two reasons were provided to the Chamber: First, that the five and a half days since the conclusion of the previous*

23. On the first point regarding its alleged inability to complete investigations, the Defence seeks to question the witness about the manner in which [REDACTED] that was not addressed by the Prosecution, including [REDACTED];⁴³ [REDACTED].⁴⁴ The Defence fails to explain why it was unable to complete its checks before the scheduled testimony or why *the Accused* could not assist in lines of questioning dealing with [REDACTED],⁴⁵ [REDACTED],⁴⁶ [REDACTED],⁴⁷ [REDACTED]⁴⁸. This information should be squarely within the Accused's own knowledge ([REDACTED])⁴⁹ and should not require extensive independent investigation.

24. The Prosecution disclosed Witness P-0290's statements on 1 November and 16 December 2013 and [REDACTED] on 11 July and 2 September 2013. As the Defence acknowledges,⁵⁰ the Prosecution's Pre-Trial Brief provided early and clear notice to the Accused (since 9 March 2015) of the relevance of [REDACTED]. Added to this notice was the nearly 11 weeks advance notice of the scheduling of Witness P-0290's testimony. The Defence has not justified its lack of due diligence in conducting any necessary inquiries in a timely fashion; its failure to do so did not justify its request to postpone Witness P-0290's testimony in February 2016⁵¹ and does not justify its request to recall Witness P-0290 now.

25. In rejecting a request to recall a witness in *Karadžić*, the Trial Chamber held that the Accused could not rely on the argument that he lacked sufficient time to prepare for a particular component of the case when the witness statement had

witness testimony had been insufficient to prepare, noting in that regard that lead counsel had been unwell for part of the time; and second, that the Defence has been pursuing certain investigation leads for some time for which there have not yet been any results".

⁴³ [REDACTED].

⁴⁴ ICC-01/04-02/06-1751-Conf-Red, paras.21, 26.

⁴⁵ ICC-01/04-02/06-1751-Conf-Red, para.26.

⁴⁶ ICC-01/04-02/06-1751-Conf-Red, para.26.

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ ICC-01/02-04/06-T-65, p.33, lines 5-14; p.38, lines 3-6; pp.47-50.

⁵⁰ ICC-01/02-04/06-1751-Conf, para.19 and footnote 9.

⁵¹ ICC-01/04-02/06-T-67, p.38, line 25 to p.39, line 9 and p.39, lines 20-22.

been disclosed years earlier, and that there was no justification for the Accused's failure to present this statement to the witness at the time he testified.⁵²

26. The Defence unsuccessfully argued its second point - regarding its lack of preparation time given the health issues affecting Defence Counsel - in its original request to postpone Witness P-0290's cross-examination. The Chamber "*recognized the difficult circumstances that lead counsel has faced in recent weeks and has made adjustments to the schedule to accommodate this*" but the Chamber did "*not, however, accept that an experienced counsel supported by his team and on notice for over two and a half months of the scheduling of the present witness testimony is not in a position to conduct the cross-examination*".⁵³ The Defence has not advanced any new or compelling facts or arguments to justify recalling the witness on the basis of its lack of ability to prepare for Witness P-0290's cross-examination.

(ii) *Denying the request does not unduly prejudice the Accused's rights*

27. Contrary to the Defence's assertion, it is not "*imperative to recall Witness P-0290*" to protect the right of the Accused to a fair trial.⁵⁴ The Chamber was clear to ensure that the Accused fully understood the potential consequences of not cross-examining Witness P-0290 at the time of his testimony: that the right to question witnesses against him is a discretionary one and can be forfeited, that he risked losing the right to cross-examine the witness altogether, that a later request to recall the witness would not be accepted absent cogent reasons.⁵⁵ Moreover, the Chamber held that the fairness of the proceedings would not be compromised by proceeding with cross-examination as scheduled.⁵⁶ Indeed, the Defence conceded that "*the issues addressed during examination in chief could be addressed in cross-*

⁵² *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Recall Johannes Rutten, 26 April 2012, para.13.

⁵³ ICC-01/04-02/06-T-67, p.39, lines 10-14.

⁵⁴ ICC-01/04-02/06-1751-Conf-Red, para.5.

⁵⁵ ICC-01/04-02/06-T-67, p.40, lines 15-25.

⁵⁶ ICC-01/04-02/06-T-67, p.38, lines 21-24.

examination with limited preparation time".⁵⁷ Yet, the Accused opted not to do so, with a clear understanding of the risks inherent in this decision.

28. Recalling Witness P-0290, or adding him to the Defence's witness list, is not the only manner to test his evidence. The Defence has put questions to other witnesses in relation [REDACTED],⁵⁸ [REDACTED]. The Defence can also call other Defence witnesses about [REDACTED].

(iii) Witness P-0290 should not become a Defence Witness

29. The Defence's alternative request should also be denied. If the Chamber were to deny the Defence request to recall the Witness because it is unsubstantiated, yet allow the Defence's alternative request to add the witness to its witness list and examine him, then the Chamber will have undermined its decision not to allow a further Defence examination of the witness. Such a decision would, in effect, permit the Defence to circumvent the Chamber's decision entirely. If granted, it would encourage this and other accused to delay investigations and postpone all cross-examination citing lack of time to prepare, only to complete investigations one year later and seek to recall witnesses.

30. Moreover, testimony causes significant issues for witnesses in terms of travel, time off from work and away from family, and the stress of testifying. For these reasons and to ensure expeditious proceedings, witnesses should not be recalled without cogent reasons for doing so. Additionally, witnesses are first asked whether they consent to appear voluntarily as a witness for either Party, which the Defence seeks to bypass through its reference to the possible need to summon the witness for him to appear as a Defence witness.⁵⁹ This is not an appropriate way to proceed in this case. The Defence provides no reasons justifying such a

⁵⁷ ICC-01/04-02/06-T-67, p.24, lines 7-8.

⁵⁸ [REDACTED].

⁵⁹ ICC-01/04-02/06-1751-Conf-Red, para.62.

drastic departure from the established procedure set by the Chamber, nor cites to any jurisprudence where such a request has been granted.

31. Lastly, the Prosecution submits that it is equally inappropriate, and undesirable, to dispense with the Chamber's orders on contact with witnesses of the opposing party by allowing the Defence to communicate and meet with the witness without disclosing a record of such meetings or exchanges to the Prosecution, in particular because the witness is a Prosecution witness.⁶⁰

Conclusion

32. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request in its entirety.



Fatou Bensouda
Prosecutor

Dated this 14th day of March 2017
At The Hague, The Netherlands

⁶⁰ ICC-01/04-02/06-1751-Conf-Red, para.61.