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TRIAL CHAMBER VI

Before: Judge Chang-ho Chung, Presiding Judge
Judge Robert Fremr
Judge Olga Herrera Carbuccion

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

**Public Redacted Version of “Request for Reconsideration or, In the Alternative,
Leave to Appeal Issues Relating to Determination of Motion to Suspend Defence
Investigators” 20 July 2015, ICC-01/04-02/06-734-Conf-Exp**

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

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Further to the *“Decision on the Defence’s expedited request for disclosure and related matters”* issued on 16 July 2015 (*“Impugned Decision”*),¹ Counsel representing Mr Ntaganda (*“Defence”*) hereby submit this:

**Request for Reconsideration or, In the Alternative, Leave to Appeal Issues
Relating to Determination of Motion to Suspend Defence Investigators**

I. INTRODUCTION

1. Bosco Ntaganda requests reconsideration or, in the alternative, leave to appeal the Impugned Decision in respect of three discrete issues: (i) the standard adopted for determination of the motion to suspend the Defence investigators;² (ii) the failure to order the disclosure of statements of P-0190 pursuant to Rule 76(3) of the Rules and applicable jurisprudence; and (iii) the failure to extend the deadline to permit adequate consultations with the individuals whose conduct is primarily at issue. Each of these issues, some of which were not fully litigated prior to the Impugned Decision, merits reconsideration based on the new arguments and information presented below. Leave to appeal is requested in the alternative in respect of any of the three issues that are not reconsidered given their irremediable consequences and the likely substantial impact on the fair and expeditious conduct of proceedings.

II. RECONSIDERATION

A. Applicable Law

2. Reconsideration is appropriate where a “clear error of reasoning has been demonstrated or if it is necessary [...] to prevent an injustice,”³ or simply where “there is reason to believe that [a Trial Chamber’s] original Decision

¹ ICC-01/04-02/06-731-Conf-Exp.

² ICC-01/04-02/06-658-Conf-Red (*“Suspension Motion”*).

³ ICC-01/04-02/06-611, para.12.

was erroneous.”⁴ The particular circumstances justifying reconsideration include not only new facts, but also new arguments.⁵ The Prosecution has previously argued in respect of new arguments that:

one circumstance in which reconsideration is the most appropriate course is where the Parties were not put on notice of, and thus did not have an opportunity to present arguments relating to the points for which reconsideration is sought, and in particular where those points are details peripheral to, or relating to the implementation of, the decision rather than the core of the decision. One such set of circumstances may be, as in the instance case, where the decision deals with a range of complex legal issues, on which the Chamber and Parties are focussed, but the decision also touches on other points of law. In such circumstances, the Prosecution submits that reconsideration of the relevant details by the original chamber is the most orderly, efficient and expeditious way to address the issue.⁶

B. The Standard for Determining Facts Is Erroneous and Not Based on Adequate Submissions

3. The Trial Chamber determined the standard that it would use for fact-finding in determining the Suspension Motion as follows:

The Trial Chamber will consider the allegations only to the extent necessary to form a view on whether or not there are *reasonable grounds to believe* that one or both of the Investigators have engaged in conduct sufficiently detrimental to the integrity of the proceedings and the safety and well-being of witnesses to warrant the relief requested, including, in particular, their suspension.⁷

⁴ *Nizeyimana*, ICTR-00-55C-T, Decision on Defence Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 1 July 2011 (“*Nizeyimana* Decision”), para.13.

⁵ *Ruto et al.*, ICC-01/09-01/11-1813, para.19 (“[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment”); ICC-01/09-02/11-863, para.11 (“[t]he Chamber finds support, as was also done by Trial Chamber I, in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) whose statutory provisions are equally silent as to the power of reconsideration, that those circumstances can include ‘new facts or new arguments’”); *Prlić et al.*, Case No. IT-04-74-A, Decision on Motions for Reconsideration, 5 September 2014, p. 4; *Stanišić & Župljanin*, Case No. IT-08-91-T, Decision Denying Joint Defence Motion for Reconsideration or Certification of the Decision of 18 April 2012 and Allowing the Defence to Reply to the Prosecution Response to the Joint Defence Final Submissions on the CHS, 10 May 2012.

⁶ ICC-01/04-01/06-120, para.9.

⁷ Impugned Decision, para.30 (italics added).

4. This determination, it is respectfully submitted, should be reconsidered for three reasons: (i) the motion⁸ being decided by the Impugned Decision made no request for determination of this issue; (ii) the issue arose extemporaneously at a status conference, and neither party addressed the issue extensively or with reference to case law; and (iii) a review of the jurisprudence demonstrates that the correct standard for adjudication of trial-related interlocutory matters is balance of probabilities, rather than “reasonable grounds to believe”.
5. The remedies requested in the Defence Motion were three-fold: (i) fuller disclosure in relation to P-0190; (ii) permission to contact the two investigators in relation to the allegations; and (iii) variation of the time-limit to respond.⁹ No requests, and no submissions, were made in respect of the standard that the Trial Chamber should apply in determining the Suspension Motion.
6. The issue of standard arose for the first time during a status conference on 3 July 2015. The only submission of the Prosecution in that regard – on which both parties agree – is that the criminal standard of proof does not apply to the Prosecution’s Suspension Motion.¹⁰ Defence counsel responded in passing, as seemed appropriate under the circumstances, that “at a minimum the standard of *prépondérance de preuve*” should be applicable.¹¹ The Prosecution did not contest the standard proposed by Defence Counsel in any further submissions at the status conference or in its response to the Motion.¹² The Defence, given the absence of apparent dispute, and without any authorization or directions from the Trial Chamber to offer further submissions on the issue, made only a passing reference to this standard in its

⁸ ICC-01/04-02/06-691 (“Defence Motion”).

⁹ Defence Motion, pp. 14-15.

¹⁰ ICC-01/04-02/06-T-21-CONF-EXP-ENG, p. 27, ll. 1-3.

¹¹ ICC-01/04-02/06-T-21-CONF-EXP-ENG, p. 31, ll. 12-14.

¹² ICC-01/04-02/06-705.

reply.¹³ These are circumstances in which reconsideration may be particularly appropriate if there is an indication, based on additional submissions, that the “original Decision was erroneous.”¹⁴

7. A review of the jurisprudence of the ICC and other international tribunals demonstrates that, in the absence of a statutorily-prescribed standard, trial motions are generally determined according to the balance of probabilities standard. As summarized in the *Bemba* case in relation to Defence motions related to admissibility of a case and abuse of process:

As to the standard of proof in the circumstances, although the Rome Statute framework again does not provide guidance, the overwhelming preponderance of national and international legal systems apply what is frequently called the ‘civil standard’ of proof (balance of probabilities) when the burden lies upon the defence in criminal proceedings. There is no reason to depart from that approach in these circumstances, and the prosecution’s suggested threshold of “clear and convincing evidence” is not to be found in the Rome Statute framework, but instead it is based on certain academic commentary.¹⁵

The Prosecution has itself argued that this is the appropriate standard, at least in respect of admissibility of a case.¹⁶

8. The balance of probabilities standard is well-established in respect of numerous trial-related issues that have confronted international courts over the years, including: fitness of an accused to stand trial;¹⁷ provisional release;¹⁸

¹³ ICC-01/04-02/06-718 (“Reply”), para. 7.

¹⁴ *Nizeyimana* Decision, para.13.

¹⁵ ICC-01/05-01/08-802, para.203.

¹⁶ ICC-01/11-01/11-276-Red2.

¹⁷ *Gbagbo*, ICC-02/11-01/11-286-Red, para.56 (“sufficient to refer in this respect to the text of rule 135 of the Rules, which states that where the Chamber is ‘satisfied that the accused is unfit to stand trial’ further proceedings must be adjourned”); *Gbagbo*, ICC-02/11-01/11-214-Conf, para. 20 (ICC OTP advocating a “balance of probabilities” standard); *Strugar*, IT-01-42-A, Judgement, 17 July 2008, para.58 (“an accused claiming to be unfit to stand trial bears the burden of so proving by a preponderance of the evidence”); *Prosecutor v. Popović et al.*, IT-05-88-A, Public Redacted Version of 30 November 2012 Decision, 16 January 2013, para.22 (“[a]n appellant claiming to be unfit to participate in the proceedings bears the burden of so proving by a preponderance of the evidence”); *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Decision on Stanišić Defence’s Motion on the Fitness of the Accused to Stand Trial, 27 April 2006, p.5 (“none of the medical reports submitted by the Defence indicates any bases on which it might currently be concluded on a balance of probabilities that there is any respect in which the Accused is unable to participate”).

indigence, so as to be entitled to legal aid;¹⁹ determining whether a person is deceased or otherwise incapable of testifying as a pre-condition for admission of their statements;²⁰ and – significantly – witness intimidation as it relates to measures sought during²¹ or at the conclusion of²² trial proceedings.

9. The registration and appointment of investigators, as the Trial Chamber correctly notes, “are primarily treated, across international courts and tribunals, as an administrative matter for which the Registrar has foremost competence.”²³ The same may be said of appointment or removal of counsel, or administration of legal aid; yet both the former²⁴ and the latter²⁵ are matters of judicial decision-making when they affect the integrity of trial proceedings. As stated by one ICTY Trial Chamber addressing the issue of appointment of counsel, “[t]he issue being raised in this case is not ‘simply’ the appointment or assignment of counsel from an administrative perspective, but extends to the substantive nature of the representation by Counsel, and the proper fulfillment of obligations of legal representations towards the Accused by Counsel.”²⁶ Accordingly, a matter of administrative decision-making may become a matter of judicial decision-making when the issue substantially affects the fair conduct of trial proceedings.

¹⁸ *Popović et al.*, IT-05-88-A, Decision on Vinko Pandurević’s Urgent Motion for Provisional Release on Compassionate Grounds, 11 January 2015, para.5 (“whether an applicant satisfies these requirements is to be determined on a balance of probabilities”); *Sainović et al.*, IT-05-87-A, Decision on Sretan Lukić’s Third Motion for Provisional Release, 3 September 2010, para.5; *Perišić*, IT-04-81-T, Public Redacted Version of Decision on Mr Perišić’s Motion, 15 July 2010, para.15.

¹⁹ *Karadžić*, IT-95-5/18-AR73.13, Public Redacted Version of the 25 July 2014 Decision on Appeal from Decision on Indigence, 2 December 2014, para.12; *Prlić et al.*, Public Redacted Version of the 25 July 2013 Decision on Slobodan Prajlak’s Motion, 28 August 2013, para.35.

²⁰ ICTR Rule 92bis (C)(ii).

²¹ *Bagosora et al.*, ICTR-98-41-T, Decision on Motion Concerning Alleged Witness Intimidation, 28 December 2004, para.9 (“The Chamber is unable, based on the evidence presented, to find on the balance of probabilities that the Rwandan authorities have intimidated Defence witnesses.”)

²² *Simba*, ICTR-01-76-A, Judgement, 27 November 2007, para.60 (“balance of probabilities”).

²³ Impugned Decision, para.29.

²⁴ See e.g. *Bemba et al.*, ICC-01/05-01/13-955, paras.30-41.

²⁵ *Hadžihasanović*, IT-01-47-PT, Decision on Prosecution’s Motion, 26 March 2002, para.14 (“[t]he basis for this action by a Chamber rests with its power and duty to guarantee a fair trial and the proper administration of justice as set forth in the Statute”).

²⁶ *Blagojević & Jokić*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion, 3 July 2003, para.27.

10. The suspension of both of the Defence's investigators on the eve of commencement of trial has such a direct impact on the fair and expeditious conduct of proceedings. The usual standard for resolution of trial-related interlocutory matters, in the absence of a statutory standard to the contrary, is therefore the civil standard – i.e. “balance of probabilities.” Further, the burden usually rests on the moving party, which in this case is the Prosecution.
11. Sound policy concerns support this standard. Permitting Defence teams to be dismantled based upon “reasonable grounds to believe” implies that an uncorroborated allegation by a witness would be sufficient. Past experience shows, however, that investigators and others who come into direct contact with witnesses are not infrequently importuned by unsubstantiated allegations of misconduct, whether out of the witness's disappointed expectation of payment of money,²⁷ or hostility towards the party.²⁸ P-0190, as reflected in words that he attributes to himself, demonstrates both an insistence on being paid for his testimony,²⁹ and a strong antipathy to Mr. Ntaganda by trying to induce his interlocutors to incriminate him while secretly recording their conversation.³⁰ Witness protection concerns must be balanced against the needs of a fair trial, including ensuring that members of the Prosecution and Defence who are on the front-line of investigations are

²⁷ *In re Sebureze & Turinabo*, MICT-13-40-R90/MICT-13-41-R90, Public Redacted Version of Decision on Allegations of Contempt, 17 July 2013, p. 17; *Karempera et al.*, ICTR-98-44-T, Decision on Remand Following Appeal Chamber's Decision of 16 February 2010; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on the Prosecutor's Further Allegations of Contempt, 30 November 2001.

²⁸ *Nzabonimana*, ICTR-98-44D-T, Decision on Motion for Contempt Proceedings, 18 November 2011; *Prosecutor v. Šešelj*, IT-03-67-T, Redacted Version of the 'Decision on Motions By The Prosecution and the Accused to Instigate Contempt Proceedings Against Ms. Dahl (From the Office of the Prosecutor) and Mr. Vučić (Associate of the Accused) Dated 10 June 2008, 8 July 2008.

²⁹ DRC-OTP-2086-0785.

³⁰ On more than one occasion, knowing that he is secretly recording the conversation, P-0190 encourages his interlocutors to state that Mr. Ntaganda had committed crimes: DRC-OTP-2086-0785. P-190 also alleges in his statement that one of the other interlocutors confirmed that Mr. Ntaganda “raped” two women (DRC-OTP-2083-0210 (“a été violée par Bosco”)), whereas the Swahili word used by the interlocutor on the transcript means only to “have sex” (DRC-OTP-2086-0779, (“il a couché avec sa femme”) (“il paraît qu’il a couché avec la femme de LINGAGA”). These are indications that P-0190 is motivated by a strong *animus* against Mr. Ntaganda.

not too easily dismissed from their functions. This should be a particular concern in respect of allegations put forward by an opposing party in an adversarial proceeding, instead of, for example, an *amicus curiae* or special prosecutor.³¹

12. The “balance of probabilities” standard is also necessary given the absence of any element of wilfulness in the issue as defined by the Trial Chamber. In *Nchamihigo*, by contrast, no order for suspension or sanctions was issued against Prosecution officials who had negligently, as opposed to intentionally, disclosed protected Defence witness identities.³² Assuming that the Defence investigators are to be subject to removal without any such requirement, then the least that should be required is proof “conduct sufficiently detrimental to the integrity of the proceedings”³³ to a balance of probabilities standard.
13. The Trial Chamber is respectfully requested, based on these new arguments and information, to reconsider the standard by which it will adjudicate suspension of the two investigators. The appropriate standard, given the direct impact that such a suspension may have on the conduct of Defence preparations and on the trial itself, is the civil standard of “balance of probabilities,” with the burden resting on the Prosecution.

C. The Failure to Order Disclosure of At Least One Known Statement of P-0190, Based on Information Revealed for the First Time in the Prosecution Response, Was Erroneous

³¹ Allegations of contempt against members of team in pending proceedings before the *ad hoc* tribunals are often handled by *amici curiae*. See e.g. *Nzabonimana*, ICTR-98-44D-T, Order for Supplemental Submissions, 9 November 2010.

³² *Nchamihigo*, ICTR-2001-63-T, Decision on Defence Motion, 9 August 2007, para.10 (“the Chamber concludes that the Prosecution did not intend to disclose the fact that the Defence was intend[ing] to call those witnesses to testify before the Tribunal and therefore breach the Chamber’s order”). Although the requested relief was for a finding of contempt, it would have been open to the Trial Chamber to adopt the lesser remedies of imposing sanctions or ordering the appointment of an *amicus curiae* to investigate.

³³ Impugned Decision, para.30. The Defence reserves the right to challenge the absence of any willfulness element even in respect of suspension.

14. The Trial Chamber held that not all information obtained from a witness “would necessarily constitute a statement within the meaning of Rule 76 of the Rules.”³⁴ The Trial Chamber also found that the Defence had not substantiated the existence of undisclosed statements,³⁵ and found that the Defence’s reference in the reply to the existence of an undisclosed audio-recording of an interview with P-0190 that occurred on 26 June 2015 would be “disregarded.”³⁶
15. This reasoning constitutes, in the Defence’s respectful submission, a clear legal error that warrants the Trial Chamber’s reconsideration. Rule 76 (3) categorically requires that “statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.” “Statements” are not limited to formal statements or interviews, but include all recordings of information conveyed by a witness in whatever form. As stated by the Appeals Chamber:

The Appeals Chamber agrees with the Prosecutor and Messrs Banda and Jerbo that the ordinary meaning of the term “statement” as used in rule 76 *is broad* and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded.³⁷

16. The Prosecution in its Response, relying on ICTY caselaw, pithily defined “statement” as nothing more than “an account of facts presented by a witness.”³⁸ This case law expressly holds that “as a matter of law [...] ‘interview notes’ are statements.”³⁹ The Prosecution has, in previous cases,

³⁴ Impugned Decision, para.19.

³⁵ *Id.* para.22.

³⁶ *Id.* para.16.

³⁷ *Prosecutor v. Banda & Jerbo*, ICC-02/05-03/09-295, para.23 (italics added). See *Ruto & Sang*, ICC-01/09-01/11-743-Red, para.20 (“This indication is sufficiently broad, for purposes of disclosure, to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a ‘statement’ of the witness for purposes of impeachment on the stand or submission under Rule 68 of the Rules”).

³⁸ ICC-01/04-02/06-705-Conf-Exp (“Response”), paras.29,31; ICC-02/05-03/09-253, paras.11-13.

³⁹ *Milutinović et al.*, IT-05-87-T, Decision on Renewed Prosecution Motion, 15 January 2007, para.15; *Lukić & Lukić*, IT-98-32/1-T, Decision on Milan Lukić’s Motion, 3 November 2008, para.16 (“[t]he interview Notes clearly fall within the meaning of ‘witness statement’”); *Stanišić and Simatović*, IT-03-69, Decision on Prosecution Urgent Motion, 12 October 2011, para.27 (“‘statement’ in Rule 66(A)(ii)

routinely disclosed investigators' witness interview notes, subject only to redaction of any "particular analysis or personal opinion" of the investigator that may fall under Rule 81(1).⁴⁰ "Personal analyses" or "personal opinions" do not encompass questions put to a witness⁴¹ or factual information. Further, even such "personal opinions" and "analyses" are disclosable if they fall within the scope of Article 67(2) of the Statute.⁴²

17. The notion of "statements" as used in Rule 76(3), as this previous jurisprudence demonstrates, is indeed "broad". It must be broad and all-encompassing to ensure that formal categorization does not defeat the substance of the Prosecution's disclosure obligations. Disclosure is required of any and all information obtained from the witness whether recorded as handwritten notes, "investigator's notes, "screening notes", memoranda, emails, "personal information sheets", or set down in any other medium or any other title whatsoever. Any other approach would permit the Prosecution to control, at its own discretion, the scope of disclosure under Rule 76(3) depending on the medium of recording the information or its formal designation. No caselaw supports a contrary approach, and the Impugned Decision relies on no legal sources to support any narrow definition of "statements" as that term is used in Rule 76(3).⁴³

has been interpreted broadly in the Tribunal's case law to include interview notes [...] the far-reaching Prosecution disclosure obligations would, in any event, cover interview notes – whether exculpatory or incriminating.")

⁴⁰ ICC-01/04-01/06-2625-Red, para.26 ("the fact that the document is internal work production does not, of course, mean that all information contained therein is protected against disclosure.")

⁴¹ *Niyitegeka*, ICTR-96-14-A, Appeal Judgment, 9 July 2004, paras.33-34 ("[a] question once put to a witness is not an internal note anymore; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules.")

⁴² *Haradinaj et al.*, IT-04-84-PT, Order on Disclosure, 12 December 2006 ("even if the investigator's memorandum did qualify as internal work product under Rule 70(A), the Prosecution would still be obliged to disclosure any portions of the memorandum that suggest the innocence or mitigate the guilt of the Accused, or affect the credibility of Prosecution evidence.")

⁴³ Impugned Decision, para.19.

18. The Trial Chamber also found that the Defence's assertions about the existence of undisclosed statements of Witness P-0190 were "speculative"⁴⁴ whilst, at the same time, declining to consider the Defence's submission⁴⁵ in its Reply about the confirmed existence of an undisclosed audio-recording of a conversation between OTP investigators and P-0190 on 26 June 2015. The Trial Chamber found that this reference "exceed[ed] the scope of what was authorized" and, in any event, also found that "it does not consider such information to be necessary for the purposes of responding to the Request."⁴⁶
19. The first the Defence learned of an interview between P-0190 and the Prosecution was the Prosecution's Response of 9 July 2015.⁴⁷ Accordingly, the Defence was not in a position to bring this information to the Trial Chamber's attention in its Motion of 2 July 2015, or even during the status conference of 3 July 2015. Even assuming that any reference to this undisclosed audio-file did indeed exceed the scope of the reply as authorized by the Trial Chamber, the the existence of an interview, and the non-disclosure of the audio, was properly before the Trial Chamber by way of the Prosecution's Response.⁴⁸ Even if referring to this new information did exceed the scope of the reply authorized by the Trial Chamber, the Defence respectfully submits that the Trial Chamber should have exercised its discretion to consider this submission in the interests of justice and judicial economy.
20. The non-disclosure of the audio of the Prosecution's five-hour interview with P-0190 is not obviated or even substantially mitigated by its disclosure of a witness statement summarizing that conversation.⁴⁹ P-0190 is the suspended investigator's principal accuser. The content of their conversation immediately prior to P-0190 commencing his surreptitious recording of their

⁴⁴ *Id.* para.22.

⁴⁵ Reply, para.12.

⁴⁶ Impugned Decision, para.16.

⁴⁷ Response, para.17.

⁴⁸ ICC-01/04-02/06-705-Conf-Exp, para.17.

⁴⁹ DRC-OTP-2086-0948.

conversation – which he apparently discusses in this 26 June 2015 interview with the OTP⁵⁰ – could be of vital importance to assessing the gravity of certain disclosures by the investigator during the portion of the conversation that was recorded. There can be no dispute that the audio, as well as any transcript thereof, is immediately disclosable to the Defence as a statement pursuant to Rule 76(3), as well as being highly material. Nevertheless, that transcript, without any explanation or justification, has still not been disclosed to the Defence. This substantially impairs the Defence’s ability to assess fully the circumstances, and to ask the suspended investigator all relevant and necessary questions.

21. The Trial Chamber is accordingly requested to reconsider its finding that the Prosecution does not have an obligation to disclose any and all information obtained from Witness P-0190, recorded in any form whatsoever; to reconsider its refusal to take account of the non-disclosure of the audio of the 26 June 2015 interview with Witness P-0190; and to reconsider whether it is indeed “speculative” to infer that a note of conversations with P-0190 must have been the basis of information communicated by the Prosecution to the Defence during a meeting on 11 March 2015.⁵¹ The Trial Chamber is respectfully requested, given these express and implied indications of non-disclosure, to order the Prosecution to disclose any audio-recordings, transcripts, notes, memoranda, emails written by investigators, or any other record whatsoever of the factual information conveyed by Witness P-0190 to the Prosecution. This would include, most importantly, the original record of a lengthy interview with main complainant, Witness P-0190, conducted less than a month ago.

⁵⁰ DRC-OTP-2086-0952, para.21 (“Avant la conversation enregistrée, durant le trajet en voiture jusqu’au Washing Bay avec Jose et LOGO [...]”).

⁵¹ Motion, para.31.

D. The Inability to Consult Adequately With the Investigators, and the Prosecution's Failure to Act Expeditiously, Justify Reconsideration of the Denial of the Request for Extension of Time

22. The Trial Chamber denied the Defence's request for additional time to consult the two investigators, *inter alia*, on the basis that: (i) "the Defence appears to have been on notice of certain allegations regarding [REDACTED]'s interaction with P-0190 since March 2015";⁵² (ii) that the Defence "is already in possession of certain relevant information from the Investigators";⁵³ and (iii) the assumption that communications with the investigators "need not be done in person."⁵⁴
23. The information gathered by the Defence prior to the embargo on contact arising out of the Trial Chamber's order of 23 June 2015 has now been disclosed to the Trial Chamber.⁵⁵ The information, particularly in respect of the investigator who was suspended by the Trial Chamber, is limited to the circumstances that led to his failure to know that he was meeting with a Prosecution witness, P-0190. The serious allegations of misconduct *during that meeting* were not known to him or to the Defence when the statement was given.
24. The Trial Chamber may not have fully appreciated the limited nature of this information at the time of the Impugned Decision. Those statements demonstrate, contrary to the suggestion in the Impugned Decision, that the Defence had no "notice" of the core allegations against the investigators in March, nor could it have gathered any information that is relevant to the allegations proffered by Witness P-0190. This new information alone is a sufficient ground to merit reconsideration.

⁵² Impugned Decision, para.26.

⁵³ *Id.* para.31.

⁵⁴ *Id.*

⁵⁵ ICC-01/04-02/06-717-Conf-Exp.

25. An independent and sufficient ground of reconsideration is the Trial Chamber's finding, made *proprio motu* and without the benefit of submissions from the parties or the VWU, that consultations could be conducted with the investigator's "not necessarily in person."⁵⁶ The consultations will require, at a minimum, the suspended investigator listening to the audio-file, preferably concurrently with the Defence team, and then providing comments or explanations. This scenario in itself poses substantial logistical difficulties given the quality and capacity of communications with the places where the investigators reside. The Defence is working with the Registry to facilitate this communication as quickly as possible, but nevertheless respectfully requests the Trial Chamber to consult the VWU and the Registry as to viability of undertaking these communications satisfactorily by 31 July 2015.

26. No consideration is given in the Impugned Decision to the untimeliness of the Prosecution request to suspend the investigators. The core of P-0190's allegations was known to the Prosecution as of 24 March 2015. A final statement of Witness P-0190 was produced, in French, on that very date. Even assuming that it was prudent and responsible for the Prosecution to delay filing its motion until a transcript of the key conversation had been obtained, no explanation has been offered as to why it should take 85 days⁵⁷ to produce a transcript and translation of a conversation upon which the Prosecution relies to suspend all of the Defence's investigators. The Impugned Decision does not address this issue, which is central to the exercise of this particular discretion.

27. The Trial Chamber is accordingly requested to reconsider the denial of the request to extend the deadline for responding to the Prosecution motion to suspend the investigators on the basis of: (i) new information showing that the Defence did not have any information relevant to the main allegations that

⁵⁶ Impugned Decision, para.31.

⁵⁷ ICC-01/04-02/06-658-Cong-Red, fn.8; para.18.

need to be determined by the Trial Chamber before the embargo on communications with the investigators; (ii) the additional information provided here about the inadequacy of electronic communications in order to assess the validity of the investigators' explanations; and (iii) the failure to consider the Prosecution's delays in bringing the Motion in deciding whether to grant the Defence an extension of time to respond. These three factors, taken individually or cumulatively, reflect a clear error of reasoning whose consequence would be to unjustly curtail the Defence's opportunity to respond to the suspension motion.

III. LEAVE TO APPEAL

A. Applicable Law

28. A decision is subject appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

29. The Appeals Chamber has defined an "issue" as "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."⁵⁸ "Essential" in this context must be taken as meaning essential to some judicial disposition, and "not merely a question over which there is disagreement or conflicting opinion."⁵⁹ The notion of "materially advance" involves examination of the degree to which an "authoritative determination" of the "matter posing for decision" will "rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial."⁶⁰ The applicable standard is may – not "will" – materially advance.

⁵⁸ ICC-01/04-168, para.9.

⁵⁹ ICC-01/04-01/06-1191, para.8.

⁶⁰ ICC-01/04-168, para.14.

30. A request for certification is not concerned with whether a decision was correctly reasoned. “Materially advance” must therefore be assessed according to the consequences of proceeding without interlocutory appeal on the assumption that the decision is incorrect.

B. The Issues Identified Above Are Well-Defined and “Essential” to the Impugned Decision’s Disposition of the “Matters”

31. Each of the issues is well-defined: (i) the correctness of the standard by which the Trial Chamber will adjudicate the suspension of the investigators; (ii) the failure to order the disclosure, pursuant to Rule 76(3), of all statements of P-0190, including one statement that is known to exist, and at least one other that must exist; and (iii) the failure to extend the deadline to permit adequate consultations with the individuals whose conduct is primarily at issue. Each of these issues correlates directly to a legal disposition in the Impugned Decision that affects, irreversibly, the disposition of the Suspension Motion which, in turn, will have major consequences for the Defence. These are not merely questions “over which there is disagreement or conflicting opinion.”

C. The Issues Significantly Affect the Fair and Expeditious Conduct of Proceedings

32. The suspension of all Defence investigators on the eve of trial is a matter that significantly affects the fairness and expeditiousness of proceedings. The Impugned Decision purports to define the legal standard by which that suspension is to be assessed. Having been definitively determined in the Impugned Decision, rather than deferred for determination in an eventual decision on suspension, the issue is immediately appealable. The propriety of the procedure for determining Suspension Motion is likewise now immediately appealable, having been determined in the Impugned Decision.

33. The issues significantly affect both the fairness and the expeditiousness of proceedings. The Defence’s ability to cross-examine, especially the earliest Prosecution witnesses, will be substantially prejudiced by suspension of the

Defence's investigators. Any reduction of the Defence's capacity to investigate in the coming weeks, or to rely on investigations conducted by the two investigators, will substantially prejudice the effectiveness of cross-examination. The expeditiousness of trial proceedings may well also be affected if the Defence is required to request repeated adjournments because of lack of access to investigators, or doubt about the reliability of past investigations.⁶¹ Decisions whose effect is to delay investigations have warranted leave to appeal.⁶² This is concrete and irremediable prejudice that affects both trial fairness and expeditiousness.

34. Imagine, for example, that the Defence has information derived from one of the investigators that P-0190 is lying in respect of a particular incident, and that three witnesses can reliably provide contradictory testimony on the issue. The reliability of the information will affect how it can be used on cross-examination. A suspension of the investigators, however, would presumptively imply that the Defence must either doubt its reliability, or double-check its reliability. If those measures cannot be undertaken in time, the cross-examination strategy may be needlessly altered to Mr. Ntaganda's detriment; alternatively, the Defence may subsequently discover that the initial investigations were sound and provide a ground of impeachment requiring P-0190's recall. Either way, there is a serious danger of unfair prejudice to Mr. Ntaganda's defense, or repeated requests for recall of witnesses in an attempt to remedy such prejudice.
35. The lack of disclosure in respect of P-0190 not only potentially taints the propriety of the decision to suspend the investigators, but also cross-examination of P-0190 himself. Matters affecting the efficacy of cross-

⁶¹ The standard is whether the decision has the "potential to significantly affect the expeditiousness of proceedings." ICC-01/04-01/07-3327, para.14.

⁶² ICC-01/04-01/07-116, p.6 ("the second issue would also significantly affect the expeditious conduct of the proceedings because, depending on the approach taken, it may have an impact on how the Prosecution goes about selecting its witnesses for the purpose of the confirmation hearing, or it may delay certain investigative steps by the Defence.")

examination – in particular, disclosure⁶³ – have in the past been recognized as sufficiently significant to fairness of proceedings as to require interlocutory resolution.⁶⁴

D. Immediate Resolution May Materially Advance the Proceedings

36. Appellate determination of the correctness by which the removal of the Defence investigators is determined will give “legal certainty”⁶⁵ to an issue that will otherwise, if wrongly decided, cause irremediable prejudice to the trial. This certainty will also avoid adjournments triggered by an unnecessary removal of the investigators. Conversely, immediate intervention by the Appeals Chamber setting a higher standard to determine whether to suspend the investigators, or ensuring that the suspension process is procedurally proper, will ensure that the case can proceed on a proper footing without an unnecessary removal of investigators that provokes adjournments or the recall of witnesses.
37. A further consideration in respect of “materially advance” is that an appeal on the merits at the end of the case would not easily be able to remedy the prejudice arising from an erroneous removal of the Defence’s investigators. An immediate resolution of these issues will ensure that the investigators’ suspension is adjudicated without any danger of a retrospective finding of error that cannot subsequently be remedied, and will avoid the serious prejudice that could be caused to the fairness and expeditiousness of proceedings.

⁶³ ICC-01/04-01/07-116, p.6.

⁶⁴ ICC-01/04-01/06-514, p.12 (“redaction of the names of Prosecution sources could affect the ability of the Defence to fully challenge the Prosecution evidence at the confirmation hearing [...] and that therefore the Fourth Issue is directly related to the fairness of the proceedings”); *Simić et al.*, IT-95-9-T, Decision on Prosecutor’s Motion, 28 April 2003 (“[Cross-examination] is an issue that would significantly affect the fair and expeditious conduct of the proceedings”).

⁶⁵ ICC-01/04-01/07-149, p.6 (“immediate resolution of the issue raised by the Defence would give legal certainty and would permit at this early stage of the proceedings in the case any necessary arrangements to be made”).

IV. CONCLUSION AND REMEDY REQUESTED

38. The Trial Chamber is respectfully requested to reconsider:

- (i) the standard adopted for determination of the Suspension Motion;
- (ii) the failure to order the disclosure, pursuant to Rule 76(3), of all statements of P-0190; and
- (iii) the failure to extend the deadline to permit adequate consultations with the individuals whose conduct is primarily at issue.

If the Trial Chamber determines that any of these three issues should not be reconsidered, then leave is respectfully sought to appeal any such issues.

RESPECTFULLY SUBMITTED ON THIS 19TH DAY OF FEBRUARY 2021

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