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**International
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Court**



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No.: **ICC-01/04-02/06**
Date: **19 February 2021**

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 Defence's expedited motion to vary the time limit to respond to the 'Prosecution's urgent request for immediate suspension of Defence investigators and other measures'" (ICC-01/04-02/06-691-Conf-Exp)", 9 July 2015, ICC-01/04-02/06-705-Conf-Exp

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

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Introduction

1. Trial Chamber VI (“Chamber”) ordered the interim suspension of one Defence investigator, as well as other measures, and ordered the Defence to submit a response to these measures within a specified time frame.¹ The Defence now seeks an extension of the time to submit its response by 21 August 2015, on the basis that it requires additional disclosure. It further requests “leave to engage” Mr [REDACTED] and Mr Logo concerning allegations raised against them (“Expedited Motion”).²

2. On 3 July 2015, the Prosecution disclosed to the Defence a number of items it requested:
 - the audio file of the recorded conversation between Witness P-0190, Mr Logo and [REDACTED] on 7 March 2015 (“Recorded Conversation”);
 - photographs of the “registre” and “deux messages” mentioned by Witness P-0901 in his statement of 25 March 2015;
 - the handwritten notes taken by Witness P-0190 during his 24 March 2015 interview with the Prosecution; and
 - the available results of investigative measures taken to date in relation to Witness P-0190’s telephone.³

3. In addition, on 10 July 2015, the Prosecution will disclose an enhanced version of the Recorded Conversation and the preliminary report of the expert who prepared the enhancement, as well as a recent witness statement from P-0190

¹ ICC-01/04-02/06-667-Conf-Exp. The Chamber ordered the Defence to file its response within 10 days of notification of the Prosecution’s request. The Prosecution’s request is ICC-01/04-02/06-658-Conf-Red (“Prosecution’s Request”). The Prosecution filed a confidential redacted version of its request on 26 June 2015, making the Defence response due on or about 8 July 2015.

² ICC-01/04-02/06-691-Conf-Exp, p.15.

³ ICC-01/04-02/06-701-Conf-Exp.

dated 26 June 2015 regarding the Recorded Conversation and handwritten notes he took during this interview.

4. The Prosecution disagrees with the Defence that it requires disclosure of any further investigative measures that may have been undertaken before it can submit its response to the Prosecution's Request.
5. The Prosecution opposes the Defence request for disclosure of "any information obtained from Witness P-0190, during any contact with him, during its investigations" because it is overly broad and amounts to a fishing expedition.⁴ The Prosecution has complied with its disclosure obligations pursuant to rules 76 and 77 of the Rules of Procedure and Evidence ("Rules") and article 67(2) of the Rome Statute ("Statute").
6. The Prosecution does not object to the Defence discussing the allegations with Mr Logo and Mr [REDACTED], provided Mr Logo and Mr [REDACTED] are not "engaged" in any way to carry out any investigative steps and are only provided limited access to confidential material strictly necessary to respond to the allegations against them.
7. The Prosecution does not agree that a variation of the time limit until 21 August 2015 is necessary or reasonable in the circumstances. The Prosecution does not oppose a limited variation of the time limit until no later than 16 July 2015. This should be sufficient time for the Defence to review the additional material recently disclosed.
8. Lastly, the Defence should already be in a position to submit, within the original 10-day time limit as ordered by the Chamber, information regarding: (a) the degree of access to confidential material, which had been permitted to the First

⁴ ICC-01/04-02/06-691-Conf-Exp, p.14.

and Second Investigators; and (b) the existence or otherwise of statements by the First and Second Investigators addressing their contacts with P-0190.⁵

Confidentiality

9. This filing is classified as “Confidential, *Ex Parte*” – Prosecution, Defence, and Victims and Witnesses Unit (“VWU”) only, pursuant to regulation 23*bis* of the Regulations of the Court (“RoC”), because it contains confidential information related to witnesses and their security. The Prosecution submits that it is appropriate to file a public redacted version of the Prosecution’s Request and this response, with redactions to protect the security of witnesses.

Procedural History

10. On 19 June 2015, the Prosecution submitted the Prosecution’s urgent request for the immediate suspension of Defence investigators and other measures.⁶
11. On 23 June 2015, the Chamber ordered interim measures in relation to a Defence investigator and related matters⁷ including: (a) the immediate suspension of the First Investigator, Mr Logo, from any involvement in the case and his access to all confidential information; (b) that steps be taken to recover all confidential case-related material from the First Investigator; (c) that the First and Second Investigators have no contact with any person in the Detention Centre; and (d) that the Defence file any response to the Prosecution’s Request within 10 days of its notification to the Defence, including indicating the degree of access to confidential information, which had been permitted to the First and Second Investigators and the existence or otherwise of statements by the First and Second Investigators addressing their contacts with P-0190. The Chamber

⁵ ICC-01/04-02/06-667-Conf-Exp, pp.8-9.

⁶ ICC-01/04-02/06-658-Conf-Exp.

⁷ ICC-01/04-02/06-667-Conf-Exp.

deferred its consideration of the remainder of the Prosecution's Request, as well as of the appropriateness or otherwise of continuing the interim orders put in place, pending receipt of the Defence's submissions.⁸

12. On 26 June 2015, the Prosecution filed the confidential redacted version of its request.⁹

13. On 2 July 2015, the Defence submitted its Expedited Motion.¹⁰

14. On 6 July 2015, the Chamber shortened the deadline for the Prosecution's response to the Expedited Motion to 9 July 2015.¹¹

Prosecution's Submissions

1. Requests for disclosure of further materials

15. The Prosecution does not object to the Defence request to obtain access to materials that it agrees are necessary to assess the Prosecution's Request. As a result, the Prosecution disclosed to the Defence on 3 July 2015:¹² (a) the audio file of the Recorded Conversation;¹³ (b) photographs of text messages sent to P-0901's phone – the pictures of the "*registre*" and "*deux messages*" mentioned by Witness P-0901 in his statement of 25 March 2015;¹⁴ (c) handwritten notes taken by Witness P-0190 during his 24 March 2015 interview with the Prosecution¹⁵; and (d) a report on the digital forensic examination of the mobile telephone of P-

⁸ ICC-01/04-02/06-667-Conf-Exp, p.8.

⁹ ICC-01/04-02/06-658-Conf-Red.

¹⁰ ICC-01/04-02/06-691-Conf-Exp.

¹¹ E-mail communication from Trial Chamber VI,

¹² ICC-01/04-02/06-701-Conf-Exp.

¹³ DRC-OTP-2084-0966.

¹⁴ 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.

¹⁵ DRC-OTP-2083-0213.

0190 prepared by the Prosecution's Scientific Response Unit, explaining the process of extraction of the audio file of the Recorded Conversation.¹⁶

16. In addition, on 3 July 2015 the Prosecution disclosed the audio-recording of P-0190's interview with the Prosecution dated 24 March 2015.¹⁷

17. On 10 July 2015, the Prosecution will disclose an enhanced version of the Recorded Conversation and the preliminary report of the expert who prepared the enhancement,¹⁸ a recent witness statement of 26 June 2015 of P-0190 regarding the Recorded Conversation and his handwritten notes taken during that interview.¹⁹

18. The Defence seeks additional disclosure of information to which the Prosecution responds as follows.

(a) The Defence does not require any additional information about further investigative measures before it responds to the Prosecution's Request

19. The Defence requests additional disclosure in relation to any further investigative measures that may have been undertaken by the Prosecution before it can respond to the Prosecution's Request.

20. First, the Defence seeks the results of any further investigative measures taken in relation to the mobile telephone of Witness P-0901. The Prosecution confirms that the results of investigative steps taken in relation to P-0901's mobile telephone undertaken to date have already been disclosed.

21. Secondly, the Defence requested disclosure of any telephone records of P-0190 or P-0901 from the telephone providers in [REDACTED]. The Prosecution

¹⁶ DRC-OTP-2084-0957.

¹⁷ DRC-OTP-2081-0937.

¹⁸ DRC-OTP-2086-0978 and DRC-OTP-2086-0981.

¹⁹ DRC-OTP-2086-0948; DRC-OTP-2086-0955.

confirms that it has not sought any such records, as it does not deem it necessary to do so for the purposes of the Prosecution's Request.

22. Thirdly, the Defence requests the results of any investigations into the authenticity or reliability of the Recorded Conversation.²⁰ The Defence acknowledged, both by email on 8 March 2015 and in person on 11 March 2015, that one or both Defence investigators "inadvertently" contacted P-0190. Moreover, on 11 March 2015, the Defence confirmed to the Prosecution that P-0190 met one of its investigators. P-0190 provided the following telephone number to the VWU for [REDACTED]: [REDACTED] .

23. The content of the Recorded Conversation further identifies the speakers. P-0190 and [REDACTED] are identified by name while the First Investigator is identified by: (i) his reference to having been part of the Defence team for Germain Katanga and now having joined the Ntaganda Defence team,²¹ (ii) his receipt of a telephone call from Mr Ntaganda's Counsel during the Recorded Conversation and discussion of upcoming meetings with him;²² and (iii) his reference to Mr Ntaganda's current Defence Counsel and former resource person by name – Stéphane and [REDACTED],²³ and [REDACTED],²⁴ respectively - as well as his clarification that (former Defence counsel for Mr Ntaganda) "Marc"²⁵ is no longer there). Finally, the voices in the audio-medium are recognisable so that once the Defence has listened to the audio file it should itself be in a position to assess whether any of the voices recorded include that of their First Investigator, Mr Logo. The Defence must clearly indicate to the Chamber and to the Prosecution if it disputes that the individual in the Recorded Conversation is Mr Logo.

²⁰ ICC-01/04-02/06-691-Conf-Exp, para.19.

²¹ ICC-01/04-02/06-658-Conf-Anx4, p.5, lns.74-88.

²² ICC-01/04-02/06-658-Conf-Anx4, p.36, lns.1266-1284.

²³ ICC-01/04-02/06-658-Conf-Anx4, p.11, lns.312-326.

²⁴ ICC-01/04-02/06-658-Conf-Anx4, p.5, lns.83-88.

²⁵ ICC-01/04-02/06-658-Conf-Anx4, p.11, lns.308-309.

24. The Prosecution considers that the Defence is able to respond to the Prosecution's Request on the basis of disclosures provided to date; and, in particular the audio file of the Recorded Conversation itself.

(b) There is no obligation to disclose every prior contact with P-0190

25. The Defence alleges that the Prosecution has not disclosed all of the information obtained from Witness P-0190 by representatives of the Prosecution from 12 February 2015 until 24 March 2015 and refers to information provided by the Prosecution on 11 March 2015 that [REDACTED] told P-0190 that he had to switch sides.²⁶ The Prosecution confirms that the VWU reported to the Prosecution on 19 February 2015 that P-0190 stated that [REDACTED] said to him that *"he will have to switch side or it will be his problem"*. This information was also later communicated to the Defence in the VWU's filing regarding potential witness interference.²⁷

26. On 6 July 2015, the VWU informed the Prosecution that P-0190 reported that [REDACTED] had allegedly told him on 10 or 11 February 2015: *"forget about testifying against Bosco, be a witness for the Defence"*. [REDACTED] also reportedly told P-0190: *"we will not get you in [REDACTED] because [REDACTED], but don't forget [REDACTED]"*.

27. The Defence further requests that the Chamber order the Prosecution to disclose to the Defence *"any information obtained from Witness P-0190, during any contact with him, during its investigations"*.²⁸ The Prosecution has already disclosed all

²⁶ ICC-01/04-02/06-691-Conf-Exp, paras.30-31.

²⁷ ICC-01/04-02/06-634-Conf-Exp-Anx, p.4: "[REDACTED]: A Prosecution witness (DRC-OTP-0190) reported to the VWU that he had been contacted several times at the beginning of 2015 by [REDACTED] who allegedly wanted him to meet with the Defence team of Mr Bosco Ntaganda. According to the Prosecution witness, [REDACTED] told him that they wanted to speak with him and that 'he will have to switch side or it will be his problem'".

²⁸ ICC-01/04-02/06-691-Conf-Exp, paras.32-33.

relevant information currently available in relation to P-0190, pursuant to article 67(2) of the Statute and rules 76 and 77 of the Rules.

28. The disclosure regime at the International Criminal Court is not an open file or *dossier* system; it is based on specific disclosure obligations as set out in the Statute and Rules. The Statute and Rules do not mandate disclosure of any contact with a witness, at any time and for whatever purpose, as set out below.

(i) Not every prior contact is disclosable under rule 76

29. First, not every prior contact with a witness is disclosable under rule 76, as not all communications come within the scope of a “prior statement” within the meaning of rule 76. A prior statement essentially means an account of facts as presented by a witness. This definition is consistent with definitions in ordinary usage and specialised legal contexts. It is also consistent with the definitions recognised by *ad hoc* tribunals construing similar statutory provisions.

30. The Oxford English Dictionary defines “statement” as a “written or oral communication setting forth facts, arguments, demands, or the like”.²⁹ Black’s Law Dictionary defines statement as “a verbal assertion or nonverbal conduct intended as an assertion.”³⁰ The French text of rule 76 uses the term “*déclarations*”, which is defined as an “action to declare; discourse or written document through which a person declares”.³¹ Similarly, the Spanish text of rule 76 uses the term “*declaraciones*”, which means a formal manifestation by a person with legal effect, especially one made by the parties, witnesses or experts

²⁹ Oxford English Dictionary, <http://www.oed.com/view/Entry/189259?rskey=IPoFc4&result=1&isAdvanced=false#eid> .

³⁰ Black’s Law Dictionary, 8th ed. (St. Paul, Minnesota: West Group, 2004), p.1444.

³¹ “Action de déclarer; discours ou écrit par lequel on déclare”. Le Petit Robert de la langue française: <http://pr.bvdep.com/>.

in proceedings.³² The ordinary and legal use of the term does not differentiate between a written and oral recording of a witness's words, or between a narrative of events and a question-and-answer transcription of an interview.

31. This concept of a statement as being no more than the witness's prior account is also consistent with decisions of the *ad hoc* tribunals. As the Appeals Chamber of the International Criminal Tribunal for Former the Yugoslavia ("ICTY") explained, like this Court's Rules, the rules of that tribunal "do not define what constitutes a witness statement. The usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime."³³

32. Similarly, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") considered that a document constitutes a statement if it meets the "question-answer" requirement, namely, that the Prosecution (either an investigator or lawyer in court) put questions to a witness, who in turn, provided a response related to the investigation or case.³⁴

33. Chambers of this Court have similarly treated as "statements" under rule 76 screening notes of an initial contact or interview with a person

³² "Manifestación formal que realiza una persona con efectos jurídicos, especialmente la que hacen las partes, testigos o peritos en un proceso.". See Diccionario de la Real Academia de la Lengua Española: <http://lema.rae.es/drae/?val=declaraciones>.

³³ *Prosecutor v Blaskic*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para. 15, at 2000 WL 33705569.

³⁴ *Niyitegeka v Prosecutor*, ICTR-96-14-A, Judgment, 9 July 2004, ("Niyitegeka Appeal Judgment"), paras.33-34. The ICTR Appeals Chamber held, when construing rule 66 that corresponds to the ICC's rule 76: "records of questions put to witnesses by the Prosecution and the answers given constitute statements pursuant to Rule 66(A)(ii) of the Rules".

specifically in connection with the investigation;³⁵ or statements or other records of questioning of persons the Prosecution intends to call as witnesses.³⁶

(ii) Not every prior contact is disclosable under rule 77 or article 67(2)

34. Contacts with a witness will only be disclosed if they are material to the preparation of the defence, intended for use by the Prosecution or if they fall under article 67(2).

(iii) The Prosecution has fulfilled its disclosure obligations

35. Finally, the Prosecution has acted in good faith when assessing whether or not information related to P-0190 and P-0901 is disclosable under rules 76 or 77, or article 67(2). The Defence has not shown any good reasons for doubting that the duty has been properly fulfilled.³⁷ The request to disclose any contact with P-0190, regardless of its nature or relevance, is not justified and is overly broad.

2. Leave to engage [REDACTED] and Mr Logo

36. The Prosecution does not object to the Defence liaising with Mr Logo and [REDACTED] regarding the allegations raised against them, including to provide information about prior investigations conducted by Mr Logo on behalf of the Defence. To the extent that the Defence is proposing that the First and Second Investigators be “engaged” in any way to carry out any investigative steps, before they secure the services of a new investigator,³⁸ the Prosecution submits that any such assistance would be inappropriate. Indeed, any

³⁵ ICC-01/09-01/11-743-Red, *Prosecutor v Ruto and Sang*, Decision on Defence Request to be provided with screening notes and Prosecution’s corresponding request for redactions, 20 May 2013, paras. 16, 20.

³⁶ ICC-02/05-03/09-295 AO2, *Prosecutor v Banda & Jerbo*, 17 February 2012, paras. 22-23.

³⁷ See e.g. ICC-01/05-01/08-632, para.22; ICC-02/11-01/11-351-Conf, para.17. See also e.g. *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para.183.

³⁸ See ICC-01/04-02/06-691-Conf-Exp, paras.50-51.

investigative assistance from the First Investigator would be in violation of the Chamber's order.

37. The Prosecution submits that the First and Second Investigators should only be provided with limited access to confidential material strictly necessary to respond to the allegations against them by P-0190 and P-0901.

3. Variation of the time limit to respond to the Prosecution's Request

38. The Prosecution agrees that it would be appropriate to grant the Defence additional time to review the newly disclosed materials prior to submitting its response to the Prosecution's Request, pursuant to regulation 35 of the RoC. However, it does not agree that it is necessary or reasonable to grant a variation of the time limit until 21 August 2015 for that purpose. The Prosecution submits that varying the deadline for a response to 16 July 2015 should be sufficient time to review the additional disclosed material.

39. Moreover, the Defence should already be in a position to submit, within the original 10-day time limit as ordered by the Chamber, information regarding: (a) the degree of access to confidential material, which had been permitted to the First and Second Investigators; and (b) the existence or otherwise of statements by the First and Second Investigators addressing their contacts with P-0190.³⁹

³⁹ ICC-01/04-02/06-667-Conf-Exp, pp.8-9.

Conclusion

40. For all the foregoing reasons, the Prosecution submits that:

- (a) the Defence's request for disclosure beyond that already provided by the Prosecution should be rejected;
- (b) the Prosecution does not oppose the Defence request for leave to speak with the First and Second Investigators for the limited purpose of obtaining information in response to the Prosecution's Request. The Prosecution submits that any access to confidential information granted to the First and Second Investigators should be strictly limited as necessary;
- (c) The Prosecution opposes the Defence request to "engage" the First and Second Investigators to the extent that it seeks leave to engage them to undertake any investigative steps; and
- (d) the Prosecution does not oppose the Defence request to vary the time limit for its response but only until 16 July 2015.



Fatou Bensouda
Prosecutor

Dated this 19th day of February 2021

At The Hague, The Netherlands