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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 Redacted Version

**Urgent request on behalf of Mr NTAGANDA seeking to postpone
the presentation of the Prosecution's Case until 2 November 2015 at the earliest
with Public Annex A**

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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Following a detailed evaluation of the state of Defence preparations for trial and further to the Chamber's Order Scheduling a Status Conference and Setting the Commencement Date for the trial issued on 9 October 2014 ("Chamber" and "Trial Preparation Order") and the Order requesting submissions on the conduct of proceedings pursuant to Rule 140 of the Rules and on modalities of victims' participation at trial issued on 12 March 2015 ("Trial Proceeding Order"), Counsel representing Mr NTAGANDA ("Mr NTAGANDA" or "Defence") hereby submit this:

**Urgent request on behalf of Mr NTAGANDA seeking to postpone
the presentation of the Prosecution's Case until 2 November 2015 at the earliest
with Public Annex A - "Defence Request"**

OVERVIEW

1. On 9 October 2014, the Chamber set the commencement date for the trial for 2 June 2015. The Chamber further held that "as this date corresponds with the commencement date desired by the parties, the Chamber stresses that unless compelling reasons are shown it will not be postponed".¹
2. While the Defence made it clear that Mr NTAGANDA wished to be tried without delay – adding that everything would be done to be ready by the date set by the Chamber for the commencement of the trial² – the current situation is such that the Defence is plainly not able to be ready for the presentation of the Prosecution's Case immediately following the Parties' opening statements scheduled for 2 June 2015. In fact, in the present circumstances set out herein, it would neither be in the interest of justice nor in Mr Ntaganda's interests to do so.
3. Thus, bearing in mind the duty of the Defence and pursuant to the right of Mr NTAGANDA to have adequate time and facilities to prepare for trial, the Defence is compelled to request that the presentation of the Prosecution's Case be delayed until 2 November 2015 at the earliest.

¹ Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382, 9 October 2014, para. 8.

² Status Conference, 11 September 2014, ICC-01/04-02/06-T-13-ENG, page 17, line 19-20; page 55, line 17-18.

4. Mr NTAGANDA cannot benefit from a fair trial unless the Defence has been able to adequately prepare for trial, which requires full knowledge and understanding of the Prosecution's Case, a meaningful opportunity to effectively investigate, the necessary human and financial resources, and sufficient *time*.

5. The exceptional volume of material disclosed by the Prosecution since 15 January 2015 – which has tripled the number of documents in the possession of the Defence until then – as well as the number of new witnesses announced make it impossible for the Defence to acquire the minimum required understanding of the Prosecution's Case by 2 June 2015. Indeed, the period between 15 January and 2 June – i.e. 4,5 months – is simply insufficient for the Defence to gain sufficient knowledge of what amounts to two thirds of the Prosecution's Case.

6. The Defence has a duty to investigate every possible avenue that can benefit the Accused, leaving no stone unturned. The inability of the Defence to review the vast quantity of material recently disclosed by the Prosecution – including the material related to more than 20 new witnesses – has significantly impeded and continues to impact the capacity of the Defence to effectively investigate the Prosecution's Case. Defence investigations have also been seriously handicapped by the delayed disclosure of the identity of numerous witnesses – at least until 2 March 2015 – as well as by the quantity of redactions applied to the material disclosed by the Prosecution.

7. In addition, the fact that the Defence investigations were significantly reduced a few months before the Decision on Confirmation of the Charges until few months after the change in lead Counsel, coupled with difficulties encountered by the Defence in securing the services of suitable investigators, have drastically precluded the Defence from fulfilling its duty to investigate. As a result, the Defence is not capable of being ready to properly challenge the evidence brought against the Accused by 2 June 2015.

8. Difficulties faced by the Defence in gaining full knowledge and understanding of the Prosecution's Case and sufficiently investigating the same to this day have been considerably compounded by the new composition of the Defence team – including

four members out of five having no previous knowledge of the Situation in the Democratic Republic of the Congo (“DRC”) – which has only been completed in November 2014, less than 7 months before the date set for the commencement of trial. In comparison with other cases of a lesser magnitude before the International Criminal Court (“Court”), such a short delay – bearing in mind the particular circumstances of this case – is clearly insufficient for a new Defence team to prepare for trial.

9. What is more, [REDACTED] severely detracted the ability of the Defence to focus on the case brought against the Accused and prepare for trial.

10. Furthermore, it is significant that the present schedule has not allowed the parties, to achieve any progress in considering any proposal for agreed facts as well as in the selection and instruction of joint experts. In addition, despite the fact that the Parties are scheduled to address these issues before 2 June 2015 and although the Defence has adopted a constructive approach, indicating its willingness to address these issues with the Prosecution, it is unlikely in the present circumstances that any meaningful progress will be made in this regard before the date set for the commencement of trial.

11. Consequently, taking stock of the significant work that remains to be accomplished to be adequately prepared to challenge the Case against the Accused, the Defence respectfully submits that an additional period of five months, i.e. until 2 November 2015, is the bare minimum required.

12. Lastly, Mr NTAGANDA takes this opportunity to underscore that postponing the presentation of the Prosecution’s Case until 2 November 2015 will not have serious repercussions on his right to be tried within a reasonable delay. Indeed, allowing the Defence the additional time requested to prepare will actually save time by allowing the parties to be fully ready as well as much more efficient and focused in the examination and cross examination of witnesses from the beginning of the presentation of the Prosecution’s case.

13. Above all, it is in the interest of justice to avoid embarking in the testimonial phase of the trial without allowing the Defence a fair opportunity to be able to challenge the evidence brought against the Accused. Should the presentation of the Prosecution's Case start before 2 November 2015, the Defence would clearly be put at a disadvantage, which must be avoided.

CONFIDENTIALITY

14. Pursuant to Regulation 23 bis (1) et (2) of the Regulations of the Court, this Defence Request is classified as Confidential and Redacted as it contains information related specifically to Defence investigations as well as information related to previous *EX PARTE* filings. Annex A is classified as *Public*.

DEFENCE SUBMISSIONS

I. Timing and scope of the disclosure by the Prosecution

15. Due to the exceptional volume of material disclosed by the Prosecution since 15 January 2015 – including: (i) evidence the Prosecution intends to rely upon at trial; (ii) exculpatory evidence in the possession or control of the Prosecution pursuant to Article 67(2) of the Statute, and; (iii) other documents and real evidence in the possession of the Prosecution which are material to the preparation of the Defence pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”) – the Defence is unable to acquire the minimum required understanding of the Case against the Accused to be ready for the presentation of the Prosecution's Case on 2 June 2015.

16. Indeed, it is imperative for the Defence to acquire before the presentation of the Prosecution's Case, at a minimum, an overall knowledge and understanding of the evidence the Prosecution intends to rely upon at trial. It is also essential for the Defence to review before the testimony of the first Prosecution witness, any exculpatory evidence as well as other evidence material to the Defence gathered by the Prosecution during its investigation.

17. In the absence of such knowledge, the Defence cannot be in a position to effectively challenge the Prosecution evidence and therefore to adequately represent the Accused.

18. In the present circumstances, considering that the material disclosed to the Defence has tripled since 15 January 2015, the time remaining until the presentation of the Prosecution's Case scheduled for 2 June, *i.e.* 4,5 months, is plainly insufficient for the Defence to gain the required knowledge of what amounts to two thirds of the Case against the Accused.

19. As of 15 January 2015, when providing its provisional list of witnesses and provisional list of evidence it intends to rely upon at trial, the Prosecution had disclosed to the Defence 2.636 items, comprising 36.407 pages of so-called incriminatory evidence.

20. On 31 January 2015, pursuant to the Trial Preparation Order, the Prosecution disclosed 5.201 additional items of so-called incriminatory evidence comprising 22.398 pages.

21. Of these 5.201 items: (i) 1.232 items were redisclosed for a second or a third time due to a change in the categorization of the document (exculpatory versus incriminatory and vice versa) and/or the extent of the redactions included therein; and (ii) 3.284 items are photos and videos which constitute underlying material for experts reports.

22. While the Prosecution would like to downplay the importance of these 4.516 new or modified items, this is wholly incorrect. Indeed, the importance for the Defence to have adequate knowledge and understanding of these documents before the presentation of the Prosecution's Case, is paramount and cannot be understated.

23. On 2 March 2015, 1.104 additional items of so-called incriminating evidence, most of which are directly related to new Prosecution witnesses, were disclosed to the Defence by the Prosecution.

24. The above mentioned additional disclosure of items since 15 January 2015 does not even take into account the new disclosure of exculpatory evidence (Article 68 (2)) and other evidence material to the preparation of the Defence (Rule 77)) – comprising hundred of items – which the Defence must also review and understand.

25. It is also significant that since 15 January 2015, 29 new witnesses have been added to the list of witnesses the Prosecution intends to rely upon at trial, which only goes to show how important it is for the Defence to gain knowledge and understanding of all additional material disclosed since that date.

26. Furthermore, the Defence wishes to stress that the 5.201 additional items disclosed, include 65 new videos for a total duration of 104 hours and 31 minutes. It is of the utmost importance for the Defence not only to review these videos with the Accused, but also to analyse the transcript thereof and assess their potential impact on the Case against the Accused, before the presentation of the Prosecution's Case. This work cannot be accomplished in isolation by one member of the Defence team. Quite to the contrary, the review of video material monopolizes the work of at least three members of the Defence team and is much more time consuming than the review of other types of evidence.

27. Lastly, the application of extensive standard and non-standard redactions to most items disclosed by the Prosecution is yet another significant obstacle faced by the Defence in gaining the required knowledge and understanding of these items.

28. In addition, the fact that the newly disclosed material since 15 January 2015 includes documents redisclosed for a second or a third time does not exempt the Defence from reviewing and analysing this material over again. Indeed, as the Prosecution explained in its *Prosecution Urgent Request to Postpone the Date of the Confirmation Hearing*, "redactions require multiple reviews"³. Hence, extensive redactions also considerably increase the workload of the Defence as it is necessary to

³ ICC-01/04-02/06-65, Prosecution Urgent Request to Postpone the Date of the Confirmation Hearing, 23 May 2013, para. 19.

re-evaluate any document redisclosed with less redactions, with a view to assessing the newly available information and determining the impact thereof on the totality of the case known to the Defence to that point.

29. In sum, as a direct result of the timing and scope of disclosure by the Prosecution, it is not possible for the Defence to acquire the minimum required understanding of the Case against the Accused to be ready for the presentation of the Prosecution's Case on 2 June 2015.

30. The extent of the additional disclosure by the Prosecution since 15 January 2015, simply could not be anticipated by the Defence when undertaking to do its utmost to be ready for trial on 2 June 2015, providing the fulfilment of certain conditions including full disclosure a minimum of three month before.

31. The inability of the Defence to acquire the minimum required knowledge of the Prosecution's Case also impacts on the ability of the Defence to effectively investigate the evidence expected to be adduced by the Prosecution at trial.

II. The inability of the Defence to adequately investigate

32. Due to its incapacity to adequately investigate the evidence expected to be adduced by the Prosecution, the Defence will be unable to be ready for the presentation of the Prosecution's Case on 2 June 2015.

33. The duty of the Defence to fully investigate every possible avenue, which can benefit the Accused cannot be under estimated. Indeed, "[t]he point of Defence investigation is to give the Accused a fair opportunity to challenge the charges and the evidence against him [...]"⁴

34. Unless the Defence is afforded a meaningful opportunity to investigate, it cannot be in a position to effectively challenge the Prosecution evidence and therefore to adequately represent the Accused.

⁴ ICC-01/04-01/07-3436-AnxI, para. 92.

35. The Defence has been unable to conduct the minimum necessary investigations due to: (i) the vast quantity of material recently disclosed by the Prosecution, including material related to 29 new witnesses; and (ii) difficulties encountered by the Defence in securing the services of suitable investigators.

(i) *The impact of the scope and format of disclosure by the Prosecution*

36. As the Prosecution made clear in its *Urgent Request to Postpone the Date of the Confirmation Hearing*⁵, investigating – *à charge et à décharge* – requires time.

37. More importantly, the conduct of investigations necessitates a sufficient knowledge and understanding not only of the allegations against the Accused but also of the sources of these allegations.

38. In addition, investigating the Case against the Accused compels the Defence to acquire knowledge of any exculpatory evidence gathered by the Prosecution as well as of other material in the possession or control of the Prosecution which is material to the preparation of the Defence. To provide but one example, it is imperative for the Defence to know if the Prosecution has interviewed a potential witness and decided not to rely on the evidence which can be provided by this witness at trial.

39. Due to the following factors, the Defence was prevented from gaining the minimum knowledge and understanding of the sources of the Prosecution allegations:

- (i) The volume of disclosure by the Prosecution since 15 January 2015 which has tripled the number of documents in the possession of the Defence until then;
- (ii) The addition of 29 new Prosecution witnesses, including 4 whose identity remains unknown to this day;
- (iii) The extent of standard and non-standard redactions applied by the Prosecution to virtually all material disclosed; and
- (iv) The delayed disclosure of the identity of numerous witnesses, including non-trial witnesses, at least until 2 March 2015.

⁵ ICC-01/04-02/06-65, Prosecution Urgent Request to Postpone the Date of the Confirmation Hearing, 23 May 2013, para. 1.

40. In addition, it is noteworthy that the Prosecution Pre-Trial Brief (“PTB”) – which comprises 250 pages and no less than 1854 footnotes and which clearly goes beyond the Case for the Prosecution presented during the Pre-Trial phase of the proceedings – was submitted on 9 March 2015, less than 3 months before the date set for the commencement of the trial.

41. Mastering the Prosecution’s PTB is also a prerequisite to effective investigations, in particular taking into consideration the multiple new references to evidence recently disclosed. To this day, the Defence has not been able to accomplish this work, which directly impacts its ability to investigate.

42. Regarding the application of redactions and the delayed disclosure of the identity of witnesses *per se*, it is significant that Defence time and resources have been detracted by the numerous requests submitted by the Prosecution, some of which were filed after the deadline set by the Chamber.

43. Indeed, in its Trial Preparation Order, the Chamber ordered the Prosecution to disclose all remaining material by 2 March 2015 and to submit any application for delayed disclosure no later than 16 February 2015. While the Chamber specified that “delayed disclosure will only be granted on an exceptional basis”, the Prosecution submitted no less than 13 applications for non-standard redactions and delayed disclosure, 11 of which after the 16 February 2015 deadline.

44. While the Redaction Protocol required the Prosecution to simultaneously disclose to the Defence the proposed redacted material when submitting such applications, it failed to do so. The Chamber noted that the Prosecution’s practice “appears to be a breach of the redactions regime set out in the Redaction Protocol”⁶.

45. The Prosecution’s multiple applications significantly monopolized the time and resources of the Defence. Even though the Prosecution withdrew some of its requests,

⁶ Order on the disclosure of material related to Witness P-0871, P-0876, P-0882, P-0013, P-0816 and P-0901, 12 March 2015, para. 13.

the Defence still had to invest considerable time in addressing the same, which delayed acquiring the necessary knowledge.

46. As a result, to this day, the Defence has been unable to effectively investigate the evidence expected to be adduced by the Prosecution as well as the exculpatory evidence and other evidence material to the preparation of the Defence. Consequently, it will not be possible for the Defence to be ready to challenge the Prosecution's Case by 2 June 2015.

(ii) Difficulties encountered in the conduct of Defence investigations

47. The inability of the Defence to adequately investigate the Prosecution's Case has been exacerbated by difficulties encountered during the conduct of investigations as well as in securing the services of suitable investigators.

48. [REDACTED]

49. Moreover, [REDACTED].

50. Lastly, [REDACTED].

51. [REDACTED]

52. Considering that it would not be possible to conduct any further investigations before the presentation of the Prosecution's Case, if the 2 June 2015 commencement date was maintained, it is evident that the Defence will not be ready to challenge the case against the Accused by that time.

III. The new composition of the Defence team hindered its ability to prepare for trial

53. While the Chamber has already considered that the Lead Counsel representing Mr NTAGANDA was replaced in August 2014⁷, it did not take into account the fact

⁷ Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382, 9 October 2014, para. 8.

that the composition of Mr NTAGANDA's Defence team was only completed in November 2014.

54. Indeed, the fact that the difficulties encountered by the Defence in gaining sufficient knowledge of the Prosecution's Case and investigating the same to this day, have been severely compounded by the new composition of the Defence team cannot be discounted.

55. Two main issues regarding the new composition of the Defence team have in particular impacted the work of the Defence.

56. Firstly, Mr NTAGANDA's initial Lead Counsel leaving the Case resulted in the almost simultaneous departure of his two senior legal assistants who had detailed knowledge of the facts of the Case, having been involved in the proceedings against Thomas LUBANGA and Mathieu NGUDJOLO.

57. As a result the new Defence team is composed of five members, four of whom had no previous knowledge of the Situation in the DRC when joining the team.

58. In addition, due litigation involving the Registry and the Counsel Support Section ("CSS"), the composition of the new Defence team could only be completed in early November 2014, 2,5 months after the assignment of the Lead Counsel.

59. Consequently, the trial schedule adopted by the Chamber provided the new defence team with only 7 months to prepare for the commencement of the trial, which in the best circumstances was exceptionally ambitious.

60. In comparison with other cases of a much lesser magnitude before the Court, such a short preparation period – bearing in mind the special circumstances of this case – is clearly insufficient for a new Defence team to prepare for trial.

61. By way of example, the average time between the decision on confirmation of charges and the commencement date of trial is of 20,5 months.⁸

⁸ See Annex A for general statistics on this issue.

62. In this regard, postponing the presentation of the Prosecution's Case until 2 November 2015 at the earliest, would allow the new Defence team a period of 12 months to prepare for trial which, for any given case before the Court is very reasonable.

63. While the Defence has deployed enormous efforts to make up the short time available – by notably recruiting one paid consultant (using the Defence limited monthly allowance for this purpose) and two *pro bono* legal assistants – this proved to be insufficient in order to meet all Defence obligations before 2 June 2015.

64. While the Defence stated that everything would be done to be ready for trial by the date set by the Chamber, this undertaking, subject to specific conditions being met, was made in the light of the circumstances ruling at the time.

65. It cannot be ignored that the situation has altogether changed.

IV. [REDACTED]

66. [REDACTED]

67. [REDACTED]

68. [REDACTED]

69. [REDACTED]

70. [REDACTED]

71. [REDACTED]

V. **Proposals for agreed facts and instructions of joint experts**

72. In considering whether to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest, it is important to bear in mind that to this day the schedule set by the Chamber has not allowed the Parties to consider any proposal for agreed facts or to select and instruct joint experts.

73. From the outset the Defence has adopted a constructive approach, indicating its willingness to address the issue of agreed facts as well as the selection and instruction of joint experts with the Prosecution.

74. In fact, the Defence is a firm believer in the benefit of agreed facts, which have the potential to concentrate the proceeding on the facts actually disputed by the Parties, thereby very likely shorting the duration of the trial. Agreed facts also pave the way to more focused examination and cross-examination of witnesses which is undoubtedly in the interest of justice.

75. For agreed facts, to yield such positive result there must be adopted by the Chamber before the beginning the Prosecution phase of the proceeding.

76. More importantly, it is not possible for the Defence, to consider proposed agreed facts unless it has acquired an overall knowledge and understanding of the evidence intended to be adduced by the Prosecution and obtain the consent of the Accused.

77. In the present circumstances described above – even though the Parties are scheduled to address to consider proposed agreed facts in the coming weeks – it will not be possible for the Defence to contribute meaningfully to this exercise considering it will not be able to acquire the required minimum knowledge of the Prosecution's Case before 2 June 2015.

78. Regarding the selection of joint experts, the Defence has very recently been provided with a general overview of the experts evidence the Prosecution intends to rely on as part of its Case in chief.

79. In addition, while the Defence was provided with the names of potential experts on some of the topics, which are of interest for the Prosecution, it has recently been informed that certain experts have been already selected due to the present trial schedule.

80. Consequently, also taking into consideration the above mention difficulties encountered by the Defence, it is very unlikely that the Parties will be in a position to jointly select and instruct joint experts.

81. While this is by no mean sure, postponing the beginning the presentation of the Prosecution's Case until 2 November 2015 would afford the Parties a genuine opportunity to seriously address this important issue.

VI. Postponement of the Prosecution's Case for a minimum of 5 months is required

82. In light of the above submissions, focusing on the difficulties encountered by the Defence in preparing for trial and taking stock of the significant work that remains to be accomplished to be adequately prepared to efficiently challenge the Case against Mr NTAGANDA, the Defence respectfully submits that an additional period of 5 months, i.e. until 2 November 2015, is the bare minimum required.

83. The work which remains to be accomplished by the Defence with the aim of fulfilling its duty and obligations includes the following tasks.

84. **Reviewing all material disclosed by the Prosecution:** [REDACTED].

85. **Reviewing of relevant video material:** [REDACTED].

86. **Reviewing the Prosecution's PTB:** [REDACTED].

87. **Conducting an overall analysis of the Prosecution's Case:** [REDACTED].

88. **Engaging the Accused in light of the Defence analysis of the Prosecution's Case:** [REDACTED].

89. **Conducting the minimum necessary investigations:** [REDACTED].

90. **Adopting the Defence strategy:** [REDACTED].

91. **Preparing for the cross-examination of the Prosecution witnesses:** [REDACTED].

92. **Considering proposed agreed facts with the Prosecution:** [REDACTED].
93. **Selecting and instructing joint experts with the Prosecution:** [REDACTED].
94. **Conducting general preparation for trial:** [REDACTED].
95. **Analysing the alleged victims' allegations and demands and that of their representatives:** [REDACTED].
96. **Addressing and responding** [REDACTED].
97. As demonstrated by the above, which constitutes by no means an exhaustive list of all tasks which must be performed by the Defence before the presentation of the Prosecution's Case, it is evident that delaying the testimony of the first Prosecution witnesses for a minimum of 5 months is imperative.

VII. Postponing the Prosecution's Case is in the interest of justice

98. Procedural fairness is a paramount consideration in international criminal trials, encompassing such fundamental guarantees as the right to adequate time to prepare for trial.⁹
99. The principle of equality of arms is a component of the right to a fair trial. Indeed, it is widely recognized that "[t]he Chamber must ensure that a trial is fair and expeditious, while respecting the rights of the accused. The Chamber must consider whether the Accused will be disadvantaged when presenting his case if trial is ordered to commence".¹⁰ The Accused is also entitled to preparation time proportional to that of the Prosecution.¹¹ In this regard, it is also widely accepted that the effective presentation of the Case for the Defence begins with its cross-examination of the first Prosecution witness.

⁹ *Prosecutor v. Bizimunga et al.*, No. ICTR-99-50-T, Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges, 2 September 2005, para. 20.

¹⁰ *Prosecutor v. Karemera et al.*, No. ICTR-98-44-AR15bis. 3, Decision on Appeals Pursuant to Rule 15 bis (D), 20 April 2007, para. 28.

¹¹ *Prosecutor v. Karemera et al.*, No. ICTR-98-44-AR15bis. 3, Decision on Appeals Pursuant to Rule 15 bis (D), 20 April 2007, para. 28.

100. Postponing the presentation of the Prosecution's Case until 2 November 2015 will neither unduly delay the proceedings nor prejudice the Prosecution. In fact, it is in the interest of justice to do so as it will allow the Parties to be fully ready as well as much more efficient and focused in the presentation of their respective cases.

101. Should the presentation of the Prosecution's Case start before 2 November 2015, the Defence would clearly be put at a disadvantage, which must be avoided.

RELIEF SOUGHT

75. In light of the submissions presented herein, the Defence respectfully requests the Chamber to postpone the presentation of the Prosecution's Case, following the Parties' opening statements, until 2 November 2015 at the earliest.

RESPECTFULLY SUBMITTED ON THIS 2 APRIL 2015

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

A handwritten signature in black ink, appearing to read 'S+B', is centered on the page below the typed name.