

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 October 2015

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 'Decision on Defence requests seeking disclosure orders in relation to witness P-0901 and seeking the postponement of the witness's cross-examination', ICC-01/04-02/06-840-Conf-Exp, issued on 18 September 2015

Decision 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 Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 55(2), 64, 67 and 68 of the Rome Statute ('Statute'), Rules 76, 77 and 111 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Public redacted version of "Decision on Defence requests seeking disclosure orders in relation to witness P-0901 and seeking the postponement of the witness's cross-examination', ICC-01/04-02/06-840-Conf-Exp, issued on 18 September 2015"'.

I. Procedural history

1. On 9 October 2014, the Chamber directed the Office of the Prosecutor ('Prosecution') to complete, by 2 March 2015, full disclosure of all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and Rule 77 material, save where delayed disclosure had been requested and authorised.¹
2. From [REDACTED], the Prosecution met with P-0901, at the time a potential witness, in order to take a statement ('[REDACTED] 2014 Interview').²
3. On 16 February 2015, the Prosecution requested delayed disclosure of the identity of, *inter alia*, Witness P-0901 ('Witness').³ On 25 February 2015, the Prosecution filed the 'Prosecution request for authorisation to provide a summary of [the Witness]'s statement', by which it amended the aforementioned request in respect of the Witness, in particular by seeking

¹ Order Scheduling a Status Conference and Setting the Commencement Date for the Trial. ICC-01/04-02/06-382-Corr. paras 8 and 9(d) and (f).

² See DRC-OTP-2079-1549-R01 to DRC-OTP-2079-1992.

³ Prosecution application for delayed disclosure. ICC-01/04-02/06-461-Conf-Exp. with confidential. *ex parte*. annexes A-C3. A confidential redacted version and a public redacted version were filed on 17 February 2015 (respectively. ICC-01/04-02/06-461-Conf-Red and ICC-01/04-02/06-461-Red2). A corrigendum of Annex A was filed on 19 February 2015 (ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr).

authorisation to disclose a summary of the witness's interview instead of a redacted version of the transcription itself.⁴

4. On 2 March 2015, the summary of the witness interview was disclosed to the defence team for Mr Ntaganda ('Defence').⁵
5. On 19 March 2015, [REDACTED], the Prosecution withdrew its application for delayed disclosure of the Witness's identity.⁶
6. On [REDACTED], the Prosecution met with the Witness to discuss issues related to his security ('Security Interview').⁷
7. On 26 March 2015, the audio-recordings⁸ and the transcripts⁹ of the [REDACTED] 2014 Interview were disclosed to the Defence, as well as one handwritten note made by the Witness during this interview¹⁰ and one investigation note pertaining to the Witness's security.¹¹
8. [REDACTED].¹² [REDACTED],¹³ a confidential redacted version of the request was notified to the Defence on 26 June 2015.¹⁴ Annexed to this filing, were five documents that contained information emanating from the Witness.¹⁵ Two of these documents, namely a statement taken during the Security Interview,

⁴ Prosecution request for authorisation to provide a summary of P-0901's statement. ICC-01/04-02/06-473-Conf-Exp. A confidential redacted version and a public redacted version were filed on that same date (respectively, ICC-01/04-02/06-473-Conf-Red and ICC-01/04-02/06-473-Red2).

⁵ DRC-OTP-2080-0608.

⁶ Prosecution withdrawal of its application for delayed disclosure for P-0901. ICC-01/04-02/06-523-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-523-Red).

⁷ DRC-OTP-2083-0199-R01.

⁸ DRC-OTP-2077-0857-R01. DRC-OTP-2077-0858-R01; DRC-OTP-2077-0859-R01 and DRC-OTP-2077-0860-R01.

⁹ The Chamber notes that the witness's identity and advance copies of the interview had already been provided to the Defence on, respectively 19 and 20 March 2015. The Kinyarwanda translations of the transcripts were formally disclosed on 21 August 2015, but the Chamber notes that the Defence had been provided with advance copies thereof prior to that date.

¹⁰ DRC-OTP-2077-0855.

¹¹ DRC-OTP-2078-2328-R01.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ Confidential redacted version of [REDACTED], 26 June 2015, ICC-01/04-02/06-658-Conf-Red.

¹⁵ Annexes 1, 8, 9, 10 and 11 to ICC-01/04-02/06-658-Conf-Exp-Red. Annex 7 contains an investigation note that had already been disclosed to the Defence on 26 March 2015 under number DRC-OTP-2078-2328-R01.

[REDACTED],¹⁶ and an investigator's note relating to security issues raised immediately after the Security Interview, were also formally disclosed on 21 August 2015.¹⁷

9. On 3 July 2015, following a request by the Defence,¹⁸ the Prosecution disclosed [REDACTED] pursuant to Rule 77 of the Rules.¹⁹
10. Between 3 June 2015 and 3 July 2015, by way of email, the parties corresponded about disclosure of: (i) witness statements;²⁰ (ii) documents related to payments to witnesses;²¹ (iii) information about protective measures;²² and (iv) agreements entered by the Prosecution with its witnesses.²³
11. On 25 August 2015, the Defence filed a request seeking orders from the Chamber, instructing the Prosecution to disclose 'any statements, in whatever form, of witnesses whom the Prosecution intends to call, pursuant to Rules 76(1) and 77 of the Rules and Article 67(2)' and a record of any payments for and benefits to Prosecution witnesses, as well as any agreement entered by the Prosecution with any of its witnesses ('Disclosure Request').²⁴
12. On 28 August 2015, the Defence filed a motion requesting the Chamber to order the Prosecution to disclose certain materials pertaining to the Witness ('Disclosure Request for the Witness').²⁵
13. On 4 September 2015, the Prosecution disclosed six investigator's notes related to the Witness's security and [REDACTED].²⁶ The Prosecution also formally

¹⁶ ICC-01/04-02/06-658-Conf-Anx9-Red was disclosed under DRC-OTP-2083-0199-R01.

¹⁷ ICC-01/04-02/06-658-Conf-Anx11-Red was disclosed under DRC-OTP-2083-0333-R01.

¹⁸ [REDACTED].

¹⁹ DRC-OTP-2083-0255 to DRC-OTP-2083-0260.

²⁰ See Request on behalf of Mr Ntaganda for disclosure orders pursuant to Rule 76 and 77 of the Rules of Procedure and Evidence. 25 August 2015, ICC-01/04-02/06-795-Conf-Exp. Annexes A to D. A public redacted version of the request was filed on the same day (ICC-01/04-02/06-795-Red).

²¹ Annexes E, H, K and N to ICC-01/04-02/06-795-Red.

²² Annexes F, I, L and O to ICC-01/04-02/06-795-Red.

²³ Annexes G, J, M and P to ICC-01/04-02/06-795-Red.

²⁴ Disclosure Request, ICC-01/04-02/06-795-Red, para. 1.

²⁵ Request on behalf of Mr Ntaganda seeking disclosure orders in relation to Witness P-0901. ICC-01/04-02/06-800-Conf-Exp. A public redacted version was notified on 7 September 2015 (ICC-01/04-02/06-800-Red).

disclosed four investigator's notes already communicated to the Defence, by way of [REDACTED].²⁷

14. On 7 September 2015, in accordance with the Chamber's order shortening the deadline for response,²⁸ the Prosecution filed a response opposing the Disclosure Request for the Witness in its entirety ('Response to Disclosure Request for the Witness').²⁹
15. Also on 7 September 2015, the Defence filed a public redacted version of the Disclosure Request for the Witness,³⁰ which was notified on 7 September 2015. That day, the Legal Representatives of Victims indicated that they would not file a response, which would have been due that same day.³¹
16. On 8 September 2015, the Defence filed an application seeking leave to reply to four discrete issues of the Response to Disclosure Request for the Witness ('First Leave to Reply Request').³² The Prosecution opposed this request on 10 September 2015 ('Response to First Leave to Reply Request').³³
17. On 9 September 2015, the Defence filed a request seeking the postponement of the cross-examination of the Witness ('Postponement Request'),³⁴ which was

²⁶ DRC-OTP-2079-1443-R01; DRC-OTP-2082-2716-R01; DRC-OTP-2083-0327-R01; DRC-OTP-2086-0516-R01; DRC-OTP-2086-0943; DRC-OTP-2087-0016-R01. See also Prosecution response to the Defence request seeking disclosure orders in relation to Witness P-0901, ICC-01/04-02/06-808-Conf-Exp, para. 43 and footnotes 59 and 60; Request on behalf of Mr Ntaganda seeking leave to reply to "Prosecution response to the Defence request seeking disclosure orders in relation to Witness P-0901", 8 September 2015, ICC-01/04-02/06-810, paras 13-14; Response to the Defence request for leave to reply to the "Prosecution Response to the Defence request seeking disclosure orders in relation to Witness P-901", ICC-01/04-02/06-816-Conf-Exp, paras 18-20.

²⁷ DRC-OTP-2079-1104; DRC-OTP-2082-2711-R01; DRC-OTP-2082-2713-R01; DRC-OTP-2083-0333-R02 (re-disclosure of DRC-OTP-2083-033-R01, disclosed on 21 August 2015). See also Annexes 1, 8, 10 and 11 of the Suspension Request, ICC-01/04-02/06-658-Conf-Red.

²⁸ E-mail from Legal Officer of the Chamber to the parties and participants of 31 August 2015, at 10:46.

²⁹ Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp (filed on 4 September 2015 and notified on 7 September 2015).

³⁰ ICC-01/04-02/06-800-Red.

³¹ E-mail from the Legal Representatives of Victims to the Chamber of 7 September 2015, at 11:46.

³² Request on behalf of Mr Ntaganda seeking leave to reply to "Prosecution response to the Defence request seeking disclosure orders in relation to Witness P-0901", 8 September 2015, ICC-01/04-02/06-810.

³³ Response to the Defence request for leave to reply to the "Prosecution Response to the Defence request seeking disclosure orders in relation to Witness P-901", ICC-01/04-02/06-816-Conf-Exp.

³⁴ Urgent request on behalf of Mr Ntaganda seeking postponement of Witness P-0901's cross-examination, ICC-01/04-02/06-815-Conf-Exp. A public redacted version was filed on 10 September 2015.

opposed by the Prosecution on 11 September 2015 ('Response to the Postponement Request').³⁵

18. On 14 September 2015, the Defence sought leave to reply to the Response to the Postponement Request ('Second Leave to Reply Request', and together, 'Requests for Leave to Reply').³⁶ That same day, the Prosecution also filed a response to the Disclosure Request ('Response to the Disclosure Request').³⁷
19. On 15 September 2015, the Prosecution opposed the Second Leave to Reply Request.³⁸
20. Also on 15 September 2015, the Prosecution informed the Chamber that it had disclosed, pursuant to Rule 77 of the Rules, the two transcripts of the Security Interview.³⁹
21. On 17 September 2015, the Chamber announced that the Requests for Leave to Reply were rejected.⁴⁰
22. Also on 17 September 2015, the Prosecution confirmed that the transcripts were disclosed by way of courtesy copy on the previous day, and that they would be formally disclosed on 17 September 2015, together with the accompanying audio-recording.⁴¹

³⁵ Prosecution's Response to Mr Ntaganda's urgent request to postpone Witness P-0901's cross-examination. ICC-01/04-02/06-817-Conf-Exp. The Chamber had shortened the deadline for response to 11 September 2015. E-mail from Legal Officer of the Chamber of 10 September 2015 at 10:28.

³⁶ Request on behalf of Mr Ntaganda seeking leave to reply to "Prosecution response to Mr Ntaganda's urgent request to postpone Witness P-0901's cross-examination" (ICC-01/04-02/06-817-Conf-Exp). ICC-01/04-02/06-821-Conf-Exp.

³⁷ Response to the Defence request for disclosure orders pursuant to rules 76 and 77 of the Rules of Procedure and Evidence. ICC-01/04-02/06-822-Conf-Exp.

³⁸ Response to the Defence request for leave to reply to the "Prosecution Response to the Defence request to postpone Witness P-901's cross-examination". ICC-01/04-02/06-825-Conf-Exp.

³⁹ E-mail from the Prosecution to the Chamber of 15 September 2015, at 14:26.

⁴⁰ Transcript of hearing of 17 September 2015. ICC-01/04-02/06-T-27-CONF-ENG ET. page 5. lines 21-25.

⁴¹ Transcript of hearing of 17 September 2015. ICC-01/04-02/06-T-27-CONF-ENG ET. page 6. lines 7-9.

II. Preliminary matters

23. As a preliminary matter, the Chamber observes the interrelatedness of the Disclosure Request for the Witness and the Postponement Request. As these requests pertain to the same witness, the Chamber will deal with both these requests in the present decision.
24. As a further preliminary matter, the Chamber notes that the Disclosure Request for the Witness was filed after the deadline of 12 August 2015 which the Chamber had set for any motion or request on matters the parties and participants wished to bring to the Chamber's attention or wished to have decided prior to the start of trial.⁴² In this regard, the Chamber observes that despite the fact that the Prosecution expressly communicated its refusal to disclose further documents to the Defence between 3 June and 3 July 2015, the Defence only seised the Chamber by way of the Disclosure Request for the Witness on 28 August 2015. The Chamber will nonetheless entertain the Disclosure Request for the Witness, but stresses that timely determination of this matter has been severely compromised by the lateness of the request and, relatedly, the subsequent filings that form part of this litigation.
25. Furthermore, the Chamber recalls that it rejected the Requests for Leave to Reply on 17 September 2015. With respect to the First Leave to Reply Request, the Chamber notes that Defence discussed some of the issues it had sought to reply to in the subsequently filed Postponement Request. To the extent the submissions on the Postponement Request did not supersede the First Leave to Reply Request, the Chamber does not consider that it would be assisted by further submissions on this matter and consequently the First Leave to Reply Request is rejected. As to the Second Leave to Reply Request, the Chamber notes that it relates to matters that could have been addressed by the Defence in

⁴² Order resetting certain pre-trial deadlines and other related matters, 24 July 2015, ICC-01/04-02/06-745.

the initial request. In addition, the Chamber does not consider that it would be assisted by further submissions on these matters.

III. Submissions

26. In its Disclosure Request for the Witness, the Defence requests disclosure of: (i) any statement pertaining to the Witness's security concerns;⁴³ (ii) any preliminary assessments or 'screening notes' taken in relation to the Witness;⁴⁴ (iii) any proofing or preparation session notes;⁴⁵ (iv) any administrative documents, receipts, correspondence or records of payments/expenditures made to or on behalf of the Witness;⁴⁶ (v) any and all documents related to benefits received by the Witness [REDACTED];⁴⁷ (vi) any agreement that the Prosecution entered with the Witness;⁴⁸ and (vii) the audio and transcripts of the Security Interview conducted in [REDACTED].⁴⁹

Disclosure of the audio-recording and transcripts of the Security Interview

27. The Defence submits that, as of when it filed the Disclosure Request for the Witness, the Prosecution has not yet disclosed the audio-recording and transcripts of the Security Interview,⁵⁰ despite it being disclosable. It argues that it must be disclosed, and that the non-disclosure of the recording prejudices the Defence.⁵¹
28. The Prosecution initially indicated that it did not intend to disclose the audio-recording and the transcripts, because the Defence had already been provided with a statement of the interview. The Prosecution emphasised that when a statement has been disclosed, there is no need to disclose the audio-

⁴³ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 17-19.

⁴⁴ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 20-23.

⁴⁵ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 24-27.

⁴⁶ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 28-31.

⁴⁷ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 32-35.

⁴⁸ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 36-41.

⁴⁹ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. para. 42.

⁵⁰ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. para. 42.

⁵¹ Request for Postponement. ICC-01/04-02/06-815-Red. paras 24-28.

recording and transcript, as it would be duplicative.⁵² Additionally, the Prosecution submits that the information collected during that interview does not constitute a 'prior statement' within the meaning of Rule 76 of the Rules, as it relates solely to security issues.⁵³

29. Subsequently, on 15 September 2015, the Prosecution stated that it

considers that the essential elements of [the Security Interview] are captured in the separate, written witness statement previously disclosed to the Defence on [REDACTED]. Moreover, the Prosecution still considers that this material is not disclosable pursuant to rule 76.

However, after further review, the Prosecution has decided to disclose these additional materials under rule 77 of the Rules of Procedure and Evidence to the Defence. In particular, because there is a certain level of detail contained in the audio record on the witness interference allegations.⁵⁴

30. As a result, the Prosecution announced that it 'will register as evidence and disclose to the Defence shortly' two transcripts and the audio-recording of the Security Interview. On 17 September 2015, the Prosecution disclosed the two transcripts.⁵⁵

Disclosure of 'statements' pertaining to the Witness's security concerns

31. The Defence submits that the time elapsed between the date of the last statement disclosed pertaining to the Witness's security concerns and the date of the request for in-court protective measures, filed on 17 August 2015,⁵⁶ strongly suggests that the Prosecution has not disclosed security statements

⁵² Prosecution Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp, paras 60-61, relying on *The Prosecutor v. Abdallaha Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*. Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 22 February 2012, ICC-02/05-03/09-295.

⁵³ Prosecution Response to Disclosure Request for P-0901, ICC-01/04-02/06-808-Conf-Exp, para. 24; and Response to Leave to Reply Request, ICC-01/04-02/06-816-Conf-Exp, para. 16.

⁵⁴ E-mail from the Prosecution to the Chamber of 15 September 2015, at 14:26.

⁵⁵ Prosecution's Communication of the Disclosure of Evidence, 17 September 2015, ICC-01/04-02/06-834.

⁵⁶ Second Prosecution Request for In-Court Protective Measures, ICC-01/04-02/06-782-Conf-Exp. A confidential redacted version was filed on the same day (ICC-01/04-02/06-782-Conf-Red) and a public redacted version was filed on 2 September 2015 (ICC-01/04-02/06-782-Red).

related to the Witness that are in the Prosecution's possession and/or control. It therefore requests the Chamber to order the Prosecution to disclose *all* security statements for the Witness.⁵⁷ The Defence requests that the Prosecution is ordered to explicitly indicate if no such statements exist.⁵⁸

32. With regard to its interpretation of the term 'prior statements', the Defence refers to its submissions made in the Disclosure Request, wherein it submitted, *inter alia*, that investigator's notes constitute prior statements and that statements are not confined only to matters relating to the substance of the case but include information obtained from a witness on security issues.⁵⁹ The Defence emphasises that prior statements must be disclosed irrespective of the form in which they are recorded.⁶⁰

33. In its Response to Disclosure Request for the Witness, the Prosecution indicates that all prior statements of the Witness have been disclosed to the Defence.⁶¹ It contends that the documents requested by the Defence do not constitute 'prior statements' within the meaning of Rule 76 of the Rules. The Prosecution submits that a prior statement is an 'account of facts as presented by a witness relevant to issues that will arise in his or her testimony' and that this definition is consistent with the jurisprudence of the *ad hoc* tribunals, of certain chambers of the Court and of this Chamber itself.⁶² The Chamber additionally notes that the Prosecution, as part of litigation on another disclosure request not specifically related to the present witness, argues that 'not all communications

⁵⁷ Disclosure Request for the Witness, ICC-01/04-02/06-800-Conf-Exp. paras 17-19.

⁵⁸ Disclosure Request for the Witness, ICC-01/04-02/06-800-Conf-Exp. para. 16.

⁵⁹ Disclosure Request for the Witness, ICC-01/04-02/06-800-Conf-Exp. para. 15, referring to paras 4-12 of the Disclosure Request: Disclosure Request, ICC-01/04-02/06-795-Red. para. 19.

⁶⁰ Disclosure Request for the Witness, ICC-01/04-02/06-800-Conf-Exp. paras 19, 23 and 27; Disclosure Request, ICC-01/04-02/06-795-Red. para. 4.

⁶¹ Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp. paras 41-43.

⁶² Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp. paras 24 and 31-40.

with a trial witness – regardless of content – constitute a “prior statement” pursuant to rule 76 of the Rules’.⁶³

34. The Prosecution further argues that the Defence has failed to demonstrate that the requested documents are material to the defence preparation and/or potentially exculpatory.⁶⁴ It submits that it is for the Defence to establish that the Prosecution breached its Article 67(2) and Rule 77 disclosure obligations.⁶⁵

Disclosure of preliminary assessments or ‘screening notes’ taken in relation to the Witness

35. The Defence requests disclosure of all screening notes in relation to the Witness and argues that the fact that the Prosecution disclosed such screening notes in relation to other witnesses suggests that the Prosecution is in possession of such documents also for the Witness.⁶⁶ The Defence submits that such screening notes are ‘likely to contain statements’ and are thus disclosable pursuant to Rule 76 of the Rules. In the absence of such statements, it argues, these notes are to be considered as material to the preparation of the defence or as relevant for the credibility of the Witness, which would then make them disclosable under Article 67(2) of the Statute or Rule 77 of the Rules.⁶⁷
36. The Prosecution indicates that there are no screening notes for the Witness.⁶⁸

Disclosure of notes taken during preparation sessions

37. The Defence requests disclosure of any notes taken during the preparation session with the Witness, arguing that the statements contained in such notes

⁶³ Response to the Disclosure Request, ICC-01/04-02/06-822-Conf-Exp, para. 17.

⁶⁴ Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp, paras 24 and 26-30.

⁶⁵ Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp, para. 28 with regard to Article 67(2) documents and para. 29 with regard to Rule 77 of the Rules documents.

⁶⁶ Disclosure Request for the Witness, ICC-01/04-02/06-800-Conf-Exp, paras 20-23.

⁶⁷ Disclosure Request for the Witness, ICC-01/04-02/06-800-Conf-Exp, para. 21.

⁶⁸ Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp, para. 20.

are to be disclosed pursuant to Rule 76 of the Rules. It submits that even in the absence of any statements therein, these notes are material to the preparation of the Defence and/or may affect the credibility of Prosecution evidence.⁶⁹

38. The Prosecution indicates that the witness preparation session had not taken place at the time of the filing of its response, but that it will disclose to the Defence the notes that will be made by the Prosecution.⁷⁰

Disclosure of any payment related materials

39. The Defence requests the Chamber to order the Prosecution to disclose all administrative documents and receipts of expenditures for and/or payments made to the Witness for the purpose of meeting with him.⁷¹ It further seeks disclosure of documents pertaining to benefits received by the Witness [REDACTED]. The Defence contends that such documents are disclosable, as they are material to its preparation and/or may relate to the credibility of Prosecution evidence.⁷²
40. The Prosecution submits that documents relating to 'routine' expenses, such as transportation, meals, compensation for loss of income, are neither material to the preparation of the defence nor potentially exculpatory. In its view, they are therefore not disclosable, unless there is a clear issue concerning the credibility of a witness.⁷³ The Prosecution further avers that it is for the Defence to establish the materiality of a document and that other chambers of this Court have ordered disclosure of documents pertaining to routine expenses only in case of 'concrete allegations affecting the witness's credibility'.⁷⁴

⁶⁹ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 24-27.

⁷⁰ Response to Disclosure Request for the Witness. ICC-01/04-02/06-808-Conf-Exp. para. 21.

⁷¹ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 28-31.

⁷² Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 32-35.

⁷³ Response to Disclosure Request for the Witness. ICC-01/04-02/06-808-Conf-Exp. paras 48-50.

⁷⁴ Response to Disclosure Request for the Witness. ICC-01/04-02/06-808-Conf-Exp. paras 51-52.

41. With regard to the expenses [REDACTED], the Prosecution indicates that it has not borne any cost for the implementation of such protective measures.⁷⁵ It submits that [REDACTED], should not be disclosed.⁷⁶

Disclosure of any agreement that the Prosecution entered into with the Witness

42. The Defence seeks disclosure of any agreements that the Prosecution entered into with the Witness on the basis that it is likely that he entered an agreement with the Prosecution, because he was interviewed as an insider witness, pursuant to Article 55(2) of the Statute.⁷⁷
43. The Prosecution indicates that it did not make any agreement with the Witness in relation to his testimony in the present case.⁷⁸

Postponement Request

44. As a basis for its request for postponement of the cross-examination of the Witness, the Defence refers to various alleged incidents of non-disclosure by the Prosecution, namely the non-disclosure of: (i) the audio-recording of the Security Interview;⁷⁹ (ii) investigator's notes of interviews with the Witness;⁸⁰ and (iii) documents pertaining to benefits accorded to the witness by the Prosecution and/or the VWU. The Defence further points out that six investigator's notes were only disclosed on 4 September 2015.⁸¹
45. According to the Defence, the non-disclosure and late disclosure causes prejudice to the Defence, and compromised its ability to properly prepare for its cross-examination of the Witness. The Defence argues that it has not had an

⁷⁵ Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp. para. 55.

⁷⁶ Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp. paras 55 -58, relying on an oral decision issued by Trial Chamber V(a) in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* on 28 October 2013, ICC-01/09-01/11-T-60-Red-Eng. page 44, ll.8-19.

⁷⁷ Disclosure Request for the Witness, ICC-01/04-02/06-800-Conf-Exp, paras 36-41.

⁷⁸ Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp. para. 22.

⁷⁹ Request for Postponement, ICC-01/04-02/06-815-Red, paras 24-28.

⁸⁰ Request for Postponement, ICC-01/04-02/06-815-Red, para. 29.

⁸¹ Request for Postponement, ICC-01/04-02/06-815-Red, para. 31.

investigator since 19 June 2015 and therefore was not in a position to investigate the information contained in the newly disclosed information. For these reasons, the Defence requests that the cross-examination of the Witness be postponed until 30 days after the Prosecution has effectuated full-disclosure of the requested materials.⁸²

46. The Prosecution submits that the Defence failed to establish a reasonable basis for the requested postponement.⁸³ It submits that the materials disclosed on 4 September 2015 are not voluminous,⁸⁴ and that they pertain to [REDACTED], rather than to the charges.⁸⁵ The Prosecution emphasises that the investigator's notes do not constitute prior statements and were disclosed pursuant to Rule 77 of the Rules as soon as they were considered relevant. The Prosecution considers that certain investigator's notes that were not considered material earlier have now become material to the preparation of the Defence, in particular as a result of the Chamber's finding that [REDACTED].⁸⁶
47. In relation to the Security Interview, although having identified 'one transcript of 30 pages and a second of 16 pages' and 'related audio tape of a total of 01:52:12 minutes', as disclosable pursuant to Rule 77 of the Rules, the Prosecution does not consider that 'this additional disclosure requires or justifies any postponement of [the Witness]'s testimony, as the essence of this information has already been disclosed and available to the Defence since June 2015 in the form of the signed witness statement from the same interview'.⁸⁷

⁸² Request for Postponement, ICC-01/04-02/06-815-Red, paras 33-35.

⁸³ Response to Postponement Request, ICC-01/04-02/06-817-Conf-Exp, paras 32-39.

⁸⁴ Response to Postponement Request, ICC-01/04-02/06-817-Conf-Exp, para. 40.

⁸⁵ Response to Postponement Request, ICC-01/04-02/06-817-Conf-Exp, paras 41-44.

⁸⁶ Response to Postponement Request, ICC-01/04-02/06-817-Conf-Exp, paras 45-48 and 50.

⁸⁷ E-mail from the Prosecution to the Chamber of 15 September 2015, at 14:26.

48. The Prosecution further submits that a postponement of cross-examination of the Witness would increase the security risks he is subject to and affect his well-being.⁸⁸

IV. Analysis

49. As the Postponement Request is largely based on the Prosecution's alleged failure to disclose all disclosable documents related to the Witness in a timely manner, the Chamber will first address the Disclosure Request for the Witness and afterwards turn to the Postponement Request.
50. With regard to the *Disclosure Request for the Witness*, the Chamber notes that the Prosecution states that: (i) no screening notes were taken of interviews with the Witness; (ii) no witness preparation notes have been made yet, but that they will be disclosed once produced; and (iii) no agreement was entered into with the Witness.⁸⁹ Accordingly, the Chamber will confine its ruling to the areas of disagreement between the parties, namely: (i) whether the audio-recordings and transcripts of the Security Interview should have been disclosed at an earlier stage; (ii) whether the information collected [REDACTED] should have been disclosed earlier; and (iii) whether information related to expenses made for or payments made to the Witness by the Prosecution or the VWU has to be disclosed.

⁸⁸ Response to Postponement Request, ICC-01/04-02/06-817-Conf-Exp, paras 53-55.

⁸⁹ With regard to the 'handwritten note', referred to in ICC-01/04-02/06-800-Conf-Exp, para. 43; ICC-01/04-02/06-808-Conf-Exp, para. 62; ICC-01/04-02/06-810, para. 10; ICC-01/04-02/06-816-Conf-Exp, para. 12, the Chamber notes the Prosecution's undertaking that all notes made by the Witness during the [REDACTED] 2014 Interview have been disclosed (Response to Disclosure Request for the Witness, ICC-01/04-02/06-808-Conf-Exp, para. 62).

Audio-recording and transcripts of the Security Interview

51. At the outset, the Chamber notes that the Prosecution has now indicated that it has disclosed two transcripts and the audio-recording of the Security Interview. As these materials have been disclosed very close to, and partially after, the start of the testimony of the Witness, it is appropriate to consider whether the disclosure at this late stage causes undue prejudice to the Defence.
52. The Chamber will first consider whether the materials should have been considered disclosable pursuant to Rules 76 and 77 of the Rules, or Article 67(2) of the Statute at an earlier stage.
53. As to disclosability under Rule 76 of the Rules, the Chamber notes that as part of the present litigation, as well as parallel litigation on another disclosure request, the parties have presented different views of what prior statements for the purposes of Rule 76 of the Rules entail. The Single Judge of Trial Chamber VII recently held that 'prior statements' within the meaning of Rule 76 are made only when witnesses are 'questioned about their knowledge of the case in the course of its investigation'.⁹⁰ The Chamber agrees with this definition of prior statements.
54. Given that the Security Interview solely pertains to the Witness's security, the Chamber finds that the material related to the interview cannot be considered as recordings of statements for the purposes of Rule 76 of the Rules. Notwithstanding this conclusion, the items concerned could still be disclosable pursuant to Rule 77 of the Rules or Article 67(2) of the Statute. However, it is incumbent on the Defence to demonstrate that the requested items are material to the preparation of the defence, or that they would fall under Article 67(2) of the Statute.

⁹⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenga Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 'Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations', ICC-01/05-01/13-1227, para. 9 (and footnotes therein).

55. In this regard, the Chamber notes that the Prosecution has now disclosed the items on the basis that they provide [REDACTED].⁹¹ The Chamber therefore considers that such disclosure pursuant to Rule 77 of the Rules may have been appropriate at an earlier stage, as soon as the materiality to the Defence of security issues [REDACTED] became apparent. Noting, however, that a written statement reflecting the substance of material information had already been disclosed and that the audio-recording and transcripts merely provide additional detail, the Chamber does not consider the late disclosure to be prejudicial in this instance.

Information collected [REDACTED]

56. The Prosecution disclosed six investigator's notes related to the Witness's security on 4 September 2015. The Chamber observes that these notes were prepared on the basis of contacts during the period of [REDACTED], and that the Chamber's finding, which – according to the Prosecution – triggered the Prosecution's re-assessment of the notes as being subject to Rule 77 disclosure,⁹² dates back to 21 August 2015. The Chamber therefore considers that the investigator's notes should have been disclosed to the Defence at an earlier moment. However, it observes that the six investigator's notes are very limited in volume, totaling less than ten pages. Therefore, the Chamber does not consider that the disclosure of the notes, thirteen days before the start of the testimony of the witness they pertain to, causes undue prejudice to the Defence.

Disclosure of information related to expenses and payments

57. The Chamber observes that in the process of trial proceedings before the Court, certain expenses are incurred by the calling party and/or the VWU, including to

⁹¹ E-mail from the Prosecution to the Chamber of 15 September 2015, at 14:26.

⁹² Response to Postponement Request, ICC-01/04-02/06-817-Conf-Exp, para. 47.

arrange for the witness to be interviewed or to testify, such as expenses for transport, meals and accommodation. The Chamber considers that material pertaining to reasonable expenses paid by the Prosecution do not automatically fall under Rule 77 of the Rules and/or *a fortiori* Article 67(2) of the Statute and are thus not *per se* disclosable.

58. The Chamber notes the Prosecution's submission that all expenses borne by the Prosecution for the Witness were 'routine' expenses. The Chamber further notes the Prosecution's undertaking to disclose any material pertaining to expenses that go beyond such 'routine' expenses.⁹³
59. The Chamber observes that the Prosecution indicated that it has not borne any expense related to protective measures implemented for the witness, [REDACTED].⁹⁴ [REDACTED].
60. Nonetheless, there may be particular circumstances which render information on such expenses *prima facie* material to the preparation of the defence, potentially exculpatory, or otherwise falling under Article 67(2) of the Statute.⁹⁵ The Chamber finds that in the case at hand, the Defence did not sufficiently substantiate that a record of the expenses incurred by the Prosecution for the Witness, [REDACTED], would be material to its preparation. The Chamber notes that the Defence merely stated, without further detail, that such documents are disclosable because 'they evidently contain information material to the preparation of the Defence and/or which may affect the credibility of the Prosecution evidence'.⁹⁶ Accordingly, in the absence of any indication of

⁹³ Response to Disclosure Request for the Witness. ICC-01/04-02/06-808-Conf-Exp. para. 47.

⁹⁴ Response to Disclosure Request for the Witness. ICC-01/04-02/06-808-Conf-Exp. para. 55.

⁹⁵ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*. Judgement on the appeal of Mr Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor". 28 August 2015. ICC-02/05-03/09-501, para. 42. See also, Decision on the Defence's expedited request for disclosure and related matters. 16 July 2015. ICC-01/04-02/06-731-Conf-Exp. para. 22.

⁹⁶ Disclosure Request for the Witness. ICC-01/04-02/06-800-Conf-Exp. paras 29 and 33.

irregularity or specific materiality, the Chamber does not find it appropriate to order the Prosecution to disclose such information to the Defence.

61. [REDACTED],⁹⁷ the Chamber recalls that the VWU is a neutral and independent organ of the Court, in charge of the Court's system for witness protection. In order to properly carry out its mandate, the VWU requires some of its working practices to remain confidential, for example those related to expenses made for protection, as the very information about such expenses could give away sensitive information related to the witnesses that are in the VWU's care. The VWU's mandate requires it to impartially evaluate the need for, and to provide reasonable support to, witnesses, to the extent necessary. In light of this mandate, and considering the applicable disclosure framework, the Chamber does not consider that the VWU has a general disclosure obligation with regards to the expenses incurred for protecting witnesses.
62. The Chamber has taken note of the Defence's argument that the effect that payments have on the testimony of a witness can only be assessed by taking into account all payments made, including those by the VWU.⁹⁸ However, the Chamber finds this argument to be speculative [REDACTED]. Similarly, recalling the Chamber's findings above on materiality, the Prosecution need not disclose any such information related to expenses borne by the VWU, which may be in its possession or control.
63. The Chamber notes, however, that the Defence will have the opportunity to cross-examine the Witness and test his credibility, including – to the extent the Chamber deems appropriate – in relation to any payments or reimbursements he may have received.

⁹⁷ [REDACTED].

⁹⁸ Request for Leave to Reply to Prosecution Response to Disclosure Request for the Witness. ICC-01/04-02/06-810, para. 17.

Postponement Request

64. On the basis of the foregoing, mindful that late disclosure of the security related information, including investigator's notes, concerned a very limited volume of information on a confined aspect, and without prejudice to any recalling of the witness for limited further cross-examination should the Defence provide cogent and convincing reasons justifying such a measure, the Chamber does not consider it necessary to postpone the cross-examination of the Witness. The Postponement Request is therefore rejected.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

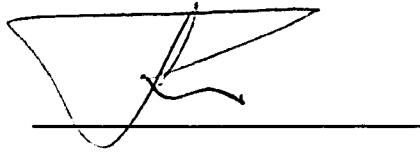
REJECTS the Disclosure Request for the Witness;

REJECTS the Postponement Request;

REJECTS all other requests; and

DIRECTS the Prosecution to file a public redacted version of the Response to Disclosure Request for the Witness (ICC-01/04-02/06-808-Conf-Exp) within five days of notification of the present decision.

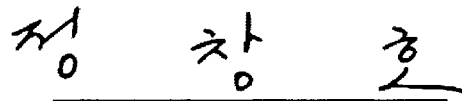
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 5 October 2015

At The Hague, The Netherlands