

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 16 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

**Decision on Defence requests seeking disclosure orders and a declaration of
Prosecution obligation to record contacts with witnesses**

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**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

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 64, 67 and 68 of the Rome Statute ('Statute') and Rules 76 and 77 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses'.

I. Procedural history

1. On 25 August 2015, the defence team for Mr Ntaganda ('Defence') filed a request seeking orders from the Chamber to instruct the Office of the Prosecutor ('Prosecution') to disclose: (i) '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 (ii) a record of all 'payments and benefits conferred' on any intended Prosecution witnesses, as well as any agreement entered by the Prosecution with any of its witnesses ('Disclosure Request').¹
2. On 28 August 2015, the Defence filed a motion requesting the Chamber to order the Prosecution to disclose certain materials pertaining to Witness P-0901, including statements, records of payments and agreements with the witness ('Witness Disclosure Request').²
3. On 31 August 2015, the Defence filed a request seeking a declaration that the Prosecution is required to record: (i) 'any new and relevant information obtained during any contacts with its witnesses, including any security concerns reported by the witness'; and (ii) any information falling within the scope of Article 67(2), including statements 'on any subject that are inconsistent

¹ Request on behalf of Mr Ntaganda for disclosure orders pursuant to Rule 76 and 77 of the Rules of Procedure and Evidence, ICC-01/04-02/06-795-Conf-Exp, with annexes A-P. A public redacted version of the Disclosure Request (ICC-01/04-02/06-795-Red) was notified on the following day. A corrigendum of Annex C to the Disclosure Request was filed on 11 September 2015.

² 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).

with previous statements of the witness' ('Declaration Request').³ The Defence further submits that the Prosecution has a duty to disclose such statements once recorded.⁴

4. On 7 September 2015, in accordance with the Chamber's order shortening the deadline for response,⁵ the Prosecution filed a response opposing the Witness Disclosure Request in its entirety.⁶
5. On 14 September 2015, the Prosecution filed a response to the Disclosure Request, submitting that it should be rejected ('Prosecution Disclosure Response').⁷
6. On 16 September 2015, the Defence filed a request for leave to reply to the Prosecution Disclosure Response in relation to five issues ('Disclosure Leave to Reply Request').⁸
7. On 17 September 2015, the Prosecution filed its response to the Declaration Request, seeking that it be rejected ('Prosecution Declaration Response').⁹
8. On 18 September 2015, the Chamber issued a decision which, amongst other things, rejected the Witness Disclosure Request ('Disclosure Decision').¹⁰ In the Disclosure Decision, the Chamber held, *inter alia*, that: (i) 'prior statements', within the meaning of Rule 76 of the Rules, are only statements made 'when

³ Request on behalf of Mr Ntaganda seeking a declaration confirming the Prosecution's duty to record the content of all contacts with its witnesses, ICC-01/04-02/06-803-Conf-Exp. A public redacted version (ICC-01/04-02/06-803-Red) was notified on the same day.

⁴ Declaration Request, ICC-01/04-02/06-803-Red, para. 1.

⁵ E-mail from Legal Officer of the Chamber to the parties and participants of 31 August 2015 at 10:46.

⁶ 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).

⁷ 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.

⁸ Request on behalf of Mr Ntaganda seeking leave to reply to '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), ICC-01/04-02/06-832-Conf-Exp.

⁹ Prosecution's response to the 'Request on behalf of Mr Ntaganda seeking a declaration confirming the Prosecution's duty to record the content of all contacts with its witnesses', ICC-01/04-02/06-803-Red, ICC-01/04-02/06-836.

¹⁰ 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.

witnesses are “questioned about their knowledge of the case in the course of its investigation”;¹¹ (ii) material ‘pertaining to reasonable expenses’ paid by the Prosecution relating to witnesses is not *per se* disclosable;¹² (iii) the Victims and Witnesses Unit (‘VWU’) does not have a ‘general disclosure obligation with regard to the expenses incurred for protecting witnesses’;¹³ and (iv) subject to the Rule 77 materiality assessment, the Prosecution also need not disclose information relating to VWU payments which it has in its possession.¹⁴

9. On 22 September 2015, the Defence requested leave to reply to the Prosecution Declaration Response in respect of two issues (‘Declaration Leave to Reply Request’).¹⁵
10. On 1 October 2015, the Prosecution responded to the Disclosure Leave to Reply Request, opposing it.¹⁶

II. Submissions and analysis

a. Leave to reply requests

11. In the Disclosure Leave to Reply Request, the Defence seeks leave to reply on the following five issues:
 - (i) the Prosecution’s ‘characterisation of the Defence request as being for “communications” instead of statements’;
 - (ii) the ‘partial’ case law cited by the Prosecution ‘in support of its claim that the term “any prior statements” under Rule

¹¹ Disclosure Decision, ICC-01/04-02/06-840-Conf-Exp, para. 53.

¹² Disclosure Decision, ICC-01/04-02/06-840-Conf-Exp, paras 57 and 60.

¹³ Disclosure Decision, ICC-01/04-02/06-840-Conf-Exp, para. 61.

¹⁴ Disclosure Decision, ICC-01/04-02/06-840-Conf-Exp, para. 62.

¹⁵ Request on behalf of Mr Ntaganda seeking leave to reply to “Prosecution’s response to the ‘Request on behalf of Mr Ntaganda seeking a declaration confirming the Prosecution’s duty to record the content of all contacts with its witnesses,’ ICC-01/04-02/06-803-Red” (ICC-01/04-02/06-836), ICC-01/04-02/06-850.

¹⁶ Response to the Defence request for leave to reply to the “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)”, ICC-01/04-02/06-880.

76(1) should be subject to a “relevance” criterion, as assessed by the Prosecution’;

- (iii) the ‘arbitrary scope of disclosure’ implied by the Prosecution’s ‘claim that emails and “handwritten notes” are categorically “internal work product”, and the notion that there is no obligation to disclose statements of witnesses, even though they are relevant to the case, if they are recorded in an email or handwritten notes’;
- (iv) the assertion that ‘the Defence has “essentially acknowledge[d]” that allegations of witness interference against Mr Ntaganda are relevant to Mr Ntaganda’s “credibility and character”’; and
- (v) the ‘wide definition of “routine” advocated by the Prosecution’, which could ‘shield from disclosure payments that have a reasonable prospect, viewed in context, of influencing a witness’s testimony – which should be the minimum criterion for disclosure’.¹⁷

12. In opposing the Disclosure Leave to Reply Request, the Prosecution submits that the issues do not arise from the Prosecution Disclosure Response,¹⁸ should have been anticipated by the Defence,¹⁹ and/or are not necessary to the Chamber’s determination.²⁰
13. The Chamber does not consider it would be assisted by further submissions on any of the identified issues. The Chamber observes that the parties have had ample opportunity to present their understanding of the meaning of ‘prior statements’, pursuant to Rule 76 of the Rules, in the context of both this and

¹⁷ Leave to Reply Request, ICC-01/04-02/06-832-Conf-Exp, para. 1.

¹⁸ ICC-01/04-02/06-880, paras 9 and 11-12.

¹⁹ ICC-01/04-02/06-880, paras 10, 16 and 19.

²⁰ ICC-01/04-02/06-880, para. 18.

prior litigation before the Chamber, and the Chamber has considered those prior submissions.²¹ Additionally, the Chamber considers that certain of the issues, while arising from the Prosecution Disclosure Response, are not necessary to the Chamber's determination of the Disclosure Request. The Chamber therefore rejects the Disclosure Leave to Reply Request.

14. In the Declaration Leave to Reply Request, the Defence seeks leave to reply on the following two issues:

- (i) the alleged impropriety of seeking guidelines or directions from the Chamber in the absence of a concrete example of a violation of the proposed direction; and
- (ii) the Prosecution's 'acknowledgment of a duty to record', upon the scope of which the Defence 'has not previously had the opportunity to comment'.

15. The Chamber notes that the matters on which the Defence seeks to reply were addressed in the Declaration Request,²² and does not consider that it would be assisted by further submissions on these points. The Chamber therefore rejects the Declaration Leave to Reply Request.

b. Declaration Request

Submissions

16. In respect of the Declaration Request, the Defence submits that a declaration by the Chamber that the Prosecution must record the information outlined in the Declaration Request is required to avoid violations of disclosure obligations by

²¹ See e.g. the submissions received in the context of the litigation leading to the Disclosure Decision and of ICC-01/04-02/06-777-Conf-Exp.

²² See e.g. Declaration Request, ICC-01/04-02/06-803-Red, paras 2 (explaining, *inter alia*, that the Defence seeks a declaration so that 'all parties are fully informed and aware of their disclosure obligations') and 1, 7 and 21-22 (explaining the scope of the recording obligation which the Defence submits exists).

the Prosecution based on a 'good faith misunderstanding' of such obligations.²³ The Defence submits that the 'implication' of certain *inter partes* communications with the Prosecution is that the Prosecution does not consider itself under any obligation to record all contacts with witnesses.²⁴

17. The Defence submits that the Prosecution has an express obligation to record any information falling within the scope of Article 67(2) of the Statute, and an implied obligation to record 'all new and relevant information' provided by a witness, including security concerns, as well as, under Rules 76 and 111 of the Rules, all statements of a witness.²⁵ The Defence submits that in the absence of such an obligation the Prosecution could 'conceal the existence' of disclosable information by failing to record it.²⁶
18. In response, the Prosecution submits that the Declaration Request should be dismissed *in limine* because it is 'made in the abstract' and the Defence does not allege that the Prosecution has actually failed to meet any of its obligations.²⁷ In the alternative, the Prosecution submits that the Declaration Request should be dismissed because a declaration confirming that the Prosecution is obliged to comply with obligations deriving from the statutory framework is 'wholly unnecessary'.²⁸ The Prosecution submits that the Declaration Request is premised upon the Defence's misunderstanding of the Prosecution's position,²⁹ and further confirms that the Prosecution does 'consider itself bound to keep a record of all contacts with its witness, including, specifically, a record of all

²³ Declaration Request, ICC-01/04-02/06-803-Red, para. 2.

²⁴ Declaration Request, ICC-01/04-02/06-803-Conf, paras 4-6.

²⁵ Declaration Request, ICC-01/04-02/06-803-Red, paras 7-11 and 16-20. The Defence supports its submission by reference to obligations to record information contained in national legislation and case law, and findings by various chambers of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), Declaration Request, ICC-01/04-02/06-803-Red, paras 12-19.

²⁶ Declaration Request, ICC-01/04-02/06-803-Red, paras 20 and 22.

²⁷ Prosecution Declaration Response, ICC-01/04-02/06-836, paras 2-3 and 13-16.

²⁸ Prosecution Declaration Response, ICC-01/04-02/06-836, paras 4, 17 and 20.

²⁹ Prosecution Declaration Response, ICC-01/04-02/06-836, para. 18.

information received which falls under the Prosecution's disclosure obligations'.³⁰

Analysis

19. Having reviewed the extracts of *inter partes* communications contained in the Declaration Request and Prosecution Declaration Response, the Chamber sees no basis for there being an 'implication' that the Prosecution does not record all contacts with witnesses, including any potentially disclosable information arising from such contacts. Contrary to the Defence's submissions, the Chamber considers it apparent that the Prosecution was referring to its disclosure obligations, rather than recording obligations, when stating that a *dossier* system does not apply at the Court. Moreover, the Chamber notes that the Defence appears not to have attempted to clarify this specific point with the Prosecution during the course of subsequent *inter partes* communications, instead merely reiterating its request for *disclosure*. The Chamber additionally notes the Prosecution confirmation that it considers itself bound to record all contacts with witnesses, including - and therefore, by express implication, not limited to - information falling under its disclosure obligations.
20. Consequently, the Chamber does not consider there to be any points of disagreement between the parties that merit adjudication. Neither, in the circumstances, does the Chamber consider that a declaration regarding the Prosecution's recording obligations is warranted. The Chamber notes in this regard that while a 'concrete example' of violation might not necessarily have been required in order to seize the Chamber of the matter, there should at least have been some concrete basis for arguing that the Prosecution interprets its recording obligations in a contrary manner. As indicated above, the Chamber considers that the Declaration Request arises from a misinterpretation of the

³⁰ Prosecution Declaration Response, ICC-01/04-02/06-836, para. 19.

Prosecution's position, which should preferably have been resolved on an *inter partes* basis.

c. Disclosure Request

Submissions

21. The Defence submits that disclosure orders, as outlined in the Disclosure Request, are required because of indications that the Prosecution is 'misinterpreting and, hence, violating' its disclosure obligations.³¹ The Defence argues that the Prosecution's disclosure obligations must also be viewed in light of its 'over-arching obligation' to investigate incriminating and exonerating circumstances equally under Article 54(1)(a) of the Statute.³²
22. Submitting that the Prosecution has demonstrated an 'unduly narrow' interpretation of its disclosure obligations, the Defence avers that the Prosecution has 'curtailed disclosure by reference to three improper criteria'.³³ These are: (i) the medium in which the witness's remarks are recorded; (ii) whether the statements relate only to security issues - the Defence submits that such statements fall under Rule 76(1) and, 'in any event', fall under either Rule 77 or Article 67(2), particularly, the Defence submits, in the context of the present case; and (iii) its erroneous reliance on Rule 81(1) of the Rules to avoid its Article 67(2) disclosure obligations.³⁴
23. In respect of payments and benefits to witnesses, the Defence submits that the existence of payments by the Prosecution to its witnesses is material to the preparation of the defence, and views those payments going beyond what is 'reasonable and necessary' as 'susceptible to affect the credibility of

³¹ Disclosure Request, ICC-01/04-02/06-795-Red, para. 2.

³² Disclosure Request, ICC-01/04-02/06-795-Red, para. 11.

³³ Disclosure Request, ICC-01/04-02/06-795-Red, paras 13-16.

³⁴ Disclosure Request, ICC-01/04-02/06-795-Red, paras 4,7-8, 10, 17-23.

[P]rosecution evidence'.³⁵ The Defence submits that United Nations daily subsistence allowance rates are such that they may have a substantial impact of witnesses living in less wealthy countries,³⁶ and, relying on jurisprudence of the *ad hoc* tribunals, submits that all Prosecution payments to its witnesses are disclosable.³⁷ The Defence further submits that: (i) the assessment of what is routine should not be left to the Prosecution; (ii) information relating to the value and importance of witness protection measures can be disclosed in redacted form; and (iii) immunity or other similar agreements with witnesses are 'manifestly relevant' to their motivation for testifying.³⁸ In arguing that information relating to payments to witnesses is relevant in the particular circumstances of this case, the Defence argues that the Prosecution has only provided records of payments to one witness before the Chamber.³⁹

24. The Prosecution opposes the Disclosure Request on the basis that the material sought either does not exist, has already been disclosed or disclosure has not been justified by the Defence.⁴⁰ It submits that it has disclosed all statements of witnesses pursuant to Rule 76 of the Rules,⁴¹ and that no screening notes exist in respect of the particular witnesses identified by the Defence as a basis for believing that there are undisclosed screening notes.⁴² The Prosecution agrees with the Defence that the form in which information is recorded is not conclusive, but disagrees that 'every communication' with a witness constitutes a Rule 76 statement, or is otherwise subject to a disclosure obligation.⁴³
25. The Prosecution submits that a statement within the meaning of Rule 76 is 'an account of facts as presented by a witness relevant to issues that will arise in his

³⁵ Disclosure Request, ICC-01/04-02/06-795-Red, para. 26.

³⁶ Disclosure Request, ICC-01/04-02/06-795-Red, para. 27.

³⁷ Disclosure Request, ICC-01/04-02/06-795-Red, paras 28-30 and 36.

³⁸ Disclosure Request, ICC-01/04-02/06-795-Red, paras 36-38.

³⁹ Disclosure Request, ICC-01/04-02/06-795-Red, para. 36.

⁴⁰ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 11.

⁴¹ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, paras 2, 15 and 32.

⁴² Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 12.

⁴³ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, paras 14 and 16-17.

or her testimony'.⁴⁴ Consequently, the Prosecution submits that statements or records of contacts relating to security concerns or 'routine contact [...] for the purpose of witness management' are not prior statements within the meaning of Rule 76 of the Rules.⁴⁵ The Prosecution submits that, nonetheless, it is in the process of re-reviewing and disclosing information regarding alleged interference with witnesses as being material to the preparation of the defence under Rule 77,⁴⁶ and states that it also reviews all statements and investigators' notes that do not fall within Rule 76 in light of its disclosure obligations under Rule 77 of the Rules and Article 67(2) of the Statute.⁴⁷ Relying on jurisprudence from Trial Chamber I, the Prosecution also distinguishes what it considers to be 'internal work product' not subject to disclosure.⁴⁸

26. Relying on jurisprudence of the *ad hoc* tribunals, the Prosecution submits that the Defence must 'specifically identify' relevant material, make a *prima facie* showing of its 'probable exculpatory nature' and demonstrate that the material is in the Prosecution's possession or control, in order to establish that the Prosecution has breached its disclosure obligations.⁴⁹ The Prosecution argues that the Defence has 'failed to explain concretely' how all communications with witnesses are material to its preparation or how they may be potentially exculpatory.⁵⁰
27. In respect of payments and benefits to witnesses, the Prosecution submits that it is undertaking a review of expenses and benefits paid to witnesses, in the order in which witnesses are scheduled to appear, and any payments which are 'not viewed as routine', or are not 'reasonable and necessary', will be disclosed.

⁴⁴ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 19. See also paragraphs 20-24.

⁴⁵ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 17.

⁴⁶ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, paras 2, 15 and 32. See also para. 33 (where the Prosecution makes submissions regarding the relevance and admissibility of such material in the context of the case).

⁴⁷ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 26.

⁴⁸ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 25.

⁴⁹ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, paras 29-30.

⁵⁰ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 27.

The Prosecution indicates that it has reviewed the expenses of the first three witnesses and confirms that all incurred expenses were routine.⁵¹ The Prosecution identifies categories of payments which it considers fall within 'routine expenses'.⁵² The Prosecution submits that such payments are not disclosable in the absence of 'a clear issue' regarding the witness's credibility,⁵³ and that the Defence has not demonstrated their materiality.⁵⁴ The Prosecution further submits that 'routine and reasonable' payments relating to protective measures, whether made by the Prosecution or the VWU, are not disclosable, and the Defence has failed to provide a 'concrete basis' for such disclosure.⁵⁵ Finally, the Prosecution submits that, in terms of 'agreements' made with Prosecution witnesses, it has disclosed all agreements under Article 54(3)(d) of the Statute, known as 'statements of limited use' agreements, and confirms that it has not entered into any other agreements with its witnesses.⁵⁶

Analysis

28. In respect of the Defence's request for statements of witnesses, in any form, 'pursuant to Rules 76(1) and 77 of the Rules and Article 67(2) of the Statute', the Chamber considers it important to distinguish between the different legal bases upon which statements of a witness may be disclosable. All statements falling within Rule 76(1) of the Rules must be disclosed, and must be provided both in the original language of the statement and in a language which the accused fully understand and speaks. By contrast, statements not falling within Rule 76 of the Rules must be disclosed only where they are material to the preparation of the Defence, within the meaning of Rule 77 of the Rules, or are potentially exculpatory in the sense of falling within Article 67(2) of the Statute.

⁵¹ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, paras 35-36.

⁵² Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 39.

⁵³ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, para. 40.

⁵⁴ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, paras 41-44.

⁵⁵ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, paras 45-50.

⁵⁶ Prosecution Disclosure Response, ICC-01/04-02/06-822-Red, paras 4 and 51.

29. The Chamber notes that statements for the purposes of Rule 76(1) of the Rules are disclosable 'irrespective of the form in which they are recorded',⁵⁷ and, as submitted by the Defence, this may include screening notes, interview notes or investigators' notes. However, as the Chamber has previously observed, not all items containing information obtained from a witness will necessarily constitute a 'statement' within the meaning of Rule 76 of the Rules.⁵⁸ As found in the Disclosure Decision, the Chamber concurs with the definition provided by the Single Judge of Trial Chamber VII that statements, within the meaning of Rule 76 of the Rules, are made only when witnesses are 'questioned about their knowledge of the case in the course of its investigation'.⁵⁹ This definition is also consistent with the jurisprudence of other international courts and tribunals.⁶⁰
30. Therefore statements of witnesses, or information provided by them, solely relating to matters other than their knowledge of the case - which may, for example, include information provided relating to security concerns or purely logistical matters - do not come within Rule 76 of the Rules. This does not mean that such information is not subject to disclosure; it may be, or become subject to disclosure, should it fall within the disclosure requirements of either Rule 77 of the Rules of Article 67(2) of the Statute. In this regard, the Chamber notes the Defence's submission that any security concerns expressed by a witness or information regarding their circumstances are 'necessarily material'

⁵⁷ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on 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', 17 February 2012, ICC-02/05-03/09-295, para. 23.

⁵⁸ ICC-01/04-02/06-731-Conf-Exp, para. 19.

⁵⁹ ICC-01/04-02/06-840-Red, para. 53 citing to *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 ('Bemba *et al* Decision'), para. 9.

⁶⁰ See for example, the jurisprudence of the ICTY Appeals Chamber, International Criminal Tribunal for Rwanda and Special Court for Sierra Leone cited to in the Bemba *et al* Decision, ICC-01/05-01/13-1227, footnote 9.

in this case.⁶¹ The Chamber, however, considers that a case-by-case assessment is required - no particular circumstances which would make all such information *prima facie* material in respect of all witnesses in the case has been demonstrated.

31. Regarding the scope of the internal work product exception provided for in Rule 81(1) of the Rules, and having considered the Prosecution's submissions regarding the distinction made between items that would constitute internal work product and those that do not qualify as such - the Chamber does not consider there to be basis for believing that the Prosecution is withholding information falling within its disclosure obligations on the basis of that provision.⁶²

32. In respect of the request for disclosure of payments and benefits to witnesses, the Chamber incorporates by reference its findings in the Disclosure Decision.⁶³ Nonetheless, noting the rather extensive list of potential payments identified as 'routine' by the Prosecution, the Chamber does emphasise the importance of the Prosecution taking a conservative view regarding what can be considered to be routine, reasonable and necessary payments to witnesses. In addition to the objective value of any payment, the particular circumstances of a witness, including, for example, any indication of dependence upon the Court's financial support, or particular requests for assistance, may be sufficient to render payment information in respect of that particular witness - including such requests or indications - material to the preparation of the defence. The Chamber does not consider it useful to further define the limits of routine payments in the abstract. It is, however, recalled that, pursuant to Article 67(2), in cases of doubt as to the potentially exculpatory nature of material the Chamber shall decide.

⁶¹ Disclosure Request, ICC-01/04-02/06-795-Red, para. 20.

⁶² See also ICC-01/04-02/06-880, paras 12-15 in this regard.

⁶³ Disclosure Decision, ICC-01/04-02/06-840-Conf-Exp, paras 57 and 60-62.

33. Finally, the Chamber notes the Prosecution's submission that all 'statements of limited use' agreements, where they exist, have been disclosed, and that no other agreements with witnesses have been entered into.
34. In light of the foregoing, the Chamber does not consider that 'corrective instructions' are required in respect of the Prosecution's disclosure obligations. The Chamber nevertheless reiterates that the Prosecution's disclosure obligations are ongoing, and that information ought to be kept under constant review and promptly disclosed where it is identified to be material to the preparation of the defence or potentially exculpatory.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Declaration Leave to Reply Request;

REJECTS the Disclosure Leave to Reply Request;

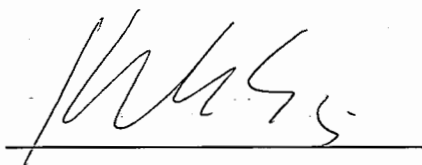
REJECTS the Declaration Request; and

REJECTS the Disclosure Request.

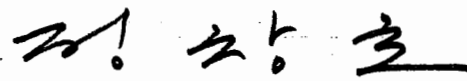
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 16 October 2015

At The Hague, The Netherlands