Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **8 September 2016**

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 request seeking disclosure of expenses provided to Witness P-0113

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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 Christopher Gosnell

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

Registrar
Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit
Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Others

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Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2) and 67(2) of the Rome Statute ('Statute') and Rule 77 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence request seeking disclosure of expenses provided to Witness P-0113'.

I. Procedural history and submissions

1. On 11 and 12 July 2016, Witness P-0113 ('Witness') testified before the Chamber.[1]

2. On 29 July 2016, the defence team for Mr Ntaganda ('Defence') filed a request seeking an order for the Office of the Prosecutor ('Prosecution') to disclose 'all payments, reimbursements, and records of other assistance of monetary value provided to Witness P-0113'.[2] The Defence indicates that, prior to the filing of the Request, it had sought disclosure of such information directly to the Prosecution, and that the Prosecution had indicated that all payments made to the Witness were routine, with the exception of one non-routine payment that it had since identified and disclosed on 21 July 2016, and that it was not obliged to disclose any information concerning those routine payments.[3] The Defence contends that information about the existence, frequency and value of any such payments or expenses, not only 'routine' ones, is disclosable pursuant to Article 67(2) of the Statute and the Chamber's previous decisions, as it would contradict the Witness's testimony ('denying' having received such payments), and thereby affect her credibility.[4] In any event, it claims that the information sought is material to the preparation of the defence pursuant to Rule 77 of the Rules.[5] It further submits that disclosure may also be required on the grounds of a party's

[1] Transcripts of hearings on 11 July 2016, ICC-01/04-02/06-T-118-CONF-ENG ET, and on 12 July 2016, ICC-01/04-02/06-T-119-CONF-ENG ET.
[2] Request on behalf of Mr Ntaganda seeking disclosure of routine expenses of Witness P-0113 under Article 67(2), 29 July 2016, ICC-01/04-02/06-1469-Conf, page 10.
[3] Request, ICC-01/04-02/06-1469-Conf, in particular paras 1, 4-9, 17 and footnote 15.
[4] Request, ICC-01/04-02/06-1469-Conf, paras 2-18.
[5] Request, ICC-01/04-02/06-1469-Conf, para. 19.

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obligation to correct any statements by a witness it called which it knows to be false or incorrect.[6]

3. On 19 August 2016, the Prosecution filed a response ('Response'), submitting that the Request should be rejected, as the Defence has not demonstrated that the information sought falls within the scope of Rule 77 of the Rules or is potentially exculpatory pursuant to Article 67(2) of the Statute; nor has the Defence shown that there are 'particular circumstances which would render the requested information *prima facie* disclosable as per the Chamber's previous decisions'.[7] According to the Prosecution, the Witness did not categorically deny having received any payment from the Prosecution, and provided information about receiving reimbursement for certain routine expenses. It avers further that questions put to the Witness by the Defence were overly broad, appeared to relate contextually to non-routine expenses, and that the Defence had ultimately failed to adequately examine the Witness on the topic.[8] The Prosecution indicates that it has not provided any 'extraordinary financial assistance or support' to the Witness, but only 'routine' expenses, which, it submits, it has no obligation to disclose.[9]

II. Analysis

4. The Chamber has previously held 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'. It also held that nonetheless, there may be particular circumstances which render information on such expenses *prima facie* material to the

[6] Request, ICC-01/04-02/06-1469-Conf, paras 2 and 20.
[7] Prosecution response to the Defence request seeking disclosure of routine expenses of Witness P-0113 under article 67(2), ICC-01/04-02/06-1477-Conf, para. 1.
[8] Response, ICC-01/04-02/06-1477-Conf, paras 11-34.
[9] Response, ICC-01/04-02/06-1477-Conf, in particular paras 22, 32-34.

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preparation of the defence, potentially exculpatory, or otherwise falling under Article 67(2) of the Statute.[10]

5. The Chamber notes that the Defence had the opportunity to cross-examine the Witness in relation to any 'routine' and other payments or reimbursements she may have received.[11] The Chamber observes, in this regard, that the Defence did not appear to pursue the matter in detail and could have been more precise if it was intended to either impeach the Witness on that basis or to establish grounds for a disclosure request such as the present one. The Chamber further notes an apparent misunderstanding in relation to the reimbursement amount to be paid to the Witness on one occasion.[12] In addition, following specific requests for disclosure addressed to the Prosecution by the Defence, the Prosecution identified and disclosed one non-routine expense of 20 dollars for the Witness. The Prosecution's late identification and disclosure to the Defence of this non-routine payment occurred only on 21 July 2016, when the Witness's testimony had already concluded. In the specific circumstances, the Chamber considers that the *prima facie* materiality of the information sought has been established. The Chamber therefore instructs the Prosecution to disclose to the Defence all payments made to the Witness.

[10] See Decision on Defence requests seeking disclosure orders in relation to witness P-0901 and seeking the postponement of the witness's cross-examination, 18 September 2015, ICC-01/04-02/06-840-Conf-Exp (a public redacted version was issued on 5 October 2015, ICC-01/04-02/06-840-Red), paras 57 and 60.
[11] See in this sense, Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 28.
[12] DRC-OTP-2053-0014.

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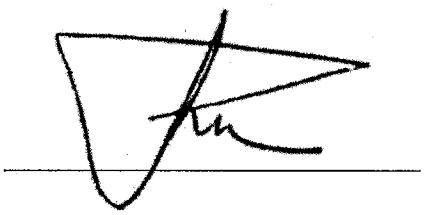
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

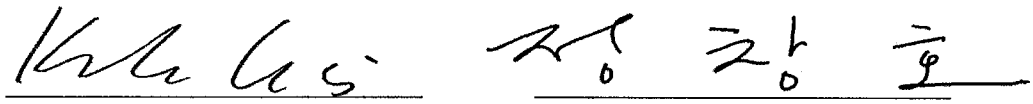
ORDERS the Prosecution to disclose all information in its possession pertaining to payments, reimbursements or equivalent assistance provided to the Witness; and

DIRECTS the parties to file public versions, with redactions if necessary, of their respective filings (ICC-01/04-02/06-1469-Conf and ICC-01/04-02/06-1477-Conf) within two weeks 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 8 September 2016
At The Hague, The Netherlands

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