



Original: **English**

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

Date: **25 August 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

**With Confidential, *ex parte* – only available to the Chamber, Defence and
Prosecution, Annexes A to P**

**Public redacted version of “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**

Source: Defence Team of Mr Bosco Ntaganda

Document 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 the Defence

Me Stéphane Bourgon
Me Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(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**

Pursuant to Articles 64(3)(c), 67(1)(a) and 67(1)(e) of the Statute and Rule 76 and 77 of the Rules of Procedure and Evidence (“Rules”) and further to correspondence exchanged with the Office of the Prosecutor (“Prosecution”), Counsel representing Mr Ntaganda (“Defence”) hereby submits this:

**Request on behalf of Mr Ntaganda for disclosure orders pursuant
to Rule 76 and 77 of the Rules of Procedure and Evidence**

INTRODUCTION

1. The Defence respectfully requests Trial Chamber VI (“Chamber”) to order the Prosecution to disclose two categories of information in its possession, namely: (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) of the Statute; and (ii) a complete record of payments and benefits conferred on any intended witness, including agreements, pursuant to Rule 77 and Article 67(2).
2. The need for an order specifying these obligations arises from indications that the Prosecution is misinterpreting and, hence, violating its disclosure obligations. The indications are direct, as reflected in refusals to provide information; and indirect, as reflected by reasonable grounds to believe that information within the aforementioned categories has not been disclosed.
3. Specific directions by the Chamber as requested will facilitate efficiency and fairness. First, it will reduce the likelihood of *post facto* discovery of disclosure violations that could interrupt proceedings; second, it will assist the Prosecution to focus its disclosure efforts effectively; third, it will permit the Defence to know whether information within the aforementioned categories exists and the extent of the Prosecution’s duty to disclose. Clear guidance in respect of the foregoing issues, which have already been the object of dispute between the parties, will reduce the chance of misunderstanding or non-

disclosure that could disrupt proceedings. Indeed, the Defence does not request an adjournment as part of the present application, but does request that it be decided expeditiously so that any such order will be known to the Prosecution in advance of the first trial session.

THE PROSECUTION HAS MISINTERPRETED THE SCOPE OF ITS OBLIGATION TO DISCLOSE WITNESS STATEMENTS AND INVESTIGATOR'S AND LAWYER'S NOTES

(i) *Applicable law*

4. All statements of intended Prosecution witnesses must, according to Rule 76(1) of the Rules, be disclosed to the Defence:

The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

“Statements”, according to the Appeals Chamber, must be disclosed “irrespective of the form in which they are recorded”:

The Appeals Chamber agrees with the Prosecutor and Messrs Banda and Jerbo that the ordinary meaning of the term “statement” as used in rule 76 is *broad* and requires the Prosecutor to disclose any prior statements, *irrespective of the form in which they are recorded*.¹

This includes, as held in the *Ruto* case, investigator’s notes:

[T]he Chamber rejects the Prosecution’s argument that it is not obligated to disclose full screening notes of all its trial witnesses. The Court’s statutory scheme and jurisprudence take particular care to ensure that *prior remarks of witnesses the Prosecution intends to call at trial are disclosed to the defence*. Rule 76(1) requires the Prosecution to disclose “any prior statements made by those witnesses [whom the Prosecution intends to call]” (“Rule 76 Statements”). Rule 76 of the Rules is not qualified in the same way as Rule 77 of the Rules, meaning that Rule 76 Statements must be disclosed even if they are not deemed by the Prosecution to be “material to the preparation

¹ *Banda & Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2001 entitled “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, ICC-02/05-03/09-295, 17 February 2012, para.22 (emphasis and italics added).

of the defence” [...] This indication is sufficiently broad, for purposes of disclosure, to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a “statement” of the witness for purposes of impeachment on the stand or submission under Rule 68 of the Rules.²

The *Ruto* Chamber also held, on the other hand, that excerpts of screening notes that concern the “prosecution’s objectives and techniques of investigation” would not be subject to disclosure pursuant to Rule 81(1), as “internal” work product.³ Disclosure, accordingly, is contemplated in excerpts where some information needs to be redacted as falling under Rule 81(1).

5. The disclosability of investigator’s or lawyer’s notes of remarks made by witnesses is well-established at the ICTR and ICTY. The ICTR Appeals Chamber has explained the difference between portions of such notes that are disclosable as witness statements, and “internal work product”:

Questions that were put to a witness – thus being part of the witness statement – have to be distinguished from “internal documents prepared by a party”, which are not subject to disclosure under Rule 70(A) of the Rules, as an exception to the general disclosure obligation pursuant to Rule 66(A)(ii) of the Rules. *A question once put to a witness is not an internal note any more; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules.* If, however, counsel or another staff member notes down a question prior to the interrogation, without putting this question to the witness, such a question is not subject to disclosure. *Similarly, any note made by counsel or another staff member of the Prosecution in relation to*

² *Ruto & Sang*, Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions, ICC-01/09-01/11-743-Red, 20 May 2013 [“*Ruto & Sang*, Decision on disclosure of screening notes”], para.20 (emphasis and italics added). This Trial Chamber has previously commented (ICC-01/04-02/06-731-Conf-Exp, fn.31) that “this decision was ultimately grounded upon Rule 77 of the Rules”, citing the preamble to the decision and paragraphs 20-22. It is respectfully submitted that this statement, which was an *obiter dictum*, does not reflect the best interpretation of the *Ruto* Decision. Rule 77 is said to apply “at any rate” after the discussion of Rule 76(1). The plain meaning of “at any rate” is that Rule 77 is an *additional* – but not the exclusive – basis on which disclosure would have been ordered. This interpretation is fortified by the operative paragraphs of the decision, which makes no reference to Rule 77: “ORDERS the Prosecution to disclose forthwith any remaining screening notes of witnesses whom it intends to call for trial.” The implication, especially in light of the full and detailed discussion of Rule 76(1) (which is must more detailed than the discussion of Rule 77), is that disclosure of the investigator’s notes was ordered both on the basis of Rule 76(1) and Rule 77.

³ *Id.* para.29.

the question of the witness is not subject to disclosure unless it has been put to the witness. The fact that a particular witness statements does not correspond to the standard set out above does not free a party from its obligation to disclose it to the other party pursuant to Rule 66(A)(ii) of the Rules [...] *The Prosecution is obliged to make the witness statement available to the Defence in the form in which it has been recorded.*⁴

6. The Special Court for Sierra Leone has likewise defined “witness statement” as encompassing investigator’s notes:

What is a witness statement? Any statement or declaration made by a witness in relation to an event he or she witnessed and *recorded in any form by an official in the course of an investigation*, falls within the meaning of “witness statement” under Rule 66(A)(i). Accordingly, facts contained in an investigator’s interview notes which constitute statements made by the witness in the course of an investigation come within the meaning of “witness statements” under Rule 66(A)(i).⁵

7. ICTY Trial Chambers have consistently held that “information reports”,⁶ “notes of ... interview” of a witness,⁷ and “interview notes”⁸, including by lawyers,⁹ fall within the scope of the rule equivalent to Rule 76(1) and must be

⁴ *Niyitegeka*, ICTR-96-14-A, Judgement, 9 July 2004, paras.34-35 (emphasis and italics added).

⁵ *Brima et al.*, SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68, 4 May 2005, para.16. See *Norman et al.*, SCSL-04-14-PT, Decision on Disclosure of Witness Statements and Cross-examination (“we find that the facts contained in the interview views [...] in fact constitute and are indeed statements made by the witness”).

⁶ *Karadžić*, IT-95-5/18-T, Decision on Accused’s Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010, para.29 (“the Trial Chamber is of the view that it is a statement which does fall within the scope of Rule 66(A)(ii) and should have been disclosed”).

⁷ *Limaj et al.*, IT-03-66-T, Decision on Joint Defence Motion on Prosecution’s Late and Incomplete Disclosure, 7 June 2005, para.10 (“[t]he Prosecution acknowledges that the notes of Hashim Thaçi’s interview ought to have been, but were not, disclosed at an earlier time”).

⁸ *Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution Urgent Motion Related to Non-Compliance of Stanišić Defence With Rule 65ter(G) and Rule 67 of the Rules, 12 October 2011, para.27 (“the term ‘statement’ in Rule 66(A)(ii) has been interpreted broadly in the Tribunal’s case law to include interview notes”); *Lukić & Lukić*, IT-98-32/1-T, Decision on Milan Lukić’s Motion to Suppress Testimony for Failure of Timely Disclosure With Confidential Annexes A and B, 3 November 2008, para.17 (“[s]imply placing the interview notes on the EDS was not sufficient for the Prosecution to discharge its positive obligation under Rule 66(A)(ii)”).

⁹ *Haradinaj et al.*, IT-04-84bis-T, Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness 81, 18 November 2011, para.34 (“the Prosecution’s disclosure, on 19 October 2011, of the attorney’s notes of the interview was not timely and therefore in violation of Rules 66(A)(ii) and 68(i). The attorney’s notes contained statements by Witness 81”).

disclosed. Furthermore, the obligation of disclosure applies to any statements in the Prosecution's possession, even if they come from a source outside the ICC.¹⁰

8. Investigator's notes will *also* often be disclosable under Rule 77¹¹ and Article 67(2). Rule 77 provides that:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

9. The ICC Appeals Chamber, noting that Rule 77 "is based on" Rule 66(B) of the ICTY Rules of Procedure and Evidence, has relied on the jurisprudence of the ICTY in holding that this provision is to "be interpreted broadly."¹² Indeed, the provision is broader than its ICTY counterpart as it requires no triggering request; the information must be automatically disclosed if it assists in "understanding" the issues,¹³ or contributes in some other way to the Defence's preparations.¹⁴ Any specific requests as are made for

¹⁰ *Ruto & Sang*, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015, ICC-01/09-01/11-1774-Red, 16 February 2015 [*"Ruto & Sang*, Decision on the appointment of a disclosure officer"], paras.27-30; *Mpambara*, ICTR-2001-65-I, Decision (Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures), 28 February 2002, para.22; *Milutinović et al.*, IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, para.14.

¹¹ *Ruto & Sang*, Decision on disclosure of screening notes, para.21.

¹² *Lubanga*, Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, 11 July 2008, para.78.

¹³ *Id.* paras.81-82.

¹⁴ *Bagosora et al.*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 (*"Bagosora*, Appeal Decision"), para.9 ("the test for materiality under the first category is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence").

information, according to the Appeals Chamber, are to be assessed on “a *prima facie* basis”, which “places a low burden on the defence.”¹⁵

10. Article 67(2) imposes a special obligation because, unlike Rule 76(1) and Rule 77, it prevails over the internal work-product exception set out in Rule 81. Hence, if an investigator returns from an interview with a witness and writes a memo interpreting that interview in a manner that “tends to show the innocence of the accused, or that “may affect the credibility of prosecution evidence,” it must be disclosed to the Defence regardless of whether it is internal work product.¹⁶ The approach adopted at the ICTY conforms with Article 51(5) of the ICC Statute, which prescribes that “in the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.” Indeed the ICC Appeals Chamber has held that Article 67(2) even prevails over other obligations in the Statute, and that breaches thereof may result even in a stay of proceedings.¹⁷

11. The foregoing disclosure obligations must be interpreted in light of the overarching obligation imposed on the Prosecutor pursuant to Article 54(1)(a) to:

establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

¹⁵ *Banda & Jerbo*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr 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”, ICC-02/05-03/09-501, 28 August 2013, para.42.

¹⁶ *Haradinaj et al.*, IT-04-84-T, Order on Disclosure of Memorandum on Interviews with a Prosecution Source and Witness, 13 December 2006, p.4 (“CONSIDERING, therefore, that even if the investigator’s memorandum did qualify as internal work product under Rule 70(A), the Prosecution would still be obliged to disclose any portions of the memorandum that suggest the innocence or mitigate the guilt of one or more of the Accused, or affect the credibility of Prosecution evidence”).

¹⁷ *Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, 13 June 2008.

12. A narrow and adversarial interpretation of the Prosecution's disclosure obligation is incompatible with these duties which require, if anything, a more transparent and open approach than at the ICTY, ICTR and SCSL.

(ii) *The Prosecution has already violated, and made statements implying an unduly narrow understanding of, its obligation to disclose statements of intended witnesses*

13. On 12 June 2015, the Defence requested "any and all information provided to the Prosecution by the witnesses it intends to rely upon at trial, during any contact with these witnesses, regardless of the purpose,"¹⁸ including any statements addressing "security concerns."¹⁹ Five days later, the Prosecution responded that it had "disclosed statements from Prosecution witnesses as well as the audio files and transcripts of the interviews of Prosecution witnesses related to the substantive case against [Mr Ntaganda]."²⁰

14. The Defence sought clarification of this response by letter of 24 June 2015, noting that the Prosecution was required to disclose information "in whatever form" recorded, and extended beyond "'formal' witness statements."²¹ The Defence also insisted that the scope of this obligation extended to "issues relevant to the credibility of witnesses, such as concerns discussed with representatives of the Prosecution."²² The Prosecution was, accordingly, placed on notice that the Defence considered discussions of security issues to be relevant to the Defence, including being considered relevant to likely challenges to the credibility of Prosecution witnesses. The Prosecution

¹⁸ Annex A: Bourgon, "Request for disclosure pursuant to Rule 76" (12/06/2015), p.1.

¹⁹ *Id.*, p.2. While this letter did not explicitly refer to material 'recorded' by the Prosecution, it nonetheless specifically requested information included in correspondence, investigative notes, notes to file, investigative reports, etc., which clearly indicates that the request was intended to encompass information 'recorded' in any format.

²⁰ Annex B: Samson, "RE: Request for disclosure pursuant to Rule 76" (17/06/2015) ("Prosecution 'Statements' Response"), para.1. The Defence has informed the Prosecution of its intention to rely on its correspondence and invited, but did not receive, any clarifications or additions.

²¹ Annex C: Bourgon, "Prosecution response to my request for disclosure pursuant to Rule 76" (24/06/2015), p.2.

²² *Id.*

provided no further information concerning its position in its response of 2 July 2015, merely re-affirming that “the same response in my email of 17 June 2015 applies.”²³

15. Two days after the Prosecution had averred that it had disclosed all prior statements of its witnesses, the Prosecution filed an *ex parte* motion before the Chamber to which were annexed several formal statements and investigator’s notes of interactions with several of its witnesses.²⁴ These statements, with one exception,²⁵ had not previously been disclosed to the Defence, and some were several months old. They were only subsequently disclosed after an order from the Chamber requiring the Prosecution to file its motion *inter partes*.²⁶

16. The Prosecution’s responses and practice suggest that it has curtailed disclosure by reference to three improper criteria, for which corrective instructions are required.

17. First, in light of the Prosecution’s reluctance to give a definition of “statement”, the Chamber is requested to instruct the Prosecution that the medium by which a witness’s remarks are recorded is immaterial to its disclosure obligations. For example, to the best of the Defence’s knowledge, no hand-written investigator’s notes of interactions with witnesses and no emails from investigators describing their interactions with witnesses were disclosed. The Defence has also not received any “screening notes” for P-0901 or P-0067, although such notes have been provided for P-0055²⁷, P-0190²⁸, P-017²⁹, P-0768³⁰ and P-0038³¹.

²³ Annex D: Samson, “RE: Prosecution response to my request for disclosure pursuant to Rule 76” (02/07/2015).

²⁴ Confidential redacted version of [REDACTED], 19 June 2015, ICC-01/04-02/06-658-Conf-Exp, ICC-01/04-02/06-658-Conf-Red, 26 June 2015 [REDACTED].

²⁵ [REDACTED], “Investigation Note”, 11 January 2015.

²⁶ [REDACTED], ICC-01/04-02/06-667-Conf-Exp, 23 June 2015, [REDACTED]; [REDACTED].

²⁷ “Screening note” (15/03/2005), DRC-OTP-0113-0234-R01,R02.

²⁸ “Investigation Report / contact with [REDACTED]” (03/2005), DRC-OTP-1062-0395.

²⁹ “Examen préliminaire de témoin” (27/01/2005), DRC-OTP-0150-0163.

³⁰ “Screening note” (13/07/2013), DRC-OTP-2055-0254-R01,R02.

18. The instruction would necessarily encompass emails or any other electronic medium. Investigator's notes are disclosable not because of their form but their content. Email is now an extremely common medium of communicating and storing important information. This medium cannot be exempted from disclosure without doing serious damage to the principles served by those obligations. Failure to disclose statements of witnesses recorded in emails are, indeed, particularly dangerous in that they are unlikely to subsequently be discovered.

19. Second, the Chamber is requested to instruct the Prosecution not to withhold any statement on the basis that it only concerns security issues. The plain language of Rule 76(1) requires disclosure of "any" statements, not just those "related to the substance of the case."³² Indeed, the Prosecution's interpretation would denude Rule 76(1) of any independent meaning, since it would then be fully subsumed by Rule 77.

20. What is more, the statements are, in any event, disclosable under Rule 77. Any fears or concerns expressed by the witness about threats, or any information about their circumstances,³³ are "necessarily material" to the Defence's preparations.³⁴ This is particularly so in the present case where the Prosecution has attempted to connect these allegations to Mr Ntaganda personally, which has a direct impact on his credibility and character. The Prosecution's attempt to confine disclosure to matters "related to the

³¹ "Screening of witness" (29/01/2006), DRC-OTP-0147-0566; "Screening notes" (08/02/2006), DRC-OTP-0233-0032-R01.

³² Prosecution 'Statements' Response, para.1.

³³ *Ruto & Sang*, Decision on the appointment of a disclosure officer, para.13 ("this investigation report fell under the Prosecution's disclosure obligations before Witness 516's testimony. That [REDACTED] requested urgent financial assistance, especially in the very message where he connected the Prosecution with two prospective witnesses, may implicate the concerns indicated in Article 67(2). Without prejudice to any future determination on [REDACTED] credibility, the link between the urgent financial request and the prospective witnesses is at least material to the preparation of the defence. This link is apparent in the investigator's report").

³⁴ *Ruto & Sang*, Decision on disclosure of screening notes, para.21.

substance of the case”³⁵ – thus implicitly excluding matters related to security – constitutes a false dichotomy.

21. The concrete significance of such statements to witness credibility has already been illustrated in the litigation concerning [REDACTED]. False, or even mistaken, statements would be highly material to these witnesses’ credibility. They are, accordingly, disclosable under Rule 77 and Article 67(2), if not, as previously mentioned, Rule 76(1).³⁶

22. Furthermore, the Prosecution cannot claim that non-disclosure is justifiable for security reasons, in light of the extremely stringent restrictions that have been imposed on Mr Ntaganda’s communications.³⁷

23. Third, the non-disclosure of any portion of any email, investigator’s note, or investigator’s memorandum suggests that the Prosecution erroneously believes that Rule 81(1) trumps its obligations under Article 67(2). This is incorrect, as discussed in the previous section.

(iii) *The scope of the order requested*

24. The Prosecution has, in its words, actions and omissions, demonstrated a misunderstanding and misapplication of the scope of its disclosure obligations. This has also been revealed by *post facto* discoveries of such misunderstandings and misapplications in other cases.³⁸ Prospective orders

³⁵ *Id.*

³⁶ Further indications of non-disclosure of the Prosecution is the tardy disclosure of three such documents (“Investigation Note”(11/01/2015), DRC-OTP-2078-2328; “Investigation Note”(31/03/2015), DRC-OTP-2083-0333; “Statement of [REDACTED]”(25/03/2015), DRC-OTP-2083-0199) and the non-disclosure of three more that are known to exist (“Investigation Note”(05/03/2015), DRC-OTP-2082-2711; “Investigation Note”(06/03/2015), DRC-OTP-2082-2713; “Investigation Note”(13/02/2015), DRC-OTP-2079-1104). The Defence also notes, incidentally, that the Prosecution has still not disclosed the audio-recording or transcripts of [REDACTED]’s 25 March 2015 interview.

³⁷ See Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts, ICC-01/04-02/06-785-Red, 18 August 2015.

³⁸ *Ruto & Sang*, Decision on the appointment of a disclosure officer, para.55 (“for seven of the nine disclosure violation, the Prosecution did not act in full conformity with its disclosure obligations [...] [o]f these seven failures, five relate to human error and two stem from the Chamber’s overruling the Prosecution position on the disclosability of certain materials”).

have been made in other cases where there were indications of non-disclosure.³⁹

25. An appropriate order for disclosure in this case, given the Prosecution's previous statements, would be: "ORDERS the Prosecution to disclose all statements of its intended witnesses regardless of the medium in which they are recorded or their subject-matter; and ORDERS the Prosecution to disclose any exculpatory analyses of expected witness testimony, regardless of whether it is considered to fall within Rule 81(1)." Such an order would appropriately clarify the scope of the Prosecution's disclosure obligations and facilitate a more efficient and fairer trial.

DISCLOSURE OF PAYMENTS AND BENEFITS, INCLUDING UNDER THE RUBRIC OF WITNESS PROTECTION, TO WITNESSES

(i) Applicable law

26. The existence of payments by the Prosecution to its witnesses is information that is material to the preparation of the Defence; such payments that go beyond those "reasonable and necessary"⁴⁰ are *also* subject to disclosure under Article 67(2) as being susceptible to "affect the credibility of prosecution evidence."

27. The present issue has been addressed extensively at the ICTR, where the potential distortions caused by payments to witnesses are similar to those faced by many witnesses in the present case. Payments according to the United Nations' daily subsistence allowance rate ("DSA"), which might be unexceptionable in a wealthier country,⁴¹ have a different character in

³⁹ *Ruto & Sang*, Decision on Defence Request for Disclosure of Information Relating to the Mungiki, ICC-01/09-01/11-1465, 25 August 2014, p.11 ("orders the Prosecution to disclose any and all information in its possession which is reasonably suggestive of Mungiki support for the ODM or for Mr Odinga in the 2007 elections").

⁴⁰ *Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para.13.

⁴¹ Cf. *Ayyash et al.*, STL-11-01/T/C, Decision on Prosecution Witness Expenses, 9 May 2014, para.7.

countries when equivalent to 50% of the annual per capita income.⁴² In such circumstances, if a witness receives ten days of DSA is a matter that should not be withheld from disclosure on the ostensible basis that it was merely “reasonable and necessary.” The effect of non-disclosure is to permanently exclude these potentially important matters from the Chamber’s consideration.

28. Trial Chambers of the ICTR have been alert to this concern and, after some early decisions to the contrary, have compelled the Prosecution to disclose records of *all* payments to its witnesses.⁴³ Sometimes, where necessary to conceal the location of the country to which a witness has been re-settled or for other reasons, Trial Chambers have required the Prosecution to first inspect such material *in camera*.⁴⁴ Requests to be relieved of the duty to disclose a full record of such payments to witnesses have been consistently denied.⁴⁵ Where disclosure of individual expenditures might reveal a

⁴² United Nations DSA rates, which formerly were publicly available, appear to have been removed from the public domain. Upon information and belief, the DSA rate for the Democratic Republic of Congo (DRC) is believed to be around \$200 per day. Per capita annual income in the DRC is \$410. See <<http://data.worldbank.org/country/congo-dem-rep>>.

⁴³ *Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit: Payments Made for the Benefit of Witness G, 29 May 2008, para.8 (“this Chamber has already found that payments made by the Prosecution to a witness are relevant and probative for assessing that witness’s credibility”); *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Motion for Records of all Payments Made Directly or Indirectly to Witness D, 18 February 2008, para.7-8 (“the Chamber finds that the Prosecution should disclose the payments made to Witness D to the Defence teams.”)

⁴⁴ *Bizimungu et al.*, Decision on Prosper Mugiraneza’s Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para.13 (“the Chamber [...] orders the Prosecution to provide such a detailed statement of expenses, which should be filed with the Chamber *ex parte* and strictly confidential. The Chamber reserves its decision on the central issue of whether these payments are exculpatory for the purposes of Rule 68 until it has had time to review the Prosecution’s disclosure made pursuant to this order”); *Karemera et al.*, ICTR-98-44-T, Order for the Prosecutor for Filing Information and Material *ex parte* and Under Seal Regarding Witness ADE, 31 March 2006; *Nzabonimana*, ICTR-98-44D-T, Order to the Prosecution to Provide Additional Information, 13 July 2011.

⁴⁵ *Karemera et al.*, ICTR-98-44-T, Decision on Prosecution’s Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, 21 June 2006, para.7 (“[t]he Chamber is not satisfied that the un-redacted budget submitted as a summary of benefits dated 4 May 2006 ‘may prejudice further or ongoing investigations, or for any other reasons which may be contrary to the public interest or affect the security interests of any State’ to warrant limited disclosure pursuant to Rules 66(C) and 68 (D)”).

protected witness's location, the Prosecution has been required to certify to total value of money, goods and services provided to a witness.⁴⁶

29. Further, "the existence of favourable arrangements between the Prosecution and a proposed witness may indeed go to the credibility of Prosecution's evidence."⁴⁷ Hence, information about the following matters has been deemed disclosable under the ICTY's equivalent to Article 67(2): requests by a witness for an extension of a residence visa; letters in support of such an application; providing legal assistance; a request to a State for an extension of a temporary residence permit; or a temporary exemption from repatriation.⁴⁸

30. "Favourable arrangements" must, *a fortiori*, include any agreements of even greater benefit, such as a grant of immunity from prosecution. Such agreements are routinely – and without litigation – disclosed by the Prosecution at the ICTY and ICTR.

(ii) *The Prosecution has denied requests for disclosure of payments to witnesses, witness protection measures and agreements with witnesses*

31. The Defence has requested from the Prosecution disclosure of any and all documents pertaining to: (i) the existence and quantum of money payments to

⁴⁶ *Zigiranyirazo*, ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, para.23 ("the Prosecutor has to certify this figure considering the amount which has been spent and is expected to be spent. The Chamber highlights, however, that it is the sum total of monies expended and to be expended which needs to be verified and confirmed by the Prosecutor").

⁴⁷ *Halilović*, IT-01-48-PT, Decision on Defence Motion for Identification of *Suspects* and Other Categories Among its Proposed Witnesses, 14 November 2003.

⁴⁸ *Karadžić*, IT-95-5/18-T, Decision on Accused's Sixtieth, Sixty-First, Sixty-Third and Sixty-Fourth Disclosure Violation Motions, 22 November 2011, paras.24,25,27,28,31; *Ayyash et al.*, STL-11-01/T/C, Decision on Prosecution Witness Expenses, 9 May 2014, para.10.

witnesses;⁴⁹ (ii) protective measures,⁵⁰ and (iii) any agreements or understandings entered into with witnesses or other persons.⁵¹

32. The Prosecution asserted, in response to these requests, that: (i) only payments that “go beyond reimbursement for routine expenses” are material and, hence, disclosable;⁵² (ii) no information at all would be disclosed concerning witness protection measures paid by the Prosecution because to do so would “undermine the purpose of those security measures”;⁵³ and (iii) no agreements other than “limited use” agreements would be disclosed, on the basis that the request was “overly broad.”⁵⁴
33. The Defence replied, *inter alia*: (i) that any payments to witnesses are material;⁵⁵ (ii) that no information identifying the location of any witness was sought and, hence, that disclosure would not compromise the integrity of any protection measures;⁵⁶ (iii) that such agreements are sought only in relation to individuals interviewed during investigations in this or the *Lubanga* case, and further defining the type of agreements sought.⁵⁷

⁴⁹ Annex E: Bourgon, “Communication of information regarding the relationship between the Office of the Prosecutor and the witnesses called in this case”(03/06/2015).

⁵⁰ Annex F: Bourgon, “Communication of information regarding witnesses who benefit from protective measures” (03/06/2015),p.2.

⁵¹ Annex G: Bourgon, “Communication of information regarding agreements entered into by the Prosecutor with its witnesses”(05/06/2015)(“Defence ‘Agreements’ Request”)(requesting disclosure of any “statements of limited use” agreements for any witness – other than P-0017, P-0038, P-0067 and P-0055, which had already disclosed – or of any other agreements whatsoever).

⁵² Annex H: Samson, “RE: Letters requesting additional information regarding the Prosecution witnesses”(23/06/2015)(Prosecution ‘Expenses’ Response).

⁵³ Annex I, Samson, “RE: Letters requesting additional information regarding the Prosecution witnesses”(17/06/2015).

⁵⁴ Annex J: Samson, “RE: Letter requesting additional information regarding the Prosecution witnesses”(16/06/2015)(“Prosecution ‘Agreements’ Request”).

⁵⁵ Annex K: Bourgon, “Prosecution response to my request for Communication of information regarding the relationship between the Office of the Prosecutor and the witnesses called in this case”(22/06/2015).

⁵⁶ Annex L: Bourgon, “Prosecution response to my request for Communication of information regarding witnesses who benefit from protective measures”(22/06/2015). Annex M: Bourgon, “Prosecution response to my request for Communication of information regarding agreements entered into by the Office of the Prosecutor with its witnesses”(22/06/2015).

⁵⁷ Defence ‘Agreements’ Reply,p.2.

34. The Prosecution responded to these letters, agreeing to provide all agreements with Prosecution witnesses in this case, but otherwise maintaining all of its previous positions.⁵⁸

35. The Prosecution, despite declining to provide disclosure of anything but “non-routine” payments to witnesses, seems to have disclosed receipts of payments to Prosecution witness P-0116, which also follows the practice in the *Lubanga* case.⁵⁹ No explanation has been given for adopting a different approach in this case in respect of witnesses other than P-0116.⁶⁰

(iii) *The information sought is subject to disclosure, in particular in the circumstances of the present case*

36. Whether reimbursements are “routine” is not a matter that should be left to the discretion of the Prosecution, given the circumstances of most witnesses who will testify in this case. Even sums that are deemed relatively minor in the eyes of the Office of the Prosecutor may nonetheless affect the motivations of witnesses. The mere fact that such amounts may be deemed “routine” under ICC or United Nations regulations does not mean that they are not relevant to the Defence’s inquiry into potential for bias or inducement to testify. Specific allegations about payments of witness have already been raised in the context of the litigation concerning [REDACTED],⁶¹ illustrating the extent to which money is relevant to the motivations of witnesses.⁶²

⁵⁸ Annex N: Samson, “RE: Letters requesting additional information regarding the Prosecution witnesses” (30/06/2015); Annex O: Samson, “RE: Prosecution response to my request for Communication of information regard [sic] witnesses who benefit from protective measures” (30/06/2015); Annex P: Samson, “Letter requesting additional information regarding the Prosecution witnesses” (02/07/2015) (“Prosecution ‘Agreements’ Final Response”).

⁵⁹ ICC-01/04-02/06-217, 10 January 2014; ICC-01/04-02/06-453, 6 February 2015.

⁶⁰ *Lubanga*, Prosecution’s Request for Non-Disclosure of Information in Witness Related Expenses, ICC-01/04-01/06-2266-Red, 10 February 2010, para.4.

⁶¹ [REDACTED], [REDACTED].

⁶² See e.g. “Revised French translation of the transcript of the 7 March 2015 meeting between [REDACTED]”, DRC-OTP-2087-1073 to 1113, ll. 335, 381-383, 425-429, 553-559, 927-936, 1118-1121; “Transcript of [REDACTED] Statement”, 24 March 2015, Track 2, p. 13, ll. 457-461 (“Voilà. Un autre astérisque, [REDACTED] confirme que des témoins du Procureur sont payés. [REDACTED] ici dans

Meanwhile, the Prosecution has provided no records of any payments to any witness, with the exception of P-0116, suggesting that it has adopted a liberal definition of “routine”.⁶³ The Prosecution should be required, accordingly, to disclose a full and comprehensive accounting of all payments to witnesses. Any statements by those witnesses, especially requests, in relation to those sums must also be disclosed, whether under Rule 76(1), Rule 77 of Article 67(2).

37. The Prosecution’s claim that disclosure of any information about witness protection undermines the effectiveness of those measures is fallacious. Information about witness protection measures can be disclosed in redacted form so that the Defence is informed of the general value and importance of the measures provided, without in any way undermining the effectiveness of those measures.

38. Immunity or similar agreements with individuals are manifestly relevant to their motivations for testifying. Such agreements with individuals whom the Prosecution has contacted, but not chosen to call as witnesses, are particularly material to the preparation of the Defence, since such individuals are likely to be of interest as potential defence witnesses – a category of information that has been deemed material to the preparation of the Defence.⁶⁴

(iv) An order is required to compel the Prosecution to comply with its disclosure obligations

39. The correspondence from the Prosecution expressly demonstrates a misinterpretation of the Prosecution’s disclosure obligations under Rule 77 and Article 67(2). Other international courts with extensive experience in the

l’enregistrement a dit que quand il disait au [REDACTED] il faut aussi que dans cette affaire de témoignage pour BOSCO ils font payer les gens parce que du côté de la CPI, du défenseur du Procureur, on les paye”).

⁶³ Prosecution ‘Expenses’ Response, para.4.

⁶⁴ *Bagosora*, Appeal Decision, paras.8-9; *Boskoški & Tarčulovski*, IT-04-82-T, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008, para.8.

potential distortions that can be caused by the disbursement of even modest sums of money have required full disclosure of payments to witnesses. If necessary to protect the location of re-settled witnesses, they may first be reviewed by the Chamber, and then disclosed to the Defence in a format that respects those legitimate interests. Non-disclosure is not permitted.

40. The Prosecution correspondence also reveals an excessively narrow interpretation of its obligation to disclose a variety of witness protection benefits that might be enjoyed by witnesses. This includes any correspondence from witnesses requesting such measures, any responses by the Prosecution whatsoever, and any actions whatsoever undertaken by the Prosecution in response to those requests.

41. The order requested is the following: “ORDERS the Prosecution to provide the Defence with a complete record of benefits provided to witnesses, including a comprehensive record of any payments or benefits conferred on witnesses; ORDERS the Prosecution to disclose any agreements conferring non-monetary benefits, such as immunity from prosecution, it has entered in with witnesses or any individual interviewed in the course of its investigation in this or *Lubanga* case; and ORDERS the Prosecution to disclose any and all statements requesting payments or benefits.”

CONFIDENTIALITY

42. Pursuant to Regulation 23*bis* (1) and (2) of the Regulations of the Court, these submissions are submitted on a confidential *ex parte* basis. A public redacted version will be filed separately. The Annexes are filed confidentially, *ex parte* Chamber, Defence and Prosecution only, as they refer to private correspondence between the Parties.

RELIEF SOUGHT

43. The Defence respectfully requests the Chamber to issue orders as set out above in paragraphs 25 and 41, or such other orders to compel disclosure by the Prosecution in a manner deemed appropriate by the Chamber.

RESPECTFULLY SUBMITTED ON THIS 25TH DAY OF AUGUST 2015

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands