



Original: **English**

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

Date: **31 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

**Public redacted version of “Request of behalf of Mr Ntaganda seeking a
declaration confirming the Prosecution’s duty to record the
content of all contacts with its witnesses”**

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Pursuant to Articles 64(3)(c), 67(1)(a), 67(1)(e) and 67(2) of the Statute and Rules 76 and 77 of the Rules of Procedure and Evidence (“Rules”) and further to correspondence exchanged with the Office of the Prosecutor (“Prosecution”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submits this:

**Request of behalf of Mr Ntaganda seeking a declaration confirming the
Prosecution’s duty to record the content of all contacts with its witnesses**

[“Defence Request”]

OVERVIEW

1. The Defence respectfully requests a declaration from Trial Chamber IV (“Chamber”), confirming 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 provided by any of its witnesses that falls within the scope of Article 67(2), including statements on any subject that are inconsistent with previous statements of the witness. Once recorded, the Prosecution has a duty to disclose such statements.

2. The Defence seeks a declaration to ensure that all parties are fully informed and aware of their disclosure obligations. Without such a declaration, the Prosecution may well violate its disclosure obligations based on a good faith misunderstanding thereof, and the existence of such violation would likely never be discovered. In these specific circumstances, a declaration, rather than an order, is the appropriate remedy.

¹ This correspondence is annexed to ICC-01/04-02/06-795-Red.

PROCEDURAL BACKGROUND

3. On 12 June 2015, the Defence requested disclosure “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.”²
4. On 17 June 2015, the Prosecution responded to this request, *inter alia*, as follows:

[REDACTED]. [REDACTED]. [REDACTED].³

The Prosecution reference to “dossier system” – which typically requires that all contacts with witnesses be recorded in the investigative case file – seems to imply that the Prosecution does not consider itself bound by any such obligation.

5. By letter of 24 June 2015, the Defence noted the Prosecution’s apparent reticence in respect of information obtained, but not recorded, by the Prosecution and its agents:

Furthermore, any and all information offered/provided by Prosecution witnesses to the Prosecution on any occasion, in whatever form, is *prima facie* material to the preparation of the defence. Beyond ‘formal’ statements, such information is necessary for understanding the narrative put forward by a witness as well as any other issues relevant to the credibility of the witness, such as potential security concerns discussed with representatives of the Prosecution.

In light of the foregoing, I kindly reiterate my request to obtain the disclosure of any information provided/offered by Prosecution witnesses during any other contact, encounter, telephone conversation, etc. between representatives of the Office of the Prosecutor and Prosecution witnesses.⁴

² ICC-01/04-02/06-795-Conf-Exp-AnxA.

³ ICC-01/04-02/06-795-Conf-Exp-AnxB.

⁴ ICC-01/04-02/06-795-Conf-Exp-AnxC.

6. The Prosecution offered no clarification of its position in any subsequent correspondence.⁵ The implication of the Prosecution's communications, however, is that it does not believe that it has any duty to record statements made by its witnesses. In other words, the Prosecution appears to adopt the position that it has an unfettered discretion, except in the case of formal statements, as to whether to record information provided to it by its witnesses.

APPLICABLE LAW

7. The Prosecution has an implied duty to record and disclose all new and relevant information provided to it by any witness, including any security concerns reported by the witness. The Prosecution also has an express duty to record and disclose any information falling within the scope of Article 67(2), which includes: (i) any statements by a witness that deviate from his or her previous statements on the same issue; or (ii) that pertain to any requests for financial or material assistance in any form.
8. Article 54(1)(a) requires the Prosecution to "investigate incriminating and exonerating circumstances equally." This means that the Prosecution has a duty to be as interested in acquiring, and recording, exonerating information as incriminating information.
9. The statutory framework of the ICC implies a duty on the Prosecution to make a record of any and all statements provided by its witnesses. Rule 76(1) of the Rules prescribes that:

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.

⁵ ICC-01/04-02/06-795-Conf-Exp-AnxD.

10. Rule 111 of the Rules, concerning “Record of questioning in general”, provides that:

A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present.

11. One possible interpretation of the reference to “formal” statements is that “informal” statements need not be recorded. This interpretation would be erroneous. Rule 111 merely prescribes the formal requirements that must be fulfilled when a formal statement is given; the Rule cannot be understood as relieving the Prosecution of its general obligation to record new and relevant information provided by a witness, and any information inconsistent with previous statements of the witness.

12. National legislation and case law, particularly in countries where there is a duty on the Prosecutor similar to that imposed on the ICC Prosecutor by way of Article 54(1)(a), imposes a broad obligation on the Prosecutor or investigating judge to record all statements of witnesses. Section 168b of the German Code of Criminal Procedure provides that:

(1) The result of investigatory acts of the investigating authorities shall be recorded on the file. (2) The examination of the accused, the witnesses and the experts shall be recorded pursuant to Sections 168 and 168a insofar as this can be done without considerably delaying the investigations.⁶

⁶ Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette [Bundesgesetzblatt] Part I, p. 1074, 1319), as most recently amended by Article 3 of the Act of 23 April 2014 (Federal Law Gazette Part I, p. 410), <http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html>.

13. Article 62 and Article 78 of the French Code of Criminal Procedure likewise require officers of the judicial police to keep a record of any statements given by witnesses:

Il dresse un procès-verbal de leurs déclarations. Les personnes entendues procèdent elles-mêmes à sa lecture, peuvent y faire consigner leurs observations et y apposent leur signature.⁷

14. Dutch criminal procedure imposes a similar obligation.⁸

15. Many adversarial systems require no less comprehensive recording of statements of witnesses. In Canada, the duty of police officers to take notes has been judicially recognized: “police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation”.⁹ This duty to record applies to prosecution counsel¹⁰ and their agents.¹¹

16. Even assuming that there is no obligation to record all new and relevant information from witnesses, Article 67(2) undoubtedly requires the Prosecution to note down any information that falls within its scope. Hence, if a witness gives a statement that contradicts a previous statement, or makes a request for money or other benefits, then these are matters that must be noted

⁷ Code de procédure pénale français (2015), Art. 62, 78.

⁸ Wetboek van Strafvordering, Wet van 15 januari 1921 (WvSv), Art. 152-153.

⁹ *Wood v. Schaeffer*, [2013] 3 S.C.R. 1053, para. 67; see also para. 62-68. This duty also derived from obligations contained in police manuals.

¹⁰ “Public Prosecution Service of Canada Deskbook”, 2014, p. 87-88, <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>> (“Crown counsel has an obligation to disclose any **additional relevant information** received from a Crown witness during an interview conducted by Crown counsel in preparation for trial. Additional relevant information includes information inconsistent with any prior statement(s) provided to the investigative agency, e.g. a recantation.”) (emphasis added).

¹¹ *Id.*, p. 88 (“In Canada’s three territories, Crown counsel work closely with Crown Witness Coordinators (CWCs). CWCs are in frequent contact with victims and witnesses throughout the court process and **often receive information from these sources between the time of initial contact and the trial or sentencing hearing**. The Crown’s disclosure obligation includes any additional relevant information received by CWCs from victims and civilian witness during interviews or other contacts with such persons. Crown counsel and CWCs must always ensure that **any additional relevant information provided by victims and civilian witnesses is properly documented** and if necessary disclosed. This will also allow Crown counsel to determine if it is necessary to ask police to interview the victim or civilian witness regarding the additional information”) (emphasis added).

down and disclosed to the Defence as potentially exculpatory. As held at the ICTY:

the Prosecution has a general duty to make a record of any inconsistencies in a witness's account. For this reason, the Prosecution must ensure that any inconsistencies in a witness's account made during an interview with the OTP are clearly recorded and disclosed to the Defence pursuant to Rules 66(A)(ii) and 68(i).¹²

17. ICTY case law has made clear that the provision equivalent to Article 67(2) requires disclosure of all "information" falling within the scope of that rule known to the Prosecution:

CONSIDERING that it is established in the jurisprudence of the Tribunal that the expression "evidence" for the purposes of Rule 68(i) evaluation is to be interpreted widely, including all information which, in the actual knowledge of the Prosecutor, may suggest the innocence, mitigate the guilt of the accused, or affect the credibility of Prosecution evidence.¹³

18. The *Krstić* Appeals Judgement likewise refers to the obligation to disclose "information", not merely existing documents or statements:

Material will affect the credibility of the Prosecution's evidence if it undermines the case presented by the Prosecution at trial; material to be disclosed under Rule 68 is not restricted to material which is in a form which would be admissible in evidence. Rather, it includes all information which in any way tends to suggest the innocence or mitigate the guilt of an accused or may affect the credibility of Prosecution evidence, as well as material which may put an accused on notice that such material exists.¹⁴

19. The equivalent of Article 67(2) has been interpreted at the ICTY as requiring disclosure of any information "which may put an accused on notice that

¹² *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. 37.

¹³ *Orić*, IT-03-68-T, Decision on Alleged Prosecution Non-Compliance With Disclosure Obligations Under Rule 66(B) and 68(i), 29 September 2005.

¹⁴ *Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 178.

exculpatory material exists” and information that “undermines the case presented by the Prosecution at trial.”¹⁵

20. The Prosecution’s obligation under Article 54(1)(a) reinforces this interpretation of Article 67(2). The Prosecution would not be acting consistent with Article 54(1)(a) of the Statute if it were permitted to choose whether to record and, hence, disclose information that falls within Article 67(2).

SUBMISSIONS

21. While the ICC Statute does not impose an express obligation on the Prosecution to take note of new and relevant information, this obligation is necessarily implied. Doing so is, in any event, a necessary incident of any diligent investigation and of information-sharing within the Office of the Prosecutor. As the Defence has submitted in another motion,¹⁶ any and all such notes must be disclosed.
22. The Defence maintains that there is also a direct and express obligation for the Prosecution to record and disclose any information provided by a witness that is inconsistent with any other statement. The existence of such an inconsistency, as is well-established, may undermine the credibility of that witness’s evidence. The Prosecution is not permitted to conceal the existence of such a statement by failing to record it. The Prosecution is therefore required to record and immediately disclose any and all such inconsistent statements.

¹⁵ *Gotovina et al*, IT-06-90-T, *Decision on Ivan Ćermak’s Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence*, 7 August 2009, para. 6.

¹⁶ “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”, ICC-01/04-02/06-795-Red, para.4-12.

CONFIDENTIALITY

23. Pursuant to Regulation 23*bis* (1) and (2) of the Regulations of the Court, these submissions are submitted on a confidential *ex parte* basis, as paragraph 4 refers to material bearing the same level of confidentiality. A public redacted version will be filed separately.

RELIEF SOUGHT

24. The Defence respectfully requests the Chamber to declare that the Prosecution has a duty to record:

- (i) any relevant information provided by any of its witnesses during any contacts therewith that has not previously been recorded and disclosed; and
- (ii) any information provided by any of its witnesses that falls within the scope of Article 67(2), including any statements that are inconsistent with other statements of the witness.

RESPECTFULLY SUBMITTED ON THIS 31TH DAY OF AUGUST 2015

A handwritten signature in dark ink, appearing to read 'StB' with a stylized flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands