

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 17 September 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

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

Source: Office of the Prosecutor

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

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Introduction

1. Trial Chamber VI (“Chamber”) should reject the Defence request for the Chamber to declare that the Prosecution has: a duty to record (i) any new and relevant information provided by any of its witnesses during any contacts therewith, including any reported security concerns; and (ii) any information provided by any of its witnesses that falls within the scope of article 67(2) of the Rome Statute (“Statute”), including any statements that are inconsistent with other statements of the witness and requests for financial or material assistance; and once recorded, (iii) to disclose such information (“Defence Request”).¹
2. The Defence does not allege that the Prosecution has failed to meet any of its obligations. It requests a declaration in order “to ensure that all parties are fully informed and aware of their disclosure obligations,”² and contends that such a declaration is necessary to ensure the Prosecution does not violate its disclosure obligations “on a good faith misunderstanding thereof”.³
3. As such, the Defence Request should be rejected *in limine* because it is made in the abstract. The Chamber’s role is to decide on live issues, not to issue declarations on hypothetical matters. To entertain the Defence Request would be contrary to considerations of efficiency and judicial economy.
4. Should the Chamber decline to reject the Defence Request *in limine*, it should nevertheless dismiss it, given the absence of any need for “confirming”⁴ the existence of Prosecution obligations derived from the Court’s regulatory framework and which have been the subject of previous orders by the Chamber.

¹ ICC-01/04-02/06-803-Conf-Exp with public redacted version at ICC-01/04-02/06-803-Red, para.1.

² Defence Request, para.2.

³ Defence Request, para.2.

⁴ Defence Request, para.1.

Procedural History

5. On 12 June 2015, the Defence requested disclosure of “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” and “[a]ny and all information offered / provided by Prosecution witnesses to the Prosecution on any occasion, in whatever form”⁵ (“Initial Disclosure Request”).
6. On 17 June 2015, the Prosecution responded to the Initial Disclosure Request, stating, *inter alia*, that:

[...] the Prosecution has conducted a review of witness-related materials and has disclosed items related to its witnesses that are material to your preparation, that provide potentially exonerating information in accordance with article 67(2) of the statute, or upon which it intends to rely at trial. The disclosure regime at the ICC is not a *dossier* system; the Prosecution reviews information in its possession on the basis of disclosure obligations as set out in the Statute and the Rules of Evidence and Procedure. Nor does Rule 76 mandate the disclosure of “any other contact, encounter, telephone conversation, etc between representatives of the Office of the Prosecutor and Prosecution witnesses, at any time and for whatever purpose”.⁶

7. On 24 June 2015, the Defence reiterated its Initial Disclosure Request, stating that “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”.⁷
8. On 2 July 2015, the Prosecution replied to the Defence, stating: “[...] the Prosecution does interpret Rule 76 broadly, [but] it is not without limits”.⁸

⁵ ICC-01/04-02/06-795-Conf-Exp-AnxA.

⁶ ICC-01/04-02/06-795-Conf-Exp-AnxB.

⁷ ICC-01/04-02/06-795-Conf-Exp-AnxC-Corr.

⁸ ICC-01/04-02/06-795-Conf-Exp-AnxD.

9. On 25 August 2015, the Defence requested the Chamber to order the 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 of Procedure and Evidence 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).⁹
10. On 31 August 2015, the Defence filed the Defence Request.¹⁰
11. On 14 September 2015, the Prosecution responded to the Defence's 25 August 2015 request.¹¹

Prosecution's Submissions

The Defence Request should be rejected *in limine*

12. The Defence requests a "declaration"¹² from the Chamber in order to confirm that the Prosecution is required to record certain information "to ensure that all parties are fully informed and aware of their disclosure obligations"¹³ and that the Prosecution does not violate its disclosure obligations "on a good faith misunderstanding thereof".¹⁴
13. Since the Defence does not explicitly allege, or present any evidence of, any failure on the part of the Prosecution to comply with any of its obligations, the Defence Request concerns an abstract issue.¹⁵

⁹ ICC-01/04-02/06-795-Conf-Exp with public redacted version at ICC-01/04-02/06-795-Red.

¹⁰ ICC-01/04-02/06-803-Conf-Exp with public redacted version at ICC-01/04-02/06-803-Red.

¹¹ ICC-01/04-02/06-822-Conf-Exp.

¹² Defence Request, para.1.

¹³ Defence Request, para.2.

¹⁴ Defence Request, para.2.

¹⁵ In other contexts, the Defence has alleged disclosure violations by the Prosecution. Not here. Where the Defence has made concrete allegations, the Prosecution has responded. See, for example, ICC-01/04-02/06-800-Conf-Exp, ICC-01/04-02/06-810, ICC-01/04-02/06-815-Conf-Exp and ICC-01/04-02/06-821-Conf-Exp (filings containing Defence allegations); and ICC-01/04-02/06-808-Conf-Exp, ICC-01/04-02/06-816-Conf-Exp, ICC-01/04-02/06-817-Conf-Exp and ICC-01/04-02/06-820 (Prosecution responses).

14. The Appeals Chamber has declined to enter findings where “any discussion by the Appeals Chamber of the issues raised would be abstract and hypothetical.”¹⁶
15. In *Milošević*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) noted that it is “not the Trial Chamber's role to issue advisory opinions on matters of general concern to parties in these, or any other, proceedings.”¹⁷ That Trial Chamber declined to rule on the relationship between two provisions of the ICTY's Rules of Procedure and Evidence because the issue was raised in the abstract and did not relate to “a particular issue in this case.”¹⁸
16. Entertaining the Defence Request would be contrary to considerations of efficiency and judicial economy. The Defence Request should be rejected *in limine*.

The Prosecution's obligations do not require clarification

17. Even if the Chamber declines to dismiss the Defence Request *in limine*, it should reject the Defence Request. A declaration “confirming”¹⁹ that the Prosecution is required to comply with obligations derived from the Court's regulatory framework and which have been the subject of previous orders by the Chamber²⁰ is wholly unnecessary, as developed below.

¹⁶ ICC-01/04-01/06-2205, para. 110.

¹⁷ *Prosecutor v. Slobodan Milošević*, ICTY-IT-02-54-T, Order on Prosecution's Motion For a Ruling Concerning the Relationship between Rule 68 and Rule 70, 19 April 2004. *See also Prosecutor v. Tadić*, IT-94-1, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 109 (“A tribunal having international criminal jurisdiction should be careful not to convert itself into a free or general advisory body. It's enunciation of the law must be on a case to case basis and limited to the lis before it. A matter which should normally be decided on the basis of law and evidence should not be foreclosed by an enunciation of law by a superior tribunal which may have the effect of pre-empting the rights of the parties to have the matter properly appraised by the lower chamber. The International Court of Justice, by Article 96 of the United Nations' Charter, has an advisory capacity. Civil and criminal courts basically have none, unless it is directed by law or is directly relevant to a particular matter in a case, which it would do only in a lis and that too after the parties were given a proper opportunity to produce evidence in the matter, if they proposed to do so.”).

¹⁸ *Prosecutor v. Slobodan Milošević*, ICTY-IT-02-54-T, Order on Prosecution's Motion For a Ruling Concerning the Relationship between Rule 68 and Rule 70, 19 April 2004.

¹⁹ Defence Request, para.1.

²⁰ *See, e.g.* ICC-01/04-02/06-382-Corr, para.9(d).

18. The Defence Request is premised on the Defence's misunderstanding²¹ of the Prosecution's statement that "[t]he disclosure regime at the ICC is not a *dossier* system" – which it is not. As is readily apparent from the Prosecution's 17 June 2015 email to the Defence,²² the Prosecution referred to a "*dossier* system" in the context of its disclosure obligations, which it stated, do not require the Prosecution to share all information obtained from Prosecution witnesses with the Defence. Given that the Court does not operate a *dossier* or "open file" system,²³ the Prosecution is only required to provide to the Defence the materials that are relevant under the statutory framework, specifically under article 67(2) of the Statute and rules 76 and 77 of the Rules.
19. That the Court operates under a disclosure regime rather than an open file or *dossier* system is immaterial to the Prosecution's obligations to record its contacts with its witnesses. Contrary to what the Defence suggests,²⁴ the Prosecution does consider itself bound to keep a record of all contacts with its witnesses, including, specifically, a record of all information received which falls under the Prosecution's disclosure obligations. As is clear from the wording immediately following the reference to the "*dossier* system" in the Prosecution's 17 June 2015 email, "the Prosecution reviews information in its possession on the basis of disclosure obligations as set out in the Statute and the Rules of Evidence and Procedure".²⁵ The fact that the Prosecution undertakes a review of information clearly implies that this information has been recorded.
20. The Prosecution discloses any new information collected when it deems this to be necessary pursuant to its obligations. This includes the disclosure of information concerning witnesses' security concerns. The disclosure of such material to date evidences the fact that the Prosecution maintains records thereof. A declaration

²¹ See Defence Response, para.4.

²² ICC-01/04-02/06-795-Conf-Exp-AnxB, also quoted at para.6, above.

²³ See ICC-01/04-02/06-822-Conf-Exp, para.16.

²⁴ *Contra* Defence Response, paras.4, 6.

²⁵ ICC-01/04-02/06-795-Conf-Exp-AnxB.

by the Chamber confirming that the Prosecution is required to do so is unnecessary.

21. Pursuant to article 67(2) of the Statute, the Prosecution is bound to disclose to the Defence evidence in the Prosecutor's possession or control which she believes shows or tends to show the innocence of the Accused, or to mitigate the guilt of the Accused, or which may affect the credibility of Prosecution evidence. Disclosing such information requires it to exist in a disclosable format which, in turn, means that it needs to be recorded. The Prosecution's disclosure of a considerable volume of material pursuant to article 67(2) attests to its having been recorded. A declaration by the Chamber confirming that the Prosecution is required to record such information is unnecessary.

22. As Trial Chamber III stated in *Bemba* in the context of disclosure, a Chamber will not routinely oversee or review decisions taken by the Office of the Prosecutor in fulfillment of its obligations unless there are good reasons for doubting that the duty had been properly fulfilled.²⁶ In the present case, the Defence has not presented any good reasons for doubting that the Prosecution maintains the records necessary to comply with its disclosure obligations. As such, the Chamber need not oversee or review the Prosecution's approach on this matter.

23. Finally, the Prosecution notes that although the Defence Request as articulated in the section titled "RELIEF SOUGHT" refers to the Prosecution's duty to "record",²⁷ the Defence Request refers repeatedly to the Prosecution's obligation to disclose.²⁸ The Prosecution responded to various Defence concerns with respect to disclosure in its 14 September 2015 response²⁹ and includes those arguments by

²⁶ ICC-01/05-01/08-632, paras. 20-22; *See also Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the interview with Michel Bagaragaza be expunged from the record, 30 October 2006, para.6.

²⁷ Defence Request, para.24.

²⁸ *See* Defence Request, paras.1, 2, 7, 20, 22.

²⁹ ICC-01/04-02/06-822-Conf-Exp.

reference to the extent that the Chamber may consider the Defence Request to also address the issue of disclosure.

Conclusion

24. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request.



Fatou Bensouda,
Prosecutor

Dated this 17th day of September 2015
At The Hague, the Netherlands