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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 “Prosecution response to the Defence request seeking disclosure orders in relation to Witness P-901”, 7 September 2015,
ICC-01/04-02/06-808-Conf-Exp**

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. The Defence requests that Trial Chamber VI (“Chamber”) order the Office of the Prosecutor (“Prosecution”) to disclose certain categories of material related to Prosecution Witness P-901 and suggests that the Prosecution has failed to comply with its disclosure obligations (“Defence Request”).¹ The Prosecution submits that no such order is needed or justified; and that it has met its disclosure obligations.
2. First, the Prosecution confirms that certain material requested by the Defence Request simply does not exist, namely: (a) preliminary assessments or screening notes; (b) witness preparation notes; or (c) any agreements that the Prosecution entered into with P-901 in relation to his testimony in this case.
3. Second, the Prosecution considers that the Defence Request for any statements, including any statements pertaining to P-901’s security concerns, is imprecisely defined and unfounded. The Prosecution confirms that it has disclosed all relevant statements, pursuant to rule 76 of the Rules of Procedure and Evidence (“Rules”). Moreover, the Prosecution has or will be disclosing all documents related to P-901’s [REDACTED] pursuant to rule 77 of the Rules. In relation to security, the Prosecution has disclosed all relevant documents other than documents related to P-901’s standard security assessment; however, any disclosable information contained in the standard security assessment was disclosed in a separate investigator’s note.
4. Third, the Prosecution objects to the Defence Request for disclosure of any documents related to expenses or payments made to P-901, because none of them go beyond routine expenses. The Defence has failed to demonstrate how any such documents are material to its preparation for trial and/or are potentially exculpatory. Finally, the Prosecution objects to the overly broad request for

¹ ICC-01/04-02/06-800-Conf-Exp.

documents concerning any and all benefits related to protective measures conferred upon P-901. [REDACTED].

5. The Prosecution observes that the Defence has sought to cross-reference its arguments and legal authorities from its separate request for disclosure (ICC-01/04-02/06-795-Conf-Exp) ("Prior Defence Request").² The Prosecution reserves its right to respond to the arguments raised in the Prior Defence Request separately, and has limited its response in this filing only to the specific arguments made in the current Defence Request regarding P-901's materials.

Confidentiality

6. The filing is classified as Confidential, *EX PARTE* – Only available to the Prosecution, Defence and VWU, pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, because it contains confidential information related to witness security.

Procedural History

7. On 16 February 2015, the Prosecution requested delayed disclosure of material regarding Witness P-901, amongst other witnesses, to enable [REDACTED].³
8. On 2 March 2015, the Prosecution disclosed a summary of P-901's interview to the Defence.⁴
9. On 19 March 2015, the Prosecution withdrew its application for delayed disclosure of material related to Witness P-901 [REDACTED].⁵ On 20 March 2015, the Defence was informed of Witness P-901's identity.
10. On 20 March 2015 the Prosecution disclosed advance copies of 19 transcripts of the interview with P-901 conducted by the Prosecution [REDACTED].⁶ These

² ICC-01/04-02/06-800-Conf-Exp, para.15. Citing ICC-01/04-02/06-795-Red, paras.4-12, 26-30.

³ ICC-01/04-02/06-461-Conf-Exp; see ICC-01/04-02/06-461-Red2.

⁴ DRC-OTP-2080-0608.

⁵ ICC-01/04-02/06-523-Conf; see ICC-01/04-02/06-523-Red.

transcripts were formally re-disclosed on 26 March 2015, together with: (a) one handwritten note taken by P-901 [REDACTED];⁷ (b) one investigation note related to Witness P-901's security concerns (the disclosable information from the otherwise confidential standard security assessment undertaken by the Prosecution [REDACTED]);⁸ and (c) the audio-recordings of the [REDACTED].⁹

11. Moreover, on 26 June 2015, the Prosecution disclosed two documents as annexes to the redacted version of its application to [REDACTED] and other measures [REDACTED]:¹⁰ (a) P-901's witness statement of 25 March 2015 [REDACTED];¹¹ and (b) a second investigation note regarding security issues [REDACTED].¹² These two documents were formally disclosed *via* ringtail on 21 August 2015.

12. On 2 July 2015, the Defence requested disclosure of a number of documents, [REDACTED],¹³ [REDACTED].

13. On 3 July 2015, as requested, the Prosecution disclosed seven photographs [REDACTED] pursuant to rule 77 of the Rules.¹⁴

14. Between 3 June 2015 and 2 July 2015, the Defence and the Prosecution exchanged correspondence on disclosure related to: (a) witness statements;¹⁵ (b) all documents related to payments to witnesses;¹⁶ (c) protective measures;¹⁷ and (d) any agreements entered into by the Prosecution with its witnesses.¹⁸

15. On 21 August 2015, the Prosecution further disclosed in relation to Witness P-901: (a) the 19 transcripts of [REDACTED] Interview translated into Kinyarwanda;

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ ICC-01/04-02/06-795-Conf-Exp-Anx-A to D.

¹⁶ ICC-01/04-02/06-795-Conf-Exp-Anx-E, H, K, N.

¹⁷ ICC-01/04-02/06-795-Conf-Exp-Anx-F, I, L, O.

¹⁸ ICC-01/04-02/06-795-Conf-Exp-Anx-G, J, M, P.

and¹⁹ (b) a corrected version of one of the interview transcripts.²⁰ As stated, two documents previously made available to the Defence, annexed to the Prosecution's Request were formally disclosed *via* ringtail that same day.²¹

16. On 25 August 2015, the Defence submitted its Prior Defence Request for disclosure orders pursuant to rule 76 and rule 77 of the Rules.²²

17. On 28 August 2015, the Defence submitted the Defence Request for disclosure orders specifically in relation to Witness P-901.²³

18. On 31 August 2015, the Chamber ordered the Prosecution to file its response to the Defence Request by 7 September 2015.²⁴

Prosecution's Submissions

19. The Defence Request to order the Prosecution to disclose certain categories of material related to P-901 is not warranted, either because the information does not exist, has been disclosed, or because its disclosure has not been justified by the Defence.

(a) The Defence requests disclosure of material that does not exist

(i) There was no preliminary assessment or "screening" of P-901

20. The Defence requests disclosure of any preliminary assessment or screening note related to P-901.²⁵ The Prosecution confirms that there was no such prior screening of or preliminary assessment conducted for Witness P-901.

¹⁹ DRC-OTP-2087-0069, DRC-OTP-2087-0078, DRC-OTP-2087-0105, DRC-OTP-2087-0113, DRC-OTP-2087-0139, DRC-OTP-2087-0165, DRC-OTP-2087-0194, DRC-OTP-2087-0219, DRC-OTP-2087-0243, DRC-OTP-2087-0269, DRC-OTP-2087-0299, DRC-OTP-2087-0328, DRC-OTP-2087-0355, DRC-OTP-2087-0387, DRC-OTP-2087-0409, DRC-OTP-2087-0433, DRC-OTP-2087-0456, DRC-OTP-2087-0482, DRC-OTP-2087-0509, DRC-OTP-2087-0530.

²⁰ DRC-OTP-2079-1855.

²¹ DRC-OTP-2083-0199, DRC-OTP-2083-0333-.

²² ICC-01/04-02/06-795-Conf-Exp; *see* ICC-01/04-02/06-795-Red.

²³ ICC-01/04-02/06-800-Conf-Exp.

²⁴ Email from the Chamber on 31 August 2015 at 10:46 am.

²⁵ ICC-01/04-02/06-800-Conf-Exp, paras.1, 20-23.

(ii) There are no notes from preparation sessions at this stage

21. Contrary to the Defence's assertions,²⁶ and consistent with the Protocol on Witness preparation and familiarisation,²⁷ the Prosecution has not at this stage conducted any preparation sessions with P-901 and only plans to conduct such a session in parallel with the familiarisation process that will be undertaken by VWU.²⁸ The Prosecution will disclose the written notes made by the Prosecution of the preparation session with P-901.

(iii) There are no agreements entered into with P-901 in relation to his testimony

22. The Defence has requested disclosure of any agreement that the Prosecution has entered into with P-901 in relation to his testimony in this case.²⁹ The Prosecution confirms that it has not entered into any agreement with P-901 in relation to his testimony in this case.

(b) The request for all statements – in any form - is imprecise and unjustified

23. The Defence requests that the Chamber order the Prosecution to disclose all statements made by P-901, including those in relation to his security concerns, and regardless of the form in which such information is recorded.³⁰

24. This request is overly broad, unjustified, and amounts to a fishing expedition. The request should be rejected, because: (a) the Defence has failed to show how the documents requested are material to its preparation and/or of a potentially exculpatory nature; (b) the documents do not constitute "prior statements" within the meaning of rule 76; and (c) the Prosecution has complied with its disclosure

²⁶ ICC-01/04-02/06-800-Conf-Exp, paras.24-27.

²⁷ ICC-01/04-02/06-656-AnxA.

²⁸ Witness Preparation Protocol, paras.26-29.

²⁹ ICC-01/04-02/06-800-Conf-Exp, paras.1, 36-41.

³⁰ ICC-01/04-02/06-800-Conf-Exp, paras. 17-19.

obligations pursuant to rules 76 and 77 of the Rules, and articles 67(2), 67(1)(e), and 64(3)(c) of the Statute.

25. The disclosure regime at the International Criminal Court is not an open file or *dossier* system. It is based on specific disclosure obligations as set out in the Statute and Rules. As shown below, the Statute and Rules do not mandate disclosure of any information provided by a witness, including their security-related concerns, in any form.

(i) The documents requested are neither material to the Defence preparation nor potentially exculpatory

26. First, the Defence fails to explain how all statements, including those containing security information regarding P-901, are relevant to or material for its adequate preparation for trial, or how they constitute potentially exculpatory evidence.³¹

27. The Chamber has previously ruled that under rule 77 of the Rules, “not all information obtained from a witness will be relevant to that witness’s credibility, or be otherwise material.”³² Similarly, any potentially exculpatory evidence under article 67(2) must have a real, and not merely, minimal impact on the trial in favour of the accused.³³ Potentially exculpatory material under article 67(2) “[i]ncludes material, first, that shows or tends to show the innocence of the accused; second, which mitigates the guilt of the accused; and, third, which may affect the credibility of Prosecution evidence”.³⁴

28. To establish that the Prosecution has breached its article 67(2) obligations, the Defence must not only show that the material requested is in the possession or custody of the Prosecution, but must also: (i) specifically identify the material,

³¹ The Defence is not clear as to what legal basis they seek these materials, but it appears to be on the basis of rules 76 and 77 of the Rules, and articles 64(3)(c), 67(1)(e), and 67(2) of the Statute. See ICC-01/04-02/06-800-Conf-Exp, preamble.

³² ICC-01/04-02/06-731-Conf-Exp, para.20. See also e.g. ICC-01/04-02/06-705-Conf-Exp, para.34.

³³ ICC-01/04-01/06-2152, para.94.

³⁴ ICC-01/04-01/06-1401, para.59.

and (ii) make a *prima facie* showing of the requested material's probable exculpatory nature.³⁵ To establish a *prima facie* case, the Defence need not show that the material directly contradicts the Prosecution's evidence, or that it is in fact exculpatory.³⁶ However, it must be shown, in light of the submissions of the parties, that the evidence is potentially exculpatory or could be relevant to the defence of the accused.³⁷ The Defence is not entitled to "embark on a fishing expedition for exculpatory material".³⁸

29. As for article 67(2), the Defence bears the onus of demonstrating any alleged breach of the Prosecution's rule 77 disclosure obligation. To succeed, the Defence not only must (i) show that the material is in the possession or control of the Prosecution;³⁹ but also (ii) show the document's *prima facie* materiality to the preparation of the Defence case,⁴⁰ and (iii) sufficiently identify the requested material.⁴¹ The Prosecution is not obliged "[t]o offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection; it is instead to provide all items that are material to the preparation of the defence [...]".⁴² Indeed, the Prosecution "[d]oes not have an obligation of handing the defence the keys to the warehouse [...]".⁴³

30. The Prosecution submits that the same principles equally apply to any request for disclosure of information pursuant to article 64 of the Statute.

³⁵ See e.g. ICTY, *Prosecutor v Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, para.179; ICTR, *Callixte Kalimanzira v The Prosecutor*, Case No. ICTR-05-88-A, Judgment, 20 October 2010, ("Kalimanzira Appeal Judgment"), para.18; *Mugenzi et al. v The Prosecutor*, Case No. ICTR-99-50-A, Decision on Prosper Mugiraneza's Motions for Relief for Rule 68 Violations, 24 September 2015, para.8; ICTR, *Kamuhanda v The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para.17.

³⁶ See e.g. ICTR Kalimanzira Appeal Judgment, para.19.

³⁷ See e.g. ICTR *Setako v The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to amend his Notice of Appeal and Motion to Admit Evidence, 23 March 2011, para.13; ICTR Kalimanzira Appeal Judgment, paras.18-20.

³⁸ See e.g. ICTR *The Prosecutor v Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, 17 November 2004, paras.14-15.

³⁹ ICC-02/05-03/09-501 OA4, 28 August 2013, para.34.

⁴⁰ ICC-02/05-03/09-501 OA4, 28 August 2013, paras. 2, 42.

⁴¹ ICC-01/09-01/11-1465, para.15.

⁴² ICC-01/05-01/08-632, para.20.

⁴³ ICC-01/05-01/08-632, para.26.

(ii) *The documents do not constitute “prior statements” under rule 76*

31. Second, the Defence does not explain how all security-related information constitutes “prior statements” pursuant to rule 76 of the Rules. Not every security-related statement, even if taken pursuant to rule 111 or 112, constitutes a “prior statement” within the meaning of rule 76 of the Rules.
32. Indeed, the Chamber has held that “information” obtained from a witness does not necessarily constitute a “statement” within the meaning of rule 76.⁴⁴
33. A prior statement is an account of facts as presented by a witness relevant to issues that will arise in his or her testimony. This interpretation of the meaning of a “prior statement” is consistent with a plain reading of rule 76, definitions in ordinary usage and specialised legal contexts. It is also consistent with the definitions recognised by the *ad hoc* tribunals construing similar statutory provisions.
34. On a plain reading of rule 76, “prior statements” are those relevant to the witness’s proposed testimony. Rule 76 only imposes an obligation to ensure pre-trial disclosure of prior statements of Prosecution witnesses who will be called to testify, and to do so sufficiently in advance to enable the adequate preparation by the Defence. Rule 76 does not require disclosure of any statement that is not relevant to a witness’s testimony, and which would therefore not be necessary for the Defence’s preparation. Moreover the disclosure obligation under rule 76 is explicitly “subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82”. Accordingly, there is an exception to disclosure where a statement contains confidential information impacting upon the protection of a witness, such as security-related concerns raised by a witness. If any information is

⁴⁴ ICC-01/04-02/06-731-Conf-Exp, para.19. See also e.g. ICC-01/04-02/06-705-Conf-Exp, paras.29-33. See e.g. *Prosecutor v Blaskic*, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para.15, at 2000 WL 33705569; *Niyitegeka v Prosecutor*, ICTR-96-14-A, Judgment, 9 July 2004, paras.33-34; ICC-01/09-01/11-743-Red, paras.16,20; ICC-02/05-03/09-295 A02, paras.22-23.

provided that is relevant to a witness's testimony this can be separately disclosed, under rule 77 or article 67(2) as appropriate.

35. The Oxford English Dictionary defines "statements" as a "written or oral communication setting forth facts, arguments, demands or the like".⁴⁵ Black's Law Dictionary defines "statement" as "a verbal assertion or nonverbal conduct intended as an assertion".⁴⁶ The French text of rule 76 uses the term "*déclarations*", which is defined as an "action to declare, discourse or written document through which a person declares".⁴⁷ Similarly, the Spanish text of rule 76 uses the term "*declaraciones*", which means a formal manifestation by a person with legal effect, especially one made by the parties, witnesses or experts.⁴⁸

36. The concept of a statement as being no more than the witness's prior account is also consistent with decisions of the *ad hoc* tribunals. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") explained, like this Court's Rules, the rules of that tribunal "do not define what constitutes a witness statement. The usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime."⁴⁹

37. Similarly, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") considered that a document constitutes a statement if it meets the "question-answer" requirement, namely, that the Prosecution (either an

⁴⁵ Oxford English Dictionary.

⁴⁶ Black's Law Dictionary, 8th ed. (St. Paul, Minnesota: West Group, 2004), p.1444.

⁴⁷ "Action de déclarer; discours ou écrit par lequel on déclare". Le Petit Robert de la langue française: <http://pr.bvdep.com/>.

⁴⁸ "Manifestacion formal que realiza una persona con efectos jurídicos, especialmente la que hacen las partes, testigos o peritos en un proceso", See Diccionario de la Real Academia de la Lengua Española: <http://lema.rae.es/drae/?val=declaraciones>.

⁴⁹ *Prosecutor v Blaskic*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch, 26 September 2000, para.15, at 2000 WL 33705569.

investigator or lawyer in court) put questions to a witness, who in turn, provided a response related to the investigation or case.⁵⁰

38. Chambers of this Court have similarly treated screening notes of an initial contact or interview with a person specifically in connection with the investigation as disclosable under rule 76,⁵¹ as well as statements or other records of questioning of persons the Prosecution intends to call as witnesses.⁵²

39. Nevertheless, even if a document does not constitute a “prior statement” pursuant to rule 76, it may still be disclosable if it is otherwise material to the preparation of Defence pursuant to rule 77 and/or contains potentially exculpatory evidence pursuant to article 67(2).

40. By incorporating by reference its Prior Defence Request, the Defence apparently also relies upon article 54(1)(a) to justify its requests for disclosure of all of P-901’s materials.⁵³ However, article 54(1)(a) and the obligation to investigate incriminating and exonerating circumstances equally is not a proper basis for requesting disclosure.

(iii) *All prior statements of P-901 were disclosed under rule 76*

41. In any event, the Prosecution has disclosed all relevant prior statements of P-901, pursuant to rule 76.

42. Moreover, the Prosecution has disclosed all relevant documents related to security matters in relation to Witness P-901, other than documents from the initial, routine confidential security assessment of P-901 undertaken by the

⁵⁰ *Niyitegeka v Prosecutor*, ICTR-96-14-A, Judgment, 9 July 2004, (‘Niyitegeka Appeals Judgment’), paras.33-34. The ICTR Appeals Chamber held, when construing rule 66 that corresponds to the ICC’s rule 76: ‘records of questions put to witnesses by the Prosecution and the answers given constitute statements pursuant to Rule66(A)(ii) of the Rules.’

⁵¹ ICC-01/09-01/11-743-Red, *The Prosecutor v Ruto and Sang*, Decision on Defence Request to be provided with screening notes and Prosecution’s corresponding request for redactions, 20 May 2013, paras.16, 20.

⁵² ICC-02/05-03/09-295 AO2, *The Prosecutor v Banda & Jerbo*, 17 February 2012, paras.22-23.

⁵³ Defence Request, para.15. Citing Prior Defence Request, paras.4-12, 26-30.

Prosecution. These standard security assessment documents⁵⁴ do not constitute “prior statements”, within the meaning of rule 76.⁵⁵ Nonetheless, any relevant information contained in the standard security assessment documents for P-901 was recorded in a separate investigator’s note and disclosed to the Defence on 26 March 2015, pursuant to rule 77 of the Rules. It is unnecessary to disclose these underlying standard security assessment documents, when the relevant information contained in them has been disclosed in a different form – namely in an investigator’s note.⁵⁶

43. The Prosecution has disclosed to the Defence security-related information from P-901 under rule 77 of the Rules in the form of a witness statement⁵⁷ and two investigator’s notes.⁵⁸ The Prosecution has also disclosed with redactions advance copies of six investigator notes, of one or two pages each, all of which contain information related to P-901’s [REDACTED].⁵⁹ Three of these investigator notes relate to discussions between the Prosecution and P-901 regarding his security, subsequent to 31 March 2015.⁶⁰

(c) Request for records of payments and benefits

44. The Defence requests that the Chamber order the Prosecution to disclose a complete record of what it describes as “payments and benefits”, including: (a) administrative documents, receipts, correspondence or expenditure of payments made to, or on the behalf of, Witness P-901 (“Expense Documents”); (b) any and all benefits related to any protective measures conferred to Witness P-901; and (c) any agreement that the Prosecution entered in with Witness P-901 in relation to his testimony in this case.

⁵⁴ DRC-OTP-2078-2328.

⁵⁵ See paras. 31 to 39 above.

⁵⁶ See e.g. ICC-02/05-03-09-295, paras.27-28. See also e.g. ICC-01/04-01/06-2147, para.24.

⁵⁷ DRC-OTP-2083-0199.

⁵⁸ DRC-OTP-2078-2328 and DRC-OTP-2083-0333.

⁵⁹ DRC-OTP-2079-1443; DRC-OTP-2082-2716; DRC-OTP-2083-0327; DRC-OTP-2086-0516; DRC-OTP-2087-0016; DRC-OTP-2086-0943.

⁶⁰ ICC-01/04-02/06-800-Conf-Exp, para.18: The Defence seeks any security-related information from P-901 subsequent to 31 March 2015. See DRC-OTP-2086-0516; DRC-OTP-2086-0943; DRC-OTP-2087-0016.

45. Previously, on 3 June 2015, the Defence requested disclosure of all receipts for expenses paid by the Prosecution to its witnesses covering :

- (i) a witness or any other related person's transport, food, accommodation, communication, allowance and/or compensation for loss of income or any other reason; and
- (ii) [REDACTED].

46. Additionally, the Defence requested any correspondence with the witness or administrative document related to the payment of expenses.

47. On 23 June 2015, the Prosecution confirmed that it would disclose any receipts related to payments by the Prosecution that go beyond reimbursement for routine expenses. As the Prosecution explained, routine expenses, such as those incurred in travelling to a meeting location to meet with the Prosecution, including transport, food, and accommodation would not generally be material to the Defence's preparation as they do not extend beyond that which is reasonably required or legitimately incurred.

(i) P-901's Expense Documents are not material to Defence preparation

48. As regards P-901, the Prosecution confirms that all of his expenses relate to reimbursement for routine expenses.

49. The Prosecution observes that routine payments associated with expenses incurred in interviewing witnesses include reasonable expenses connected with a witness's transport, meals, accommodation, phone credit, and any moderate medical expense for a medical condition that might affect the witness's fitness for interview. The Prosecution further views as routine the related costs of individuals that must travel with the witness to the interview, such as a support person or young dependent child. The Prosecution also compensates or reimburses witnesses, but only where a clear need is demonstrated, for time spent

during the interviews in the form of reasonable loss of income, or for care of dependents during absence from home. Contrary to the Defence's assertion,⁶¹ the Prosecution provides an appropriate compensation for loss of income or daily expenses and bases these expenses on the standard incomes in the Democratic Republic of the Congo. The Prosecution further reimburses for reasonable out-of-pocket costs or expenses incurred such as copying of documentary evidence provided. The Prosecution also views expenses incurred in transporting referred witnesses to VWU assessment meetings as a routine expense.

50. The Prosecution submits that unless a clear issue regarding a witness's credibility is raised, information regarding routine expenses is not material for preparation of trial, nor can it be considered potentially exculpatory. In contrast, information pertaining to payments, benefits or other forms of assistance "*that go beyond the ordinary requirements of subsistence may affect the credibility of witnesses and information related thereto*" may be material to the preparation of trial and disclosable pursuant to rule 77 of the Rules.⁶²

51. The Defence has not explained how P-901's Expense Documents, including those that can be viewed as routine, are material for the Defence's trial preparation and/or can be considered potentially exculpatory. As stated above, if the Defence seeks disclosure of a document under rule 77 and/or article 67(2) the Defence must demonstrate the *prima facie* materiality of the document when the request is made.⁶³ It is not sufficient to simply speculate about the document's materiality.

⁶¹ ICC-01/04-02/06-795-Conf-Exp, para.27.

⁶² See ICC-01/05-01/08-3167-Conf, para.33. ICC-01/05-01/08-1857-Conf, paras.10-12; ICC-01/04-01/06-T-294-ENG-CT-WT, p.28, ll.1-10: A request which '*could be interpreted properly as expressing a somewhat unusual financial interest in giving evidence before this Court [...] was always disclosable material to the Defence*'; ICTR, *Prosecutor v Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber III: Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para.16; Decision on Defence Motion for Full disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para.7; 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. See also e.g. Special Tribunal for Lebanon ("STL"), *The Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra*, Decision on Prosecution Witness Expenses, 9 May 2014, paras.1, 7-16;

⁶³ See paras. 28-29.

52. In the few instances before this Court where Chambers have ordered the disclosure of routine witness expense documents, the Defence had raised concrete allegations affecting a witness's credibility as opposed to a blanket request for access to routine expenses, without a concrete foundation and in an effort to conduct a fishing expedition. Examples include: (a) alleged wrongdoing by a Prosecution intermediary in connection with Prosecution witnesses⁶⁴; and/or (b) alleged bribery of Prosecution witnesses.⁶⁵ In the present case, there are no allegations of any wrongdoing, financial or otherwise, of any Prosecution intermediary or other Prosecution staff member towards P-901 (or towards any other Prosecution witness), or on the part of P-901 himself. In particular, there is no information to suggest that P-901 has been offered or received payments by the Prosecution in return for his testimony.⁶⁶

53. Accordingly, the Defence has not demonstrated how the Expense Documents are material to any issue in this case and/or constitute potentially exculpatory evidence.

(ii) The Prosecution has not borne the expense [REDACTED] for P-901

54. It is not clear if the Defence is seeking information about payment of expenses [REDACTED]. On 3 June 2015, the Defence requested information about payment of expenses for witnesses [REDACTED]. However, in this Defence Request, the Defence seeks disclosure of materials about any and all benefits [REDACTED] for P-901, [REDACTED].

55. The Prosecution advised the Defence on 17 June 2015 that [REDACTED]. The Prosecution confirms that it has not borne any expenses [REDACTED] in relation to P-901. The Prosecution covered the reasonable costs of transporting P-901

⁶⁴ See e.g. ICC-01/04-01/06-2597-Red, para.1; ICC-01/04-01/06-2266-Red.

⁶⁵ See e.g. ICC-01/04-01/06-2597-Red, para.1; ICC-01/04-01/06-2266-Red; ICC-01/05-01/13-1154, para.12; ICC-01/05-01/08-3167-Conf, para.45; ICC-01/05-01/13-983-Conf, para.5.

⁶⁶ Contrast to ICC-01/05-01/13-1154, para.12; ICC-01/05-01/08-3167-Conf, para.45.

[REDACTED]. These constitute routine expenses. The Prosecution submits that any information about expenses [REDACTED].

56. [REDACTED].⁶⁷

57. As Trial Chamber V(A) reasoned:

...[T]he probative value of granting the request... is outweighed by both the considerations of prejudice and efficiency, not only in relation to the witness but also the operations of the [VWU] and the administration of justice in general. Witnesses who come to testify, it is presumed, will have to have sustenance in their lives, whether it is afforded to them on their own or through the instrumentality of the [VWU]. It therefore does not afford a prima facie [indicium] of credibility that the [VWU] has undertaken those reasonable tasks of providing reasonable support and maintenance to a witness rather than the witness doing it themselves.⁶⁸

58. The Prosecution submits that the same reasoning should be applied in this case.

59. The Defence has failed to show why any payments made by VWU are material to its preparation for trial or constitute potentially exculpatory evidence. In particular, the Defence has not shown any concrete basis as to how this information would be relevant to P-901's credibility.

(d) Other disclosure requests

60. The Defence asserts that the Prosecution has yet to disclose: (a) the audio recording and the transcripts of interview conducted with Witness P-901 [REDACTED]; or (b) P-901's handwritten notes made during his interview [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ See Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-Red-Eng, p.44, ll.8-19.

61. On the first point, as detailed above, the witness statement from P-901's [REDACTED] Interview, which related solely to security matters,⁶⁹ was made available to the Defence on 26 March 2015 as an annex to the Prosecution's Request. It was formally disclosed *via* Ringtail on 21 August 2015. The audio recording and transcript of this security witness statement⁷⁰ have not been disclosed, because the signed witness statement containing the same information has already been disclosed. As the Appeals Chamber has previously reasoned, there is no need to provide both an audio recording of an interview as well as a separate signed written statement where the same information is contained in both.⁷¹ Disclosure of both would be duplicative.⁷² Similarly, Trial Chamber I in *The Prosecutor v. Lubanga* confirmed that where sufficient information was disclosed in one form, it was not necessary to disclose more above and beyond what had already been disclosed, as it would have no material effect.⁷³

62. On the second point, the Prosecution disclosed an advance copy of P-901's handwritten note from the [REDACTED] Interview to the Defence on 20 March 2015, and formally disclosed it *via* Ringtail on 26 March 2015.⁷⁴ The Defence acknowledged in its filing that it had received this handwritten note, but does not seem to acknowledge that these were the notes written by P-901 during his [REDACTED] Interview.⁷⁵ P-901 did not make any other handwritten notes during this interview. He made handwritten notes during the standard security assessment prior to the interview, but they are not relevant to any issue related to his forthcoming testimony and relate strictly to his personal security situation.⁷⁶ These latter notes are not disclosable.

⁶⁹ DRC-OTP-2083-0199.

⁷⁰ DRC-OTP-2081-0942.

⁷¹ *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03-09-295, p.1, paras.1-2, 26: "[...]the Appeals Chamber considers that an additional signed and written record of a witness's statements prepared pursuant to rule 111 is not required when such statements are audio- or video-recorded prepared pursuant to rule 112."

⁷² See e.g. ICC-02/05-03-09-295, paras.27-28. See also e.g. ICC-01/04-01/06-2147, para.24.

⁷³ ICC-01/04-01/06-2147, para.24.

⁷⁴ DRC-OTP-2077-0855.

⁷⁵ ICC-01/04-02/06-800-Conf-Exp, para.7.

⁷⁶ [REDACTED].

Conclusion

63. For the foregoing reasons, the Prosecution requests that the Chamber reject the Defence Request.



Fatou Bensouda,
Prosecutor

Dated this 28th day of September 2015

At The Hague, The Netherlands