

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 October 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 “Response to the Defence request for disclosure orders pursuant to rules 76 and 77 of the Rules of Procedure and Evidence”,
14 September 2015, ICC-01/04-02/06-822-Conf-Exp**

Source: Office of the Prosecutor

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

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of the 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**

Other

Introduction

1. The Defence requests that Trial Chamber VI (“Chamber”) order the Office of the Prosecutor (“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 of Procedure and Evidence (“Rules”) and article 67(2) of the Rome Statute (“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).¹ The Defence alleges that the Prosecution has failed to comply with its disclosure obligations (“Defence Request”).² The Prosecution submits that no such order is needed or justified; and that it has met its disclosure obligations.

2. First, as Chambers of the Court have confirmed, the duties of disclosure under article 67(2) and inspection under rule 77 rest with the Prosecution and the Chamber will not routinely oversee or review the decisions taken by the Office of the Prosecutor in fulfillment of them.³ The Prosecution has disclosed all prior statements of its trial witnesses pursuant to rule 76. The Prosecution has also disclosed all documents, including investigator notes, which contain relevant information pursuant to rule 77 and/or article 67(2). The Prosecution is conscious of its ongoing obligations under rule 77 and article 67(2) and is re-reviewing documents related to every trial witness in advance of their testimony. In particular, certain documents related to allegations of witness interference that were not previously disclosed will now be disclosed, especially in light of the Chamber’s conclusions regarding witness interference.

3. Second, the Prosecution considers that the Defence Request for any statements, including any investigator notes, regardless of the content, is imprecisely defined

¹ ICC-01/04-02/06-795-Conf-Exp, para.1.

² ICC-01/04-02/06-795-Conf-Exp.

³ See *e.g.* ICC-01/05-01/08-632, paras. 20-22; ICC-02/11-01/11-351-Conf, para.17.

and unfounded. This Chamber has held that not every recorded communication with a witness is disclosable. As already stated, the Prosecution discharged its disclosure obligations under rule 76. The Prosecution has or will also disclose all documents related to alleged witness interference concerning trial witnesses, pursuant to rule 77.

4. Third, the Prosecution confirms that it has disclosed agreements related to statements of limited use made with trial witnesses where they exist. Although the Defence request for disclosure of all “agreements” with Prosecution trial witnesses is not clear, the Prosecution clarifies that it has not entered into any other agreements with its witnesses. The Prosecution is reviewing the documents related to expenses or payments made to its trial witnesses. However, the Prosecution does not consider that expenses or payments that are routine – thus, reasonable and necessary – are *per se* disclosable. Finally, the Prosecution objects to the overly broad request for records of any payments or benefits related to protective measures conferred upon its trial witnesses.

Confidentiality

The filing is classified as Confidential, *EX PARTE* – Only available to the Prosecution, Defence and Victims and Witnesses Unit (“VWU”), pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, because it refers to certain information contained in submissions bearing the same level of confidentiality and contains confidential information related to witness security.⁴ The Prosecution will file a redacted version.

⁴ See ICC-01/04-02/06-816-Conf-Exp, paras.3-4.

Procedural History

5. On 2 March 2015, the Prosecution disclosed the evidence upon which it seeks to rely for trial, pursuant to the Chamber's order.⁵
6. Between 3 June 2015 and 2 July 2015, the Defence and the Prosecution exchanged correspondence on disclosure related to: (a) witness statements;⁶ (b) all documents related to payments to witnesses;⁷ (c) protective measures;⁸ and (d) any agreements entered into by the Prosecution with its witnesses.⁹
7. On 16 June 2015, the Prosecution informed the Defence that only four witnesses signed "statements of limited use" and that all had been disclosed except for one statement which was signed in the witness re-interview.¹⁰ The Prosecution subsequently disclosed this last statement of limited use. The Prosecution asked for clarification on what the Defence means by "any other type of agreement"; to which the Defence responded that this included any agreements formal or implied.¹¹
8. On 17 June 2015, the Prosecution confirmed to the Defence which trial witnesses are in the Court Protection Program and under VWU management.¹²
9. On 25 August 2015, the Defence filed a request on behalf of Mr Ntaganda for disclosure orders pursuant to Rule 76 and 77 of the Rules.¹³
10. On 9 September 2015, the Chamber shortened the deadline for any response to the Defence Request to 14 September 2015, at midday.¹⁴

⁵ ICC-01/04-02/06-496 and ICC-01/04-02/06-0496-Conf-Anx.

⁶ ICC-01/04-02/06-795-Conf-Exp-Anx-A to D.

⁷ ICC-01/04-02/06-795-Conf-Exp-Anx-E, H, K, N.

⁸ ICC-01/04-02/06-795-Conf-Exp-Anx-F, I, L, O.

⁹ ICC-01/04-02/06-795-Conf-Exp-Anx-G, J, M, P.

¹⁰ ICC-01/04-02/06-795-Conf-Exp-Anx-J. The remaining "statement of limited used" was disclosed on 19 June 2015, ICC-01/04-02/06-663-Conf-AnxA.

¹¹ Defence email sent to Prosecution on 22 June 2015 at 15:18; ICC-01/04-02/06-795-Conf-Exp-AnxM.

¹² Prosecution email sent to Defence on 17 June 2015 at 17:25; ICC-01/04-02/06-795-Conf-Exp-Anx-I.

¹³ ICC-01/04-02/06-795-Conf-Exp and ICC-01/04-02/06-795-Red.

Prosecution's Submissions

11. The Defence Request to order the Prosecution to disclose certain categories of material related to its trial witnesses 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) There are no screening notes for the trial witnesses identified

12. Contrary to the Defence's speculative assertions,¹⁵ there are no screening notes for P-901 or P-67.

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

13. The Defence requests that the Chamber order the Prosecution to disclose all statements of trial witnesses, in whatever form¹⁶ including any information about a witness's security concerns.¹⁷ The Defence is effectively requesting disclosure of all communications with a trial witness, regardless of the content of these communications. It is not necessary for the Chamber to order the Prosecution to disclose relevant statements pursuant to rules 76, 77 and article 67(2). The Prosecution is mindful of its obligations and has complied with them.

14. The Prosecution agrees that it is not the form that determines whether a document is a "statement" within the meaning of rule 76.¹⁸ The Prosecution further agrees that where there is a screening note containing a witnesses' prior remarks relevant to the case, then this constitutes a prior statement pursuant to rule 76.¹⁹ However, the Prosecution disagrees that every communication with a

¹⁴ Email from the Chamber, 9 September 2015, at 10:02 am.

¹⁵ Defence Request, para.17.

¹⁶ Other than an exception for Prosecution internal work product: *See* Defence Request, para.4; ICC-01/09-01/11-743-Red, para.29.

¹⁷ Defence Request, paras.13-14.

¹⁸ ICC-02/05-03/09-295 OA, para.22: "*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.*"

¹⁹ ICC-01/09-01/11-743-Red, para.20.

trial witness constitutes a prior statement and must be disclosed under rule 76. Moreover, not every communication with a trial witness will be relevant pursuant to rule 77 or article 67(2).

15. The Prosecution has disclosed all prior statements of its trial witnesses pursuant to rule 76. The Prosecution, mindful of its ongoing obligations under rule 77 and article 67(2), is re-reviewing all materials related to its trial witnesses. It will ensure that any information, now considered to be relevant under rule 77, such as information regarding alleged witness interference with witnesses, will be disclosed promptly. However, the Prosecution does not consider that informational communications with its witnesses, including those regarding security concerns outside the witness interference allegations, are relevant or material to the Defence.
16. The disclosure regime at the International Criminal Court is not an open file 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. In particular, as detailed further below: (i) not every communication with witnesses constitutes a “prior statement” under rule 76; (ii) not all investigator notes are material to the Defence preparation or potentially exculpatory; and (iii) all prior statements of trial witnesses have been disclosed under rule 76 and relevant and material documents disclosed under rule 77 and article 67(2).

(i) Not every communication with witnesses constitutes a “prior statement” under rule 76

17. First, contrary to the Defence’s implied assertions, not all communications with a trial witness – regardless of content – constitute a “prior statement” pursuant to rule 76 of the Rules. For instance, investigator notes of contacts with witnesses

can include security-related information regarding a witness that is not relevant to the charges in the case or any issue that might arise during a witness's testimony. They can also include routine contact with witnesses for the purpose of witness management unrelated to either security issues or the substantive case.

18. Indeed, this Chamber has held that "information" obtained from a witness does not necessarily constitute a "statement", within the meaning of rule 76.²⁰ Trial Chamber VII held that statements under rule 76 are "*made only when witnesses are questioned about their knowledge of the case in the course of its investigations.*"²¹

19. 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.

20. 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 allow the Defence to prepare. 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".

²⁰ 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.

²¹ ICC-01/05-01/13-1227, para.9.

21. The Oxford English Dictionary defines “statements” as a “written or oral communication setting forth facts, arguments, demands or the like”.²² Black’s Law Dictionary defines “statement” as “a verbal assertion or nonverbal conduct intended as an assertion”.²³ 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”.²⁴ 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.²⁵
22. 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.”²⁶
23. 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 investigator or lawyer in court) put questions to a witness, who in turn, provided a response related to the investigation or case.²⁷

²² Oxford English Dictionary.

²³ Black’s Law Dictionary, 8th ed. (St. Paul, Minnesota: West Group, 2004), p.1444.

²⁴ “Action de déclarer; discours ou écrit par lequel on déclare”. Le Petit Robert de la langue française: <http://pr.bvdep.com/>.

²⁵ “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>.

²⁶ *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.

²⁷ *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.”

24. 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 76,²⁸ as well as statements or other records of questioning of persons the Prosecution intends to call as witnesses.²⁹
25. Trial Chamber I defined as internal work product – and not subject to disclosure – all preliminary examination reports, information related to the preparation of a case such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies, information related to the Prosecution’s objectives and techniques of investigation, analyses and conclusions derived from evidence collected by the Prosecution, investigator interview notes reflected in the witness statements or audio-video recording of the statement; investigator’s subjective opinions or conclusions that are recorded in the investigator’s interview notes, and internal correspondence.³⁰ Contrary to the Defence’s assertions³¹, internal emails regarding an investigator’s interactions with witnesses and handwritten notes regarding their investigative activities constitute internal work product.
26. Nevertheless, the Prosecution reviews all statements and investigator notes, even when such documents do not constitute a “prior statement” pursuant to rule 76, and discloses information contained in those documents³² if it is material to the preparation of Defence pursuant to rule 77 and/or contains potentially exculpatory evidence pursuant to article 67(2). The Defence also relies upon article 54(1)(a) to justify its requests for disclosure of all of P-901’s materials.³³

²⁸ 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.

²⁹ ICC-02/05-03/09-295 AO2, *The Prosecutor v Banda & Jerbo*, 17 February 2012, paras.22-23. Contrast, ICC-01/05-01/08-750-Red, paras.31-37. Citing e.g. ICC-01/04-01/06-T-104-Eng-ET-WT, p.24, l.19-p.25, l.2 : Trial Chamber III in *The Prosecutor v Jean-Pierre Bemba Gombo*, held that pre-assessment interviews are not statements for the purposes of rule 76 (ICC-01/05-01/08-750-Red, para.33).

³⁰ ICC-01/04-01/06-2656-Red, paras.17-18.

³¹ Defence Request, para.17.

³² See e.g. ICC-01/09-01/11-743-Red, para. 22. Trial Chamber V decided that even in the case of screening notes of trial witnesses who are questioned about matters related to the case that ‘*it does not follow that they must always be disclosed in full. The Prosecution is entitled to redact its work product and any other information falling within the scope of the Protocol*’.

³³ Defence Request, paras.4-12; in particular, para.11.

However, article 54(1)(a) and the obligation to investigate incriminating and exonerating circumstances equally is not a proper basis for requesting disclosure.

(ii) *Not all investigator notes are material to the Defence preparation or potentially exculpatory*

27. The Defence has failed to explain concretely how all investigator notes or communications with trial witnesses – including those dealing with the security information of trial witnesses or routine witness management – are relevant to or material for its adequate preparation for trial, or how they constitute potentially exculpatory evidence pursuant to rule 77 or article 67(2). A speculative assertion that such information *may* impact the credibility of witnesses is insufficient to ground its request. Where an issue of witness credibility in such communications or expenses arises, the Prosecution is already under an obligation to disclose the information under article 67(2) and has done so.

28. 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.”³⁴ 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.³⁵ 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”.³⁶

29. 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, and (ii) make a *prima facie* showing of the requested material’s probable

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

³⁵ ICC-01/04-01/06-2152, para.94.

³⁶ ICC-01/04-01/06-1401, para.59.

exculpatory nature.³⁷ 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.³⁸ 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.³⁹ The Defence is not entitled to "embark on a fishing expedition for exculpatory material".⁴⁰

30. 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;⁴¹ but also (ii) show the document's *prima facie* materiality to the preparation of the Defence case,⁴² and (iii) sufficiently identify the requested material.⁴³ 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 [...]".⁴⁴ Indeed, the Prosecution "[d]oes not have an obligation of handing the defence the keys to the warehouse [...]".⁴⁵

31. Trial Chamber III in *The Prosecutor v Jean Pierre Bemba* confirmed that the duties of disclosure under article 67(2) and inspection under rule 77 rest with the Prosecution and the Chamber will not routinely oversee or review the decisions

³⁷ 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.

³⁸ See e.g. ICTR Kalimanzira Appeal Judgment, para.19.

³⁹ 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.

⁴⁰ See e.g. ICTR *The Prosecutor v Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, 17 November 2004, paras.14-15.

⁴¹ ICC-02/05-03/09-501 OA4, 28 August 2013, para.34.

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

⁴³ ICC-01/09-01/11-1465, para.15.

⁴⁴ ICC-01/05-01/08-632, para.20.

⁴⁵ ICC-01/05-01/08-632, para.26.

taken by the Office of the Prosecutor in fulfillment of them. The Chamber stated that it would only intervene if there were good reasons for doubting that the duty had been properly fulfilled.⁴⁶

(iii) Prior statements of trial witnesses have been disclosed under rule 76 and any relevant, material documents disclosed under rule 77 and article 67(2)

32. In any event, as stated the Prosecution has disclosed all relevant prior statements of its trial witnesses pursuant to rule 76, and has or will disclose any relevant documents material to the Defence under rule 77 and article 67(2). The Prosecution agrees that investigator notes concerning witness interference allegations are relevant now, especially in light of the Chamber's conclusions regarding attempts to interfere with witnesses.⁴⁷ It is for that reason that additional investigator notes were disclosed to the Defence [REDACTED]. In particular, the Prosecution agrees with the Defence that witness interference issues may be appropriate matters for the parties to address with relevant witnesses, [REDACTED].⁴⁸ The Prosecution is currently undertaking a review of all other witnesses who alleged witness interference, for disclosure purposes.

33. The Defence essentially acknowledges that the witness interference allegations will be relevant to assessing the Accused's credibility and character.⁴⁹ The Prosecution submits that it is appropriate to address this issue with relevant witnesses, for the Chamber's assessment of the Accused's consciousness of guilt,

⁴⁶ ICC-01/05-01/08-632, paras. 20-22.

⁴⁷ ICC-01/04-02/06-785-Conf-Exp, paras.46-70.

⁴⁸ ICC-01/04-02/06-T-24-ENG, p.33, ln.3 to p.34, ln.1 : The Defence said in its Opening Statement that it required information in relation to allegations of witness intimidation in order to question witnesses coming to testify: "We have to bear in mind that those allegations of the Prosecution concern witnesses who will come and testify in this case and we still do not have the information that will enable us to cross-examine them, This is very worrying for us, and it is a great concern because we want the trial to be very fair, and the evidence from those witnesses should not undermine the assessment of the evidence".

⁴⁹ Defence Request, para.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, are 'necessarily material' to the Defence's preparations. 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.[...]"

pursuant to its truth-seeking function.⁵⁰ In particular, because the Chamber found reasonable grounds to believe that the Accused has been involved in attempts to interfere with witnesses.⁵¹ In contrast, in *The Prosecutor v Ruto & Sang*⁵², the Prosecution did not seek to introduce evidence of witness interference to establish consciousness of guilt because there was no *prima facie* finding that the accused were involved in witness interference. However, even then the Prosecution was entitled to introduce evidence regarding witness interference allegations to understand the context, and as circumstantial evidence, regarding a potentially broader witness interference scheme. This was relevant under applications to introduce prior statements of hostile witnesses under rule 68.⁵³ It is also appropriate in this case to allow such evidence as the witness interference attempts may impact on witnesses coming to testify and the Prosecution may need to have recourse to rule 68. It is not in the interests of the witnesses or of the efficient and expeditious conduct of the proceedings to recall witnesses if an issue subsequently arises. It is better to address the issues now when witnesses testify.

(c) Request for a complete record of payments and benefits

34. The Defence requests that the Chamber order the Prosecution to disclose a complete record of what it describes as “payments and benefits”, conferred on any intended witness including “agreements”, pursuant to rule 77 and article 67(2).⁵⁴

⁵⁰ See e.g. article 69(3); ICC-01/09-01/11-1938-Corr-Red2, para.60; ICTY, *Prosecutor v Milan Lukic & Sredoje Lukic*, IT-98-32/I-T, Judgment, 20 July 2009, paras.168-169, 230; *Prosecutor v Mitar Vasiljevic*, IT-98-32-A, Judgment, 25 February 2004, Dissenting Opinion of Judge Shahabuddeen, Dissenting Opinion, para.24; United States: Pa.- Com. V. Johnson, 576 Pa. 23, 838 A.2d 663 (2003), cert. Denied, 543 U.S. 1008, 125 S. Ct. 617, 160 L. Ed. 2d 471 (2004) (any attempt by a defendant to interfere with a witness’s testimony is admissible to show the defendant’s consciousness of guilt) ; see also U.S. v. Cirillo, 468 F.2d 1233 (2d Cir. 1972).

⁵¹ ICC-01/04-02/06-785-Conf-Exp, paras.46-70.

⁵² ICC-01/09-01/11-1938-Corr-Red2, para.43.

⁵³ See e.g. ICC-01/09-01/11-1625-Red, para.28; ICC-01/09-01/11-1938-Corr-Red2, para.60

⁵⁴ Defence Request, paras.26-30.

(i) Expenses or benefits that are not routine will be disclosed

35. The Prosecution has reviewed the expenses of the first three witnesses appearing – P-805, P-901, and P-931 – and confirms that all incurred expenses are routine. The Prosecution is currently undertaking a review of expenses and benefits in relation to its other trial witnesses, in the order in which they will appear, to assess if any such information is relevant pursuant to rule 77 or article 67(2). The Prosecution undertakes to disclose any such expenses or benefits paid, that are not viewed as routine.
36. The Prosecution agrees that expenses and benefits viewed as ‘routine’, must also be “reasonable and necessary”;⁵⁵ and this indeed is the approach it takes to witness expenses and benefits.
37. 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) the implementation of protective measures paid by the Prosecution not borne by the VWU. Additionally, the Defence requested any correspondence with the witness or administrative document related to the payment of expenses.
38. 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.

⁵⁵ Defence Request, para.26.

39. 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 reasonable 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,⁵⁶ the Prosecution provides an appropriate compensation for reasonable 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 reasonable expenses incurred in transporting referred witnesses to VWU assessment meetings as a routine expense.

40. The Prosecution submits that unless a clear issue regarding a witness's credibility is raised, information regarding routine expenses, which are reasonable and necessary, 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.⁵⁷

⁵⁶ ICC-01/04-02/06-795-Conf-Exp, para.27.

⁵⁷ See e.g. ICC-01/09-01/11-T-132-Red-Eng, p.2, l.16 – p.5, l.19; 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

41. The Defence has not explained how routine expenses or payments 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.⁵⁸ It is not sufficient to simply speculate about the document's materiality.
42. 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 witnesses⁵⁹; and/or (b) alleged bribery of Prosecution witnesses.⁶⁰ In the present case, there are no allegations of any wrongdoing, financial or otherwise, of any Prosecution intermediary or other Prosecution staff member towards any Prosecution witness, or on the part of any Prosecution witness. In particular, there is no information to suggest that any Prosecution trial witness has been offered or received payments by the Prosecution in return for his or her testimony.⁶¹ The Prosecution confirms that the Witness expense receipts for P-116⁶² were disclosed in this case inadvertently.

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; ICC-01/05-01/08-3167-Conf, para.33.

⁵⁸ See paras. 29-33.

⁵⁹ *See e.g.* ICC-01/04-01/06-2597-Red, para.1; ICC-01/04-01/06-2266-Red.

⁶⁰ *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.

⁶¹ *Contrast to* ICC-01/05-01/13-1154, para.12; ICC-01/05-01/08-3167-Conf, para.45.

⁶² Defence Request, para.35.

43. The cases relied upon by the Defence do not support the Defence's proposition that all payments are disclosable even if there is no issue of payments being made beyond what is reasonably required. In *The Prosecutor v Casimir Bizimungu et al.*, where an issue arose as to whether payments to a witness were exculpatory, the expenses ultimately disclosed related to payments made by the Prosecution to a relocated witness for several years (from 2001 to 2006).⁶³ Similarly, in *The Prosecutor v Karamera et al.*, the Chamber was dealing with benefits paid that went "beyond that which is reasonably required".⁶⁴

44. Accordingly, the Defence has not demonstrated how routine expense or payment documents are material to any issue in this case and/or constitute potentially exculpatory evidence.

(ii) Payments in relation to protective measures are not disclosable

45. It is not clear if the Defence is seeking information about payment of expenses for protective measures for trial witnesses paid for by the VWU, or any such expenses paid for by the Prosecution. On 3 June 2015, the Defence requested information about payment of expenses for witnesses in the implementation of protective measures paid by the Prosecution, and not paid by the VWU. However, in this Defence Request, the Defence seeks disclosure of "a complete record of payments and benefits" conferred on intended witnesses, and does not distinguish between payments made by the Prosecution or by the VWU.

46. The Prosecution submits that any routine and reasonable expenses or payments incurred by the Prosecution in relation to protective measures should not be disclosed. This may otherwise prejudice the security of the witnesses concerned.

⁶³ *The Prosecutor v Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, 18 February 2008, para.6.

⁶⁴ *The Prosecutor v 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.

Moreover, any information about expenses paid by the VWU when implementing protective measures should not be disclosed.

47. Trial Chamber V(A) in *The Prosecutor v. Ruto and Sang* rejected a similar Defence request to disclose costs expended by VWU for purposes of relocation, maintenance and/or support of a witness within the witness protection and support programme.⁶⁵

48. 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.”⁶⁶

49. The Prosecution submits that the same reasoning should be applied in this case. 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 the credibility of any trial witness.

50. The Prosecution further submits that any arrangements entered into by VWU on behalf of witnesses to ensure their stay in countries of relocation⁶⁷ should, for the same reasons, not be disclosable.

⁶⁵ See e.g. Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-Red-Eng, p.44; Transcript of hearing of 9 September 2014, ICC-01/09-01/11-T-132-Red-ENG, p.2, l.11-p.5, l.22. See also ICC-01/09-01/11-1154.

⁶⁶ See Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-Red-Eng, p.44, ll.8-19.

⁶⁷ Defence Request, para.30.

(iii) All “agreements” with trial witnesses have already been disclosed

51. The Prosecution observes that although the Defence is not clear as to the “agreements” to which it seeks access, the Prosecution has already disclosed any agreements with trial witnesses under article 54(3)(d): known as “statements of limited use” agreements, where they exist.⁶⁸ Although not an agreement between the Prosecution and a trial witness, the Prosecution has also disclosed a letter from the Democratic Republic of the Congo confirming it will not use evidence given by any witnesses before the Court against them in national proceedings.⁶⁹

Conclusion

52. For the foregoing reasons, the Prosecution submits that the Defence’s Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 6th day of October 2015

At The Hague, The Netherlands

⁶⁸ DRC-OTP-0149-0089, DRC-OTP-0167-0046, DRC-OTP-0168-0097, DRC-OTP-2052-0199, DRC-OTP-2057-0507, DRC-OTP-2052-0430, DRC-OTP-2084-0606, and DRC-OTP-0187-0029. All were formally disclosed in 2013 except for DRC-OTP-2084-0606 that was disclosed on 19 June 2015.

⁶⁹ DRC-OTP-0207-0159. this was formally disclosed on 10 July 2015.