



Original: English

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

Date: 28 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

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

**Public redacted version of “Request on behalf of Mr Ntaganda seeking leave to
appeal the ‘Decision on Defence requests seeking disclosure orders and a
declaration of Prosecution obligation to record contacts with witnesses’”,
26 October 2015, ICC-01/04-02/06-941-Conf-Exp**

Source: Defence Team of Mr Bosco Ntaganda

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Further to the *“Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses”* issued on 16 October 2015 by Trial Chamber VI (“Chamber”) (*“Impugned Decision”*),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Public redacted version of “Request on behalf of Mr Ntaganda seeking leave to appeal the ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’”,
26 October 2015, ICC-01/04-02/06-941-Conf-Exp**

(“Defence Request”)

I. Introduction

1. Bosco Ntaganda requests leave to appeal three issues arising from the Impugned Decision: (i) the correctness of the definition of “statement” pursuant to Rule 76(1) of the Rules;² (ii) whether the Chamber erred in law and in fact in failing to provide any criteria for disclosure of Rule 77 material beyond stating that this requires a “case-by-case assessment”;³ and (iii) whether the Chamber erred in law and in fact in giving the Prosecution discretion not to disclose payments to witnesses on the basis that they are, in its view, “routine”.⁴
2. These issues are appealable. They significantly affect the fair and expeditious conduct of proceedings or their outcome, for which immediate appellate resolution will, or at the very least may, materially advance proceedings. On the contrary, the absence of immediate appellate resolution will likely obstruct and delay the proceedings.

II. Procedural background

¹ ICC-01/04-02/06-904

² Impugned Decision, para. 29.

³ Impugned Decision, paras. 30.

⁴ Impugned Decision, para. 32.

3. On 25 August 2015, the Defence submitted the Defence Disclosure Request, in which it sought from the Chamber orders to instruct the Prosecution to disclose: (i) any statements of witnesses pursuant to Rules 76(1) and 77 of the Rules and Article 67(2) of the Statute; and (ii) a record of payments and benefits conferred on any intended witnesses, including agreements, pursuant to Rule 77 and Article 67(2).
4. On 28 August 2015, the Defence submitted its *Request on behalf of Mr Ntaganda seeking disclosure orders in relation to Witness P-901*⁵ (“Defence Witness P-0901 Disclosure Request”), seeking disclosure of, *inter alia*: (i) any statement of Witness P-0901, including any statement pertaining to his security concerns; and (ii) a complete record of payments and benefits.
5. On 7 September 2015, the Prosecution responded to the Defence Witness P-0901 Disclosure Request, submitting that “no such order is needed or justified; and that it has met its disclosure obligations.”⁶
6. On 8 September 2015, the Defence sought leave to reply to the Prosecution response to the Defence Witness P-0901 Disclosure Request⁷ and on 10 September 2015, the Prosecution responded to this Defence application for leave to reply.⁸
7. On 14 September 2015, the Prosecution responded to the Defence Disclosure Request, denying the need for any disclosure orders and stating that it has met its obligations in this regard.⁹

⁵ ICC-01/04-02/06-800-Conf-Exp.

⁶ ICC-01/04-02/06-808-Conf-Exp, para. 1.

⁷ ICC-01/04-02/06-810.

⁸ ICC-01/04-02/06-816-Conf-Exp.

⁹ ICC-01/04-02/06-822-Conf-Exp.

8. On 16 September 2015, the Defence sought leave to reply to the Prosecution response to the Defence Decision Request¹⁰ and on 1 October 2015, the Prosecution responded to this Defence application for leave to reply.¹¹
9. On 18 September 2015, the Chamber rendered its decision on the Defence Witness P-0901 Disclosure Request, rejecting the request in its entirety.¹²
10. On 16 October 2015, the Chamber rendered its decision on the Defence Disclosure Request, rejecting the request in its entirety.¹³

III. Applicable law

11. A decision is subject to appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
12. The Appeals Chamber has defined an “issue” as “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination” and as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”¹⁴ “Essential” in this context is understood as meaning essential to some judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion.”¹⁵ Issues that have previously been recognised as appealable range from the

¹⁰ ICC-01/04-02/06-832-Conf-Exp.

¹¹ ICC-01/04-02/06-880.

¹² ICC-01/04-02/06-840-Conf-Exp (“Witness P-0901 Disclosure Decision”).

¹³ ICC-01/04-02/06-904.

¹⁴ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9 (“DRC, Appeals Chamber LtA Decision”). See *Ntaganda*, Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date, ICC-01/04-02/06-604, 21 May 2015, para. 15.

¹⁵ *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim’s Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para. 8.

correctness of a particular determination to the standard that has been applied as part of a determination. An appealable issue may be “legal or factual or mixed.”¹⁶ An example of the former includes the following broadly formulated issue recently approved for interlocutory appeal by another ICC Trial Chamber:

Whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution’s cooperation request, such that it ought to have referred the matter to the Assembly of States Parties (‘ASP’); or in the alternative, if the Chamber’s findings are not considered ‘formal’ or ‘judicial’ findings under Article 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP.¹⁷

13. Examples of issues that are more legal in nature include:

Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of “interference.”¹⁸

[...]

“Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law.”¹⁹

[...]

The correctness of the standard and procedure established and applied by the Trial Chamber to determine whether the identity of an intermediary must be disclosed under Rule 77.²⁰

14. A Trial Chamber has the discretion to re-formulate issues posited for appeal as it deems necessary and fit²¹ and, as illustrated above, such issues may be

¹⁶ *DRC*, Appeals Chamber LtA Decision, para. 9.

¹⁷ *Kenyatta*, Decision on the Prosecution’s request for leave to appeal, ICC-01/09-02/11-1004, 9 March 2015 (“*Kenyatta*, Decision on Prosecution LtA”), para. 9(i), 25.

¹⁸ *Ruto et al.*, Decision on the Defence’s Applications for Leave to Appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-1953-Red-Corr, 10 September 2015 (“*Ruto et al.*, Decision on Defence LtA”), paras. 20(v), 21.

¹⁹ *Ruto et al.*, Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, ICC-01/09-01/11-817, 18 July 2013, para. 2(ii), 18-19.

²⁰ *Lubanga*, Decision on the prosecution request for leave to appeal the “Decision on Intermediaries”, ICC-01/04-01/06-2463-Conf, 2 June 2010, paras. 2, 8.

formulated in the alternative.²² Multiple issues may, and often are, permitted in respect of the same decision.²³

15. The second requirement under Article 82(1)(d) is that the issue involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.
16. The third requirement is that the Trial Chamber be of the opinion that immediate appellate intervention would “materially advance the proceedings.” This involves an assessment of the degree to which an “authoritative determination” of the “matter posing for decision” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”²⁴
17. The Appeals Chamber has also held that the criterion is met if immediate determination would “move forward” the proceedings, by “ensuring that the proceedings follow the right course” and “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines.”²⁵ The purpose of such appeal is to avoid the consequences that would otherwise be embedded in the proceedings and which could “cloud or unravel the judicial process.”²⁶ The applicable threshold is “*may* materially advance” not “*will* materially advance”.
18. Even though leave to appeal has been viewed as “exceptional”, it is nonetheless an important procedure that can “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the

²¹ *Ruto et al*, Decision on Defence LtA, para. 20.

²² *Kenyatta*, Decision on Prosecution LtA, para. 9(i), 25.

²³ *Ruto et al*, Decision on Defence LtA, paras. 20-21.

²⁴ *DRC*, Appeals Chamber LtA Decision, para. 14.

²⁵ *DRC*, Appeals Chamber LtA Decision, paras. 15.

²⁶ *DRC*, Appeals Chamber LtA Decision, para. 16.

trial”.²⁷ Significant issues concerning disclosure have previously been recognized as being matters that “may materially advance” the proceedings and in respect of which leave to appeal has been granted.²⁸

19. The Prosecution has previously submitted in other proceedings, with which the Defence agrees, that a request for leave to appeal “must not engage on the merits or correctness of a Decision.”²⁹ The sole issue of concern, unlike in a request for reconsideration, is the consequences – not the correctness – of the decision for the conduct of proceedings, and the potential benefits for the conduct of proceedings that would accordingly arise from immediate appellate intervention.

²⁷ *DRC*, Appeals Chamber LtA Decision, para. 19.

²⁸ *Banda & Jerbo*, Decision on the Defence Application for Leave to Appeal the “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 21 March 2013, ICC-02/05-03/09-457, para. 19 (“The fairness of the proceedings would be significantly affected if the defence were denied access to relevant material which is in the possession of the prosecution. The resulting need to investigate and gather evidence to replace the material to which the defence would be denied access would cause delays in the proceedings and would thus affect the expeditious conduct of the proceedings. Should the defence fail to collect evidence to replace such missing material, the outcome of the trial could also be affected.”); *Lubanga*, Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210, paras. 23 (“if this broad area of evidence is relevant and merits research and thereafter introduction into the trial, this could affect the length of the trial and its fairness”). See also: *Katanga*, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, ICC-01/04-01/07-116, p. 6 (“CONSIDERING that [...] the Defence may have an interest in contacting [individuals interviewed by the Prosecution that are not witnesses]; and that the redaction of their identities and identifying information would prevent the defence from contacting them for the purpose of the preparation of the confirmation hearing; CONSIDERING, therefore that the second issue would significantly affect the fair conduct of the proceedings; CONSIDERING that the second issue would also significantly affect the expeditious conduct of the proceedings because [...] it may delay certain investigative steps by the Defence”); *Lubanga*, Decision on Third Defence Motion for Leave to Appeal, 4 October 2006, ICC-01/04-01/06-514, p. 12 (“redaction of the names of Prosecution sources could affect the ability of the Defence to fully challenge the Prosecution evidence at the confirmation hearing [...] and that therefore the Fourth Issue is directly related to the fairness of the proceedings”); *Simić et al.*, IT-95-9-T, Decision on Prosecutor’s Motion, 28 April 2003 (“[Cross-examination] is an issue that would significantly affect the fair and expeditious conduct of the proceedings”).

²⁹ *Bemba et al.*, Corrected version of “Prosecution’s application for leave to appeal the “Decision on Witness Preparation and Familiarisation”, 21 September 2015, ICC-01/05-01/13-1276, ICC-01/05-01/13-1276-Corr, 21 September 2015, para. 24.

20. Article 82(1)(d) confers no discretion to deny leave when the conditions are satisfied.

IV The issues are “appealable issues”

21. Leave is requested to appeal the following issues:
- i. Whether the Chamber erred in law in its definition of “statement” in Rule 76(1) of the Rules;
 - ii. Whether the Chamber erred in law and in fact in failing to define the scope of the Prosecution’s obligation to disclose non-Rule 76(1) statements of witnesses beyond stating that this was a matter of “case-by-case assessment” and, accordingly, subject to the Prosecution sole discretion without any applicable criteria; and
 - iii. Whether the Chamber erred in law and in fact in entrusting the Prosecution to use its discretion to determine what payments and benefits to witnesses should be assessed as “routine” and, therefore, not subject to disclosure.³⁰
22. Each of these issues was essential to one or more of the dispositions set out in the Decision in relation to the Defence Disclosure Request. They are not matters upon which there is mere academic disagreement, but constitute issues decisive to the scope of actual disclosure to which the Defence is entitled. The issues also fall well within the type of legal and factual issues that have been accepted as appealable by other Trial Chambers in the past.
23. If the Chamber considers that the formulation of any of these issues is deficient or defective, then the Chamber is invited to make any modifications thereto as are deemed necessary and appropriate.

³⁰ Impugned Decision, para. 32.

IV. Each of the three issues satisfies the standard for immediate appellate review

(A) *First issue: whether the Chamber erred in law in its definition of “statement” in Rule 76(1) of the Rules*

24. The Chamber held that “statement” within the meaning of Rule 76(1), though applicable “irrespective of the form in which they are recorded”, is subject to at least two conditions: (i) it must relate to the witness’s “knowledge of the case”, thus excluding statements given about issues such as security concerns; and (ii) can only be generated when “questioned” about this knowledge by the Prosecution “in the course of its investigations.”³¹
25. The consequence of these two qualifications to the word “statement” is to curtail the scope of disclosure arising from the plain meaning of the word “statement” as used in Rule 76(1). Statements concerning security concerns or other matters, for example, will not be subject to disclosure unless they meet the Prosecution’s unreviewable “case-by-case” assessment of materiality under Rule 77 or, potentially, Article 68(2).
26. The rule adopted by the Trial Chamber also excludes statements that do concern the subject-matter of the case if the Prosecution deems that such statements do not arise from its own “questioning” or “investigations.” This might include, for example, spontaneous statements to the Office of the Prosecution (“OTP”) investigators outside of the context of formal questioning, or statements by the witness in the Prosecution’s possession that were given to organizations other than the OTP. The Chamber’s interpretation of Rule 76(1) removes these categories from disclosure.

³¹ Impugned Decision, paras. 29-30, also citing Witness P-0901 Disclosure Decision, para. 53 and *Bemba et al*, Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations, 9 September 2015, ICC-01/05-01/13-1227, para. 9.

27. Experience in other cases before the ICC, and at the ICTY and ICTR, suggests that statements taken by organizations other than the OTP can be of major significance to a case. Other Trial Chambers have specifically required disclosure of such material.³²
28. The removal of such statements from the scope of disclosure to the Defence has a substantial and direct impact on trial fairness. The accused's ability to impeach and confront witnesses, unlike in systems relying on a *dossier* system, depends on the Prosecution making full and frank disclosure without any judicial supervision. The scope of disclosure is the cornerstone of a fair trial. Prior statements of a witness that could reveal issues about their credibility, whether directly relevant to the case or not, are amongst the most essential forms of disclosure.
29. Immediate appellate resolution will materially advance the proceedings. Non-disclosure or late disclosure in other complex trials has obliged Trial Chambers to draw an adverse inference about the reliability of Prosecution evidence.³³ Any similar finding on appeal would, similarly, compel reversal of factual findings arising from a context of non-disclosure. Immediate appellate

³² *Ruto & Sang*, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015, ICC-01/09-01/11-1774-Red, 16 February 2015, paras.27-30; *Mpambara*, ICTR-2001-65-I, Decision (Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures), 28 February 2002, para.22; *Milutinović et al.*, IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, para.14: "The interpretation of the term "witness statement" "is broad enough to include statements taken by humanitarian organisations for the purpose of recording allegations of human rights abuses, when these are passed to the Prosecution in order to assist it in identifying potential lines of inquiry which then result in the person who gave the original statements becoming witnesses in Tribunal proceedings".

³³ See for example: *Bizimungu et al.*, ICTR-99-50-T, Judgement and Sentence, 30 September 2011, para. 176 ("[g]iven [that the Prosecution only informed the Defence of the exculpatory material once the Chamber was at an advanced stage in the process of drafting its judgment], the Chamber considers that the most appropriate remedy is to draw a reasonable inference in favour of the Accused from the exculpatory material"), paras. 1063-1065 ("[d]rawing the reasonable inferences due to the late disclosure of this highly relevant, probative and exculpatory material, the Chamber entertains reasonable doubt"), paras. 1189-1192 (Drawing the reasonable inferences due to the late disclosure of this exculpatory material, the Chamber entertains reasonable doubt").

resolution, especially where there has been no previous appellate treatment of the issue,³⁴ would avoid such draconian consequences and ensure that the trial proceeds on a proper footing in respect of a vital issue of disclosure.

(B) *Second issue: whether the Chamber erred in law and in fact in failing to provide any criteria for disclosure of Rule 77 material beyond stating that this requires a “case-by-case assessment”*

30. Assuming that the Chamber’s definition of “statements” in Rule 76(1) is correct (as it must be so deemed unless and until reversed by the Appeals Chamber), the scope and application of Rule 77 assumes decisive importance for the disclosure of Prosecution witnesses statements that are deemed not to address “knowledge of the case” or that were not collected in response to OTP “questioning” or “investigations.” Such statements would include statements about security issues, but could address many other issues as well, including requests for money, allegations against the accused that are not directly related to “the case”, allegations against other persons, or statements given in the context of other cases.
31. The Decision, however, offered no guidance or even principles that would assist the Prosecution in discharging its obligation to disclose information “material to the preparation of the defence” other than to say that a “case-by-case assessment is required.”³⁵ The failure to provide more precise guidance accords a virtually unfettered discretion to determine what is material to the defence and, hence, disclosable.
32. The absence of a clearer definition of “materiality” – including with reference to concrete examples – impacts negatively on the expeditious conduct of proceedings. The Defence has been drawn into a time-consuming cat-and-mouse exercise with the Prosecution, trying to discern what information is

³⁴ As implicitly recognized by the Chamber: Impugned Decision, para. 29.

³⁵ Impugned Decision, para. 30.

likely in the Prosecution's possession, and then endeavouring to frame its requests with specificity. The consequence has been a profusion of correspondence. The entire exercise has been a waste of precious time and resources which should be replaced, as is the practice at the ICTY,³⁶ with a generous and spontaneous approach to disclosure of potentially relevant material. Such an approach is not only in the interest of a fairer and more transparent trial, but also reduces the wasteful and almost futile exercise of requiring the Defence to define with a high-level of specificity information that is within the sole knowledge of the OTP. The issue, accordingly, significantly affects the fairness and expeditiousness of proceedings.

33. An illustration of the extent of exchanges and its broad ramification is illustrated by just one example of recent submissions to the Chamber arising out of the ambiguous scope of the Prosecution's Rule 77 obligations:

The office of the Prosecution is, in our respectful opinion, erroneously relying on the trial Chamber's decision in at least two ways. First, the Prosecution is referring to the Chamber's decision, which -- or a part of the Chamber's decision which referred specifically to expenses where the topic raised has nothing to do with expenses. Secondly, the Prosecution is in our respectful submission, taking advantage of the fact that the trial Chamber's decision does not elaborate a clear and objective materiality test. In fact, Mr President, ever since the trial Chamber's decision came out in at least three occasions, but I think there are more, the Prosecution has been refusing to disclose information on the basis of an alleged failure by the Defence to demonstrate -- to demonstrate, sorry, materiality. Respectfully Mr President we ask that the Prosecution be ordered to disclose this information, which includes what they have in their possession concerning witness P-743. I say witness, but intermediary P-743. I do not believe, Mr President, that there are any security concerns

³⁶ At the ICTY, the corresponding provision was interpreted broadly. *See for example : Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution Urgent Motion Related to Non-Compliance of Stanišić Defence With Rule 65ter(G) and Rule 67 of the Rules, 12 October 2011, para.27 ("the term 'statement' in Rule 66(A)(ii) has been interpreted broadly in the Tribunal's case law to include interview notes"; *Haradinaj et al*, IT-04-84bis-T, Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness 81, 18 November 2011, para.34 ("the Prosecution's disclosure, on 19 October 2011, of the attorney's notes of the interview was not timely and therefore in violation of Rules 66(A)(ii) and 68(i). The attorney's notes contained statements by Witness 81").

involved. Any information given will be, of course, kept confidential. We are bound by a duty to maintain this information confidential and we will act with the utmost of care with this information. So in terms of security, we don't believe that this is something that can prevent disclosure of the information. But the most important parts of our request has to do with the materiality test. Right now we do not have a materiality test. We say that the Prosecution is unduely taking advantage of this fact and, in this specific case, we ordered -- we respectfully request that they be ordered to provide this information so that we can prepare for our cross-examination. So this is the first application, Mr President.³⁷

34. The Prosecution has also denied that the security concerns of Prosecution Witness [REDACTED]³⁸ and the identity, contractual information, correspondence and reports of Prosecution Intermediary P-0743³⁹ are disclosable under Rule 77. Disputes that rest on a "case-by-case" assessment without further guidance are likely to engender disputes and more litigation.
35. Immediate appellate intervention may, accordingly, materially advance the proceedings. Both parties require greater specificity as to the content of the Prosecution's Rule 77 obligations, especially in respect of non-Rule 76(1) statements. If the Prosecution misjudges its obligations and fails to disclose such statements that are later assessed to have been material to the preparation of the Defence, the effects on any Trial Judgement are likely to be fundamental. This is because disclosure is the cornerstone of a fair trial, and because the concrete scope of the information that will not be disclosed is likely to be substantial. Immediate appellate resolution, however, will ensure that the trial proceeds on a proper footing and, accordingly, may materially advance the proceedings.

³⁷ ICC-01/04-02/06-T-37-CONF-ENG, p.67, l.22 to p.68, l.23. On 26 October 2015, the Chamber has rendered an oral decision and denied the Defence's application without developing further on the criteria of materiality.

³⁸ Annex B: N. Samson, *RE: Witness [REDACTED] – Disclosure*, email, 14 October 2015, 11:18 ("[REDACTED]"). See also Annex A: S. Bourgon, *Witness [REDACTED] – Disclosure*, email, 13 October 2015, 09:17.

³⁹ Annex D: N. Samson, *RE: Request for Disclosure – Witness P-0886*, email, 22 October 2015, 18:37 ("[REDACTED]"). See also Annex C: S. Bourgon, *Request for Disclosure – Witness P-0886*, email, 22 October 2015, 12:35.

(C) *Third issue: whether the Chamber erred in law and in fact in giving the Prosecution discretion not to disclose payments to witnesses on the basis that they are, in its view, “routine”*

36. The Chamber held that some payments to Prosecution witnesses by the Prosecution – those deemed “routine” by the Prosecution itself – could be with-held from disclosure to the Defence.⁴⁰
37. The issue squarely affects the fair and expeditious conduct of proceedings. Other Trial Chambers have held that the Prosecution must disclose all payments to its witnesses under Rule 77.⁴¹
38. The non-disclosure of any payments to Prosecution witnesses significantly affects the fair conduct of proceedings and, potentially, the outcome of the trial. Inducements to testify should be disclosed to the Defence. Whether such payments could have an impact on credibility is not a matter that should be assessed by the Prosecution behind closed doors, but rather by the Chamber in the context of a trial. Refusing disclosure of such information impairs the fairness of proceedings, and the Chamber’s ability to assess the credibility of witnesses.
39. Immediate appellate resolution may materially advance the proceedings. Factual findings based on the testimony of witnesses for whom witness payments were subsequently found to have been wrongly with-held could not easily be preserved in a final appeals judgement. Determining this issue immediately will ensure that the Chamber possesses all salient information to assess the credibility of witnesses, and ensure that its factual findings are not subject to wholesale reversal because of a substantial non-disclosure issue.

⁴⁰ Impugned Decision, para. 32.

⁴¹ *Bemba et al*, Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses, 24 August 2015, ICC-01/05-01/13-1172, p. 9 (“ORDERS the Prosecution to disclose all previously undisclosed payments and other forms of assistance given by the Prosecution to the fourteen Defence witnesses, as well as all correspondence and documentation concerning these payments.”)

CONFIDENTIALITY

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

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:
GRANT leave to appeal the Impugned Decision on the Issues.

RESPECTFULLY SUBMITTED ON THIS 28TH DAY OF OCTOBER 2015

A handwritten signature in black ink, appearing to be 'S+B' with a flourish.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands