



Original: **English**

No.: ICC-01/04-02/06
Date: 29 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

**Prosecution's response to Defence application for leave to appeal the
"Decision on Defence requests seeking disclosure orders and a declaration of
Prosecution obligation to record contacts with witnesses"**

Source: Office of the Prosecutor

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Introduction

1. The Defence application for leave to appeal¹ the Decision on the Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses² should be rejected.
2. The first issue raised by the Defence (namely whether the Chamber erred in its definition of “statements” under rule 76(1) of the Rules of Procedure and Evidence),³ is an appealable issue arising from the Decision, but does not meet the criteria for leave to appeal under article 82(1)(d) of the Rome Statute. The second issue (whether the Chamber erred in failing to provide any criteria for disclosure of rule 77 material beyond stating that this required a “case-by-case assessment”)⁴ and the third issue (whether the Chamber erred in giving the Prosecution discretion not to disclose payments to witnesses on the basis that they were, in its view, “routine”)⁵ do not arise from the Decision and in any event do not meet the criteria for leave to appeal.

Submissions

(a) The First Issue does not meet the criteria for leave to appeal

3. The First Issue, namely whether the Trial Chamber erred in law in its definition of “statements” under rule 76(1),⁶ is predicated on the Trial Chamber’s finding that “statements within the meaning of Rule 76 of the Rules, are made only when witnesses are ‘questioned about their knowledge of the case in the course of its investigation’”.⁷ Although this First Issue is an appealable issue that arises from

¹ ICC-01/04-02/06-941-Conf-Exp and ICC-01/04-02/06-941-Red (“Application”).

² ICC-01/04-02/06-904 (“Decision”).

³ Application, paras. 24-29 (“First Issue”).

⁴ Application, paras. 30-35 (“Second Issue”).

⁵ Application, paras. 36-39 (“Third Issue”).

⁶ Application, paras. 24-29.

⁷ Decision, para. 29.

the Decision within the meaning of article 82(1)(d), it does not meet the criteria for leave to appeal and should therefore be rejected.

4. The Defence's arguments that the First Issue significantly affects the fair conduct of the proceedings⁸ and that immediate appellate intervention will materially advance the proceedings⁹ are predicated on the incorrect assumption that the Decision "curtail[s] the scope of disclosure"¹⁰ and permits the Prosecution to withhold pertinent information from the Defence.¹¹ As demonstrated below, this is not the case. Accordingly, the First Issue does not meet the criteria for leave to appeal under article 82(1)(d).
5. In particular, the Decision does not exempt from disclosure information such as witness statements given to the Prosecution outside the context of a formal questioning.¹² The Chamber emphasised that statements are disclosable, "irrespective of the form in which they are recorded".¹³ As a result, the Prosecution must disclose all witness statements, even if they don't reflect a "formal questioning", and if they are recorded in the form of screening notes, interview notes or investigators' notes.¹⁴
6. Likewise, the Decision does not exclude from disclosure witness statements that were given to organisations other than the Prosecution.¹⁵ The Chamber expressly noted that information that is not recorded in a rule 76 statement is not automatically exempted from disclosure. In fact, the Prosecution must provide any such information to the Defence, if it falls within the scope of rule 77 or article 67(2).¹⁶ This also applies to statements by a witness that are in the Prosecution's

⁸ Application, paras. 25-28.

⁹ Application, para. 29.

¹⁰ Application, para. 25.

¹¹ Application, paras. 28-29.

¹² *Contra* Application, para. 26.

¹³ Decision, para. 29.

¹⁴ Decision, para. 29.

¹⁵ Application, para. 26.

¹⁶ Decision, para. 30.

possession but that were given to organisations other than the Prosecution. If, as argued by the Defence, such statements are “of major significance to a case”,¹⁷ the Decision requires the Prosecution to disclose them. Similarly if information in the Prosecution’s possession impacts on “the accused’s ability to impeach and confront witnesses”,¹⁸ or affects the witnesses’ credibility,¹⁹ then it must be disclosed pursuant to rule 77 and/or article 67(2).

7. Although the Decision limits the extent to which information must be disclosed pursuant to rule 76,²⁰ it does not exempt the Prosecution from disclosing any relevant information pursuant to rule 77 or article 67(2). Whether the Prosecution discloses a particular piece of information pursuant to rule 77, article 67(2), or any other provision does not affect the fair or expeditious conduct of the proceedings. Neither is immediate appellate intervention required to materially advance the proceedings.
8. The Defence’s request for leave to appeal on the First Issue should therefore be rejected.

(b) The Second Issue does not arise from the Decision and does not meet the criteria for leave to appeal

9. The Second Issue, namely 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”²¹ does not accurately reflect the Decision and therefore does not arise from it.
10. Contrary to the Defence’s contention,²² the Chamber did not fail to provide sufficient guidance to the Prosecution on how to meet its disclosure obligations.

¹⁷ Application, para. 27.

¹⁸ Application, para. 28.

¹⁹ Application, para. 28.

²⁰ Application, para. 25.

²¹ Application, paras. 30-35.

²² Application, para. 31.

The Chamber expressly found that beyond rule 76, the Prosecution must conduct a case-by-case assessment to determine whether information is material for the preparation of the defence, within the meaning of rule 77, or when it is potentially exculpatory in the sense of article 67(2).²³ It is obvious from the Decision that in conducting this case-by-case analysis the Prosecution must apply rule 77 and article 67(2) consistently with the prior jurisprudence of this Chamber²⁴ and the Appeals Chamber.²⁵ It must be assumed that the Parties are aware of this jurisprudence; there is no need to reiterate it in this Decision to provide clarity for the purposes of the disclosure process. The First Issue should therefore be rejected.

11. Even if, *arguendo*, the Second issue were an appealable issue arising from the Decision, it would not meet the criteria for leave to appeal. Because the Prosecution has a duty to disclose all information that is material to the preparation of the defence or which is potentially exculpatory in the sense of article 67(2), no pertinent information will be withheld from the Defence as a result of the Decision. Accordingly, the Second Issue does not materially affect the fairness of the proceedings.

12. The fact that the Prosecution has not accommodated a number of the Defence's email disclosure requests does not demonstrate any impact on the fair and expeditious conduct of the proceedings.²⁶ The Prosecution has assessed each request and disclosed information in light of its duties under rules 76 and 77 and article 67(2). The Defence disagrees with the outcome of its disclosure requests. However, that is not because of a lack of clarity with respect to the interpretation of rule 77 and article 67(2). Rather it is because the Defence continues to believe

²³ Decision, paras. 28, 30.

²⁴ See for instance, ICC-01/04-02/06-731-Conf-Exp, paras. 20-21.

²⁵ ICC-01/04-01/06-1433 OA11, paras. 77-82; ICC-01/04-01/06-3017 A5 A6, paras. 10-11; ICC-02/05-03/09-501 OA4, paras. 1-2, 34-35, 39-40, 42.

²⁶ Application, paras. 32-34.

that it should receive certain categories of information in bulk, without assessing whether the individual items of information are disclosable.²⁷

13. In any event, immediate resolution by the Appeals Chamber of the Second Issue would not materially advance the proceedings.²⁸ The Appeals Chamber has already provided extensive guidance on how to interpret and apply rule 77²⁹ and article 67(2),³⁰ which the Prosecution follows in this and other cases. In addition, the Trial Chamber's Decision to reject the wholesale disclosure of certain categories of information and instead to instruct the Prosecution to conduct a case-by-case assessment is fully consistent with the Appeals Chamber's jurisprudence.³¹ It can be expected that the Appeals Chamber will follow its own case-law on this matter and that a referral of the Second Issue to the Appeals Chamber would therefore not advance the proceedings but rather could delay them.

14. Accordingly, the Defence's request for leave to appeal on the Second Issue should be rejected.

(c) The Third Issue does not arise from the Decision and does not meet the criteria for leave to appeal

15. The Third Issue, namely whether the Chamber erred in law and in fact in giving the Prosecution discretion not to disclose payments to witnesses when the Prosecution regards them as "routine,"³² does not accurately represent the Decision and therefore does not arise from it.

²⁷ The Trial Chamber has rejected this request: see Decision, para. 30.

²⁸ *Contra* Application, para. 35.

²⁹ ICC-01/04-01/06-1433 OA11, paras. 77-82; ICC-01/04-01/06-3017 A5 A6, paras. 10-11; ICC-02/05-03/09-501 OA4, paras. 1-2, 34-35, 39-40, 42.

³⁰ ICC-01/04-01/06-1486 OA13, para. 46; ICC-01/04-01/07-476 OA2, paras. 57, 62; ICC-01/04-01/07-475 OA, paras. 62, 72(c); ICC-01/04-01/06-1433 OA11, para. 16. Diss. Op; ICC-01/04-01/06-1486 OA13, paras. 43, 46. Diss. Op.

³¹ See ICC-02/05-03/09-501 OA4, para. 39: "the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the specific circumstances of the case".

³² Application, paras. 36-39 ("Third Issue").

16. Contrary to the Defence's contention,³³ the Decision does not allow the Prosecution to withhold from the Defence information regarding payments to Prosecution witnesses simply because the Prosecution regards them as "routine" payments. To the contrary, the Decision stresses that the Prosecution must disclose all information that falls within the scope of rule 77 or article 67(2),³⁴ and clarifies that under certain circumstances information relating to Prosecution payments to witnesses is disclosable. The Decision even provides concrete guidance as to what information regarding payments to Prosecution witnesses may be disclosable.³⁵ Accordingly, the Third Issue does not arise from the Decision and should be rejected on that basis alone.
17. In any event, the Third Issue does not meet the criteria for leave to appeal. Because the Decision does not allow the Prosecution to withhold from the Defence any payments that fall within the scope of rule 77 or article 67(2), the Third Issue does not materially affect the fair and expeditious conduct of the proceedings or the outcome of the trial.³⁶ Under the Decision, the Prosecution is required to disclose what the Defence terms as "inducements to testify", especially if they could impact on the credibility of witnesses.³⁷
18. Finally, because the Prosecution is not withholding any information referred to by the Defence in its Application,³⁸ immediate resolution by the Appeals Chamber of the Third Issue would not materially advance the proceedings.
19. The Defence's request for leave to appeal on the Third Issue should therefore be rejected.

³³ Application, para. 36.

³⁴ Decision, para. 30.

³⁵ Decision, para. 32; see also ICC-01/04-02/06-840-Red, para. 60, which the Decision (para. 32) incorporates by reference.

³⁶ *Contra* Application, paras. 37-38.

³⁷ Application, para. 38.

³⁸ Application, para. 39.

Conclusion

20. For the above reasons, the Application should be rejected in its entirety.



Fatou Bensouda, Prosecutor

Dated this 29th day of October 2015

At The Hague, The Netherlands