

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: **27 November 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

Decision on Defence request for leave to appeal the ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’

Decision 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 Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on Defence request for leave to appeal the "Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses"'.

I. Background

1. On 25 August 2015, the defence team for Mr Ntaganda ('Defence') filed a request seeking orders from the Chamber to instruct the Office of the Prosecutor ('Prosecution') to disclose: (i) 'any statements, in whatever form, of witnesses whom the Prosecution intends to call, pursuant to Rules 76(1) and 77 of the Rules and Article 67(2)'; and (ii) a record of all 'payments and benefits conferred' on any intended Prosecution witnesses, as well as any agreement entered by the Prosecution with any of its witnesses ('Disclosure Request').¹
2. On 31 August 2015, the Defence filed a request seeking a declaration that the Prosecution is required to record: (i) 'any new and relevant information obtained during any contacts with its witnesses, including any security concerns reported by the witness'; and (ii) any information falling within the scope of Article 67(2), including statements 'on any subject that are inconsistent with previous statements of the witness' ('Declaration Request').²
3. On 16 October 2015, the Chamber issued a decision rejecting the Disclosure Request and Declaration Request ('Impugned Decision').³

¹ Request on behalf of Mr Ntaganda for disclosure orders pursuant to Rule 76 and 77 of the Rules of Procedure and Evidence, ICC-01/04-02/06-795-Conf-Exp, with annexes A-P. A public redacted version of the Disclosure Request (ICC-01/04-02/06-795-Red) was notified on the following day. A corrigendum of Annex C to the Disclosure Request was filed on 11 September 2015.

² Request on behalf of Mr Ntaganda seeking a declaration confirming the Prosecution's duty to record the content of all contacts with its witnesses, ICC-01/04-02/06-803-Conf-Exp. A public redacted version (ICC-01/04-02/06-803-Red) was notified on the same day.

³ Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses, ICC-01/04-02/06-904.

4. On 26 October 2015, the Defence filed a request for leave to appeal the Impugned Decision on three issues ('Request').⁴
5. On 29 October 2015, the Prosecution opposed the Request ('Response').⁵

II. Submissions

6. The Defence seeks leave to appeal on the following three issues:⁶
 - i. 'Whether the Chamber erred in law in its definition of "statement" in Rule 76(1) of the Rules' ('First Issue');
 - 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' ('Second Issue'); 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' ('Third Issue', and together with the First Issue and Second Issue, the 'Issues').
7. The Defence submits that each of the Issues is 'essential to one or more of the dispositions' set out in the Impugned Decision and 'decisive to the scope of actual disclosure', and therefore appealable.⁷

First Issue

8. In respect of the First Issue, the Defence submits that the Chamber's definition of a 'statement' within the meaning of Rule 76(1) of the Rules of Procedure and Evidence ('Rules') is subject to the conditions: (i) that it must relate to the

⁴ 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", ICC-01/04-02/06-941-Conf-Exp. A public redacted version was filed on the same day (ICC-01/04-02/06-941-Red).

⁵ 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", ICC-01/04-02/06-967.

⁶ Request, ICC-01/04-02/06-941-Red, para. 21.

⁷ Request, ICC-01/04-02/06-941-Red, para. 22.

witness's knowledge of the case; and (ii) that it can only be generated when questioned about this knowledge by the Prosecution 'in the course of its investigations', and consequently unduly restricts the scope of disclosure.⁸ The Defence argues that statements relating to security concerns or other relevant matters, as well as significant statements by the witness in the Prosecution's possession which were given to other organisations, might be excluded if the Prosecution would deem them not to arise from its own questioning or investigations.⁹

9. The Defence argues that reducing the scope of disclosure by removing such statements has a 'substantial and direct impact on trial fairness' by, amongst other things, limiting the accused's ability to impeach and confront witnesses.¹⁰ The Defence avers that immediate appellate resolution will materially advance the proceedings, because it would exclude the possibility of an appellate 'reversal of factual findings' at a later stage.¹¹
10. In relation to the First Issue, the Prosecution accepts that it is an appealable issue arising from the Impugned Decision, but submits that it fails to meet the criteria for leave to appeal.¹² The Prosecution argues, *inter alia*, that the Defence relies on the 'incorrect assumption' that the Impugned Decision 'curtails the scope of disclosure'.¹³ In particular, noting its obligations pursuant to Rule 77 of the Rules and Article 67(2) of the Statute, the Prosecution argues that no pertinent information will be withheld from the Defence as a result of the Impugned Decision, which consequently does not affect the fairness and expeditious of the proceedings.¹⁴

⁸ Request, ICC-01/04-02/06-941-Red, paras 24-25.

⁹ Request, ICC-01/04-02/06-941-Red, paras.25-27.

¹⁰ Request, ICC-01/04-02/06-941-Red, paras 28-29.

¹¹ Request, ICC-01/04-02/06-941-Red, para. 29.

¹² Response, ICC-01/04-02/06-967, paras 2-3.

¹³ Response, ICC-01/04-02/06-967, paras 3-4.

¹⁴ Response, ICC-01/04-02/06-967, paras 5-7.

Second Issue

11. In relation to the Second Issue, the Defence argues that the Impugned Decision gave the Prosecution ‘virtually unfettered discretion’ in determining what is material to the preparation of the Defence, and hence subject to a disclosure obligation.¹⁵ The Defence submits that greater clarity would halt the ‘profusion of correspondence’ between the Prosecution and Defence on disclosure matters, which, it submits, significantly affects the fairness and expeditiousness of the proceedings.¹⁶ The Defence further submits that if the Prosecution were to misjudge its disclosure obligations the effects ‘are likely to be fundamental’.¹⁷ The Defence therefore contends that immediate appellate intervention may materially advance the proceedings by ensuring that ‘the trial proceeds on a proper footing’.¹⁸
12. The Prosecution submits that the Second Issue does not ‘accurately reflect’ the Impugned Decision and therefore does not arise from it.¹⁹ Additionally, the Prosecution argues that the Second Issue does not materially affect the fairness of the proceedings as no pertinent information will be withheld from the Defence as a result of the Impugned Decision.²⁰ Moreover, the Prosecution submits that immediate appellate resolution would not materially advance the proceedings, recalling that the Appeals Chamber has already provided ‘extensive guidance’ on how to interpret and apply Rule 77 of the Rules and Article 67(2) of the Statute.²¹

¹⁵ Request, ICC-01/04-02/06-941-Red, paras 30-31.

¹⁶ Request, ICC-01/04-02/06-941-Red, paras 32-34.

¹⁷ Request, ICC-01/04-02/06-941-Red, para 35.

¹⁸ Request, ICC-01/04-02/06-941-Red, para. 35.

¹⁹ Response, ICC-01/04-02/06-967, paras 9-10.

²⁰ Response, ICC-01/04-02/06-967, paras 11-12.

²¹ Response, ICC-01/04-02/06-967, para. 13.

Third Issue

13. In respect of the Third Issue, the Defence submits that the non-disclosure of any payments to Prosecution witnesses ‘significantly affects the fair conduct of proceedings and, potentially, the outcome of the trial’.²² The Defence states that all ‘[i]nducements to testify’ should be disclosed.²³ The Defence argues that the possible impact of such payments on a witness’s credibility should be assessed by the Chamber in the context of the trial, rather than by the Prosecution ‘behind closed doors’.²⁴ The Defence avers that immediate appellate resolution will materially advance the proceedings by excluding the possibility of an appellate reversal of factual findings at a later stage.²⁵
14. In relation to the Third Issue, the Prosecution submits that it does not ‘accurately represent’ the Impugned Decision and therefore does not arise from it.²⁶ The Prosecution argues that, contrary to the Defence submissions, the Impugned Decision refers to the applicable disclosure regime and provides ‘concrete guidance’ as to what information may be disclosable.²⁷ Further, the Prosecution submits that under the terms of the Impugned Decision all ‘inducements to testify’, and material otherwise falling under Rule 77 or Article 67(2), is disclosable, that the Third Issue therefore does not materially affect the fair and expeditious conduct of the proceedings, and that immediate appellate resolution would not materially advance the proceedings.²⁸

²² Request, ICC-01/04-02/06-941-Red, para. 38.

²³ Request, ICC-01/04-02/06-941-Red, para. 38.

²⁴ Request, ICC-01/04-02/06-941-Red, para. 38.

²⁵ Request, ICC-01/04-02/06-941-Red, para. 39.

²⁶ Response, ICC-01/04-02/06-967, para. 15.

²⁷ Response, ICC-01/04-02/06-967, paras 16.

²⁸ Response, ICC-01/04-02/06-967, paras 17-18.

III. Analysis

15. The Chamber incorporates by reference the applicable law as set out in previous decisions.²⁹
16. The Chamber considers that the First Issue constitutes an ‘issue’ arising from the Impugned Decision within the meaning of Article 82(1)(d).
17. In the Impugned Decision, the Chamber found that a statement within the meaning of Rule 76 is made when witnesses are questioned about their knowledge of the case ‘in the course of its investigation’. The Chamber notes, however, in this regard that the Defence inaccurately quotes the Impugned Decision.³⁰ This misunderstanding underlies the Defence’s subsequent submissions that the Impugned Decision excludes, from the scope of Rule 76, statements given to organisations other than the Prosecution. The Chamber made no such finding. In fact, the Trial Chamber VII decision cited to in the Impugned Decision expressly found that statements given by witnesses to entities other than the Prosecution could come within the definition.³¹
18. Nonetheless, the Chamber considers that how a statement is understood for the purposes of Rule 76 would significantly affect the fair and expeditious conduct of proceedings. It is recalled in this context that the term ‘proceedings’ is not ‘confined to the proceedings in hand but extends to proceedings prior and subsequent thereto’.³²
19. While the fact that a statement may not be disclosable pursuant to Rule 76 does not mean that it would not be otherwise subject to a disclosure obligation, the

²⁹ Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, para. 21.

³⁰ Request, ICC-01/04-02/06-941-Red, para. 24 (submitting that the Chamber held that a statement can only be generated when a witness is questioned ‘about this knowledge *by the Prosecution* “*in the course of its investigations*”’ (emphasis added)).

³¹ See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo 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.

³² Appeals Chamber Judgment, ICC-01/04-168, para. 11.

Chamber notes that there are particular requirements specified for material falling within Rule 76, including in relation to translation and the timing of the disclosure. The Chamber also considers that immediate resolution by the Appeals Chamber may materially advance the proceedings. The Chamber notes the fundamental importance of Rule 76 disclosure to all trial proceedings before the Court, and considers that certainty on this matter, through appellate review, is appropriate.

20. The Chamber is not, however, persuaded that the Second and Third Issues meet the requirements of Article 82(1)(d).
21. The Chamber considers that the Second Issue misrepresents the Impugned Decision and consequently does not arise from it. Contrary to the suggestion that the Chamber failed to 'define the scope of the Prosecution's disclosure obligation to disclose non-Rule 76 statements' and left it to the 'sole discretion' of the Prosecution 'without any applicable criteria', the Chamber clearly indicated that such material would fall to be considered within the Rule 77 and Article 67(2) disclosure regime.³³ As noted by the Prosecution, the existing jurisprudence of the Court, including, in particular, that of the Appeals Chamber, provides substantial guidance on the appropriate interpretation and application of those provisions.
22. In respect of the Third Issue, as a preliminary matter, the Chamber observes that it dealt with the applicable framework for disclosure of payments to witnesses in a decision rendered on 18 September 2015, which the Defence did not seek leave to appeal.³⁴ The Impugned Decision reaffirmed the findings made in that earlier decision,³⁵ and therefore, to the extent the Third Issue is

³³ Impugned Decision, ICC-01/04-02/06-904, para. 30.

³⁴ ICC-01/04-02/06-840-Conf-Exp, paras 57-63. The Chamber found, *inter alia*, that such information falls to be considered under Rule 77 and Article 67(2) and that payments by the Prosecution to witnesses are not '*per se* disclosable'.

³⁵ Impugned Decision, ICC-01/04-02/06-904, para. 32 (incorporating by reference the Chamber's earlier findings).

directed at challenging that framework, the Chamber considers it to be untimely.

23. Additionally, and even putting aside whether the Third Issue accurately represents the Impugned Decision,³⁶ the Chamber considers that the Defence has failed to demonstrate that the Third Issue would significantly affect the fair and expeditious conduct of proceedings. The fact that other Trial Chambers, in the particular circumstances of the cases before them, may have found that details of all payments to witnesses were material to the preparation of the defence does not make that so in the present case.³⁷ Moreover, as previously noted by the Chamber, the Defence will have the opportunity to examine witnesses and test their credibility, 'including - to the extent the Chamber deems appropriate - in relation to any payments or reimbursements'.³⁸
24. Having so found, it is unnecessary for the Chamber to continue to consider the remaining criteria under Article 82(1)(d) with regard to the Second and Third Issues. Nonetheless, the Chamber notes that, for similar reasons to those already expressed above, it does not consider that review of the Second or Third Issues by the Appeals Chamber may materially advance the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Defence leave to appeal the First Issue; and

REJECTS the remainder of the Request.

³⁶ The Chamber notes that it did not say that payments which the Prosecution considers to be 'routine' are not subject to disclosure. The Impugned Decision incorporated by reference relevant findings in ICC-01/04-02/06-840-Conf-Exp which indicated that the appropriate assessment is whether such material falls within Rule 77 or Article 67(2), Impugned Decision, ICC-01/04-02/06-904, para. 32.

³⁷ The Chamber observes that the Trial Chamber VII decision cited by the Defence in the Request in support of this submission did not in fact relate to all Prosecution witnesses in the case but rather to fourteen specific individuals. These individuals are alleged by the Prosecution in that case to have been corruptly influenced, including by being bribed. See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses, 24 August 2015, ICC-01/05-01/13-1172, para. 19.

³⁸ ICC-01/04-02/06-840-Red, para. 63.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a horizontal line and a small flourish.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, consisting of a stylized 'K' followed by 'u' and 's'.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of the Korean characters '정창호' (Jeong Chang-ho) written in a stylized cursive.

Judge Chang-ho Chung

Dated this 27 November 2015

At The Hague, The Netherlands