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No.: ICC-01/04-02/06
Date: 22 September 2016

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 "Request on behalf of Mr Ntaganda seeking disclosure of routine expenses of Witness P-0113 under Article 67(2)" 29 July 2016, ICC-01/04-02/06-1469

Source: Defence Team of Mr Bosco Ntaganda

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

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Pursuant to Articles 64(3)(c) and 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (“Rules”) and further to the correspondence exchanged with the Office of the Prosecutor (“Prosecution” or “OTP”), Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Request on behalf of Mr Ntaganda seeking disclosure of
routine expenses of Witness P-0113 under Article 67(2)**

“Defence Request”

INTRODUCTION

1. Prosecution Witness P-0113 testified that, [REDACTED]¹[REDACTED].² The Defence, reasonably suspecting that such payments had been made, requested disclosure of any such payments. The OTP has confirmed that such payments have been made but, with the exception of one “non-routine” payment of which the Defence was not previously aware, has declined to disclose any information about these payments.
2. The Defence requests an order compelling disclosure of all payments, reimbursements and assistance of monetary value, routine or otherwise, given by the OTP to P-0113. The existence of such payments would contradict the witness’s testimony; indeed, if they are of a certain amount and regularity, they would be probative of a lie. Either way, the existence of such payments, contrary to her testimony, “may affect” her “credibility” pursuant to Article 67(2) of the Statute. The Prosecution should not be permitted to with-hold disclosure of information which, to its knowledge, shows that the witness’s testimony is incorrect or false.

¹ [REDACTED].

² [REDACTED].

PROCEDURAL HISTORY

3. Prosecution Witness P-0113 testified on 11 and 12 July 2016. The witness denied during cross-examination, with minor qualifications, that she had received any payments from the OTP. At the time, the Defence knew about only two payments by the OTP to the witness of relatively small sum.³ The impeachment value of this information was not deemed sufficient to confront the Witness with the information about this payment during cross-examination.
4. On 15 July 2016, the Defence emailed the Prosecution requesting disclosure, pursuant to Article 67(2) of the Statute, of any payments or reimbursement by the OTP to the witness.⁴ The Defence explained that the basis for the request was the impact that such information would have on P-0113's credibility in light of her denial of such payments.
5. The Prosecution responded by email the same day as follows: "We confirm that witness P-0113 did not receive any assistance – financial or otherwise – from the OTP, *and that the expenses incurred from the OTP were routine.*"⁵
6. The Defence clarified on 18 July 2016, specifying that it was requesting disclosure of all payments, routine or non-routine, as they would in either case contradict the Witness's testimony under oath. The Defence again invoked Article 67 as the basis for its request.⁶
7. The Prosecution responded the same day, asserting that the witness did not deny having received payments from the OTP.⁷

³ DRC-OTP-2053-0014.

⁴ Email from Me Stéphane Bourgon to Ms Dianne Luping dated 15 July 2016 ("Defence First Request").

⁵ Email from Ms Dianne Luping to Me Stéphane Bourgon to dated 15 July 2016 ("Prosecution First Response") (*italics added*).

⁶ Email from Me Stéphane Bourgon to Ms Dianne Luping dated 18 July 2016 ("Defence Second Request").

⁷ Email from Ms Julieta Solana to Me Stéphane Bourgon to dated 18 July 2016 ("Prosecution Second Response").

8. The Defence replied the same day, quoting the specific portions of the Witness's testimony upon which it relied. The Defence narrowed its disclosure request to exclude any payments made through Intermediary P-0154 on the basis that Witness P-0113's testimony might arguably be interpreted as excluding payments by P-0154 for transportation to [REDACTED]. The Defence therefore narrowed its request to information that would unequivocally contradict her testimony – i.e. payments may directly by the OTP to P-0113.⁸
9. On 21 July 2016, the Prosecution denied even this narrower request while at the same time: (i) acknowledging that it had made routine payments to the witness that it would not disclose to the Defence; and (ii) disclosing the one non-routine payment of which the Defence had not previously been aware.⁹

APPLICABLE LAW

10. Article 67(2) requires the Prosecution to disclose information in its possession “which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”
11. The Trial Chamber has previously accepted the Prosecution's distinction between routine and non-routine payments as the boundary line for disclosure for payments to witnesses, while also insisting that indications of “specific materiality” may require disclosure of even routine payments:

Nonetheless, there may be particular circumstances which render information on such expenses *prima facie* material to the preparation of the defence, potentially exculpatory, or otherwise falling under Article 67(2) of the Statute.¹⁰

⁸ Email from Me Stéphane Bourgon to Ms Julieta Solano dated 18 July 2016 (“Defence Third Request”).

⁹ Email from Ms Julieta Solana to Me Stéphane Bourgon to dated 21 July 2016 (“Prosecution Third Response”).

¹⁰ ICC-01/04-02/06-840-Conf-Exp para 60.

12. Indeed, the Prosecution has itself conceded that routine expenses are subject to disclosure when “a clear issue regarding a witness’s credibility is raised”.¹¹

SUBMISSIONS

13. Witness P-0113, contrary to the Prosecution’s assertions by email, did deny having received payments from the Prosecution:

[REDACTED]¹²

14. The issue of payments from Intermediary P-0154 was addressed separately as follows:

[REDACTED]¹³

15. The witness’s denial of having received payments from the OTP, despite her evasiveness, is clear and unequivocal. The witness denied – with the exception of [REDACTED] – having received any assistance from the OTP, including payments of money. If the witness received payments, reimbursement or assistance from the OTP, this would contradict her testimony.
16. The Prosecution has claimed in its emails that the Defence’s questions were “broadly framed.”¹⁴ The significance of this assertion is unclear. In any event, the witness’s was clear in denying that she received payments or assistance from the OTP.
17. The Prosecution has conceded, contrary to the witness’s testimony, that it made payments to Witness P-0113.¹⁵ The implications for the witness’s credibility depends very much on the number and value of such payments or assistance. The payments may be small in number and in value, in which case the

¹¹ *Contra* ICC-01/04-02/06-808-Conf-Exp, paras 50.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ Prosecution Second Response (“[...] you subsequently posed another very broad question, ie whether she had received “[REDACTED]”).

¹⁵ Prosecution Third Response (“The Prosecution does not dispute that it incurred in routine expenses in relation to this witness [...]”).

impeachment value is less; they may, however, have been frequent and of substantial value relative to the witness's likely income. Either way, this is information that may affect her credibility under Article 67(2). The fact that such payments were "routine" is irrelevant; indeed, if they were so frequent as to have been "routine" then this increases their significance for the witness's credibility.

18. The extent of expenses that the Prosecution has asserted are "routine"¹⁶ mean that such payments could be substantial. The scope of payments that the Prosecution has asserted are shielded from routine disclosure includes medical expenses, care of dependents during absence from home, and reasonable loss of income.¹⁷ The amounts could be more than sufficient in value and frequency as to be relevant to assessing the plausibility of the witness's having forgotten the existence of such payments.

Material to the Defence

19. Even if not reaching the threshold of Article 67(2) disclosure, the witness's testimony regarding the absence of such payments evident makes the existence of such payments material to the preparation of the Defence under Rule 77.

Obligation to correct wrongful statements

20. Disclosure may also be required on the basis of a party's obligation to correct the statements by its witnesses that it knows to be false. Although the scope of such an obligation must be treated with great caution, the Prosecution has asserted in other cases before this court that there is such an obligation.¹⁸ Although in most cases "knowledge" of falsity is not a threshold that can be easily reached by a party, the denial of payments that the Prosecution knows

¹⁶ ICC-01/04-02/06-904, para 32.

¹⁷ ICC-01/04-02/06-808-Conf-Exp, para 49.

¹⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, Public redacted version of "Prosecution Pre-Trial Brief", 31 July 2015, ICC-01/05-01/13-1110-Conf, 14 July 2016, ICC-01/05-01/13-1110-Red, para 249 ("failing to correct the trial record despite knowing that witnesses had falsely testified.").

that it made to the witness arguably satisfies this standard. The Prosecution should be held not only to have an obligation to officially correct the witness's false statement, but also to particularize the extent of its falsity. This can be accomplished only by disclosure of the details of all payments that the witness denied having received.

CONFIDENTIALITY

21. Pursuant to Regulations 23*bis* (1) of the Regulations of the Court, this Defence Request is classified as confidential as it refers to matters related to the testimony of witness P-0113 and the Intermediary P-0154.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

ORDER the Prosecution to disclose to the Defence all payments, reimbursements, and record of other assistance of monetary value provided to Witness P-0113.

RESPECTFULLY SUBMITTED ON THIS 22ND DAY OF SEPTEMBER 2016

A handwritten signature in dark ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands