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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 Prosecution and the Victims
and Witnesses Unit Annexes A-J**

**Public redacted version of "Prosecution response to Defence request for lifting of
redactions to materials related to Witness P-0815 and request regarding alleged
disclosure violations (ICC-01/04-02/06-1221-Conf)", 23 March 2016,
ICC-01/04-02/06-1226-Conf-Exp**

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

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Introduction

1. The Prosecution responds to the Defence's expedited request to lift standard redactions applied to material related to Prosecution Witness P-0815 and alleging disclosure violations ("Expedited Request").¹

2. The Prosecution takes very seriously its disclosure obligations and court orders, and seeks to discharge its obligations in a timely manner. The Prosecution periodically re-reviews witnesses' materials for disclosure purposes, including in the weeks prior to their testimony. It was during its updated review of materials related to P-0815 that the Prosecution found documents that it decided should be disclosed for the sake of completeness, even where some of the content was duplicative of other previously disclosed materials, or of one another ("Disclosed Information").

3. In response to the Defence's Expedited Request for further lifting of redactions, the Prosecution confirms that upon further review of the contested materials it will lift certain additional redactions, namely the identity of the wife of P-0815 and the sisters [REDACTED]. However, the Prosecution considers that all other redactions for which lifting has been requested should be maintained because the relevance of the information for the Defence has not been established, or redactions are still needed to protect the safety, security, privacy and well-being of witnesses and their families pursuant to article 68(1) of the Rome Statute ("Statute") and Redactions Protocol.²

4. The Prosecution opposes the Defence request to recall Prosecution Witnesses P-0800, P-0886 and P-0017 as none of the Disclosed Information recently provided in relation to P-0815 warrants recalling any of these witnesses. [REDACTED].

¹ ICC-01/04-02/06-1221-Conf.

² ICC-01/04-02/06-411-AnxA.

Moreover, the Defence has failed to explain precisely how any of the Disclosed Information warrants the recall of these other Prosecution witnesses.

5. The Prosecution submits that there has been no violation of its disclosure obligations as material was disclosed as soon as it was assessed to be material pursuant to rule 77 of the Rules of Procedure and Evidence ("Rules"). The information is extremely limited in scope and/or aspects of that information was previously disclosed. The Disclosed Information comprises: six investigator notes [REDACTED], three recent investigator notes detailing extraordinary expenses made to P-0815, [REDACTED]. Most of these documents are one to two page documents. There is ample time for the Defence to prepare for cross-examination of P-0815 on the Disclosed Documents, should it decide to do so, in particular due to the limited nature of the Disclosed Information in terms of number of pages and issues covered.

Confidentiality

6. This filing is classified as Confidential, *ex parte* – only available to the Prosecution and the Victims and Witnesses Unit, pursuant to regulation 23bis(1) of the Regulations of the Court, as it responds to a confidential filing, and as it provides information about the security and locations of residence of witnesses and/or their family members. The Prosecution will file confidential and public redacted versions of this filing.

Background

7. On 8 March 2016, the Defence asked the Prosecution to lift standard redactions³ applied to Witness P-0815's witness statement ("Statement")⁴ and to an investigator's note detailing leads provided by Witness P-0815 ("Leads'

³ ICC-01/04-02/06-1221-Conf-AnxA.

⁴ See Annex A: DRC-OTP-2062-2260.

Document’’).⁵ Both the Statement and Leads’ Document were first disclosed to the Defence on 30 January 2015, well in advance of the disclosure deadline.

8. On 8 March 2016, the Prosecution responded to the Defence request⁶ and agreed to lift the following redactions: (a) the name of one investigator (whose identity was already disclosed to the Defence in February 2015)⁷ and the place of birth of P-0815 in the Statement; and (b) the occupation of P-0815’s daughter in the Leads’ Document.
9. In its response of 8 March 2016, the Prosecution explained why remaining redactions needed to be maintained in the Leads’ Document, namely: (a) the current place of residence of “[REDACTED]”; (b) information identifying [REDACTED] wife and son; (c) the current place of residence and current phone contact details for [REDACTED] son; (d) a recommendation made by the investigator that is covered by rule 81(1); (e) the current place of residence of P-0815’s daughter; (f) the name of P-0815’s wife; (g) the current joint place of residence of P-0815’s wife and of P-0815, and his wife’s current phone number.
10. On 11 March 2016,⁸ the Prosecution disclosed lesser redacted versions of the Statement and Leads’ Document. On the same day, the Prosecution further disclosed the following documents in anticipation of the upcoming testimony of P-0815, copies of which are annexed to this filing:

(a) six investigator notes, all of which largely relate to [REDACTED] (10 pages in total);⁹

⁵ See Annex B: DRC-OTP-2078-2682.

⁶ ICC-01/04-02/06-1221-Conf, Annexes B and C.

⁷ The Statement was disclosed initially on 30 January 2015 with a code assigned to the investigator. The Defence was provided the names corresponding to the codes for investigators on 4 February 2015.

⁸ ICC-01/04-02/06-1221-Conf-AnxD.

⁹ See Annex C.1: DRC-OTP-2067-1758; Annex C.2: DRC-OTP-2067-1761; Annex C.3: DRC-OTP-2067-1763; Annex C.4: DRC-OTP-2067-2377; Annex C.5: DRC-OTP-2067-2379; Annex C.6: DRC-OTP-2070-0175.

(b) three investigator notes created recently in 2016 to detail non-routine witness expense payments made in relation to P-0815 (4 pages in total);¹⁰

(c) four [REDACTED] (each one and a half pages);¹¹

(d) three forms [REDACTED] (each 7 and a half pages but much of this is standard text format);¹² and

(e) a report [REDACTED] (9 pages).¹³

11. On 18 March 2016, the Defence submitted its Expedited Request on behalf of Mr Ntaganda seeking the lifting of standard redactions to material related to Witness P-0815 and findings of disclosure violations.

Submissions

I. The remainder of the Expedited Request for lifting of redactions should be rejected

12. Upon further review of the Disclosed Information, the Prosecution is disclosing lesser redacted versions by lifting the following redactions: (a) the name of P-0815's wife in the of the Leads' Document¹⁴ and investigator note DRC-OTP-2067-2379;¹⁵ and (b) the names of the sisters of [REDACTED].¹⁶ Otherwise, the Prosecution submits that the remainder of the Defence's Expedited Request for lifting of redactions should be rejected, for the following reasons. '

¹⁰ See Annex D.1: DRC-OTP-2091-0177; Annex D.2: DRC-OTP-2091-0179; Annex D.3: DRC-OTP-2091-0174.

¹¹ See Annex E.1: DRC-OTP-2070-0041; Annex E.2: DRC-OTP-2070-0045; Annex E.3: DRC-OTP-2070-0048; Annex E.4: DRC-OTP-2070-0052.

¹² See Annex F.1: DRC-OTP-2080-0385; Annex F.2: DRC-OTP-2080-0393; Annex F.3: DRC-OTP-2080-0401.

¹³ See Annex G: DRC-OTP-2085-0019.

¹⁴ See Annex B.

¹⁵ See Annex C.5.

¹⁶ See Annex F.2.

(a) Redactions to the Statement must be maintained

13. Contrary to the Defence's assertion,¹⁷ the number of a witness's children may identify both the witness and the family members themselves. Disclosure of a combination of information – including a witness's name and number of their children – could lead to identification of immediate family members. As the Defence is seeking this information on the basis that it wants to investigate P-0815's family members,¹⁸ it is contradictory to argue that disclosure of numbers of children does not potentially identify them so is not warranted under Category B of the Redactions Protocol.¹⁹
14. As the Defence concedes,²⁰ where the family members in question are not relevant to the witness's account, it is appropriate that their identities remain anonymous.
15. Redaction of numbers of children constitutes a standard Category B redaction,²¹ and has been routinely applied in all of the Prosecution's witness statements on this basis without objections previously from the Defence. The Defence has failed to indicate why there should be any difference in treatment of P-0815, in contrast to other Prosecution witnesses whose numbers of children have been redacted from their witness statements, as Category B redactions.
16. In particular, the Defence has failed to demonstrate how this information is material to their investigations in relation to Witness P-0815. The only concrete example provided as to how P-0815's children are relevant to his account, is [REDACTED].²² However, in addition to information in the Statement,²³ [REDACTED] contained in the Leads' Document has already been disclosed to

¹⁷ Expedited Request, paras.6-9.

¹⁸ Expedited Request, para.10.

¹⁹ Expedited Request, paras.6-9.

²⁰ Expedited Request, para.19.

²¹ See ICC-01/04-02/06-411-AnxA: paras.20-24 (Category B redactions: Identifying and contact information of family members of witnesses). See also e.g. ICC-01/04-02/06-180-Corr-Red, para.13.

²² Expedited Request, para.10.

²³ Annex A, paras. 18-24.

the Defence.²⁴ The number of children P-0815 has in total is simply irrelevant to P-0815's account [REDACTED]. The Defence fails to explain why information regarding P-0815's other children is needed.

(b) Redactions to the Leads' Document

17. The Defence has requested that all remaining redactions applied to the Leads' Document be lifted.²⁵

18. The Prosecution, upon re-review of the Leads' Document,²⁶ agrees to lift redactions to the identity of the wife of P-0815, as indeed she is mentioned in P-0815's account [REDACTED].²⁷

19. The Prosecution does not agree to lift the remaining redactions requested, for the following reasons.

20. First, the Prosecution submits that the current place of residence of P-0815's wife, who lives with P-0815, and her current phone number are standard redactions under the Redaction's Protocol and should not be disclosed to the Defence.²⁸ The Defence during the course of its investigations is not entitled to simply appear at the homes of witnesses and/or their family members, or to call them directly using their personal phones. This would constitute a violation of their rights to privacy under article 68(1). This would further constitute a violation of the Redaction Protocol, in terms of Category A.1 and Category B redactions.²⁹ The Defence should be able to conduct their investigations without such direct approaches.

²⁴ DRC-OTP-2078-2682, pp.1-2.

²⁵ Expedited Request, para.11.

²⁶ Annex B.

²⁷ See Annex A: DRC-OTP-2062-2260, paras.19-24.

²⁸ ICC-01/04-02/06-411-AnxA: Category B redactions (para.21). This information could also be redacted as a Category A.1 redaction as it constitutes recent contact information of Witness P-0815.

²⁹ ICC-01/04-02/06-411-AnxA, paras.15-17 and 20-23.

21. Second, the Defence has not demonstrated the relevance of the identifying information of P-0886's wife or son, including their name, his son's current age, or their current places of residence. Neither P-0886's wife nor son is mentioned in P-0815's account of events.
22. Moreover, the Defence fails to explain how this information is relevant to assess P-0886's credibility. The Defence also does not explain why this information was not sought before P-0886 testified. The Defence was aware even before P-0886 testified that his wife and family fled from Sayo at the start of the attack; and that he later went in search of them.³⁰ The Prosecution submits that this information provided by P-0886 regarding the mere presence of his family in Sayo at the start of the attack is an insufficient basis on which to seek their identifying information. No arguments are provided to explain how the identifying information is now relevant, following receipt of the Disclosed Information. Moreover, redactions of current places of residence of witnesses and their families are standard redactions under the Redactions Protocol.³¹
23. Third, the observations from the investigator in the Leads' Document, as to follow-up on leads, amounts to internal work product and as such is a standard redaction, both under the Redaction Protocol³² and rule 81(1) of the Rules of Procedure and Evidence ("Rules").³³ The Defence has failed to justify why internal work product should be disclosed and why it is material to the evaluation of P-0886 and/or P-0815.³⁴

³⁰ DRC-OTP-2077-0019, at p.0022, paras.18-19.

³¹ ICC-01/04-02/06-411-AnxA: Category A.1: paras.15-17; Category B: 20-23.

³² Annex B, p.1.

³³ ICC-01/04-02/06-411-AnxA, p.9, paras.46-47.

³⁴ Expedited Request, paras.16-17.

(c) Redactions to investigator notes DRC-OTP-2067-2379 and DRC-OTP-2080-0393

24. The Defence submits that all Category B redactions be lifted from documents DRC-OTP-2067-2379 (Annex C.5) and DRC-OTP-2080-0393 (Annex F.2).
25. The Prosecution has re-reviewed the redactions contained in these documents and, consistent with its approach to the Leads' Document (Annex B), agrees to lift the redactions in DRC-OTP-2067-2379 to the name of P-0815's wife, as she is mentioned in P-0815's account [REDACTED].
26. However, the Defence has failed to explain how the identity of [REDACTED] is necessary for their investigations. [REDACTED]. She was also not mentioned in P-0815's Statement. [REDACTED]. Redaction of her identity is a standard Category B redaction.³⁵ [REDACTED]. Therefore, disclosure of her identity and contact with her may not only compromise her own safety and security but may unnecessarily lead to disclosure of P-0815's status as a witness, to P-0815's extended family members. Moreover, the identity of P-0815's wife, who was also [REDACTED] detailed in DRC-OTP-2067-2379, is being disclosed. Accordingly, the Prosecution submits it is not justifiable or necessary to disclose the [REDACTED].
27. There is no justification for revealing the current place of residence of P-0815 or his extended family members [REDACTED]. This also constitutes a standard redaction under the Redaction Protocol.³⁶
28. The Prosecution agrees to unredact the names [REDACTED].³⁷

³⁵ ICC-01/04-02/06-411-AnxA, paras.20-23 (Category B).

³⁶ ICC-01/04-02/06-411-AnxA, paras.20-23 (Category B – family members) ; paras.15-17 (Category A.1 : recent contact information of witnesses).

³⁷ Expedited Request, para.22.

(c) Redactions to investigator notes DRC-OTP-2067-1758 and DRC-OTP-2067-1763

29. The Defence requests that all Category C redactions, as regards innocent third parties, be lifted.³⁸

30. First, the Defence requests information related to the family members of Colonel LUSALA contained in DRC-OTP-2067-1758 (Annex C.1).³⁹ The Prosecution submits that this redacted information, which is not information identifying Colonel LUSALA's family members, but instead indicates their current place of residence, should not be disclosed. The Defence has been aware of the allegations concerning the death of Colonel LUSALA for a considerable period of time, including well before the testimony of P-0800, P-0886, P-0017 and P-0815. This is a matter that should have been anticipated. If the Defence wanted to investigate the circumstances in relation to Colonel LUSALA's family it could and should have done so long ago. It should have been possible for the Defence to conduct their own investigations into Colonel LUSALA's family without disclosure of their current place of residence.

31. Secondly, the Defence requests that redactions applied to information concerning [REDACTED] be lifted from investigator note DRC-OTP-2067-1763 (Annex C.3). [REDACTED].

32. [REDACTED].⁴⁰ [REDACTED].⁴¹ [REDACTED].

³⁸ Expedited Request, paras.23-24.

³⁹ Expedited Request, para.25.

⁴⁰ Annex H: DRC-OTP-2084-0002 , p.5.

⁴¹ ICC-01/04-02/06-411-AnxA, paras.20-23 (Category B).

II. The requested remedies in relation to the Disclosed Information should not be granted

33. The Prosecution submits that the requested remedies in relation to the Disclosed Information should not be granted.
34. First, the Prosecution submits it has not violated its disclosure obligations, as the documents were disclosed as soon as they were assessed to be relevant under rule 77.
35. The Prosecution confirms that certain documents amongst the Disclosed Information - namely: [REDACTED],⁴² [REDACTED]⁴³ - [REDACTED]⁴⁴. The Prosecution decided after re-review of the reports that for the sake of completeness, the Prosecution should disclose these documents. Similarly, the four [REDACTED]⁴⁵ were not viewed as disclosable under rule 77 as [REDACTED]. However, upon re-review, the Prosecution also decided for the sake of completeness that they could be disclosed, even if these forms are arguably not material as such to the Defence pursuant to rule 77.
36. The Defence was already aware that P-0815 [REDACTED], because this is detailed in his Statement.⁴⁶ Moreover, the fact that [REDACTED] has also been disclosed.⁴⁷
37. The six previous investigation notes⁴⁸ were not previously disclosed because they largely relate to [REDACTED]. It was only upon re-review of the materials, during the Prosecution's periodic review of its witness's materials prior to

⁴² See Annex F.1: DRC-OTP-2080-0385; Annex F.2: DRC-OTP-2080-0393; Annex F.3: DRC-OTP-2080-0401.

⁴³ See Annex G: DRC-OTP-2085-0019.

⁴⁴ [REDACTED]

⁴⁵ See Annex E.1: DRC-OTP-2070-0041; Annex E.2: DRC-OTP-2070-0045; Annex E.3: DRC-OTP-2070-0048; Annex E.4: DRC-OTP-2070-0052.

⁴⁶ See Annex A: DRC-OTP-2062-2260, p.2266, paras.29-30.

⁴⁷ See e.g. DRC-OTP-2084-0002.

⁴⁸ See Annex C.1: DRC-OTP-2067-1758; Annex C.2: DRC-OTP-2067-1761; Annex C.3: DRC-OTP-2067-1763; Annex C.4: DRC-OTP-2067-2377; Annex C.5: DRC-OTP-2067-2379; Annex C.6: DRC-OTP-2070-0175.

testimony, that the Prosecution concluded that the six investigator notes contained information of potential relevance to the Defence because [REDACTED].

38. Information regarding expenses or costs related to Prosecution witnesses are reviewed on a rolling basis some weeks before witnesses are due to testify to ensure that the information is the most up-to-date. Accordingly, the three new investigator notes were created and disclosed after review of expenses or costs related to P-0815, which the Prosecution considered were not routine. The Prosecution observes that a fourth investigator note, as annexed to this filing, is being disclosed to the Defence as it confirms that investigators from the Prosecution [REDACTED].⁴⁹

39. Amongst all of the Disclosed Information, the Defence has identified only one short extract of information regarding circumstances surrounding Colonel LUSALA's death [REDACTED], much of which is in fact consistent with the accounts of witnesses who have testified about the death of Colonel LUSALA to date. Some details provided by the two individuals, (as to the alleged presence of Colonel LUSALA's son when he died), have not been verified.⁵⁰

40. The Defence has failed to explain how, or why, any of this information warrants the potential *"recall [of] witnesses who testified on events occurring the during the attack in Sayo, the death of Colonel Lusala [REDACTED], namely witnesses P-0886, P-0800 and P-0017"*.⁵¹ In particular, none of these witnesses testified that they were present when Colonel LUSALA died. The Defence request for their recall should be dismissed.

⁴⁹ See Annex J: DRC-OTP-2091-0391.

⁵⁰ Expedited Request, para. 34. DRC-OTP-2070-0175, para.11. Namely, the alleged presence of Colonel LUSALA's son.

⁵¹ Expedited Request, para.38.

41. Even the postponement of P-0815's testimony is not warranted (and has not been requested) because the Disclosed Information is not voluminous and the scope and nature of the information recently disclosed is extremely limited.⁵²

Conclusion

42. For all the foregoing reasons, the Prosecution submits that the Expedited Request should be rejected in its entirety.



Fatou Bensouda
Prosecutor

Dated this 24th day of March 2016

At The Hague, The Netherlands

⁵² See e.g. ICC-01/04-02/06-817-Red; ICC-01/04-02/06-840-Red, para.64. See also *The Prosecutor v Rukono*, Appeals Chamber, Judgment, ICTR-2001-70-A, 20 October 2010, paras.137-140.