



Original: **English**

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

Date: **26 July 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
with confidential Annexes A and B**

**Public redacted version of “Expedited request on behalf of Mr Ntaganda seeking
the lifting of standard redactions applied to material related to Witness P-0769,
disclosure orders and reclassification”**

ICC-01/04-02/06-1438-Conf-Exp, 6 July 2016

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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Further to: (i) electronic correspondence between Counsel representing Mr Ntaganda (“Defence”) and the Office of the Prosecutor (“Prosecution”) in May 2016; and (ii) the disclosure of material related to Witness P-0769 by the Prosecution on 23, 24 and 26 May 2016, the Defence hereby submits this:

Expedited request on behalf of Mr Ntaganda seeking the lifting of standard redactions applied to material related to Witness P-0769, disclosure orders and reclassification

“Defence Expedited Request”

INTRODUCTION

1. On 13 May 2016, the Defence requested the Prosecution to lift standard redactions¹ applied to material related to Witness P-0769.
2. On the same day, the Defence requested the Prosecution to disclose (i) audio recordings of the [REDACTED] interview with Witness P-0769; (ii) any [REDACTED] from Witness P-0769’s telephone, [REDACTED]; and (iii) the Basic Security Questionnaire (“BSQ”) of Witness P-0769.²
3. On 20 May 2016, the Prosecution responded to the Defence request for the lifting of redactions. While the Prosecution agreed to lift certain redactions, it expressed the view that all remaining redactions were to be maintained as standard / on-going redactions in accordance with the Redactions Protocol.³
4. On 25 May 2016, the Prosecution responded to the Defence request for disclosure.⁴ The Prosecution agreed to disclose the transcripts of the [REDACTED] interview. However, the Prosecution refused to disclose the corresponding audio recordings as well as the BSQ of Witness P-0769.

¹ See email from Stéphane Bourgon to Dianne Luping, 13 May 2016 enclosed in Annex A.

² See email from Stéphane Bourgon to Dianne Luping, 13 May 2016 enclosed in Annex B.

³ See email from Dianne Luping to Stéphane Bourgon, 20 May 2016, enclosed in Annex A.

⁴ See email from Dianne Luping to Stéphane Bourgon, 25 May 2016 enclosed in Annex B.

5. On 23, 24 and 26 May 2016, the Prosecution disclosed certain new documents related to Witness P-0769 and re-disclosed other documents in which certain redactions were lifted, as requested by the Defence.
6. In light of the above and for the reasons expressed below, the Defence respectfully requests Trial Chamber VI (“Chamber”) to order the Prosecution to lift forthwith some of the remaining redactions applied to various documents related to Witness P-0769.
7. Furthermore, for the reasons expressed below, the Defence respectfully requests the Chamber to order the Prosecution to disclose certain material it refuses to disclose.
8. Finally, the Defence respectfully requests the Chamber to order the lifting of redactions applied to the Request for Protective Measures and to order the reclassification of Annexes H to K to the same.

SUBMISSIONS

I. Request for the lifting of certain redactions

A. Redactions applied to Witness P-0769 [REDACTED] interview

9. In light of the upcoming testimony of Witness P-0769, the Defence posits that all category B redactions applied to the [REDACTED] interview of Witness P-0769 must be lifted.
10. The Defence refers in particular to: (i) the redaction applied at [REDACTED] of Transcript [REDACTED]; and (ii) redactions applied at pages [REDACTED] of Transcript [REDACTED].
11. According to the Redaction Protocol, Category B redactions refer to “*Identifying and contact information of family members of witnesses*”. Redactions to identifying information of family members of witnesses shall be ongoing only when the redactions were applied on the basis of their own security and when

the family members concerned are of no relevance to any known issue in the case. For any family member falling outside these two scenarios, the application-based procedure set out at paragraphs 48-50 must be followed.⁵

12. The Defence submits that the information redacted is relevant, material and necessary to prepare for the cross-examination of P-0769.
13. In particular, redactions applied to transcript [REDACTED] appear to relate to [REDACTED] given to Witness P-0769 by [REDACTED]. Hence, it does not relate to identifying and/or contact information of Witness P-0769's family members.
14. Moreover, this information is necessary in order for the Defence to investigate Witness P-0769's [REDACTED].

B. Redactions applied to Investigation Note [REDACTED]

15. The Defence submits that all A.1 and B redactions applied to Investigation note [REDACTED] must now be lifted.
16. These redactions appear to include information related to [REDACTED] Witness P-0769 on [REDACTED]. The Defence must be in a position to investigate this [REDACTED], especially since Witness P-0769 claims that he assumed [REDACTED].
17. In particular, information related to Witness P-0769 is redacted as well as his phone number [REDACTED]. Obtaining Witness P-0769's phone number [REDACTED] would allow the Defence to investigate [REDACTED] by, for instance, requesting the [REDACTED] from [REDACTED].

⁵ Redaction Protocol, para.23.

C. Redactions applied to the [REDACTED] Witness Statement [REDACTED] and corresponding transcript of interview [REDACTED]

18. On 24 May 2016, following a request from the Defence, the Prosecution disclosed two transcripts of its [REDACTED] interview with Witness P-0769.

19. These transcripts contain A.1 and B redactions which must now be lifted. Reference is made in particular to the following:

(i) the identity of Witness P-0769's [REDACTED] which is necessary for the Defence to investigate on the circumstances surrounding his [REDACTED].⁶ In particular, Witness P-0769 would have received the assistance from [REDACTED] ⁷, [REDACTED], who had contact with [REDACTED], who also assisted Witness P-0769 to [REDACTED];

(ii) the name of Witness P-0769's [REDACTED] is material and should be disclosed.⁸ Following the alleged [REDACTED], Witness P-0769's [REDACTED] is the only person he informed of the alleged [REDACTED]. Therefore, his name is necessary in order for the Defence to be in a position to investigate the circumstances in which this [REDACTED] would have taken place;

(iii) several details related to [REDACTED] Witness P-0769 would have had with [REDACTED] are redacted at page [REDACTED] of transcript [REDACTED];

(iv) several details of [REDACTED] are redacted at page [REDACTED] of transcript [REDACTED]; and

⁶ The name of Witness P-0769's [REDACTED] is redacted at page [REDACTED] of Witness Statement [REDACTED]. The Defence notes that this information is also redacted at page [REDACTED] of Witness Statement [REDACTED] and at page [REDACTED] of Witness Statement [REDACTED].

⁷ [REDACTED].

⁸ The identity and contact information of Witness P-0769 [REDACTED] are redacted at pages [REDACTED] of transcript [REDACTED] and at [REDACTED] of Witness Statement [REDACTED].

(v) E redactions applied to transcript [REDACTED] at pages [REDACTED] and [REDACTED]. The Defence notes that it has not been notified of a request submitted by the Prosecution to the Chamber seeking the application of non-standard redactions, and that it was not provided with an opportunity to make observations on these redactions, contrary to paragraph 49 of the Protocol on redactions.⁹

D. Redactions applied to the [REDACTED] Statement [REDACTED] and corresponding transcript of interview [REDACTED]

20. Transcript [REDACTED] contains a significant E redactions at page [REDACTED] which must be lifted.

21. The Defence notes that it has not been notified of a request submitted by the Prosecution to the Chamber seeking the application of non-standard redactions, and that it was not provided with an opportunity to make observations on these redactions, contrary to paragraph 49 of the Protocol on redactions.¹⁰

E. Lifting of redactions applied to the [REDACTED] Witness Statement [REDACTED] and corresponding transcripts of interview [REDACTED]

22. The [REDACTED] Witness Statement and corresponding transcripts contain several redactions related to a [REDACTED] Witness P-0769 allegedly [REDACTED].

23. Several details related to his mother's knowledge of [REDACTED] and his mother's [REDACTED] are redacted including: (i) his mother's phone number;¹¹ (ii) his mother's occupation;¹² and (iii) his mother's place of residence when [REDACTED].¹³

⁹ The Defence sent a request for the lifting of redactions and/or clarification to the Prosecution on this issue on 4 July 2016. The Prosecution acknowledged receipt of this email on the same day but did not provide an answer yet.

¹⁰ The Defence sent a request for the lifting of redactions and/or clarification to the Prosecution on this issue on 4 July 2016. The Prosecution acknowledged receipt of this email on the same day but did not provide an answer yet.

¹¹ [REDACTED].

24. In addition, the identity of Witness P-0769's [REDACTED] is redacted at page [REDACTED] of transcript [REDACTED]. Witness P-0769 and [REDACTED] refer to [REDACTED]. Therefore, his identity is necessary for the Defence to investigate on the circumstances in which [REDACTED] would have occurred.

F. Lifting of redactions applied to Investigation note [REDACTED]

25. In the present case, category A.1 redactions were mainly applied to P-0769's telephone number [REDACTED], at a time when he allegedly [REDACTED].¹⁴
26. The Defence posits that all these category A.1 redactions must be lifted in order to allow the Defence to investigate [REDACTED] involving Witness P-0769, in particular, [REDACTED]. Obtaining Witness P-0769's phone number [REDACTED] will allow the Defence to investigate [REDACTED] by, for instance, requesting the [REDACTED].

II. Request for disclosure

A. Audio recording of the [REDACTED] interview

27. Witness P-0769's three statements of [REDACTED] confirm that these interviews were audio recorded. Accordingly, the Defence requested the Prosecution to disclose the related audio recordings.¹⁵
28. While the Prosecution agreed to disclose the transcript of this audio recording, after necessary redactions have been applied, it rejected the Defence request for disclosure of the audio recording, arguing that it was not necessary. On this issue, the Prosecution previously referred to the Chamber's

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ See [REDACTED] and [REDACTED].

¹⁵ See email from Stéphane Bourgon to Dianne Luping, 19 May 2016 enclosed in Annex C.

previous ruling in its Decision on Defence request for disclosure of the audio recording of Witness P-0963's interview.¹⁶

29. The Defence notes that the Chamber considered in its ruling that audio recordings may be subject to disclosure if they are deemed material to the preparation of the Defence.
30. In its *Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219*, Trial Chamber II considered that:

the Defence does not have to provide concrete examples to support its allegations relating to discrepancies between different statements by the witness concerned, or to the witness's credibility, in order to demonstrate that the audio records in question are material to the preparation of the Defence. In effect, preparing the cross-examination of a witness will inevitably prompt speculation as to his or her credibility or to any inconsistencies, and access to the audio records of the interview, in addition to the record of the statement, can only facilitate that task. Moreover, the Chamber notes that such disclosure would not cause any prejudice to the Prosecutor and, moreover, that he has not presented any argument to that effect. The Chamber accordingly considers that the Prosecutor must disclose such audio records to the Defence, in accordance with rule 77.

31. Accordingly, also taking into consideration the Prosecution's previous assessment regarding other similar audio recording involving other witnesses, the Defence submits that the audio recording of the [REDACTED] interviews must be disclosed pursuant to Rule 77.

B. BSQ of Witness P-0769

32. In its Investigation note [REDACTED], the Prosecution refers to the Biographic Data and Security Questionnaire ("BSQ") interview of P-0769.¹⁷

¹⁶ ICC-01/04-02/06-1258-Conf.

¹⁷ [REDACTED], para.7.

33. When responding to the Defence's request for disclosure of the BSQ, the Prosecution submitted that it does not contain any information that may fall under Rule 77 of the Rules.
34. However, taking into consideration the content of Investigation note [REDACTED], it is very likely that the BSQ also contains information related to P-0769's knowledge of the case or that would put his credibility in doubt or serve to show potential bias. As such, this document is subject to disclosure pursuant to Rule 77 and/or Article 67(2) of the Statute.
35. Consequently, the Defence respectfully requests the Chamber, at a minimum, to order the Prosecution to disclose a redacted version of these three documents comprising solely standard redactions in accordance with the Redactions Protocol.

III. Reclassification of Annexes H to K of the Prosecution's twenty-first request for in-court protective and special measures and order to lift of redactions

36. The Prosecution's twenty-first request for in-court protective and special measures ("Request for Protective Measures")¹⁸ contains significant redactions at paragraphs 15, 16 and 22 to 25, which must now be lifted in light of the upcoming testimony of Witness P-0769.
37. Accordingly, Annexes H to K – to which the Prosecution refers to in the Request for Protective Measures – should be reclassified and made available to the Defence, as they provide information on the witness' security situation and location.¹⁹ Most likely, these annexes also refer to the alleged [REDACTED].
38. The Prosecution claims that [REDACTED] Witness P-0769 to cease his cooperation. Moreover, the Prosecution appears to link these [REDACTED].

¹⁸ ICC-01/04-02/06-1397-Conf-Exp-Red.

¹⁹ Request for Protective Measures, para.6.

Nevertheless, all the information which appears to establish the link between [REDACTED] and [REDACTED] are redacted or unavailable to the Defence.²⁰

39. The Prosecution also alleges that Witness P-0769 and his family reside [REDACTED]. Nevertheless, all information related to this so called “[REDACTED]” and to the [REDACTED] are currently redacted and unavailable to the Defence.²¹
40. In light of the above, the Defence posits that Annexes H to K must be reclassified.

CONFIDENTIALITY

41. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Expedited Request is classified as confidential *ex parte*, as it refers to confidential material related to Prosecution witnesses and an *ex parte* filing—only available to the Chamber, Prosecution, VWU and Defence proceedings. A confidential redacted version will be filed separately.

RELIEF SOUGHT

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

ORDER the Prosecution to lift redactions applied to (i) Witness P-0769 [REDACTED] interview; (ii) Investigation Note [REDACTED]; (iii) the [REDACTED] Witness Statement [REDACTED] and corresponding transcript of interview [REDACTED]; (iv) the [REDACTED] Statement [REDACTED] and corresponding transcript of interview [REDACTED]; (v) the [REDACTED] Witness Statement [REDACTED] and corresponding transcripts of interview [REDACTED]; (vi) Investigation note [REDACTED]; and (vii) the Request for Protective Measures.

²⁰ Request for Protective Measures, para.15 and 16 and footnotes 13, 14, 20 to 22.

²¹ Request for Protective Measures, para.22-25 and footnotes 31-37.

ORDER the Prosecution to disclose: (i) Audio recording of the [REDACTED] Interview; and (ii) the BSQ of Witness P-0769; and

RECLASSIFY Annexes H to K to the Request for Protective Measures as Confidential.

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF JULY 2016

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda