

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **22 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

Public redacted version of “Prosecution response to the ‘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”, 8 July 2016, ICC-01/04-02/06-1446-Conf-Exp

Source: Office of the Prosecutor

Document 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 the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Trial Chamber VI (“Chamber”) should reject the “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 Request”).¹
2. Insofar as it concerns the lifting of redactions to Witness P-0769’s materials, the Defence Request does not relate to any information that is relevant to P-0769’s knowledge of the case. Rather, the information the Defence seeks to access constitutes sensitive contact information of P-0769 and his family members to which the Defence is not entitled, pursuant to the Redaction Protocol.²
3. The Prosecution has maintained limited, necessary redactions to the material at issue. These redactions do not impede the Defence from conducting any investigation, even on issues unrelated to the witness’s knowledge of the case. Neither should they preclude the Defence from effectively cross-examining Witness P-0769 on these tangential issues, to the extent that the Chamber may deem them relevant to the proceedings.
4. Consistent with its previous decisions, the Chamber should reject the Defence Request for the disclosure of the audio recordings of P-0769’s three [REDACTED] interviews as well as his Biographic Data and Security Questionnaire (“BSQ”). The Prosecution has disclosed the transcripts of the [REDACTED] interviews and the Defence has failed to provide any justification why the corresponding audio recordings would be *prima facie* material to their preparation. The Prosecution has also extracted from P-0769’s BSQ all information that is material and disclosed it to the Defence.

¹ ICC-01/04-02/06-1438-Conf-Exp.

² ICC-01/04-02/06-411-AnxA.

5. Lastly, the Prosecution opposes the re-classification of Annexes H, I, J and K to its request for in-court protective measures for P-0769, as these annexes contain sensitive information regarding the witness, his family members and innocent third parties to which the Defence is not entitled, pursuant to the Redaction Protocol.

Confidentiality

6. This filing is classified as “Confidential, *ex parte* - only available to the Prosecution and Victims and Witnesses Unit” pursuant to regulation 23*bis*(1) of the Regulations of the Court (“Regulations”), since it contains information which is not disclosable to the Defence, and refers to [REDACTED]. The Prosecution will file a confidential redacted version of this filing. The annexes to this filing are classified as “Confidential, *ex parte* - only available to the Prosecution and Victims and Witnesses Unit” pursuant to regulation 23*bis*(1) of the Regulations, because they contain information in relation to which the Defence is seeking the lifting of redactions and disclosure.

Procedural History

7. Between 13 and 25 May 2016, the Parties engaged in email exchanges, initiated by the Defence, concerning the lifting of redactions to, and disclosure of, material related to Witness P-0769.
8. On 4 July 2016, the Defence sent the Prosecution a further request for the lifting of redactions applied to the materials disclosed for Witness P-0769.
9. On 6 July 2016, the Defence filed the Defence Request. On the same day, the Chamber shortened the deadline for the Prosecution’s response to this request to 8 July 2016.

Prosecution's Submissions

I. The limited redactions to Witness P-0769's material are necessary

A. Transcripts of Witness P-0769's [REDACTED] interview³

10. [REDACTED] and [REDACTED] are two transcripts of Witness P-0769's [REDACTED] interview. The Defence seek lifting of the standard Category "B" redactions in these two transcripts, which to the Defence do not appear to cover identifying and/or contact information of Witness P-0769's family members, but rather [REDACTED], which, the Defence argues it needs in order "to investigate Witness's P-0769's [REDACTED]."⁴

11. This request should be rejected, as it is based on an erroneous assumption as to the nature of the information redacted by the Prosecution. Contrary to the Defence's submissions, the Prosecution's redactions do not [REDACTED], but identifying information of [REDACTED] of P-0769's family members, namely [REDACTED], information which squarely falls under Category "B" of the Redaction Protocol.

12. In adopting the Redaction Protocol, the Chamber concluded that the family members of witnesses are particularly vulnerable and that non-disclosure is necessary to protect their safety, dignity, privacy and well-being.⁵ The Chamber specifically found that redacting their identifying information is

³ The Prosecution attaches copies of these two transcripts, [REDACTED] and [REDACTED], in a format which allows the Chamber to view the information which has been redacted from the Defence ("proof versions") as Confidential, *ex parte* - Prosecution only Annex A. The Defence's submissions in relation to the lifting of redactions in these documents are contained in paras.9-14 of the Defence Request.

⁴ Defence Request, paras. 13 and 14.

⁵ ICC-01/04-02/06-411, paras. 32-33 and ICC-01/04-02/06-411-AnxA, para.20.

justified where it is mentioned in an incidental manner or by way of general biographical background.⁶ This is the case for P-0769's [REDACTED].

13. P-0769's [REDACTED] is not relevant to any known issue in the case and merely appears in these two transcripts in an incidental manner. Indeed, in the relevant parts of his [REDACTED] interview, P-0769 explained that, [REDACTED]. P-0769 stated that [REDACTED]. In addition to his [REDACTED]'s name, P-0769 referred to his profession and his place of residence.

14. [REDACTED] on this occasion is not an issue of relevance to this case. The Defence has all the information it requires to investigate P-0769's [REDACTED], should it deem it necessary to do so. Providing the Defence with the name of P-0769's [REDACTED] would not in any way assist it in this regard.

15. Importantly, however, Witness P-0769 has expressed a particular concern as to the security situation of [REDACTED], who [REDACTED]⁷ [REDACTED]. It follows that revealing his identity would unnecessarily put the witness's [REDACTED] at risk and, in accordance with the Redaction Protocol, non-disclosure of this name is and remains necessary to protect his safety and well-being.

B. [REDACTED] investigation note⁸

16. The Defence requests the lifting of all standard Categories "A.1" and "B" redactions applied to information in [REDACTED], an investigation note dated

⁶ ICC-01/04-02/06-411, para. 36.

⁷ See [REDACTED].

⁸ The Prosecution attaches a proof version of this document, [REDACTED], as Confidential, *ex parte* - Prosecution only Annex B. The Defence's submissions in relation to the lifting of redactions in this document are contained in paras.15-17 of the Defence Request.

[REDACTED], submitting that the redacted information “relates to [REDACTED] and that it needs this information to investigate the [REDACTED].

17. The four standard redactions applied to this document cover (1) Witness P-0769’s concerns for his [REDACTED]’s safety, (2) Witness P-0769’s place of residence, (3) information revealing Witness P-0769’s current occupation, and (4) Witness P-0769’s current telephone number. These redactions should be maintained to preserve the witness’s and his [REDACTED]’s safety and well-being.
18. First, the first three redactions described above do not in any way relate to the [REDACTED]; the Defence’s assumption that they do is incorrect. These redactions cover the witness’s contact information as well as information regarding the security situation of [REDACTED] of his family members. As such, these redactions squarely fall within the limits of the standard redaction categories that were pre-approved by the Chamber and should be maintained.
19. Second, non-disclosure of the witness’s telephone number, which the witness still currently uses, remains necessary to protect P-0769’s safety, dignity, privacy and well-being [REDACTED].⁹
20. At the outset, the Prosecution notes that, in submitting that [REDACTED],¹⁰ the Defence has taken information provided by P-0769 out of context. As recorded in the investigation note of [REDACTED], Witness P-0769 indeed reported to the Prosecution, [REDACTED], that [REDACTED] and that he [REDACTED].¹¹

⁹ [REDACTED].

¹⁰ Defence Request, para. 16.

¹¹ [REDACTED].

However, as the Defence is aware, P-0769 later made a statement about [REDACTED], wherein he [REDACTED], and explained that, [REDACTED].¹²

21. The Defence fails to justify why it would be entitled to receive Witness P-0769's telephone number, contrary to the terms of the Redaction Protocol. There is nothing to suggest that the witness lied about [REDACTED] or that affects his credibility in any way. The Defence merely indicates that obtaining P-0769's telephone number would allow it to "investigate [REDACTED]. The Prosecution notes, in this regard, that the Chamber already has before it the [REDACTED] for both Witness P-0769 and the [REDACTED], and that these [REDACTED] confirm that [REDACTED] as reported by P-0769.¹³

22. The Defence should not benefit from [REDACTED]. Accordingly, the Defence Request should be rejected.

C. Statement and transcript of Witness P-0769's [REDACTED] interview¹⁴

(1) The identity of Witness P-0769's [REDACTED]

23. The Defence seeks the lifting of redactions to the names of [REDACTED], arguing that this information is necessary for the Defence to investigate the circumstances surrounding the witness's [REDACTED].

24. First, whilst the Defence has failed to demonstrate how the name of the witness's [REDACTED] and the issue it argues it relates to are material to its preparation, the Prosecution informs the Chamber that it inadvertently did not

¹² [REDACTED].

¹³ See ICC-01/04-02/06-1397-Conf-Exp-AnxH.

¹⁴ The Prosecution attaches proof versions of these documents, [REDACTED] and [REDACTED], as Confidential, *ex parte* - Prosecution only Annex C. The Defence's submissions in relation to the lifting of redactions in these documents are contained in paras.18-19 of the Defence Request.

redact this information in one of the witness's interview transcripts.¹⁵ Accordingly, the Defence is already in the possession of Witness P-0769's [REDACTED]'s name. The Prosecution is re-disclosing copies of Witness P-0769's materials with redactions to his [REDACTED]'s identity lifted.

25. Second, the Defence request for the disclosure of the name of P-0769's [REDACTED] should be denied, as the Defence has failed to provide any reason or information supporting its view that this name is material or relevant to any known issue in the case such that this standard Category "B" redaction is no longer required.

(2) The identity of Witness P-0769's [REDACTED]

26. The Defence also requests the disclosure of the name of P-0769's [REDACTED], arguing that he "is the only person he informed of [REDACTED] and that it needs this information in order to investigate the circumstances in which [REDACTED].

27. This request should be denied. The Defence's assertion that P-0769's [REDACTED] is the only person he informed of [REDACTED] is incorrect. Indeed, neither the witness's [REDACTED] statement,¹⁶ nor the transcript of the [REDACTED] interview,¹⁷ indicate that P-0769 informed [REDACTED]. According to the statement and transcript of Witness P-0769's [REDACTED] interview, following [REDACTED], the witness informed [REDACTED].¹⁸ Moreover, even if the witness had informed [REDACTED] about [REDACTED], the Defence has not substantiated its claim that the identity of P-0769's [REDACTED] is material to its preparation.

¹⁵ [REDACTED].

¹⁶ Witness P-0769's statement, [REDACTED].

¹⁷ Transcript of Witness P-0769's interview, [REDACTED].

¹⁸ Transcript of Witness P-0769's interview, [REDACTED].

(3) Other information

28. The Defence requests the lifting of redactions in the records of the [REDACTED] interview, to what it describes as “details related to [REDACTED]” and “several details of the [REDACTED]”.¹⁹

29. The Prosecution agrees to lift redactions applied to the names of the individuals [REDACTED] and will re-disclose the transcript of the [REDACTED] interview shortly.²⁰ However, the remaining redactions²¹ referred to by the Defence strictly cover information that would reveal the witness’s place of residence, namely [REDACTED]. This information is therefore appropriately redacted under standard redaction Category “A.1” of the Redaction Protocol.

(4) Category “E” redactions

30. The Defence requests the lifting of certain Category “E” redactions applied to the transcript of Witness P-0769’s [REDACTED] interview,²² noting that it has not been notified of any Prosecution request for non-standard redactions and was not provided with an opportunity to make observations on these redactions.²³

31. The Prosecution acknowledges that it applied Category “E” redactions to this document without seeking the Chamber’s authorisation. In the interest of providing this document to the Defence as early as possible following the

¹⁹ Defence Request, para. 19(iii) and (iv).

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ Defence Request, para. 19(e).

Defence's request for its disclosure,²⁴ the Prosecution disclosed it with Category "E" redactions with the intention of requesting the Chamber's authorisation to maintain these redactions, in accordance with Section D of the Redaction Protocol. However, the Prosecution inadvertently omitted to do so.

32. The discrete redactions applied to the transcript of the [REDACTED] cover information that would reveal [REDACTED]. As such, the redactions to this information, which is irrelevant to any issue in the case, are justified [REDACTED]. The Prosecution hereby requests the Chamber's authorisation to maintain them.

D. Statement and transcript of Witness P-0769's [REDACTED] interview²⁵

33. The Defence requests the lifting of a Category "E" redaction applied to the transcript of a [REDACTED] interview conducted with Witness P-0769 on [REDACTED]. As above, the Prosecution acknowledges that it has inadvertently not requested the Chamber's authorisation to maintain this redaction.

34. The Prosecution hereby requests the Chamber to authorise the Prosecution to maintain the discrete redaction to [REDACTED] lines of this transcript, which cover information that would reveal [REDACTED]. In particular, this portion of the transcript provides [REDACTED]. These details are wholly irrelevant to the case and their non-disclosure is justified [REDACTED].

²⁴ The Defence requested the disclosure of this transcript on 13 May 2016. The Prosecution was able to disclose the transcript on 24 May 2016.

²⁵ The Prosecution attaches proof versions of these documents, [REDACTED] and [REDACTED], as Confidential, *ex parte*- Prosecution only Annex D. The Defence's submissions in relation to the lifting of redactions in these documents are contained in paras. 20-21 of the Defence Request.

E. Statement and transcripts of Witness P-0769's [REDACTED] interview²⁶

35. The Defence requests the lifting of redactions applied to what it describes as “details related to [Witness P-0769's] mother's knowledge of [REDACTED], including her telephone number, her occupation and her place of residence when P-0769 was [REDACTED].²⁷

36. The Defence fails to explain how the above information is of any relevance to P-0769's [REDACTED]'s knowledge of [REDACTED], let alone to any known issue in the case. The information the Defence seeks to obtain is contact information of one of the witness's family members, [REDACTED], and the Redaction Protocol provides that redactions to such information shall be ongoing.²⁸ The Defence has not provided any extraordinary reason for departing from the provisions of the Redaction Protocol and, accordingly, these redactions should remain. P-0769 has reported that his [REDACTED]. The non-disclosure of her contact details is necessary to prevent [REDACTED].²⁹

37. The Defence also requests the lifting of redactions to the identity of P-0769's [REDACTED], arguing that because P-0769 and [REDACTED] referred to [REDACTED], it needs this information to investigate the circumstances in which [REDACTED] took place.³⁰

38. As submitted above, Witness P-0769's [REDACTED] is not relevant to any known issues in the case and again appears in this particular transcript in an

²⁶ The Prosecution attaches proof versions of these two documents, [REDACTED] and [REDACTED], as Confidential, *ex parte* - Prosecution only Annex E. The Defence's submissions in relation to the lifting of redactions in these documents are contained in paras. 22-24 of the Defence Request.

²⁷ Defence Request, para. 23.

²⁸ Redaction Protocol, paras. 20-21.

²⁹ See ICC-01/04-02/06-1397-Conf-Exp, para.13.

³⁰ Defence Request, para. 24.

entirely incidental manner. Yet, Witness P-0769 has expressed specific security concerns for this family member, [REDACTED]. In the absence of any justification for departing from the Redaction Protocol, this standard Category “B” redaction should be maintained.

F. [REDACTED] investigation note³¹

39. The Defence requests the lifting of all Category “A.1” redactions applied to Witness P-0769’s current telephone number in an investigation note dated [REDACTED]. In this regard, the Prosecution refers to its submissions with respect to the identical request the Defence made with respect to the [REDACTED] investigation note.³²

II. Request for the disclosure of audio recordings of interviews

40. The Defence requests the disclosure of the audio recordings of Witness P-0769’s interviews with the Prosecution of [REDACTED].³³

41. Consistent with the Chamber’s previous decisions on identical requests related to Witnesses P-0963 and P-0190,³⁴ this request should be rejected, as the Prosecution has disclosed to the Defence all the transcripts of these [REDACTED] interviews with minimal redactions,³⁵ and the Defence has failed to provide any justification why these audio recordings would be *prima facie* material in this case.

³¹ The Prosecution attaches proof version of this document, [REDACTED], as Confidential, *ex parte* - Prosecution only Annex F. The Defence’s submissions in relation to the lifting of redactions in this document are contained in paras. 25-26 of the Defence Request.

³² See the Prosecution’s submissions concerning the [REDACTED] investigation note, in section I.B., above.

³³ [REDACTED].

³⁴ See ICC-01/04-02/06-1258-Conf, para. 9 and ICC-01/04-02/06-1440-Conf, para. 21.

³⁵ [REDACTED].

III. Request for disclosure of Witness P-0769's BSQ

42. The Defence requests the disclosure of Witness P-0769's BSQ, arguing that "it is very likely that the BSQ [...] 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".³⁶ The Defence points out that this BSQ is referred to in the [REDACTED] investigation note.³⁷

43. Whilst this request is purely speculative, as it is solely based on the witness's indication that, in [REDACTED],³⁸ the Prosecution has reviewed its records and found an additional BSQ, containing more information than the BSQ it reviewed for the purposes of responding to the Defence's disclosure request. In accordance with its previous practice, the Prosecution extracted information from this updated BSQ which could be material to the Defence's preparation, and disclosed this to the Defence through investigation note [REDACTED], on 7 July 2016.³⁹ The Prosecution notes that the information that may be material to the preparation of the Defence, namely Witness P-0769's role in [REDACTED], had already been disclosed through the witness's substantive interview.⁴⁰

³⁶ Defence Request, para. 34.

³⁷ Defence Request, para. 32.

³⁸ [REDACTED].

³⁹ An advance copy of this document was provided to the Defence on 7 July 2016. The Prosecution further attaches a proof version of the updated BSQ of Witness P-0769 as well as investigation note [REDACTED], which has not yet been uploaded to e-Court, as Confidential, *ex parte* - Prosecution only Annex G, in order to allow the Chamber to assess whether all the potentially relevant information has been extracted from this document and disclosed to the Defence.

⁴⁰ [REDACTED].

IV. Request for the re-classification of four annexes to the Prosecution's request for in-court protective measures for Witness P-0769

44. The Defence requests access to four annexes to the "Prosecution's twenty-first request for in-court protective and special measures",⁴¹ arguing that these annexes provide "information on the witness' security situation and location" and "most likely [...] also refer to [REDACTED]."⁴²

45. The Prosecution opposes the re-classification of Annexes H, I and J, as these annexes provide sensitive information related Witness P-0769's security in the form of his contact details.

46. Indeed, Annex H contains [REDACTED]. These records cannot be disclosed to the Defence without redactions to [REDACTED] which are not relevant to [REDACTED], which, in addition to P-0769's [REDACTED], in all likelihood include family members of P-0769 and innocent third parties. The significant redactions to be applied to these records would render meaningless the disclosure thereof. The Prosecution notes, in this regard, that it has extracted from these records and disclosed, with the necessary redactions, the information regarding [REDACTED], through the [REDACTED] investigation note.

47. The Prosecution also opposes that the Defence be given access to Annexes I and J. Although the documents contained in these two annexes – [REDACTED] – are already in the Defence's possession,⁴³ the context in which these documents are referred to in the application for in-court protective measures for Witness P-0769 would reveal to the Defence Witness P-0769's

⁴¹ ICC-01/04-02/06-1397-Conf-Exp, Confidential, *ex parte*, Annexes H-K.

⁴² Defence Request, para. 37.

⁴³ [REDACTED].

[REDACTED], in order to ensure the witness's safety and well-being, it should not be disclosed to the Defence.

48. The Prosecution opposes the disclosure of Annex K, which relates [REDACTED]. Disclosing the annex could reveal [REDACTED]. Moreover, the Defence has sought access to this annex on the basis that it may "refer to [REDACTED]".⁴⁴ However, Annex K does not contain any such information.

Conclusion

49. For the foregoing reasons, the Chamber should reject the Defence Request.

50. The Prosecution seeks authorisation to retain the Category "E" redactions to the transcripts of Witness P-0769's [REDACTED] interviews, as requested in sections I.C.(4) and D, above.



Fatou Bensouda
Prosecutor

Dated this 22nd day of July 2016
At The Hague, The Netherlands

⁴⁴ Defence Request, para.37.