



Original: **English**

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

Date: **08 August 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, *ex parte* – only available to the Chamber, Prosecution and
Defence, Annexes A to C**

**Public redacted version of “Expedited request on behalf of Mr Ntaganda seeking
the lifting of standard redactions applied to material related to Witness P-0190 and
disclosure orders”, 27 May 2016, ICC-01/04-02/06-1338-Conf-Exp**

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 exchanged with the Office of the Prosecutor (“Prosecution”) in May 2016; and (ii) the disclosure of material related to Witness P-0190 by the Prosecution to Counsel representing Mr Ntaganda (“Defence”) on 23 and 24 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-0190 and disclosure orders

“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-0190.
2. On the same day, the Defence requested the Prosecution to disclose (i) Tracks 2 and 3 of the [REDACTED] interview of Witness P-0190; and (ii) any transcript, note or statement taken during the brief discussion preceding the beginning of the audio recording of [REDACTED].²
3. On 16 May 2016, the Prosecution responded to the Defence’s request for 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 18 May 2016, the Prosecution responded to the Defence’s request for disclosure.⁴ The Prosecution agreed to disclose formally Tracks 2 and 3 of the [REDACTED] interview, [REDACTED].⁵ Nonetheless, the Prosecution also

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, 16 May 2016, enclosed in Annex A.

⁴ See email from Dianne Luping to Stéphane Bourgon, 18 May 2016 enclosed in B.

⁵ [REDACTED].

indicated that it would disclose four additional investigation notes related to Witness P-0190.

5. On 19 May 2016, the Defence submitted an additional disclosure request by electronic mail,⁶ to which the Prosecution responded on 22 May 2016.⁷
6. On 23 and 24 May 2016, the Prosecution disclosed various new documents related to Witness P-0190 and re-disclosed other documents in which certain redactions were lifted, as requested by the Defence.
7. 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-0190.
8. Furthermore, for the reasons expressed below, the Defence respectfully requests the Chamber to order the Prosecution to disclose certain material it refuses to disclose.
9. Lastly, the Defence respectfully requests the Chamber to find that the Prosecution has violated its disclosure obligations in relation to Witness P-0190.

SUBMISSIONS

I. Request for the lifting of certain redactions

A. Redactions applied to expert report DRC-OTP-2089-0425 and to the corresponding letter of instruction DRC-OTP-2089-0440

10. The Defence posits that all category A.1, C and 81(1) redactions applied to documents DRC-OTP-2089-0425 (expert report) and DRC-OTP-2089-0440 (letter of instruction) must be lifted forthwith.

⁶ See email from Stéphane Bourgon to Dianne Luping, 19 May 2016 enclosed in Annex C.

⁷ See response from Dianne Luping to Stéphane Bourgon, 22 May 2016 enclosed in Annex C.

11. The Defence refers in particular to: (i) Category A.1 redactions applied to P-0190's mobile telephone number; (ii) Category C redactions applied to the telephone numbers of other persons at risk; and (iii) Category 81(1) redactions applied to the telephone numbers of Prosecution investigators.
 12. While these redactions are 'on going' pursuant to the Redactions Protocol, the Defence submits that the information redacted is relevant, material and necessary to prepare for the cross-examination of P-0190.
 13. Indeed, the Defence must be in a position to understand and analyse the conclusions drawn in the Prosecution's expert report on the digital forensic examination of P-0190's mobile telephone. This requires at a minimum *inter alia*, having access to the underlying telephone data and possibly submitting the same to an independent expert able to assess the conclusions drawn in the report.
 14. Significantly, the redactions applied to the expert report and the instruction letter deprive the Defence of the possibility to perform this essential investigating task.
 15. The Defence notes in this regard that the Prosecution's expert report on the digital forensic examination of P-0190's mobile telephone – disclosed on 24 May 2016 – was actually obtained by the Prosecution as early as [REDACTED] at which time it should have been immediately disclosed to the Defence. It is also noteworthy that this report was prepared *in house*, by the Scientific Response Unit (SRU) within the Office of the Prosecutor.
- B. Redactions applied to the six documents bearing ERN numbers DRC-OTP-2092-0342 to DRC-OTP-2092-0347**
16. The Defence submits that all redactions applied to documents DRC-OTP-2092-0342 to DRC-OTP-2092-0347 must now be lifted.

17. Reference is made in particular to Category C Redactions applied to documents DRC-OTP-2092-0342 to DRC-OTP-2092-0347, which appear to include identifying information of [REDACTED] that interviewed or received a statement from P-0190 in [REDACTED], in the context of [REDACTED].
18. According to the Redaction Protocol, Category C redactions concern *“Identifying and contact information of ‘other persons at risk as a result of the activities of the Court’ (also known as ‘innocent third parties’)”*. Redactions to identifying and contact information of ‘innocent third parties’ shall be ongoing only when the individuals are of no relevance to any known issue in the case. For any individual falling outside this scenario, the application-based procedure laid out at paragraphs 48-50 must be followed.⁸
19. Moreover, category A.1 and B redactions appear to relate, respectively to contact information of Witness P-0190 as well as to the name of his parents.
20. The Defence submits that it must be in a position to investigate the circumstances leading and related to the investigation of [REDACTED]. This is even more so, considering that these documents are of an exculpatory nature as they could undermine Witness P-0190’s credibility, and were actually disclosed as such by the Prosecution.
21. Thus, all information redacted in these six documents must be made available to the Defence, in order to be able to investigate these judicial proceedings.

C. Redactions applied to Investigation note DRC-OTP-2091-0099

22. On 23 May 2016, the Prosecution disclosed investigation note DRC-OTP-2091-0099.
23. This investigation notes contain significant category A.1, Rule 81(1) and D.2.6 redactions, which the Defence submits must be lifted in light of the upcoming testimony of Witness P-0190.

⁸ Redaction Protocol, para.27.

24. Investigation note DRC-OTP-2091-0099 relates to several incidents involving a member of VWU. The identity of this VWU staff member is redacted as a category D.2.6 redaction. In addition, several details concerning these incidents are redacted as category A.1 and Rule 81(1) redactions.
25. The Defence observes that the incidents described by Witness P-0190 in this investigation note are of serious concern. The Defence must be in a position to investigate these allegations, which is all the more important considering that P-0190 made these allegations against a [REDACTED].
26. The Defence posits that this information is material to preparation of the defence as well as necessary for the purpose of evaluating / challenging the credibility of Witness P-0190.

D. Redactions applied to Statement DRC-OTP-2079-0329

27. The Defence submits that all category B, C and A.1 redactions applied to statement DRC-OTP-2079-0329 must now be lifted.
28. This significant redactions contained in this statement preclude the Defence from investigating the [REDACTED] described by P-0190 as well the telephone calls he allegedly received in [REDACTED].
 - a. Category B redactions applied at page 0329 and paragraphs 16 to 18 of the statement must now be lifted
29. According to the Redaction Protocol, Category B redactions relate to *"Identifying information of family members, including photographs, as well as contact information including phone numbers, specific addresses and email addresses"*. 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 laid out at paragraphs 48-50 must be followed.⁹

30. The identifying information of Witness P-0190's family members is both relevant and necessary for the conduct of Defence investigations. In particular, the Defence notes that family members of P-0190 played an important part in [REDACTED] described by Witness P-0190 in the statement.
 - b. Category C redactions applied at paragraphs 7, 21, 24-25, 29-31 and 35 of the statement must be lifted
31. Reference is made in particular to what appears to be the name of P-0190's [REDACTED] that is redacted (category C) at paragraph 7 of the statement. This information is necessary for the Defence to investigate the [REDACTED]- which P-0190 did not witness himself - but which was rather reported by his [REDACTED].
32. The name of one of P-0190's friends is redacted at paragraph 20 of the statement. This information is necessary for the Defence to investigate the [REDACTED] as well as the reasons provided by P-0190 for [REDACTED] since the incident allegedly took place.
33. Several telephone numbers also appear to be redacted at paragraphs 24-25 and 29-31 of the statement. These numbers are necessary for the Defence to investigate the various telephone calls P-0190 allegedly received in [REDACTED].
34. At paragraph 35 of the statement, the name of a former UPC member is redacted. The name of this person is necessary of the Defence to be able to investigate not only in relation to this individual but also in relation to P-0190's links with former UPC members.

⁹ Redaction Protocol, para.23.

c. Category A.1 redactions applied at paragraphs 11-16, 21, 23 and 26-27 must be lifted

35. The information redacted appears to include P-0190's mobile telephone number on which he would have received several calls as well as the [REDACTED] where P-0190 allegedly went following the [REDACTED].

36. As explained above,¹⁰ P-0190's mobile telephone number is necessary to allow the Defence to verify his allegations of calls received from a [REDACTED] and other individuals he claims are friends of Mr Ntaganda.

37. Moreover, the location of the [REDACTED] P-0190 allegedly went [REDACTED] is relevant and necessary to allow the Defence to investigate these events.

E. Lifting of redactions applied to transcripts DRC-OTP-2086-0617, DRC-OTP-2086-0647 and investigation note DRC-OTP-2078-2415

38. The Defence submits that all category A.1 redactions applied to transcripts DRC-OTP-2086-0617 at page 644, DRC-OTP-2086-0647 at page 649, and investigation note DRC-OTP-2078-2415, now be lifted.

39. According to the Redaction Protocol, Category A.1 redactions relate to "*Recent contact information of witnesses*". Redactions to identifying information of family members of witnesses shall be ongoing unless an agreement between the parties is reached or an order from the Chamber decides otherwise.¹¹

40. In the present case, category A.1 redactions were mainly applied to P-0190's telephone number in [REDACTED], at a time when he allegedly received phone calls from several individuals including [REDACTED].¹²

¹⁰ See para.33 and 41.

¹¹ Redaction Protocol, para.13.

¹² See DRC-OTP-2086-0644, p.644, l.972 to 981 and DRC-OTP-2086-0647, p.649, l.56 to 63.

41. The Defence posits that all these category A.1 redactions must be lifted in order to allow the Defence to investigate alleged security incidents involving Witness P-0190, in particular, telephone calls P-0190 allegedly received at the beginning of [REDACTED]. Obtaining Witness P-0190's phone number at the time will allow the Defence to investigate the alleged calls by, for instance, requesting the related telephone data log from the relevant telephone company.

II. Request for disclosure

A. Various items referred to in statement DRC-OTP-2079-0329

42. Several items annexed to P-0190's statement of [REDACTED] have not been disclosed by the Prosecution.
43. These items include: (i) a sketch of [REDACTED];¹³ (ii) a sketch of [REDACTED];¹⁴ (iii) a photograph taken by the investigators of the [REDACTED];¹⁵ (iv) a photograph taken by the investigators of a piece of paper with a reference number;¹⁶ and (iv) a photograph of P-0190's mobile telephone screen taken by the investigators.¹⁷
44. While the Defence requested these documents – which are material to Defence preparations for the cross-examination of P-0190 – the Prosecution refuses to disclose the same on the basis that the Defence has not specified their materiality and because they contain sensitive security information.¹⁸
45. The Defence submits that these items form part of P-0190's statement and that they are necessary to allow the Defence to understand the allegations contained therein. Accordingly, these items must be disclosed pursuant to Rule 76.

¹³ DRC-OTP-2079-0329, para.12.

¹⁴ DRC-OTP-2079-0329, para.22.

¹⁵ DRC-OTP-2079-0329, para.28.

¹⁶ DRC-OTP-2079-0329, para.28.

¹⁷ DRC-OTP-2079-0329, para.31.

¹⁸ See Annexe C.

46. Moreover, these documents are necessary for the Defence to conduct investigations on P-0190's allegations in his [REDACTED] Statement as well as on the [REDACTED] mentioned therein.

B. Audio recording of the [REDACTED] interview

47. Statement DRC-OTP-2079-0329 mentions at paragraph 2 that P-0190's interview of [REDACTED] was audio-recorded. Accordingly, the Defence requested the Prosecution to disclose this audio recording.¹⁹
48. While the Prosecution agreed to disclose the transcript of this audio recording, after necessary redactions have been applied, it rejected the Defence's request for disclosure of the audio recording, arguing that it was not was not necessary. On this issue, the Prosecution referred to the Chamber's previous ruling in its Decision on Defence request for disclosure of the audio recording of Witness P-0963's interview.²⁰
49. First, the Defence notes that both the [REDACTED] and [REDACTED] interviews were audio recorded and that the audio recording of these interviews as well as their corresponding transcripts were disclosed to the Defence pursuant to Rule 77.
50. Secondly, 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.
51. 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

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

²⁰ ICC-01/04-02/06-1258-Conf.

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.

52. Accordingly, also taking into consideration the Prosecution's previous assessment regarding other similar audio recording involving Witness P-0190, the Defence submits that the audio recording of the [REDACTED] interview must be disclosed pursuant to Rule 77.

C. BSQ, updated BSQ and interview concerning protection related issues

53. In its Investigation note DRC-OTP-2092-0246, the Prosecution refers to the Biographic Data and Security Questionnaire ("BSQ") interview of P-0190,²¹ to an updated BSQ of [REDACTED] as well as to an interview with Witness P-0190 concerning protection related issues.²²
54. When responding to the Defence's request for disclosure of the BSQ, the updated BSQ and the interview concerning protection related issues, the Prosecution submitted that it had extracted from these documents any information that may fall under rule 77 of the Rules and disclosed it though investigation note DRC-OTP-2092-0246.
55. However, taking into consideration the content of Investigation note DRC-OTP-2092-0246, it is very likely that the BSQ, the updated BSQ and the interview concerning protection related issues also contain information related to P-0190's knowledge of the case or that would put his credibility in

²¹ DRC-OTP-2092-0246, para.1.

²² DRC-OTP-2092-0246, para.5.

doubt or serve to show potential bias. As such, these documents are subject to disclosure pursuant to Rule 77 and/or Article 67(2) of the Statute.

56. 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. Findings of disclosure violation

57. On 23 May 2016, the Prosecution disclosed three new investigation notes related to Witness P-0190, dated [REDACTED],²³ [REDACTED]²⁴ and [REDACTED].²⁵
58. On 24 May 2016, the Prosecution disclosed six new documents related to Witness P-0190²⁶ and as well as a Digital Forensic Examination Report dated [REDACTED].²⁷
59. The Defence deems necessary to recall [REDACTED],²⁸ that the Prosecution and Witness P-0190 must have had contacts in the period between [REDACTED].
60. [REDACTED], [REDACTED],²⁹ the Prosecution confirmed, following a “good faith assessment”,³⁰ that it had disclosed all relevant information currently available in relation to P-0190, pursuant to article 67(2) of the Statute and rules 76 and 77 of the Rules.
61. Hence, the Defence is somewhat surprised to receive, less than two weeks before the beginning of the testimony of P-0190, an investigation note dated

²³ DRC-OTP-2078-2415.

²⁴ DRC-OTP-2087-0649.

²⁵ DRC-OTP-2091-0099.

²⁶ DRC-OTP-2092-0342 to DRC-OTP-2092-0347.

²⁷ DRC-OTP-2089-0425 and DRC-OTP-2089-0440.

²⁸ [REDACTED]

²⁹ [REDACTED].

³⁰ [REDACTED].

[REDACTED], indicating that on that same day, three representatives of the Office of the Prosecutor met with Witness P-0190. What is more, this investigation note specifically refers to [REDACTED] and [REDACTED] other individuals, whom the witness calls “friends of Bosco Ntaganda”.

62. Furthermore, [REDACTED], [REDACTED].³¹
63. Yet, it is only on 24 May 2016, more than six months after having requested and obtained an in-house expert report, that the Prosecution disclosed this report to the Defence.
64. The Prosecution’s late disclosure is prejudicial to the Accused as these documents provide information related to P-0190’s security concerns - including in particular, [REDACTED] – for the first time.
65. Not only is this information highly relevant for the assessment of P-0190’s credibility, it is also essential to understand and conduct investigations on the [REDACTED].³²
66. In its *“Order Scheduling a Status Conference and Setting the Commencement Date for the Trial”*, the Chamber set deadlines for completion of all disclosure by the Prosecution to 31 January and 2 March 2015, save where delayed disclosure has been specifically requested and authorized and without prejudice to the ongoing nature of the Prosecution’s disclosure obligations for material obtained after that date.³³
67. The Defence contends that when disclosing these three investigation notes and the Digital Forensic Examination Report, which are internal documents, prepared and/or obtained by the Prosecution and which are available since January, 21 May, 16 November 2015 and 12 February 2016, the Prosecution has violated its disclosure obligations.

³¹ [REDACTED].

³² [REDACTED].

³³ ICC-01/04-02/06-382-Corr, para.9(d).

68. Furthermore, while additional time to prepare for the cross-examination of witness P-0190 is not requested at this juncture – subject to on going investigations and preparations for the testimony of Witness P-0190 - the Defence submits that it might very well be necessary to recall Witness P-0190 for additional cross-examination in the event Defence investigations related to these documents reveal new and/or additional information, either material for the purpose of impeaching Witness P-0190's credibility and/or exculpatory in nature. Hence, a finding that the Prosecution has violated its disclosure obligations is required.

CONFIDENTIALITY

69. 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 to various *ex parte* – only available to the Chamber, Prosecution, VWU and Defence proceedings. A confidential redacted version will be filed separately.

RELIEF SOUGHT

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

ORDER the Prosecution to lift redactions applied to documents DRC-OTP-2089-0425 and DRC-OTP-2089-0440; DRC-OTP-2092-0342 to DRC-OTP-2092-0347; Investigation note DRC-OTP-2091-0099; Statement DRC-OTP-2079-0329; transcripts DRC-OTP-2086-0617, DRC-OTP-2086-0647 and investigation note DRC-OTP-2078-2415; and

ORDER the Prosecution to disclose: A. Documents mentioned in the statement DRC-OTP-2079-0329; B. The audio recording of the [REDACTED] interview; and C. The BSQ, updated BSQ and interview concerning protection related issues; and

FIND that the Prosecution has breached its disclosure obligations.

RESPECTFULLY SUBMITTED ON THIS 08TH DAY OF AUGUST 2016

A handwritten signature in black ink, appearing to read 'StB', is centered within a light gray rectangular box.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda