



Original: **English**

No.: ICC-01/04-02/06
Date: 17 October 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 'Redacted version of 'Urgent Request on behalf of Mr Ntaganda seeking disclosure of material related to Intermediary P-0154 as well as the lifting of redactions applied to this material', ICC-01/04-02/06-1509-Conf-Red", 20 September 2016, ICC-01/04-02/06-1519-Conf

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
(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. The Prosecution opposes the Defence's "Urgent Request on behalf of Mr Ntaganda seeking disclosure of material related to Intermediary P-0154 as well as the lifting of redactions applied to this material" ("Request") in its entirety.

2. The Defence Request is based on the incorrect premise that there is evidence on the record that Intermediary P-0154 improperly influenced witnesses to give false evidence.¹ This is simply not the case. None of the five witnesses who have testified to date about their interactions with Intermediary P-0154 have even suggested that Intermediary P-0154 colluded with them to give false testimony or in any way influenced their account of events. Nor have any other witnesses – either those yet to testify or those who are not trial witnesses - suggested influence by Intermediary P-0154 over their account of events. The Prosecution is not in possession of any such material.

3. The Defence's reliance on decisions ordering disclosure of information related to intermediaries in the *Lubanga* case is misguided. The *Lubanga* decisions set a high threshold for disclosure – based on evidence in the record of possible improper influence that may have affected the reliability of testimony. Here there is no such evidence.

4. Accordingly, the Defence fails to demonstrate that additional material exists that is disclosable under rule 77 of the Rules or article 67(2) of the Rome Statute. The Defence's claim that the Prosecution possesses additional relevant material that it refuses to disclose is speculative and incorrect. The Prosecution has discharged its disclosure obligations in relation to Intermediary P-0154.

¹ ICC-01/04-02/06-1509-Conf-Red, para.35.

5. The Defence request to lift redactions should also be rejected. The remaining redactions are minimal and are applied in accordance with the Protocol establishing a redaction regime.² The Prosecution attaches to this filing as Confidential, *ex parte*, Prosecution Only Annex A the information that remains redacted in the four documents that are the subject of the Defence's Request.³
6. Lastly, the Prosecution notes that the Defence allegations and arguments regarding P-0154 are entirely redacted. These allegations form the basis of the Defence request yet the extent of the redactions prevents the Prosecution from assessing and responding to them. The information underlying the Defence allegations appears to originate from the Prosecution's disclosure, making the extensive redactions in the filings on these documents unjustified.⁴ Accordingly, the Prosecution requests that the redactions be lifted without delay and the Prosecution be given an opportunity to respond to the allegations.

Confidentiality

7. This filing is classified as "Confidential" pursuant to regulation 23*bis*(1) and (2) of the Regulations because it responds to a filing with the same classification level.

Procedural Background

8. On 4 July 2016, the Defence requested the disclosure of the identity of Intermediary P-0154.⁵

² ICC-01/04-02/06-411-AnxA.

³ ICC-01/04-02/06-1509-Conf-Red, para.59, Footnote 74.

⁴ ICC-01/04-02/06-1509-Conf-Red, paras. 38-50, and 52-55 are entirely redacted in the version accessible to the Prosecution and the Legal Representatives. See particularly "According to information obtained by the Prosecution from Intermediary P-0143 [REDACTED]", para.50; references to the "handwritten notes", para. 55.

⁵ ICC-01/04-02/06-1435-Conf.

9. On 6 July 2016, the Prosecution opposed the request and argued that witness evidence had not been called into question due to interactions with Intermediary P-0154; that the Defence was able to cross-examine witnesses without the name of the Intermediary; and that security concerns prevented disclosing his identity.⁶
10. On 6 July 2016, the Chamber ordered the disclosure of the Intermediary's identity so that the Defence would "be provided with the opportunity to explore the role of the intermediary in question in a more concrete manner".⁷
11. On 16 September 2016, the Defence filed an urgent request seeking disclosure of material related to Intermediary P-0154 as well as the lifting of redactions applied to this material.
12. On 16 September 2016, the Chambered shortened the deadline for responses to 20 September 2016.⁸

Prosecution's Submissions

A. The Prosecution has disclosed all relevant material

Documents material to the preparation of the Defence or potentially exculpatory have been disclosed

13. Intermediary P-0154 was used by the Prosecution as an intermediary [REDACTED]. [REDACTED]. The intermediaries did not attend the interviews between the Prosecution and witnesses.

⁶ By way of email, later filed in the record of the case: ICC-01/04-02/06-1465.

⁷ ICC-01/04-02/06-T-115-CONF-ENG, pp.41-43.

⁸ ICC-01/04-02/06-T-133-CONF-ENG, p.73, ll.6-9

14. The Prosecution first asked Intermediary P-0154 [REDACTED]. [REDACTED]. [REDACTED].⁹ [REDACTED].¹⁰ [REDACTED]. [REDACTED].¹¹
15. The Prosecution subsequently conducted interviews of several witnesses in 2005 [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].¹²
16. Intermediary P-0154 is associated with 15 Prosecution witnesses,¹³ 6 non-trial witnesses,¹⁴ and 3 other individuals whom the Prosecution met.¹⁵ 4 other persons met with P-0154 [REDACTED] but they did not meet the Prosecution.¹⁶
17. From February to May 2016, the Prosecution further disclosed eleven Investigation Notes containing information related to Intermediary P-0154 that is material to the preparation of the Defence under Rule 77 or potentially exculpatory under Article 67(2) and that came from the original reports [REDACTED] submitted by Intermediary P-0154, as well as internal mission reports.¹⁷ The information in these investigation notes included information such as: [REDACTED]. The Defence appears to suggest that the Prosecution only disclosed relevant information following the attendance of Prosecution Witness [REDACTED] and Defence disclosure request dated 4 July 2016,¹⁸ but this is not the case.
18. While the Prosecution recognised that the above information was disclosable, none of it indicates that P-0154 sought to influence or did influence the

⁹ DRC-OTP-0150-0213, p.0214.

¹⁰ DRC-OTP-0150-0213, p.0214.

¹¹ [REDACTED].

¹² DRC-OTP-2092-0207, DRC-OTP-2092-0213, DRC-OTP-2092-0215.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ DRC-OTP-2090-0406; DRC-OTP-2090-0407; DRC-OTP-2090-0408; DRC-OTP-2090-0409; DRC-OTP-2092-0227; DRC-OTP-2092-0229; DRC-OTP-2092-0230; DRC-OTP-2092-0319; DRC-OTP-2092-0321; DRC-OTP-2092-0323; DRC-OTP-2092-0325.

¹⁸ Request, para.6.

independent witness accounts of the individuals the Prosecution met and subsequently sought to rely upon in this case. Nor does it cast doubt on the truthfulness of the eye-witness accounts or indicate that Intermediary P-0154 exerted any improper influence over any witnesses.

Additional disclosure pursuant to Defence requests

19. Further to a Defence request for disclosure of the original reports [REDACTED] from P-0154, the Prosecution disclosed the original redacted versions [REDACTED] in July 2016.¹⁹ It did so despite the fact that it considers that all relevant, disclosable information from these reports had already been disclosed via Investigation Notes earlier in the proceedings.

20. Also in July 2016, the Prosecution disclosed extracts of a [REDACTED], solely because the extracts seemed to refer to the role of Intermediary P-0154 in [REDACTED] and because [REDACTED].²⁰

21. Following the Chamber's order to disclose the identity of Intermediary P-0154²¹, the Prosecution lifted redactions to his name [REDACTED]. On 2 September 2016, the Defence made an *inter partes* request for information related to several (non-trial) individuals for whom [REDACTED] had been disclosed.²² The Prosecution responded on 5 September 2005 and provided an Investigation Note with information on [REDACTED].²³ The Investigation Note did not relate to Intermediary P-0154 at all.²⁴

¹⁹ DRC-OTP-2092-0319 is the investigator note extracting information from DRC-OTP-2092-0207, the same goes for DRC-OTP-2092-0321 and DRC-OTP-2092-0213, DRC-OTP-2092-0323 and DRC-OTP-2092-0215, DRC-OTP-2092-0325 and DRC-OTP-0198-0072,

²⁰ DRC-OTP-2090-0302.

²¹ ICC-01/04-02/06-T-115-CONF-ENG, p.41, line 23 to p.43, line 22.

²² Email from the Defence to the Prosecution received on 2 September 2016, at 10:18.

²³ Email from the Prosecution to the Defence, sent on 5 September 2016, at 15:40

²⁴ DRC-OTP-2095-0082.

22. The Prosecution further agreed to disclose all mission reports prepared by Intermediary P-0154 related to the facts of this case, including his reports on the monitoring of the situation of witnesses.²⁵ The Prosecution had already extracted the disclosable information from these reports, as explained above, but will transmit the original reports to allow the information to be put in full context.
23. Four mission reports have already been disclosed to the Defence. Disclosure of the remaining mission reports was delayed due [REDACTED]. The material will be disclosed this week.

B. The Defence Request is unfounded

Nothing in evidence suggests that Intermediary P-0154 may have influenced witnesses

24. The Defence baldly asserts that the role of Intermediary P-0154 has become a crucial issue in this case, yet does not substantiate this assertion. The accounts of the witnesses who have testified in the present case have not been materially called into question nor have those witnesses stated that Intermediary P-0154 influenced their testimony. No analogy to the *Lubanga* case can be drawn. On the contrary, the *Lubanga* precedent demonstrates the stark contrast between that situation and this one. In *Lubanga*, Trial Chamber I considered that evidence existed that some intermediaries [REDACTED].²⁶ This included allegations on the record by Prosecution and Defence witnesses, and evidence of contacts between intermediaries. This is simply not the case here.²⁷

²⁵ Email sent by the Prosecution to the Defence of 11 July 2016 at 18:23.

²⁶ ICC-01/04-01/06-2434-Conf -Red-Corr, para 140.

²⁷ In any event, and noting that the disclosure threshold articulated in *Lubanga* has not been met in this case, the *Lubanga* Trial Chamber did not order the Prosecution to provide a schedule of all contacts between *all* persons the Prosecution interviewed; rather, the pool was limited to trial witnesses and witnesses whose statements were disclosed as rule 77 or article 67(2).

25. The Prosecution notes with concern that the substance of the Defence's allegations regarding Intermediary P-0154 is redacted, including what the Defence purports arises from the evidence.²⁸ These redactions are unjustified and the Prosecution requests that they be lifted. The extensive redactions prevent the Prosecution from responding to arguments which form the basis of the Request, when much if not all of the redacted information may already be available to the Prosecution (if the underlying documents emanated from the Prosecution in the first place).
26. On the role Intermediary P-0154 as it arises from the record, and without access to the Defence's unredacted allegations, the Prosecution makes the following points.
27. First, the reports from Intermediary P-0154 document [REDACTED]. These reports do not suggest any influence by Intermediary P-0154 on the individual accounts of the witnesses [REDACTED].
28. Second, Intermediary P-0154 began [REDACTED] *after* the Prosecution had interviewed those witnesses.²⁹ The first report by Intermediary P-0154 [REDACTED] is dated [REDACTED]. It would be to no advantage to attempt to influence witnesses months after they had already given a statement to the Prosecution.
29. Third, and contrary to what the Defence asserts,³⁰ document DRC-OTP-2090-0407 does not refer to a group meeting. Rather, it refers to a Prosecution investigative mission that lasted from [REDACTED]. The note indicates that the witnesses were being [REDACTED]. There is no information that anything improper occurred during this time, either between the witnesses or with Intermediary P-0154.

²⁸ ICC-01/04-02/06-1509-Conf-Red, paras. 38-50, and 52-55 are entirely redacted in the version accessible to the Prosecution and the Legal Representatives.

²⁹ [REDACTED].

³⁰ ICC-01/04-02/06-1509-Conf-Red, para.51.

Witness [REDACTED].³¹ [REDACTED].³² [REDACTED].³³ It is important to note that the Defence failed to ask [REDACTED] whether P-0154 exerted any improper influence over him. Accordingly, no information to confirm this Defence hypothesis exists.

30. There is also no information to suggest that the [REDACTED] witnesses were present during the entire mission, as they were interviewed at different times. The Prosecution further notes that the lists referred to in paragraph 51 of the Request concern 13 witnesses, not 15 as indicated by the Defence. Other errors are contained in the Defence's description of the [REDACTED] in this paragraph.³⁴

31. The Prosecution reiterates that the fact that witnesses were in contact with one another does not demonstrate contamination or collusion. It may provide a fair basis to question the witnesses on the nature of their interactions with each other or to ask them if they discussed their victimisation together; but without more it does not cast doubt as to the truthfulness of their evidence. By way of analogous example, witnesses from the same family are not considered unreliable on the sole basis that they are related or live together. Similarly, witnesses of attacks may have lived in the same area for many years and may be known to each other, but alone this does not cast doubt on their credibility.

32. When cross-examined on whether he discussed the events of 2003 with other individuals, [REDACTED] responded "[REDACTED]."³⁵ As mentioned above,

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ Concerning DRC-OTP-2092-0207, DRC-OTP-2092-0213 and DRC-OTP-2092-0215: the witnesses mentioned are [REDACTED]. The other individuals mentioned are [REDACTED]. Witness [REDACTED] is not mentioned in those lists. DRC-OTP-2092-0319 is the investigation note referring to [REDACTED] DRC-OTP-2092-0207, the material documents the same [REDACTED].

³⁵ [REDACTED].

Witness [REDACTED] testified that [REDACTED].³⁶ Witness [REDACTED].
When asked, Witness [REDACTED].³⁷

33. Internal discrepancies between prior statements are not indicative of collusion, contamination or undue influence. A myriad of reasons explain variations in statements, starting with misunderstandings due to interpretation. Similarly, the various purposes for which a “statement” is taken (applications for victim participation, local NGO reporting, criminal case statement), the methods used to take a statement, and the time devoted to the interview all may create variation in accounts.
34. Importantly, neither the prior statements nor the testimony of the witnesses have revealed any trace of collusion or evidence contamination. The Defence previously argued that the [REDACTED] casts doubt as to the role of Intermediary P-0154. However, [REDACTED] occurred years after P-0154 interacted with them. When asked during cross-examination if Intermediary P-0154 [REDACTED].³⁸ The Defence also suggested in cross-examination that [REDACTED].³⁹ In any event, numerous independent witnesses refer to the UPC [REDACTED] – UPC military insiders, other crime base witnesses and overview witnesses.
35. The fact that similar information arises from statements of different witnesses is equally unrevealing of collusion or contamination; in fact, it is corroborative of accounts of individuals who witnessed the same attacks, and suffered from the same criminal *modus operandi* in the hands of the perpetrators.

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

36. The Prosecution acknowledges [REDACTED]. This is speculative and unconnected to the veracity of the witness's account. The investigator did not suspect or even suggest that the intermediary influenced any witnesses to lie about their substantive accounts.

37. When asked by the Defence during testimony to explain [REDACTED]. The witness further explained that Intermediary P-0154 [REDACTED].

38. Witness [REDACTED].⁴⁰ This is an appropriate expense. When [REDACTED].⁴¹

All other disclosure requests should be rejected

39. The Prosecution is not resisting "full and candid disclosure" of relevant information related to Intermediary P-0154, as the Defence contends.⁴² The extent of disclosure to date related to P-0154's activities for the Prosecution demonstrates that where information falls under the Prosecution's disclosure obligations, it discloses it.

40. Chambers of this Court have confirmed that the Prosecution does not have an obligation to provide the Defence with all the material related to an issue so that the Defence can thereafter determine whether it is relevant to its case.⁴³

41. Neither has the Defence substantiated its request for the disclosure of Intermediary P-0154's employment contracts, record of expenses, instructions given by the Prosecution, the selection process to find witnesses, information

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² Request, para.2.

⁴³ e.g. ICC-01/05-01/08-632, para. 26 ("the Chamber rejects the defence submission that the prosecution has an obligation to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of 'handing the defence the keys to the warehouse' in this way").

reflecting any and all interaction between Intermediary P-0154 and “potential” witnesses in the field, the contribution of any NGOs related to Intermediary P-0154, any and all interactions between Intermediary P-0154 and any assistant, the schedules of all contacts between Intermediary P-0154 and “potential” witnesses and between “potential” witnesses.⁴⁴ The documents falling within the scope of rule 77 or article 67(2) were already disclosed to the Defence. The scope of the request is unreasonably broad and unjustified. The Defence is simply seeking to embark on a fishing expedition and it should not be permitted to do so. This Chamber has previously rejected such broad and unjustified request.⁴⁵

C. The remaining redactions are minimal and necessary

42. The Defence request fails to identify with precision which documents are, in its view, “related to Intermediary P-0154”, and only four documents are referred to concretely. Accordingly, the Prosecution responds to the Defence request on these four documents and attaches as Annex A to this filing the four documents with see-through redactions for the Chamber’s assessment.⁴⁶ The four documents are detailed below.

43. The redactions applied to the material are to the place of residence, names of family members and contact information of witnesses and innocent third parties. These redactions are standard redactions under the Protocol establishing a redaction regime and remain necessary for the protection of witnesses, their families and innocent third parties; they are in accordance with the Chamber’s

⁴⁴ ICC-01/04-02/06-1509-Conf-Red, paras 21-25.

⁴⁵ ICC-01/04-02/06-1360, “The Defence makes minimal submissions in this regard, seemingly arguing that the requests for assistance are required simply in order to ‘demonstrate’ that the Prosecution has fulfilled its Article 54(1)(a) obligations. The Chamber does not consider this to be a sufficient basis for a broad disclosure request of the nature presented “.

⁴⁶ ICC-01/04-02/06-1509-Conf-Red, para.59, Footnote 74.

previous decisions.⁴⁷ Contrary to the Defence's assertion, the redactions are not applied to protect ongoing investigations.

44. The Prosecution notes that document DRC-OTP-2058-0163 is not a "handwritten list of attendance to a group meeting by Intermediary P-0154" as indicated in the Defence Request.⁴⁸ Rather the document is an annex prepared by Witness [REDACTED]. The Prosecution omitted to lift a redaction to the name of intermediary P-0154 in the document. The redaction will be lifted and the document disclosed without delay. The information related to this redaction was already available to the Defence through the statement itself which describes this annex.⁴⁹ The rest of the redactions cover the place of residence of witnesses.
45. Document DRC-OTP-2092-0323 is an investigation note that was disclosed unredacted, contrary to what appears in the Defence Request.
46. Document DRC-OTP-0077-0002 contains handwritten notes of a meeting between [REDACTED] and Witness [REDACTED]. Redactions under the categories A.1, B and C of the Protocol are: the names of the witness' parents and that of his wife, their place of residence and number of children; the residence of Witness [REDACTED] and of his family; and the residence of a teacher.
47. Document DRC-OTP-2093-0200 is an investigation note describing a telephone call that Intermediary P-0154 placed to [REDACTED] to explain to her the disclosure of her statement in the *Lubanga* case. The residence of the witness and of her family is redacted under Categories A.1. and B.

⁴⁷ ICC-01/04-02/06-411-AnxA; ICC-01/04-02/06-1241-Conf, para.15 and ICC-01/04-02/06-1453, paras. 14-15.

⁴⁸ ICC-01/04-02/06-1509-Conf-Red, para.59, Footnote 74.

⁴⁹ DRC-OTP-2058-0132, page 0153, para.96; where reference and explanation of this annex and of the name and the role of P-0154 were disclosed unredacted.

Request

48. Based on the foregoing, the Prosecution asks the Chamber to:

- a. reject the Defence Request in its entirety; and
- b. order the Defence to lift redactions in the filing and give the Prosecution a further opportunity to respond to the allegations.



Fatou Bensouda
Prosecutor

Dated this 17th Day of October 2016
At The Hague, the Netherlands