



Original: English

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

Date: 28 March 2017

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

**Confidential, *EX PARTE* – only available to the Prosecution and VWU
Annexes A to D**

**Public redacted version of “Corrected Confidential redacted version of
Prosecution's Response to the Defence's 'Expedited request on behalf of Mr.
Ntaganda seeking the lifting of standard redactions applied to Witnesses P-0761's
statement and P-0758's Victim Application Form (ICC-01/04-02/06-1608-Conf)”,
9 November 2016, ICC-01/04-02/06-1621-Conf- Exp-Corr**

Source: Office of the Prosecutor

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

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Introduction

1. The Defence requests the lifting of certain redactions in Witness P-0758's victim application forms and in Witness P-0761's witness statement ("Request").¹

2. The Defence has now explained the basis for its Request for lifting of the redactions, which it did not do during *inter partes* communications.² Nonetheless, while the Prosecution agrees to lift one of the redactions, it maintains the need for all other redactions referred to in the Request. In particular, the Prosecution maintains its position that standard redactions are necessary as regards: (a) the current place of residence of Witness P-0773 [REDACTED]; and (b) the identity of innocent third parties, namely: (i) the local non-governmental organisation ("NGO") [REDACTED] and its coordinator [REDACTED], who are based in The Democratic Republic of the Congo ("DRC") and who have received threats in the past [REDACTED] as a result of [REDACTED]; and (ii) the identity of a locally-based staff member of [REDACTED].

3. The Defence's speculation that persons involved in assisting P-0758 to complete her victim application forms, or who provided [REDACTED] due to security threats many years prior to her cooperation with the Office of the Prosecutor "may have impacted the content and credibility of her testimony" is unfounded and cannot be a justified basis for seeking disclosure.

4. Even if the Chamber were to find that the information is material to the Defence, the security risks to these individuals militate in favour of non-disclosure. There is no undue prejudice to the Defence, as it can cross-examine Witnesses P-0758

¹ ICC-01/04-02/06-1608-Conf.

² ICC-01/04-02/06-1608-Conf- AnxB.

and P-0761 about the circumstances of obtaining P-0758's birth certificates (one of which was obtained by P-0761) and the process of completing the different versions of the victim application forms for P-0758 [REDACTED], and the involvement of the persons who assisted her.

Confidentiality

5. This filing is classified as "Confidential *ex parte*", as it refers to confidential *ex parte* information regarding Prosecution witnesses or innocent third parties regarding their identities and current places of residence. The Prosecution will file confidential and public redacted versions. The Prosecution has filed Annexes A to C on an *ex parte* basis, as they contain the unredacted versions of the Witness Statement of P-0761 and the Victim Application Forms ("VA forms") of P-0758.

Procedural Background

6. On [REDACTED], P-0758, also known as [REDACTED], of a local NGO [REDACTED].³
7. On [REDACTED], the Victims Participation and Reparations Section ("VPRS"), submitted a revised version of the requests for participation [REDACTED] [REDACTED].⁴ The revised materials annexed by VPRS, included: (a) a letter [REDACTED] from the NGO [REDACTED] explaining an error in the date of birth in the original Victim Application Form and attaching a birth certificate dated [REDACTED];⁵ (b) a declaration from P-0761 [REDACTED],⁶ and a statement from [REDACTED] explaining the circumstances in which

³ DRC-OTP-2066-0154 (Annex A), pp.0155 to 0171.

⁴ DRC-OTP-2066-0154 (Annex A), ICC-01/04-533-Conf.

⁵ DRC-OTP-2066-0154 (Annex A), pp.0172 to 0174.

⁶ DRC-OTP-2066-0154 (Annex A), p.0176.

[REDACTED] obtained the declaration from P-0761;⁷ (c) a revised Victim Application Form from P-0758, which she completed with the assistance of [REDACTED] dated [REDACTED],⁸ which included an annexed birth certificate dated [REDACTED];⁹ and, (d) a declaration from P-0758 explaining that she withdrew her mandate from [REDACTED] and instead sought representation from [REDACTED].¹⁰

8. On 17 October 2016, the Defence requested that the Prosecution lift redactions applied to material related to Witness P-0761.¹¹ On the same day, the Prosecution confirmed that it would not lift the redactions as requested because they are covered by standard redaction categories and the information was not material to known issues.¹²
9. On 3 November 2016, the Defence submitted its Request to seek the lifting of certain standard redactions applied to the Witness Statement of P-0761¹³ and to the Victim Application Form submitted by P-0758.¹⁴
10. On the same day the Chamber shortened the deadline for any responses to the Request to Tuesday, 8 November 2016.¹⁵

Submissions

11. The Defence has been routinely requesting lifting of all standard redactions from the materials of Prosecution witnesses, regardless of their nature, such as the witness's place of residence, names of parents, places of interview, identities of

⁷ DRC-OTP-2066-0154 (Annex A), p.0179.

⁸ DRC-OTP-2066-0154 (Annex A), pp.0181 to 0205.

⁹ DRC-OTP-2066-0154 (Annex A), p.0199.

¹⁰ DRC-OTP-2066-0154 (Annex A), pp.0206-0207.

¹¹ ICC-01/04-02/06-1608-Conf-AnxA.

¹² ICC-01/04-02/06-1608-Conf-AnxB.

¹³ DRC-OTP-2054-8283 (Annex B).

¹⁴ DRC-OTP-2066-0154 (Annex A) and DRC-OTP-2078-2255 (Annex C).

¹⁵ Email from the Chamber of 3 November 2016 at 17:47pm.

innocent third parties and identities of interpreters. The standard reason given by the Defence for the requests, including in this instance, has been “[w]hereas the redactions we ask you to lift might have been necessary at an earlier stage of the proceedings, this is no longer the case in light of the upcoming testimony” of the witness.¹⁶

12. During *inter partes* communications with the Prosecution, the Defence provided no reasoned explanation as to why it was seeking lifting of the redactions from the materials of Witnesses P-0761 and P-0758. Detailed reasons have now been provided in the Defence’s Request. The Prosecution has had an opportunity to consider the Defence’s explanation for its Request and agrees to lift one redaction, namely the redaction at paragraph 15 of the Witness Statement of P-0761, to the location [REDACTED]. Otherwise, the Prosecution does not agree to any of the remaining requests for lifting of redactions.

13. Contrary to the Defence’s assertion that the Prosecution has an “excessively” broad interpretation of redactions and has been tardy in disclosure,¹⁷ the Prosecution has maintained the standard redactions in this case after careful review, pursuant to the Redactions Protocol.¹⁸

(a) Redaction to current place of residence of P-0773 [REDACTED]

14. First, the Prosecution observes that [REDACTED]. [REDACTED].

15. However, the Prosecution must maintain the redaction at paragraph 21 as [REDACTED] this is P-0773’s current place of residence.

¹⁶ ICC-01/04-02/06-1608-Conf-AnxA.

¹⁷ Defence Request, para.1.

¹⁸ ICC-01/04-02/06-411-AnxA.

(b) Redaction to identities of those who assisted in filling out the Victim Application forms

16. The Prosecution submits that it must maintain the standard redactions to the identity of the innocent third parties, namely the individuals and organisations who provided assistance to P-0758 to complete her Victim Application forms.
17. First, contrary to the Defence assertions, the identity of these individuals and organisations is not material to the preparation of its case pursuant to rule 77 of the Rules of Procedure and Evidence (“Rules”).
18. The Defence states that the identity of the individuals who helped P-0758 complete the forms is material to its case and thus disclosable pursuant to rule 77, because of the indication in her first Victim Application form dated [REDACTED] that her date of birth was [REDACTED] instead of [REDACTED].¹⁹ Yet, all relevant and material information about the inconsistency is already contained in the Victim Application form (including in a cover letter submitted with the supplementary Victim Application) and in Witness P-0761’s witness statement.
19. Both P-0758, who signed the initial Victim Application form, and [REDACTED] P-0761 are available to be questioned about this discrepancy. Indeed, in a letter to the Court dated [REDACTED] that was disclosed to the Defence, the NGO [REDACTED] explained that: (a) when the first application was submitted in [REDACTED] there had not been sufficient time to collect the relevant birth certificate but the birth certificate states she was born instead on [REDACTED]; (b) that P-0771 said P-0758 was 13 years old at the time of the events whilst the applicant said she was 15 years of age at the time, but “[t]he Intermediary decided to take the information provided by the applicant regarding her age, and

¹⁹ DRC-OTP-2066-0154 at 0155.

this age is reflected in the application form".²⁰ Accordingly, P-0758 and P-0761 are best placed to clarify the dates of birth provided in the first and subsequent Victim Application forms, rather than the individuals who simply acted as notetakers on P-0758's behalf.

20. Similarly, the second Victim Application form to which the Defence refers dated [REDACTED], for which P-0758 received assistance from [REDACTED] from the NGO [REDACTED], was signed by P-0758. This second form, which has her corrected date of birth of [REDACTED], annexes a birth certificate that P-0761 confirmed in his witness statement was obtained by him.²¹ Accordingly, P-0758 and P-0761 are best placed to answer any questions regarding the date of birth of [REDACTED] recorded in this form and in the annexed birth certificate.

21. In any event, even if the identity of these individuals was deemed to be material to the Defence, there are potential security risks to [REDACTED] and the NGO [REDACTED], as well as to [REDACTED] of [REDACTED], that must be considered pursuant to article 68 and that outweigh the obligation to disclose.

22. The NGO [REDACTED] is a [REDACTED] organization [REDACTED] based locally in the DRC. Its staff have previously been the subject of a number of threats including from [REDACTED]. [REDACTED].²² [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

23. [REDACTED] was finally reached by telephone by the Prosecution regarding the Defence's Request on 8 November 2016. [REDACTED] stated that [REDACTED]

²⁰ DRC-OTP-2066-0154 at p.0172.

²¹ DRC-OTP-2054-8283, para.9.

²² [REDACTED]. [REDACTED].

had significant security concerns regarding the requested disclosure [REDACTED]. [REDACTED].²³

24. The Prosecution observes that [REDACTED] of [REDACTED] is recorded in the second Victim Application form as living in [REDACTED].²⁴ Whilst the Prosecution has no specific information regarding [REDACTED], the Prosecution similarly opposes disclosure because of the unwarranted risk to [REDACTED] security.

25. The Prosecution observes that it contacted [REDACTED], regarding the Request concerning [REDACTED]. Following discussions with [REDACTED] on 7 and 8 November 2016, when the relevant Victim Application forms for P-0758 were listed and the disclosure Request explained, [REDACTED] confirmed that there may be an additional corrected Victim Application form dated [REDACTED] provided to the OPCV and VPRS that does not appear to have been provided to the Prosecution, which confirms that P-0758's date of birth is [REDACTED] and records [REDACTED] as the individuals who filled out the form with the interpretation assistance of [REDACTED]. The Prosecution is urgently seeking access to that form from OPCV and VPRS, and will immediately disclose it once it becomes available.

(c) Redactions to the identity of the organisation who assisted in obtaining P-0758's first birth certificate and [REDACTED]

26. The Defence states that the authenticity of both *attestations de naissance* are at issue, so it is relevant to know who assisted in procuring them.²⁵ However, only the first birth certificate was obtained with the assistance of the organisation

²³ DRC-OTP-2098-0034 (Annex D).

²⁴ DRC-OTP-2078-2255 (Annex C).

²⁵ ICC-01/04-02/06-1608-Conf, para.5.

[REDACTED].²⁶ P-0761 confirmed that he obtained directly the second birth certificate.²⁷ As stated at paragraphs 20 to 21, P-0758 and P-0761 are best placed to provide evidence regarding P-0758's date of birth.

27. The fact that P-0758 received assistance [REDACTED] has previously been disclosed. The Prosecution disagrees that the identity of the local organisation, [REDACTED], who helped [REDACTED], and who assisted her [REDACTED], is material to the Defence.²⁸ It is baseless and speculative for the Defence to argue that the organisation's assistance to P-0758, including in enrolling her as a victim in [REDACTED], [REDACTED], and in helping to obtain her first birth certificate "may have impacted upon the content and credibility of her testimony".²⁹

28. Finally, the Prosecution submits that even if the identity of the individuals or organisations that provided assistance to P-0758 in obtaining her birth certificate or completing her Victim Application forms was deemed to be material to the Defence, the potential risks to their security should outweigh any obligation to disclose. The Defence would not be unduly prejudiced by the maintenance of these redactions. The Defence is able to cross-examine P-0758 and P-0761 regarding all relevant points and they are best placed to answer questions regarding P-0758's date of birth.

²⁶ DRC-OTP-2054-8283 (Annex A), para.8.

²⁷ DRC-OTP-2054-8283 (Annex A), para.9.

²⁸ ICC-01/04-02/06-1608-Conf, para.12.

²⁹ ICC-01/04-02/06-1608-Conf, para.12.

Conclusion

29. For all the foregoing reasons, the Prosecution submits that the Request should be rejected.



Fatou Bensouda
Prosecutor

Dated this 28th day of March 2017

At The Hague, The Netherlands