

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **1 April 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 'Decision on Defence request regarding certain
materials related to Witness P-0815'**

Decision 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 Bosco Ntaganda

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of 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**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2), (3)(c), (6)(c) and (e), 67 and 68(1) of the Rome Statute, Rules 76-77, 81 and 87 of the Rules of Procedure and Evidence ('Rules'), and incorporating by reference the applicable law as set out in the 'Decision on the Protocol establishing a redaction regime',¹ issues the following 'Decision on Defence request regarding certain materials related to Witness P-0815'.

I. Procedural background and submissions

1. The defence team for Mr Ntaganda ('Defence') indicated that, between 8 and 11 March 2016, it had initiated *inter partes* consultations with the Office of the Prosecutor ('Prosecution') concerning standard redactions applied by the Prosecution pursuant to the 'Protocol establishing a redaction regime' ('Redaction Protocol')² to materials which relate to Witness P-0815 and that, as a result thereof, the Prosecution agreed to lifting some of the redactions contested.³
2. On 18 March 2016, the Defence filed an expedited request ('Request')⁴ seeking that the Chamber: (i) order the Prosecution to lift certain standard redactions to materials related to Witness P-0815 applied to information which, in the Defence's view, is not covered by the categories listed in the Redaction Protocol; (ii) find that the Prosecution breached its disclosure obligations in disclosing 17 documents relating to Witness P-0815 [REDACTED] less than one month before the beginning of his scheduled testimony; and (iii) authorise the Defence to recall at a later time, if necessary, Witnesses P-0886, P-0800 and P-0017, who already testified in relation to the attack in Sayo, the death of Colonel Lusala and

¹ 12 December 2014, ICC-01/04-02/06-411, particularly paras 12-15 and Annex A.

² Annex A to Decision on the Protocol establishing a redaction regime, ICC-01/04-02/06-411-AnxA.

³ Annexes A to D of the Expedited request on behalf of Mr Ntaganda seeking the lifting of standard redactions applied to material related to Witness P-0815 and findings of disclosure violations, 18 March 2016, ICC-01/04-02/06-1221-Conf-AnxA; ICC-01/04-02/06-1221-Conf-AnxB; ICC-01/04-02/06-1221-Conf-AnxC; ICC-01/04-02/06-1221-Conf-AnxD.

⁴ Expedited request on behalf of Mr Ntaganda seeking the lifting of standard redactions applied to material related to Witness P-0815 and findings of disclosure violations, ICC-01/04-02/06-1221-Conf and four confidential Annexes.

[REDACTED], which are events related to the material newly disclosed. The Defence further informs the Chamber that additional time to prepare for the cross-examination of Witness P-0815 is not requested at this juncture.

3. On 21 March 2016, the Prosecution filed a notice of its disclosure of evidence, whereby it indicated, *inter alia*, that it disclosed on 11 March 2016: i) lesser redacted versions of the statement of Witness P-0815 (DRC-OTP-2062-2260) and of a related Investigation Note (DRC-OTP-2078-2682); and ii) 17 items related to Witness P-0815 that had not previously been disclosed.⁵
4. On 23 March 2016, in accordance with instructions from the Chamber,⁶ the Prosecution filed its response to the Request ('Response'),⁷ in which it indicates that 'upon further review of the contested materials it will lift certain additional redactions' but submits that all other redactions for which lifting is sought 'should be maintained because the relevance of the information for the Defence has not been established, or redactions are still needed to protect the safety, security, privacy and well-being of the witnesses and their family pursuant to [A]rticle 68(1) of the Rome Statute' and the Redaction Protocol.⁸
5. The Prosecution further submits that, in the instant case, there has been no violation of its disclosure obligations as materials were disclosed as soon as they were assessed to be relevant under Rule 77 of the Rules. Finally, the Prosecution opposes the Defence request that the Chamber authorise it to recall, if necessary,

⁵ Prosecution's Communication of the Disclosure of Evidence, ICC-01/04-02/06-1223 and one confidential Annex.

⁶ E-mail from a Legal Officer of the Chamber to the parties and participants on 21 March 2016 at 11:55.

⁷ Prosecution response to Defence request for lifting of redactions to materials related to Witness P-0815 and request regarding alleged disclosure violations (ICC-01/04-02/06-1221-Conf), ICC-01/04-02/06-1226-Conf-Exp, only available to the Prosecution and the Victims and Witnesses Unit, and 22 confidential, *ex parte*, Annexes. The Response was reclassified to 'confidential' on 24 March 2016 (ICC-01/04-02/06-1226-Conf) and its annexes were either reclassified to 'confidential' on the same day or public redacted versions thereof were filed (*see* E-mail from the Prosecution to the Chamber of 24 March 2016 at 11:37 and E-mail from a Legal Officer of the Chamber to the parties and participants of 24 March 2016 at 16:29). A public redacted version of the Response was also filed on 24 March 2016 (ICC-01/04-02/06-1226-Red).

⁸ Response, ICC-01/04-02/06-1226-Conf, paras 3, 12, 18 and 32. The redactions to be lifted are those applied to the name of the wife of Witness P-0815, the sisters of [REDACTED] and [REDACTED].

Witnesses P-0800, P-0886 and P-0017 as, in the Prosecution's view, none of the recently disclosed information warrants recalling any of these witnesses.⁹

6. On 24 March 2016, the Chamber informed the parties and participants, via email, that it had decided the following with regard to the part of the Request seeking the lifting of certain standard redactions:

1- Concerning Statement DRC-OTP-2062-2260-R02:

- The redaction applied under the standard category B at 2260 shall be lifted forthwith;

2- Concerning Information Report DRC-OTP-2078-2682-R03:

- Redactions applied under the standard category B at 2682 and 2683 shall be maintained, with the exception of the redaction applied to the name of Witness P-0815's wife at 2683 and the name and identifying information of Witness P-0886's wife and son at 2682, which should be lifted forthwith;
- The Rule 81(1) redaction at 2682 shall be maintained;

3- Concerning Investigator Note DRC-OTP-2067-2379-R01:

- Redactions applied under the standard category B at 2379 and 2381 shall be maintained, with the exception of the redaction applied at 2379 to the name of Witness P-0815's wife which should be lifted forthwith;

4- Concerning Document DRC-OTP-2080-0393-R01:

- The redaction applied under the standard category B at 0394 shall be lifted forthwith, to the extent that it relates to [REDACTED];

5- Concerning Investigator Note DRC-OTP-2067-1758-R01:

- The redaction applied under the standard category C at 1758 shall be maintained;

⁹ Response, ICC-01/04-02/06-1226-Conf, paras 4-5 and 40.

6- Concerning Investigator Note DRC-OTP-2067-1763-R01:

- The redaction applied under the standard category C at 1763 shall be lifted to the extent that it relates to [REDACTED] and maintained in relation to their current contact information.¹⁰

The Chamber further indicated that this ruling and the reasons therefor would be placed on the record in due course, together with the Chamber's decision on the part of the Request seeking findings of disclosure violations.¹¹

7. Also on 24 March 2016, the Prosecution filed a notice of disclosure of evidence, whereby it indicated, *inter alia*, that it disclosed to the Defence on 23 and 24 March 2016, respectively: i) one item related to Witness P-0815 that had not previously been disclosed; and ii) lesser redacted versions of four documents related to Witness P-0815 for which a number of contested redactions were lifted, namely redactions applied to Investigator Notes DRC-OTP-2067-1763, DRC-OTP-2078-2682 and DRC-OTP-2067-2379, as well as document DRC-OTP-2080-0393.¹²

II. Analysis

A) Lifting of certain standard redactions

i. Number of children of Witness P-0815

8. The Chamber notes that Witness P-0815 is expected to testify in relation to having fled Sayo with his family and about [REDACTED] by UPC/FPLC soldiers. While recalling that the Chamber had previously permitted redactions to the number of Witness P-0886's children to remain in place,¹³ the Chamber considers that a case-by-case determination is required. In relation to Witness P-0815 and having

¹⁰ E-mail from Legal Officer of the Chamber to parties and participants on 24 March 2016 at 16:29.

¹¹ E-mail from Legal Officer of the Chamber to parties and participants on 24 March 2016 at 16:29.

¹² Prosecution's Communication of the Disclosure of Evidence, notified on 29 March 2016, ICC-01/04-02/06-1235 and confidential Annex.

¹³ Transcript of hearing on 26 October 2015, ICC-01/04-02/06-T-38-Red-ENG WT, pages 2, line 14 to page 5, line 7.

regard to the justification for the redaction provided by the Prosecution, as well as his expected testimony, the Chamber considered that the redaction¹⁴ should be lifted forthwith.

ii. Identity of the wife of Witness P-0815

9. The Chamber notes that, upon further review of the material, the Prosecution has agreed to lift the redactions applied to the identity of Witness P-0815's wife.¹⁵ The Chamber notes that she is mentioned on numerous occasions in relation to Witness P-0815's account,¹⁶ including his narrative of [REDACTED], and therefore finds that redactions¹⁷ applied to her identity should have been lifted by the Prosecution when the identity of the witness was disclosed to the Defence, in accordance with the procedure, including the relevant timeline, set out in the Redaction Protocol.¹⁸

iii. Identity of the sisters and [REDACTED] of [REDACTED]

10. The Chamber notes that, upon further review of the material, the Prosecution has agreed to lift the redactions applied to the identity of the sisters of [REDACTED]¹⁹ but submits that the identity of [REDACTED] should remain redacted.²⁰ The Chamber notes that the Prosecution has included on its List of Evidence material with a view to establishing the circumstances of the death of Witness P-0815's family members, including [REDACTED], notably by way of [REDACTED].²¹

¹⁴ Redaction applied under the standard category B at 2260 of DRC-OTP-2062-2260-R02.

¹⁵ Response, ICC-01/04-02/06-1226-Red, paras 3, 12, 18

¹⁶ DRC-OTP-2062-2260, particularly at paras 16-24.

¹⁷ Redactions applied under the standard category B at 2683 of DRC-OTP-2078-2682-R03; and at 2379 of DRC-OTP-2067-2379-R01.

¹⁸ See Redaction Protocol, ICC-01/04-02/06-411-AnxA, paras 4 and 23.

¹⁹ Response, ICC-01/04-02/06-1226-Red, paras 3, 12 and 28.

²⁰ Response, ICC-01/04-02/06-1226-Conf, para. 26.

²¹ Annex I to Request, ICC-01/04-02/06-1226-Conf-Exp-AnxI; DRC-OTP-2084-0002; Annex B to Prosecution's Updated List of Evidence and List of Witnesses, 1 May 2015, ICC-01/04-02/06-587-AnxB, item 2440.

Consequently, the Chamber considered that the identity of [REDACTED], including his sisters, is relevant. These redactions²² should be lifted.

11. The Chamber however observes that, based upon the information available, it appears that [REDACTED] is not [REDACTED]. In light of the above consideration, the Chamber agrees with the Prosecution that redactions should only be lifted to the extent that they relate to [REDACTED] and, consequently, the redaction²³ applied to the identity of [REDACTED] should be maintained.

iv. Identity of the wife and son of Witness P-0886

12. The Chamber notes that Witness P-0886 testified that he and his family fled from and returned to Sayo during the conflict.²⁴ In light of the purported materiality of this information to the preparation of the defence, including, notably, to evaluate the credibility of Witness P-0886, the Chamber considers that the identity of the witness's wife and son may be relevant to the present case and, notwithstanding the fact that the Defence was free to directly seek this information during its cross-examination of Witness P-0886, finds that these redactions²⁵ should be lifted.

v. Identity of [REDACTED]

13. The Chamber notes that the Prosecution intends to rely on [REDACTED]²⁶ and, as indicated above, the Chamber considers that the identity of family members is relevant to the extent that it relates to [REDACTED]. The Chamber notes in this regard that the Prosecution indicated in its Response that it will lift 'certain identifying information' related to [REDACTED], who [REDACTED].²⁷ The Chamber concurs that redactions²⁸ should be maintained to the extent that they

²² Redactions applied under the standard category B at 0394 of DRC-OTP-2080-0393-R01.

²³ Redaction applied under the standard category B at 2379 of DRC-OTP-2067-2379-R01.

²⁴ See, generally, transcripts of hearings on 22, 23, 26, 27 and 28 October 2015, ICC-01/04-02/06-T-36-Red-ENG; ICC-01/04-02/06-T-37-Red-ENG; ICC-01/04-02/06-T-38-Red-ENG; ICC-01/04-02/06-T-39-Red-ENG; and ICC-01/04-02/06-T-40-Red-ENG.

²⁵ Redactions applied under the standard category B at 2682 of DRC-OTP-2078-2682-R03.

relate to identifying information of persons who are not [REDACTED]. On the basis that such information is relevant to [REDACTED], however, redactions applied to the identity of all [REDACTED] should be lifted, not merely those relating to [REDACTED].

vi. Rule 81(1) redactions

14. The Chamber considers that the information redacted pursuant to Rule 81(1) of the Rules, which was contested by the Defence, is indeed properly covered by this provision, given that it pertains to internal work product. The Chamber considers that the Rule 81(1) redaction²⁹ should therefore be maintained.

vii. Other contested redactions

15. The Chamber notes that, in relation to certain documents, the Defence sought the lifting of ‘all redactions applied’ either pursuant to category B or C of the Redaction Protocol.³⁰ As submitted by the Prosecution and having reviewed the information redacted, the Chamber considers that the remaining contested redactions are covered by the standard justifications as they relate to current contact information of Witness P-0886 and his relatives, of Witness P-0815 and his relatives, of unnamed family members of Colonel Lusala and of [REDACTED]’s relatives. The remaining contested redactions³¹ may consequently be maintained.

²⁶ DRC-OTP-2084-0002. *See also*, Annex B to Prosecution’s Updated List of Evidence and List of Witnesses, 1 May 2015, ICC-01/04-02/06-587-AnxB, item 2440.

²⁷ Response, ICC-01/04-02/06-1226-Conf, para. 32.

²⁸ Redaction applied under the standard category C at 1763 of DRC-OTP-2067-1763-R01.

²⁹ Redaction applied under Rule 81(1) at 2682 of DRC-OTP-2078-2682-R03.

³⁰ *See for example*, Request, ICC-01/04-02/06-1221-Conf, paras 11, 18 and 23.

³¹ Other redactions applied under the standard category A1 and B at 2682 and 2683 of DRC-OTP-2078-2682-R03; under the standard category B at 2381 of DRC-OTP-2067-2379-R01; and under the standard category C at 1758 of DRC-OTP-2067-1758-R01; and at 1763 of DRC-OTP-2067-1763-R01.

B) Alleged breach of disclosure obligations

16. The Chamber now turns to the Defence request seeking that, in light of the Prosecution's late disclosure of certain new documents related to Witness P-0815, the Chamber: (i) find that the Prosecution breached its disclosure obligations; and (ii) authorise the Defence to recall at a later time, and if necessary, Witnesses P-0886, P-0800 and P-0017, who testified on related matters.
17. The Chamber notes the Prosecution's notice of disclosure of 17 new items related to Witness P-0815 on 11 March 2016, 12 of which were disclosed as incriminatory materials,³² as well as its notice of disclosure of a further new item related to Witness P-0815 pursuant to Rule 77 on 24 March 2016.³³ The Chamber notes that the Prosecution added 13 of these items to its List of Evidence and seeks to use and/or rely on certain of the documents at trial.³⁴
18. It further takes cognisance of the Prosecution's submission that the newly disclosed items relating to Witness P-0815 concern information 'extremely limited in scope [both in terms of number of pages and issues covered] and/or aspects of that information was previously disclosed',³⁵ and which were purportedly disclosed 'for the sake of completeness'.³⁶ The Chamber observes further that the Defence submits, to the contrary, and notably because it takes issue with the fact that information related to the involvement of Witness P-0815 in [REDACTED] is provided for the first time only three weeks before his scheduled testimony, that

³² Prosecution's Communication of the Disclosure of Evidence, ICC-01/04-02/06-1223 and one confidential Annex.

³³ Prosecution's Communication of the Disclosure of Evidence, notified on 29 March 2016, ICC-01/04-02/06-1235 and confidential Annex. *See also*, Response, ICC-01/04-02/06-1226-Conf, para. 38 and Annex J.

³⁴ Annex A to Prosecution's Updated List of Evidence, 11 March 2016 (notified on 14 March 2016), ICC-01/04-02/06-1208-AnxA, section XIII; and Email from Prosecution to the Chamber, Defence and Legal Representatives on 29 March 2016 at 19:04, providing the list of items the Prosecution may use during the examination-in-chief of Witness P-0815.

³⁵ Response, ICC-01/04-02/06-1226-Red, para. 5.

³⁶ Response, ICC-01/04-02/06-1226-Red, paras 2 and 35.

the late disclosure of these items is prejudicial to the accused.³⁷ In this regard, the Defence submits that this tardily disclosed information is essential to assess the credibility of Witness P-0815, as well as to understand the circumstances surrounding [REDACTED].³⁸

19. The Chamber is of the view that, in the present circumstances, the Prosecution has not provided an adequate justification as to why the 18 items disclosed were only recently ‘assessed to be material pursuant to Rule 77’.³⁹ The Chamber is of the view that information that is material to the preparation of the Defence and which relates to investigations and activities conducted by the Prosecution during the first half of 2014 should have been disclosed at a much earlier stage and observes that, already by May 2015, Witness P-0815 appeared on the Prosecution’s List of Witnesses⁴⁰ and [REDACTED] had been disclosed and added to the List of Evidence.⁴¹

20. Concerning the three documents disclosed pursuant to Rule 77 of the Rules regarding non-routine expenses paid to Witness P-0815, the Chamber notes that they relate to expenses incurred during the period from November 2013 to April 2014 and in April 2015.⁴² The Prosecution indicates in its Response that it reviews expenses or costs related to witnesses ‘on a rolling basis some weeks before witnesses are due to testify’ in order to ensure information is ‘the most up-to-date’.⁴³ The Chamber recalls that, in a decision rendered in October 2015, it had

³⁷ Request, ICC-01/04-02/06-1221-Conf, para. 34.

³⁸ Request, ICC-01/04-02/06-1221-Conf, para. 35.

³⁹ Response, ICC-01/04-02/06-1226-Red, para. 5. *See also*, para. 34.

⁴⁰ Annex A to Prosecution’s Lists of Witnesses, Summaries, and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf-AnxA-Red, item 53.

⁴¹ DRC-OTP-2084-0002; Annex B to Prosecution’s Updated List of Evidence and List of Witnesses, 1 May 2015, ICC-01/04-02/06-587-AnxB, item 2440. *See also*, Annex I to Request, ICC-01/04-01/06-1226-Conf-AnxI-Red.

⁴² DRC-OTP-2091-0177; DRC-OTP-2091-0179; DRC-OTP-2091-0174.

⁴³ Response, ICC-01/04-02/06-1226-Conf, para. 38.

already clarified that non-routine witness expenses are disclosable,⁴⁴ and therefore considers that the Prosecution ought to have reviewed non-routine expenses in relation to Witness P-0815 with the view of disclosing details of these expenses much earlier than 'some weeks' before he is due to testify.

21. The Chamber considers that, in light of the above, the Prosecution has violated its disclosure obligations with regard to the aforementioned materials. With respect to the Defence submission that the appropriate remedy for the disclosure breach is for the Chamber to now authorise it to recall Witnesses P-0886, P-0800 and P-0017, if necessary, the Chamber considers that the Defence's generalised submissions on this issue do not adequately substantiate such a request at this time. The Chamber will consider the matter further only if and when a specific request providing cogent and convincing reasons for the recall of any of these witnesses is presented.

⁴⁴ Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses, 16 October 2015, ICC-01/04-02/06-904, para. 32; Decision on Defence request seeking disclosure orders in relation to witness P-0901 and seeking the postponement of the witness's cross-examination, 5 October 2015 (original on 18 September 2015), ICC-01/04-02/06-840-Red, para. 60.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PLACES on the record its decision granting, in part, the Request, as reproduced at paragraph 6 of the present decision;

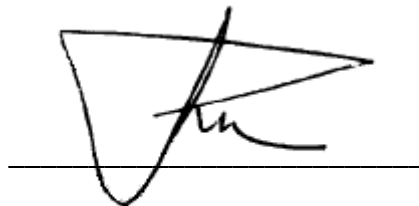
ORDERS the Prosecution to disclose the lesser redacted versions of this material forthwith, to the extent it has not already done so;

FINDS that the Prosecution has violated its disclosure obligations;

REJECTS all other requests; and

ORDERS the Defence to file a public redacted version of its Request (ICC-01/04-02/06-1221-Conf) within two weeks of the issuance of this decision.

Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 1 April 2016

At The Hague, The Netherlands