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Date: **20 March 2015**

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

**Response on behalf of Mr Ntaganda to Prosecution urgent request for
authorization to provide a summary of P-0040's statement and to apply non-
standard redactions to the annexes to P-0040's statement**

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 the “Public redacted version of ‘Prosecution urgent request for authorisation to provide a summary of P-0040’s statement and to apply redactions to the statement’s annexes’, 2 March 2015”¹ filed by the Prosecutor on 2 March 2015 (“Prosecution Request”), Counsel representing Mr Ntaganda (“Defence” or “Mr Ntaganda”) hereby submit this:

Response on behalf of Mr Ntaganda to Prosecution urgent request for authorization to provide a summary of P-0040’s statement and to apply non-standard redactions to the annexes to P-0040’s statement

OVERVIEW

1. The Defence hereby responds to the Prosecutor’s request for authorization to provide a summary of P-0040’s statement *in lieu* of the witness’s statement and to apply redactions to P-0040’s name and identifying information in five related documents.
2. At the outset, the Defence underscores that the information regarding P-0040’s purported security concerns is plainly insufficient. Indeed, the extent of redactions included in the Prosecution Request makes it impossible for the Defence to respond. In light of the fact that all appended annexes are *ex parte* and unavailable to the Defence, the Prosecutor failed in her duty to ensure that, in spite of the information redacted, her submissions could be understood by the Defence. As a result, the Defence is unable to respond unless additional information is provided by the Prosecutor.
3. The Prosecutor’s request to provide a summary of P-0040’s statement *in lieu* of the statement itself ignores the fundamental difference between the evidentiary threshold for the confirmation of charges and that for the trial. Measures which are justified at the pre-trial stage – such as the provision of an anonymous

¹ ICC-01/04-02/06-492-Red.

summary *in lieu* of the witness's statement – are not necessarily permissible at trial.

4. The Prosecution Request further ignores that when deciding on the need to impose protection measures, respect for the rights of the Accused must be given priority. While due regard must be had for the protection of victims and witnesses, this is a secondary consideration to the rights of the Accused. Hence, requests for non-disclosure and/or non-standard redactions must be denied if they result in a violation of the rights of the Accused.
5. It is well established in the jurisprudence of the International Criminal Court ("Court") that in requesting non-standard redactions, a party must demonstrate nothing less than the existence of an objectively justifiable risk *to the safety* of the person concerned. The Prosecutor erroneously advances the potential risk to the *well-being, dignity* and *privacy* of P-0040 as justification to provide to the Defence a summary of P-0040's statement *in lieu* of the statement and to apply non-standard redactions to five related documents.
6. When adjudicating the Prosecution Request, the Chamber must assess whether the proposed summary and the non-standard redactions will unduly prejudice the fair trial rights of the Accused. Concretely, such prejudice comprises at least two components, namely: (i) whether the measures requested impact the ability of the Accused to prepare for the testimony of the other witnesses relied upon by the Prosecutor for the same events; and, more importantly, (ii) whether the measures requested impact the ability of the Accused to know the case he has to meet, in the sense of having a comprehensive understanding of the case for the Prosecution. In other words, the Accused must have sufficient information to develop the case for the Defence.
7. Lastly, should the Prosecution Request be granted, the requested measures cannot be maintained until there is a "relevant change in circumstances". In so

requesting, the Prosecutor ignores the obligation to periodically review the decision authorizing the redactions should circumstances change.

8. Despite the Prosecutor's arguments to the contrary, it is evident that the measures sought by the Prosecutor will unduly prejudice the fair trial rights of the Accused.

SUBMISSIONS

I. Insufficient information is provided allowing the Defence to respond

9. At the outset, the Defence notes that the Prosecution Request contains extensive redactions. Moreover, the annexes supporting the Prosecutor's arguments regarding the potential risks to Witness P-0040 have not been communicated to the Defence.
10. The Defence understands that there might be a need for the Prosecutor not to disclose certain information concerning Witness P-0040, including his/her individual witness security assessment.
11. However, it is evident that the Prosecutor could have either applied less redactions and/or provided much more information regarding P-0040, thereby allowing the Defence to respond while still meeting her objectives not to disclose certain information to the Accused.
12. As a result, the Defence is unable to respond to the Prosecution Request. The Defence thus respectfully requests the Chamber to review and pronounce on the appropriateness of all redactions applied by the Prosecutor in the Prosecution Request.²

² See ICC-01/04-02/06-502-Corr2-Red, at para.27.

II. The aim of disclosure before trial is entirely different from the aim of disclosure at the confirmation stage

13. At the pre-trial stage, pursuant to Article 61(5) of the Statute, the Prosecutor may rely on summary evidence. The reason for this is that the aim of the confirmation proceedings is solely to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. As a result, the information which must be disclosed to the Accused at that stage might not be as extensive or complete.
14. The situation at trial is quite different. The Accused must have sufficient information to prepare for trial and to be able to challenge the Prosecutor's witnesses when the trial begins. This requires that disclosure must be complete long before trial – at a minimum three months before – and that any non-standard redactions be authorized only in exceptional circumstances.³
15. The Prosecutor's request to provide a summary of P-0040's statement *in lieu* of the witness's statement highlights a misunderstanding of the Prosecutor's disclosure obligations at the trial stage. Whereas the Prosecutor may rely on anonymous or summarized versions of witness interviews at pre-trial – as opposed to interview transcripts or signed statements – this is not permissible at trial.
16. At this stage, the Defence is investigating and preparing for cross-examination of witnesses who will be called to testify at trial. Such preparation can only be meaningful with the disclosure of both inculpatory and exculpatory evidence in the possession of the Prosecutor. An anonymous summary of a non-trial witness is inevitably subjective – i.e. prepared solely for the purpose of highlighting how the information provided by the witnesses supports the Prosecutor's case – and incomplete, if only because it does not include the

³ *The Prosecutor v. Ramush Haradinaj*, IT-04-84-PT, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statement, 22 November 2006 ("*Haradinaj* Decision"), para.2

necessary information for the Defence to investigate and prepare for its cross-examination of the related witnesses.

III. Priority must be given to the rights of the Accused

17. Article 64(2) of the Statute makes it clear that the rights of the Accused must be given priority over the protection of victims and witnesses.
18. Similarly, before the ICTY, Trial Chambers have held that when adjudicating requests for delayed disclosure and/or the application of non-standard redactions, the balance between the rights of the Accused and the protection of witnesses favours the rights of the Accused.⁴ Indeed, while due regard must be had for the protection of victims and witnesses, this is a secondary consideration to the rights of the Accused.⁵ Consequently, the Trial Chamber will refuse to grant any order for non-disclosure where such order would infringe the rights of the Accused, even where the Prosecutor has shown exceptional circumstances justifying non disclosure.⁶
19. At this stage, with less than three months to go before beginning of the trial, the balance must favour the rights of the Accused. As clearly stated in Article 68(5) of the Statute, protection measures for witnesses “shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.
20. In the present case, it appears evident that the Prosecutor is incorrectly requesting the Chamber to give priority to the protection of witnesses over the rights of the Accused to be informed promptly and in detail of the nature,

⁴ *The Prosecutor v. Radovan Karadžić*, IT-95-5/18-PT, Decision on Prosecution’s Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ432, and variation of protective measures for KDZ489, 5 June 2009 (“*Karadžić Decision*”), para.12

⁵ *Karadžić Decision*, para.12

⁶ *Haradinaj Decision*, para.3

cause and content of the charges and to have adequate time for the preparation of the defence.⁷

IV. A potential risk to the well-being, dignity and privacy of witnesses is insufficient in and of itself to justify delayed disclosure or the application of non-standard redactions

21. The Prosecutor incorrectly posits that the requested measures “are necessary in order to protect the safety, well-being, dignity and privacy of [Witness P-0040] [...]”.⁸
22. While the well-being, dignity and privacy of witnesses are indeed important considerations for the Court pursuant to Article 68 of the Statute, it is well established that they are in and of themselves insufficient to justify delayed disclosure of the identity of a witness and/or the application of a non-standard redaction. Indeed, such far-reaching measures, especially at this stage, require nothing less than the existence of a potential risk to the *safety* of the witness.⁹
23. Consequently, unless the Prosecutor establishes convincingly an objectively justifiable risk *to the safety* of P-0040, the Prosecution Request must be denied.

V. The delayed disclosure and non-standard redactions sought will unduly prejudice the fair trial rights of the Accused

24. It is well established that the authorization of the non-disclosure of information requires “[a]n assessment as to whether the redactions sought are ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’”.¹⁰

⁷ Prosecution Request, para.3.

⁸ Prosecution Request, para.3.

⁹ Decision on the Protocol establishing a redaction regime, ICC-01/04-02/06-411 (“Decision on Protocol on Redactions”), para.15.

¹⁰ See Decision on Protocol on Redactions, para.15.

25. In this regard, it must be recalled that: (i) the overriding principle is that full disclosure should be made; and (ii) it must also always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule.¹¹
26. The measures sought by the Prosecutor impact on two specific fundamental rights of the Accused, namely: (i) to be informed promptly and in detail of the nature, cause and content of the charges; and (ii) to have adequate time for the preparation of the defence.
27. Preparation for trial implies that the Defence must be able to approach the Prosecution phase of the trial with full knowledge and understanding of *all* evidence the Prosecutor intends to rely upon at trial as well as *all* exculpatory material which came to the Prosecutor's attention in the course of her investigations. This undoubtedly includes materials in the possession of the Prosecutor which are material to the case for the defence on the basis that these materials constitute an important source of exculpatory evidence and/or investigation leads.
28. The Accused cannot benefit from a fair trial unless the Defence has had the opportunity to adequately prepare for trial in this manner. This requires full disclosure by the Prosecutor, a meaningful opportunity to effectively investigate, time and the necessary human and financial resources.
29. In fact, the Defence has a duty to fully investigate every possible avenue which can benefit the Accused, not leaving any stone unturned. Indeed, "[t]he point of defence investigations is to give the Accused a fair opportunity to challenge the charges and the evidence against him. Thus, even if in the end the accused is convicted the defence's investigatory efforts will still have made a very important contribution to the trial process, namely by showing that the incriminating evidence was so strong that it could not be defeated by whatever

¹¹ ICC-01/04-01/07-475, para.70.

evidence the defendant could – or, crucially, could not – find to contradict the charges.”¹²

30. In this regard, non-trial witnesses are of the utmost importance for the Defence for the purpose of identifying exculpatory evidence and/or investigation leads. When the Prosecution meets with a potential witness and obtains a statement from the same, only to later decide not to call that person as a witness, the information provided by the person – including his/her identity – is undoubtedly material to the Defence in preparing for trial. With less than three months to go before trial, authorizing the non-disclosure of information sought by the Prosecutor for P-0040 will impede the Defence’s ability to identify, locate and obtain information from him/her, thereby prejudicing the rights of the Accused, as the Defence will not be able to prepare adequately for trial.
31. It is also significant that the objective risk to the safety of a person who will not testify at trial is necessarily less. Consequently, the non-disclosure of information concerning such persons should not be authorized other than in very exceptional circumstances, which the Prosecutor has not established.
32. In sum, the prejudice to the Accused arising from the Prosecution Request includes: (i) the fact that the Defence is deprived of the necessary witness information to be able to investigate; (ii) the fact that even where the Defence is able to investigate, much more time and resources will be required, despite the limited resources available; and (iii) the fact that the Defence will not be able to begin the trial with a full understanding of the Prosecution case and/or the ability to effectively engage Prosecution related witnesses.

¹² ICC-01/04-01/07-3436-AnxI, para.92.

VI. Should the Prosecution Request be granted, the requested measures cannot remain in force until there is a “relevant change in circumstances”

33. The Defence is also concerned by the Prosecutor’s request to maintain the requested measures until there is a “relevant change in circumstances”.
34. First, the Prosecutor omits to provide any information regarding what change of circumstances would justify the lifting of the requested non-standard redactions. Thus, the reference to a “relevant change of circumstances” is much too vague.
35. Second, pursuant to the applicable test,¹³ one of the requirements to authorize the non-disclosure of information is the obligation to periodically review the decision authorising the redactions should circumstances change. Again, the Prosecution Request omits to provide any information regarding the periodical review of the circumstances justifying the non-standard redactions.
36. Hence, not only is the Prosecutor’s approach prejudicial the Defence, it also puts the burden on the Defence to request a lifting of the non-standard redactions which is both time consuming and impact the Defence’s limited resources.
37. Consequently, should the Chamber consider granting the Prosecution Request, the Defence respectfully submits that it must be accompanied by: (i) a periodical review mechanism; and, more importantly, (ii) specific information regarding the circumstances which could lead to the lifting of the measures.

VII. Merits of the measures sought by the Prosecutor

38. Taking into account the above considerations, the Defence opposes the Prosecution Request.

¹³ See Decision on Protocol on Redactions, para.15.

39. In particular, the Prosecutor fails to demonstrate an objectively identifiable risk to the safety of Witness P-0040 and ignores that certain information which can be redacted during the confirmation stage must be disclosed at the trial stage.
40. If granted, the Prosecutor's request would impede Defence investigations related to non-trial witnesses by denying the Defence crucial information necessary for this purpose, namely the identity of P-0040. In this regard, the proposed anonymous summary is insufficient and inadequate to effectively investigate. Hence, the Prosecution Request unduly prejudices the fair trial rights of the Accused by depriving the Defence of the necessary time and facilities to adequately prepare for trial.
41. As a result, should the Prosecution Request be approved, the Defence would only be in possession of an anonymous summary not revealing the identity of the witness, even though it very likely contains information that could otherwise be material to the Defence's preparation of the trial, and that for an indefinite period of time.
42. In the alternative, the Prosecution Request fails to provide sufficient information allowing the Defence to respond effectively and the Chamber must delay adjudication of the Prosecution Request and order the Prosecutor to provide additional information.

RELIEF SOUGHT

43. In light of the above, the Defence respectfully requests the Chamber to:
 - (i) **REVIEW** and **PRONOUNCE** on the appropriateness of the redactions applied to the information contained in paragraphs 6, 7, 8, 9, 11, 12, 13, 14 and 16 of the Prosecution Request;
 - (ii) **DENY** the Prosecution Request and **ORDER** the Prosecutor to disclose to the Defence Witness P-0040's statement as well as a non-redacted version of the five related documents; or, in the alternative

- (iii) **DELAY** adjudication of the Prosecution Request and **ORDER** the Prosecutor to provide additional information allowing the Defence to respond effectively.

Should the Chamber be inclined to grant the Prosecution Request, the Defence respectfully requests that the trial schedule be amended accordingly to minimize the prejudice to the fair trial rights of the Accused.

RESPECTFULLY SUBMITTED ON THIS 20th DAY OF MARCH 2015

A handwritten signature in dark ink, appearing to read 'S+B', is centered on the page.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands