

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 April 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 redacted version of

**Decision on Prosecution application for authorisation to provide a summary of
Witness P-0040's statement and to apply redactions to the statement's annexes**

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 Stéphanie Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Mr Dmytro Suprun
Ms Sarah Pellet

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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')¹ of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2), (3), (6)(e), 67(2) and 68(1) and (5) of the Rome Statute and Rules 77, 81(4), 84 and 87 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution application for authorisation to provide a summary of Witness P-0040's statement and to apply redactions to the statement's annexes'.

I. Procedural History

1. On 9 October 2014, the Chamber set the commencement date for trial for 2 June 2015 and directed the Prosecution to complete, by 2 March 2015, full disclosure of all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and Rule 77 material, save where delayed disclosure had been requested and authorised.²
2. On 12 December 2014, the Chamber issued a decision adopting a 'Protocol establishing a redaction regime in the case of *The Prosecutor v. Bosco Ntaganda*',³ according to which redactions not falling under identified standard categories are subject to an application to the Chamber.⁴
3. On 2 March 2015, the Prosecution filed a request for authorisation to provide a summary of non-trial Witness P-0040's statement and to apply redactions to the statement's annexes ('Application').⁵

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber VI as composed by the Presidency's 'Decision replacing a judge in Trial Chamber VI', 18 March 2015, ICC-01/04-02/06-521 and to the chamber in its previous composition.

² Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382-Corr, paras 8 and 9(d) and (f).

³ Decision on the Protocol establishing a redaction regime, ICC-01/04-02/06-411 and public annex.

⁴ Redaction Protocol, ICC-01/04-02/06-411-AnxA, paras 48-50.

⁵ Prosecution urgent request for authorisation to provide a summary of P-0040's statement and to apply redactions to the statement's annexes, ICC-01/04-02/06-492-Conf-Exp. A redacted version was also filed (ICC-01/04-02/06-492-Red).

4. On 4 March 2015, the Prosecution submitted a proposed summary of Witness P-0040's statement.⁶
5. On 17 March 2015, the Prosecution disclosed the proposed summary to the Defence.⁷
6. On 20 March 2015, the defence team for Mr Ntaganda ('Defence') responded to the Application, arguing that it should be rejected ('Defence Response').⁸

II. Applicable law

7. The Chamber set out the relevant applicable law in the Redaction Protocol, as well as in the 'Decision on the Prosecution request for redactions',⁹ which it incorporates here by reference.
8. Accordingly, the following criteria shall be applied: i) the existence of an 'objectively justifiable risk'¹⁰ to the safety of the person concerned;¹¹ ii) the risk must arise from disclosing the particular information to the Defence;¹² iii) the infeasibility or insufficiency of less restrictive protective measures;¹³ iv) an assessment as to whether the redactions sought are 'prejudicial to or inconsistent

⁶ Confidential, *ex parte*, Annex A to Prosecution submission of proposed summary of P-0040's statement, ICC-01/04-02/06-497-Conf-Exp-AnxA.

⁷ Prosecution's Communication of the Disclosure of Evidence and Submission of Rule 77 Inspection Report (notified on 18 March 2015), ICC-01/04-02/06-520, para. 4. It is noted that an advance copy of the summary had been provided to the Defence on 13 March 2015 (Prosecution's Provision of the Current Status of Disclosure, 13 March 2015, ICC-01/04-02/06-517).

⁸ 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, ICC-01/04-02/06-529.

⁹ Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411; Redaction Protocol, ICC-01/04-02/06-411-AnxA, paras 48-50; Decision on the Prosecution request for redactions, 7 April 2015, ICC-01/04-02/06-545-Red2.

¹⁰ *The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, OA, ('*Katanga* OA Judgment'), para. 71.

¹¹ *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 97.

¹² *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71(b).

¹³ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, para. 37; Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, OA5 ('*Lubanga* OA5 Judgment'), para. 33.

with the rights of the accused and a fair and impartial trial’;¹⁴ and v) the obligation to periodically review the decision authorising the redactions should circumstances change.¹⁵

III. Submissions and Analysis

9. The Prosecution submits that non-standard redactions to the statement of non-trial Witness P-0040 would not suffice to protect his/her identity. For reasons of safety and security, and arguing that there exist objectively justifiable risks, it therefore requests the Chamber’s authorisation not to disclose Witness P-0040’s statement, submitting that the proposed anonymous summary suffices for the purpose of disclosure.¹⁶ It additionally seeks authorisation to apply redactions to identifying information and metadata of the statement’s annexes.¹⁷
10. The Defence argues that: (i) due to the ‘extensive redactions’ in the Application, and *ex parte* nature of the annexes, insufficient information has been provided to enable the Defence to respond and requests that the Chamber ‘review and pronounce’ on the appropriateness of the redactions applied;¹⁸ (ii) while the Prosecution may rely on anonymous or summarised versions of witness interviews at pre-trial, it is not permissible at trial;¹⁹ (iii) priority must be given to the rights of the accused above the protection of victims and witnesses;²⁰ and (iv) the fair trial rights of the accused would be unduly prejudiced by the redactions requested stressing, in particular, the crucial importance of non-trial witnesses for the Defence for the purpose of identifying exculpatory evidence and/or

¹⁴ *Lubanga* OA5 Judgment, ICC-01/04-01/06-773, para. 34.

¹⁵ *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 73(c); *The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-476, OA2, para. 64.

¹⁶ Application, ICC-01/04-02/06-492-Red, para. 10.

¹⁷ Application, ICC-01/04-02/06-492-Red, paras 14-15.

¹⁸ Defence Response, ICC-01/04-02/06-529, paras 2 and 9-12.

¹⁹ Defence Response, ICC-01/04-02/06-529, paras 3 and 13-16.

²⁰ Defence Response, ICC-01/04-02/06-529, paras 4 and 17-20.

investigation leads, as well as that the objective risk to the safety of non-trial witness is necessarily less than that of trial witnesses.²¹

11. In respect of the first issue raised by the Defence, namely the request that the Chamber rules on the appropriateness of the redactions applied to the Application, the Chamber considers that the redactions were appropriate and necessary in the context of the request being made. Noting also that copies of the relevant redacted underlying materials and/or proposed summaries were provided to the Defence, the Chamber considers that the Defence had adequate information to be in a position to respond meaningfully to the Application.
12. The Chamber has further noted the Defence's submissions that the notion of 'changed circumstances' is too vague and that non-disclosure of information should be periodically reviewed.²² In this regard, it recalls, as indicated in the 'Decision on the Prosecution request for redactions', that periodical review shall be triggered by the existence of changed circumstances and that the Prosecution is to bring to the Chamber's attention any newly available information which may cause it to reconsider its ruling on non-disclosure.²³
13. Turning to the merits of the Application, the Chamber notes that the Prosecution indicates that Witness P-0040 strongly opposes the disclosure of his/her identity to Mr Ntaganda. The Prosecution submits that the witness is [REDACTED] and that [REDACTED] makes him/her easily identifiable from his/her statement. The witness has also reported [REDACTED].²⁴ The Prosecution [REDACTED],²⁵ [REDACTED].²⁶

²¹ Defence Response, ICC-01/04-02/06-529, paras 6 and 24-32.

²² Defence Response, ICC-01/04-02/06-529, paras 7 and 33-37.

²³ Decision on the Prosecution request for redactions, 7 April 2015, ICC-01/04-02/06-545-Red2, para. 20. *See also* Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411, para. 15.

²⁴ ICC-01/04-02/06-492-Conf-Exp-AnxB.

²⁵ Application, ICC-01/04-02/06-492-Conf-Exp, para. 11.

²⁶ Application, ICC-01/04-02/06-492-Conf-Exp, para. 8.

14. In light of the above, and recalling that the Prosecution does not intend to rely on this witness at trial, the Chamber is persuaded that non-disclosure of potentially identifying and contact information of Witness P-0040 is the most appropriate measure until there is a relevant change in the circumstances, to ensure his/her continued safety. The Chamber therefore authorises the redactions sought to identifying information contained in the statement's annexes and any related metadata, until there is a relevant change of circumstance.
15. The Chamber however considers that the Defence is entitled to receive the redacted witness's statement. It therefore rejects the Prosecution's Application in this regard and orders that it disclose a redacted version of Witness P-0040's statement. Should the Defence contest the extent of the redactions applied, it may seek the Chamber's intervention through a written application.
16. Further, given that the proposed summary of Witness P-0040's statement would further assist the Defence's preparation, the Chamber, pursuant to Rule 84 of the Rules, directs the Prosecution to provide this summary along with the redacted statement.

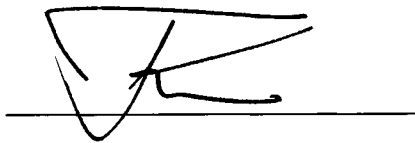
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the Application;

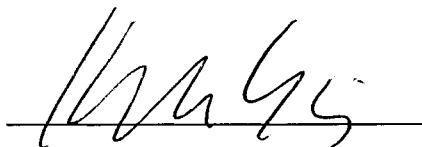
AUTHORISES all redactions sought in the Application;

ORDERS the Prosecution to disclose, together with the summary, a redacted version of the statement of Witness P-0040 within 3 days of notification of this decision.

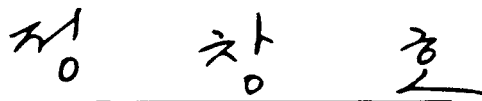
Done in both English and French, the English version being authoritative.

A stylized signature consisting of a large 'F' and 'R' combined, written in black ink above a horizontal line.

Judge Robert Fremr, Presiding Judge

A stylized signature in cursive script, written in black ink above a horizontal line.

Judge Kuniko Ozaki

A signature in Korean Hangul script, written in black ink above a horizontal line.

Judge Chang-ho Chung

Dated this 8 April 2015

At The Hague, The Netherlands