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Date: **17 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

**Motion on behalf of Mr Ntaganda seeking reconsideration of a discrete portion of
the “Decision on the Prosecution request for redactions”**

Source: Defence Team of Mr Bosco Ntaganda

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

Me Stéphane Bourgon
Me Luc Boutin
Me William St-Michel

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of 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**

Further to the “*Decision on the Prosecution request for redactions*” issued by Trial Chamber VI (“Chamber”) of the International Criminal Court (“Court”) on 7 April 2015 (“*Impugned Decision*”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Motion on behalf of Mr Ntaganda seeking reconsideration of a discrete portion of the “*Decision on the Prosecution request for redactions*”

INTRODUCTION

1. In its Request for Redactions,² the Prosecution sought authorisation to maintain redactions, as authorised by the Single Judge, to identifying information contained in the screening notes of non-trial witnesses P-0087 and P-0125³ on the basis that it “has been unable to inform them of disclosure and provide them with the relevant security information in the event of an emergency”.⁴
2. For reasons that were unknown to the Defence at the time of the submission of the Request for Redactions,⁵ the Prosecution also sought authorisation to apply non-standard redactions to identifying information in the unfinished and unsigned statement of non-trial witness P-0876, who decided not to continue cooperation with the Prosecution.⁶

¹ ICC-01/04-02/06-545-Conf-Exp-Red. A public redacted version was issued on the same day: ICC-01/04-02/06-545-Red2.

² ICC-01/04-02/06-462-Conf-Red, Confidential redacted version of “Prosecution request for redactions”, 16 February 2015, ICC-01/04-02/06-462-Conf-Exp (“Request for Redactions”).

³ Request for Redactions, paras.3(i), 10, 15-17.

⁴ Request for Redactions, para.17.

⁵ The Defence became aware of the specific reason justifying the Prosecution’s request with respect to Witness P-0876 when it was notified of the Impugned Decision, in which the Chamber noted that “Witness P-0876’s present location is unknown”: Impugned Decision, para.49, *referring to* confidential *ex parte* Annex A to the Request for Redactions.

⁶ Request for Redactions, paras.3(ii), 10, 19, 23.

3. On 7 April 2015, the Chamber granted the Prosecution's request with respect to Witnesses P-0087, P-0125 and P-0876. It authorised, "until there is a relevant change in the circumstances", the application of the non-standard redactions sought by the Prosecution to the screening note of Witness P-0087, the interview notes of Witness P-0125 and the unsigned statement of Witness P-0876, without imposing on the Prosecution any obligation to locate and contact these individuals ("Chamber's Authorisation").⁷
4. For the reasons explained below, the Defence respectfully submits that the Chamber's Authorisation, as articulated, rests on a clear error of reasoning.

SUBMISSIONS

I. Applicable law

5. As the Chamber has previously held:

[T]he Statute does not provide guidance on reconsideration of interlocutory decisions, but the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by one of the parties or *proprio motu*. Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.⁸

II. Arguments

6. The Chamber's authorisation to redact the identifying information contained in the materials of non-trial witnesses P-0087, P-0125 and P-0876 "until there is a relevant change in the circumstances" is based on the fact that these witnesses did not recently have the opportunity to express or negate their willingness to be part of the Court's proceedings and may not be aware that their identity could be disclosed to Mr Ntaganda.⁹ In particular, the Chamber noted that: (i) the Prosecution was last in contact with Witnesses P-0087 and

⁷ Impugned Decision, p.25.

⁸ ICC-01/04-02/06-519, para.12

⁹ Impugned Decision, para.32. Although these reasons are not clearly stated in the Chamber's analysis of the Prosecution's request with respect to Witness P-0876 (*see* Impugned Decision, paras.49-50), the same rationale appears to have been applied.

P-0125 in January 2006 and in August 2005, respectively;¹⁰ and that (ii) Witness P-0876's present location is unknown.¹¹

7. In its Response to Request for Redactions,¹² the Defence underscored the vagueness of the phrase "relevant change of circumstances"¹³ as well as the related need to ensure that there be a periodical review of the circumstances justifying the non-standard redactions.¹⁴
8. In addressing the Defence's submissions, the Chamber agreed with the Defence "that its determination on non-disclosure should be kept under review", but considered that an automatic periodical review is not warranted.¹⁵ The Chamber further held that periodical review shall be triggered by the existence of changed circumstances and stressed that the Prosecution should assist the Chamber in bringing to its attention factors that may cause it to reconsider its ruling on non-disclosure.¹⁶
9. However, when granting the Prosecution's requests with respect to Witnesses P-0087, P-0125 and P-0876, the Chamber did not impose on the Prosecution any obligation to attempt to locate these individuals for the purpose of informing them of disclosure and providing them with relevant security information.
10. The absence of any explicit obligation on the part of the Prosecution to locate and contact Witnesses P-0087, P-0125 and P-0876 – combined with the absence of any undertaking from the Prosecution in this regard – is likely to result in

¹⁰ Impugned Decision, para.32.

¹¹ Impugned Decision, para.49.

¹² ICC-01/04-02/06-502-Conf-Corr2, Corrected version of "Corrigendum to 'Consolidated response on behalf of Mr Ntaganda to Prosecution Application and Prosecution Request and seven additional related submissions'", 10 March 2015, ICC-01/04-02/06-502-Conf-Corr ("Response to Request for Redactions").

¹³ Response to Request for Redactions, para.62.

¹⁴ Response to Request for Redactions, paras.63-65.

¹⁵ Impugned Decision, para.20.

¹⁶ Impugned Decision, para.20.

the non-standard redactions applied to their identifying information being maintained for the whole duration of the trial, irrespective of the possibility that these individuals could have no longer any security concerns. Put otherwise, the absence of an obligation to locate and contact Witnesses P-0087, P-0125 and P-0876 will likely deprive the Chamber of information related to the “factors that may cause it to reconsider its ruling on non-disclosure”.¹⁷

11. Considering the Chamber’s duty to keep under review its determination on non-disclosure of identifying information of Witnesses P-0087, P-0125 and P-0876¹⁸ and the Prosecution’s related obligation to assist the Chamber in bringing to its attention the factors that may cause it to reconsider its ruling on non-disclosure,¹⁹ the Defence respectfully submits that the Chamber’s omission to explicitly direct the Prosecution to take all feasible steps to locate and contact these individuals within a set timeframe, amounts to a clear error of reasoning, warranting reconsideration of the Chamber’s Authorisation.
12. The Defence acknowledges that there is a possibility that Witnesses P-0087, P-0125 and P-0876 might never be located. This should not, however, preclude the Prosecution from periodically attempting to contact these individuals with the aim of bringing to the Chamber’s attention factors that may cause it to reconsider its ruling on non-disclosure.
13. In this regard, the Defence respectfully suggests that the Prosecution be ordered to: (i) take all feasible steps to locate and contact Witnesses P-0087, P-0125 and P-0876 with a view to informing them of disclosure and providing them with relevant security information; and (ii) inform the Chamber and the Defence of the outcome of the measures taken within two months.

¹⁷ Impugned Decision, para.20.

¹⁸ Impugned Decision, para.20.

¹⁹ Impugned Decision, para.20.

14. The Defence reserves its right to make further submissions on the impact of the impossibility to reach Witnesses P-0087, P-0125 and P-0876 upon being informed of the outcome of the measures taken by the Prosecution.
15. The Defence recalls the position expressed in its Response to Request for Redactions that non-trial witnesses are of the utmost importance 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 is undoubtedly material to the Defence in preparing for trial.²⁰ The Defence stresses that such information should not be limited to the contents of a statement, but should also include any identifying information. Meeting with non-trial witnesses is essential for the Defence to verify the information provided and identify new investigation leads.
16. As explained above, the Chamber's Authorisation is likely to lead to non-disclosure of identifying information of Witnesses P-0087, P-0125 and P-0876 being maintained for the whole duration of the trial, irrespective of the possibility that these individuals may be located and contacted by the Prosecution in order to assess or reassess their security concerns. This will undoubtedly hamper Defence investigations related to non-trial witnesses.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to **RECONSIDER** the Chamber's Authorisation and to **ORDER** the Prosecution to:

- (i) take all feasible steps to locate and contact Witnesses P-0087, P-0125 and P-0876 with a view to informing them of disclosure and providing them with relevant security information; and
- (ii) inform the Chamber and the Defence of the outcome of the measures taken within two months.

²⁰ Response to Prosecution Request for Redactions, para.82.

The Defence reserves its right to make further submissions on the appropriateness of the non-standard redactions applied upon being informed of the outcome of the measures taken by the Prosecution.

RESPECTFULLY SUBMITTED ON THIS 17TH DAY OF APRIL 2015

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands