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

Date: **21 June 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 “Response on behalf of Mr Ntaganda to ‘Prosecution’s proposed redactions to P-0912’s medical records’” dated 3 May 2016 (ICC-01/04-02/06-1305-Conf)

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 confidential redacted version of the “*Prosecution’s proposed redactions to P-0912’s medical records*” submitted by the Office of the Prosecutor (“Prosecution”) on 8 April 2016 (“Prosecution Request”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s proposed redactions to P-0912’s medical records”

“Defence Response”

1. The Prosecution seeks authorisation from Trial Chamber VI (“Chamber”) to apply, pursuant to the “*Protocol establishing a redaction regime in the case of The Prosecutor v. Bosco Ntaganda*”,² non-standard redactions to parts of Witness P-0912’s medical records that it had received from the Victims and Witnesses Unit (“VWU”) at an unknown date and which it intends to disclose to the Defence [REDACTED].³ The Defence received informal disclosure of the medical records on 22 March 2016 with the Prosecution’s proposed redactions applied thereto.
2. For the reasons set out below, the Defence opposes the Prosecution Request and requests that Witness P-0912’s medical records be disclosed in their entirety without any redactions applied thereto. However, the Defence does not object to the redactions applied by VWU to remain in place.

¹ ICC-01/04-02/06-1260-Conf-Red. The Prosecution Request was notified to the Defence on 11 April 2016.

² 12 December 2014, ICC-01/04-02/06-411-AnxA (“Redaction Protocol”).

³ Prosecution Request, para.1, *referring to* ICC-01/04-02/06-1260-Conf-Exp-AnxA. *See also* para.9.

SUBMISSIONS

- I. **The Prosecution Request fails to meet the criteria for the proposed non-standard redactions to be applied**
3. In essence, the Prosecution grounds the necessity for its proposed non-standard redactions on the need to protect Witness P-0912's psychological well-being, dignity and privacy.⁴
4. The Defence recalls that ensuring the 'psychological well-being', 'dignity' and 'privacy' of a witness is not a relevant consideration when assessing the need for a non-standard redaction to be applied to discrete information. In its "*Decision on the Prosecution request for redactions*",⁵ the Chamber made clear that non-standard redactions can only be granted if disclosing the particular information to the Defence poses an objectively justifiable risk to the *safety* of the person concerned.⁶ The Prosecution Request fails to identify any such risk.
5. The Prosecution Request further fails to take into consideration that members of the Defence team are professionals bound by confidential and ethical obligations under various instruments, in particular the "*Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant*".⁷ Any confidential information disclosed to the Defence is treated and used with utmost care, with due regard to the dignity and privacy of the person concerned. The Prosecution Request fails to identify any compelling reason which would warrant withholding from the Defence any of the information contained in Witness P-0912's medical records.
6. Whether the information for which non-standard redactions are sought is disclosable or not under Rule 77 of the Rules of Procedure and Evidence, as

⁴ Prosecution Request, para.8.

⁵ 7 April 2015, ICC-01/04-02/06-545-Conf-Exp-Red ("*Decision on Request for Non-Standard Redactions*").

⁶ Decision on Request for Non-Standard Redactions, para.16.

⁷ ICC-01/04-02/06-412-AnxA.

additionally argued by the Prosecution,⁸ is also not a relevant consideration for the purpose of assessing the need for the non-standard redactions.

7. In its Decision on Request for Non-Standard Redactions, the Chamber emphasised that “disclosable material should be served in *full*”.⁹ Having assessed that Witness P-0912’s medical records contain information that is disclosable under Rule 77 of the Rules, the Prosecution cannot artificially dissect the contents of the medical records and seek authorisation to apply non-standard redactions to some of its information because it deems that such information is not material to the preparation for the defence. Whether a non-standard redaction is warranted or not must be assessed against the existence of an objectively justifiable risk to the safety of the person concerned – a risk which the Prosecution Request fails to establish – and not its purported absence of materiality.
8. Consequently, in the absence of an averred objectively justifiable risk to the safety of Witness P-0912 as result of disclosure in full to the Defence, the entirety of the witness’s medical records should be disclosed to the Defence. In this regard, the Defence observes that the extent of the proposed non-standard redactions makes it difficult to appreciate the internal structure of the medical records with a view to understanding *inter alia* the exact chronology of Witness P-0912’s medical examination as well as the full diagnosis reached as to her medical condition.

II. Late disclosure of Witness P-0912’s medical records

9. It is only on 8 March 2016 – more than [REDACTED] after Witness P-0912’s medical examination in [REDACTED]– that the Prosecution took steps to gain access to Witness P-0912’s medical records to assess whether they might relate to her rapes as described in her witness statement.¹⁰

⁸ Prosecution Request, para.8.

⁹ Decision on Request for Non-Standard Redactions, para.15 (emphasis added).

¹⁰ Prosecution Request, para.5.

10. The Prosecution contends that it was not able, before that time, to determine whether there was any disclosure obligation related to Witness P-0912's medical records because "[w]ithout access to [her medical records], the Prosecution was not aware at that stage what the treatment was for [REDACTED]".¹¹
11. The Prosecution provides no persuasive reason as to why it conducted its review of Witness P-0912's materials for disclosure purposes at such a late stage, which surprisingly coincides with the Defence's request of 8 March 2016 for confirmation that the Prosecution has disclosed "all material pursuant to Rules 76, 77 and Article 67(2) in relation to this witness".¹² The Defence notes that Witness P-0912 was amongst the witnesses the Prosecution intended to call during the fourth evidentiary block as early as 25 February 2015.¹³
12. The Defence recalls that Witness P-0912 was medically examined at the request of the Prosecution itself. The Prosecution was also aware that one of Witness P-0912's medical complaints [REDACTED]. In such circumstances, the Prosecution should have inquired much earlier about the results of Witness P-0912's medical examination for the purposes of assessing the disclosability of any information arising from this medical examination.
13. Consequently, the Defence submits that the Prosecution's late review of Witness P-0912's materials amounts to a disclosure violation and respectfully requests the Chamber to find that the Prosecution has failed to comply with its disclosure obligations.

III. Lack of information to provide meaningful observations on the proposed non-standard redactions

¹¹ Prosecution Request, para.4.

¹² Email from Me Stéphane Bourgon to Ms Nicole Samson, 8 March 2016, 10h00.

¹³ Email from Ms Nicole Samson to Me Stéphane Bourgon, 25 February 2016, 17h26 ("Dear Stéphane, As discussed these are the witnesses the Prosecution has so far on its witness list for the next block, in tentative order of appearance: [...] P-912").

14. In accordance with the Redaction Protocol, when a party seeks to apply non-standard redactions, it must support the requested redactions with an application to the Chamber which shall include *inter alia* a chart indicating the location of the redaction, its category and the justification.¹⁴ The Redaction Protocol further provides that “[a] redacted version of [the] application shall be provided to the receiving party”.¹⁵
15. The Defence notes that a ‘justification’ chart is indeed appended to the Prosecution Request as Annex E; however, it is unavailable to the Defence. As a result, the Defence is unable to provide informed and meaningful observations on the proposed non-standard redactions and is left to respond to the Prosecution Request in general terms.
16. The Defence submits that both the letter and spirit of the Redaction Protocol warrant that, at minimum, a redacted version of the ‘justification’ chart be served on the receiving party to ensure that informed and meaningful observations can be provided on the merits of the non-standard redactions. Accordingly, the Defence respectfully requests the Chamber to direct the Prosecution to provide, for any future application for non-standard redactions, a redacted version of its ‘justification’ chart.

CONFIDENTIALITY

17. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is classified as confidential, as it responds to a filing bearing the same classification.

RELIEF SOUGHT

¹⁴ Redaction Protocol, para.49.

¹⁵ Redaction Protocol, para.49.

18. In light of the above submissions, the Defence respectfully requests the Chamber to:

- a. **REJECT** the Prosecution Request;
- b. **FIND** that the Prosecution has violated its disclosure obligations in respect of Witness P-0912's medical records; and
- c. **DIRECT** the Prosecution to provide, for any future application for non-standard redactions, a redacted version of its 'justification' chart.

RESPECTFULLY SUBMITTED ON THIS 21ST DAY OF JULY 2016

A handwritten signature in black ink, appearing to read 'StB-' with a stylized flourish.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands