

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 29 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

**Prosecution response to Mr Ntaganda's motion for reconsideration of a discrete
portion of the "Decision on the Prosecution request for redactions"
(ICC-01/04-02/06-562)**

Source: Office of the Prosecutor

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

Mr Stéphane Bourgon
Mr Luc Boutin
Mr William St-Michel

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 Other
Section**

Introduction

1. Trial Chamber VI (“Chamber”) authorised the Office of the Prosecutor (“Prosecution”) to maintain redactions to the identifying information of Witnesses P-0087 and P-0125, with whom the Prosecution has lost contact, and P-0876, who has ceased cooperating with the Prosecution and whose location is also unknown, “until there is a relevant change in the circumstances”¹ (“Decision”).
2. The Defence seeks reconsideration of the Decision, alleging an error of reasoning, on the basis that the Chamber failed to explicitly direct the Prosecution to report on its efforts to locate and contact these witnesses within a specific timeframe² (“Request for Reconsideration”). The Defence contends that, combined with the absence of any undertaking from the Prosecution in this regard, the absence of a timeframe may result in the redactions being maintained for the duration of the trial.³ In addition to reconsideration of the Decision, the Defence seeks an order for the Prosecution to take all feasible steps to locate and contact the witnesses and to inform the Chamber and the Defence of the outcome of the measures taken within two months⁴ (“Request for an Order”).
3. The Request for Reconsideration fails to demonstrate that the Decision is manifestly unsound and should be dismissed. The Chamber was properly guided by Appeals Chamber decisions which require the Prosecution to trigger the Chamber’s re-examination of its decisions on non-disclosure when circumstances change, but do not impose specific timeframes. Moreover, the Request for an Order is unnecessary and should also be dismissed, as the

¹ ICC-01/04-02/06-545-Red2, paras.33, 50 and p.24.

² ICC-01/04-02/06-562, para.11.

³ ICC-01/04-02/06-562, para.10.

⁴ ICC-01/04-02/06-562, para.13.

Prosecution has already undertaken to inform the Chamber, should it manage to obtain contact information, consent (to disclosure) and current security information of Witnesses P-0087 and P-0125, and is obliged to do the same in relation to P-0876.

Procedural history

4. On 29 January 2014, the Single Judge of Pre-Trial Chamber II authorised redactions to the contact and identifying information of Witnesses P-0087 and P-0125.⁵
5. On 9 October 2014, the Chamber ordered the Prosecution to file “any requests for redactions that, pursuant to the Redaction Protocol, require approval by the Chamber,” by 16 February 2015.⁶
6. On 12 December 2014, the Chamber issued its “Decision on the Protocol establishing a redaction regime.”⁷
7. On 16 February 2015, the Prosecution filed the “Prosecution request for redactions” in which it sought authorisation, *inter alia*, to maintain redactions to identifying information in the screening note of Witness P-0087 and in the interview note of Witness P-0125, and to apply redactions to identifying information in the (unfinished and unsigned) statement of Witness P-0876 (“Request for Redactions”).⁸
8. On 9 March 2015, the Defence filed its response to the Request for Redactions, opposing these redactions.⁹ The Defence submitted that “any such requests granted must be accompanied by: (i) a periodical review mechanism; and,

⁵ ICC-01/04-02/06-233-Conf-Exp-AnxII, pp.10-19 and pp.50-53, respectively.

⁶ ICC-01/04-02/06-382-Corr, fn.15.

⁷ ICC-01/04-02/06-411.

⁸ ICC-01/04-02/06-462-Red2, paras.16-17, 20, 23.

⁹ ICC-01/04-02/06-502-Corr2-Red, paras.91, 96, 121.

more importantly, (ii) specific information regarding the circumstances, for each witness concerned, which could lead to the lifting of the non-standard redactions authorised.”¹⁰

9. On 12 March 2015, the Chamber ordered the Prosecution to disclose materials that, due to an oversight, had not been provided to the Defence (which included the redacted materials of Witness P-0876), and invited supplemental observations from the Defence.¹¹
10. On 16 March 2015, the Prosecution filed the “Prosecution’s Provision of the Current Status of Disclosure”, in which it advised the Chamber that the Defence had been provided with these materials on 13 March 2015.¹²
11. On 20 March 2015, the Defence filed supplemental observations on the material disclosed by the Prosecution on 13 March 2015 in which it maintained its opposition to the Prosecution’s request to apply non-standard redactions to the materials of, *inter alia*, Witness P-0876.¹³

Prosecution Submissions

12. Chambers of the Court have the discretion to reconsider their own decisions, but that reconsideration is exceptional and should only occur if there is a clear error of reasoning or it is necessary to prevent an injustice.¹⁴
13. The Prosecution disagrees that there is a clear error of reasoning in the Decision. In its response to the Request for Redactions, the Defence asserted that the notion of “relevant change of circumstances” was too vague and

¹⁰ ICC-01/04-02/06-502-Corr2-Red, para.65.

¹¹ ICC-01/04-02/06-506, para.14.

¹² ICC-01/04-02/06-517, para.14.

¹³ ICC-01/04-02/06-530, para.2.

¹⁴ ICC-01/04-02/06-519, para.12 (including footnotes).

requested a “periodical review mechanism” be put in place.¹⁵ The Chamber noted these submissions in the Decision, agreeing that non-disclosure should be kept under review, but concluded that “an automatic periodical review is not warranted.”¹⁶ The Chamber was guided by the Appeals Chamber’s decisions in *Katanga* that make it incumbent on the Prosecution to trigger the Chamber’s reconsideration of its rulings on redactions where the circumstances have changed.¹⁷ These decisions do not impose a specific timeframe.

14. The Prosecution also disputes that the Request for an Order is necessary. The Prosecution has explicitly undertaken to inform the Chamber should it manage to obtain contact information, consent (to disclosure) and current security information of Witnesses P-0087 and P-0125.¹⁸ As for Witness P-0876, the Prosecution is aware of its duty to keep the Chamber informed should circumstances change, as articulated in the Appeals Chamber’s jurisprudence and the Decision.¹⁹

15. As the Defence accepts,²⁰ it is possible that circumstances will not change prior to the end of the trial and the witnesses will never be located;²¹ the imposition of an obligation to report to the Chamber and Defence within a specific timeframe will not make it more likely that the Prosecution can renew contact or secure cooperation from these witnesses.

¹⁵ ICC-01/04-02/06-502-Corr2-Red, paras.62, 65. At para.65 the Defence submitted that “any such requests granted must be accompanied by: (i) a periodical review mechanism; and, more importantly, (ii) specific information regarding the circumstances, for each witness concerned, which could lead to the lifting of the non-standard redactions authorised.”

¹⁶ ICC-01/04-02/06-545-Red2, para.20, referring to “the notion of ‘changed circumstances’”.

¹⁷ Decision, para.20, citing ICC-01/04-01/07-475, para.73(c) and ICC-01/04-01/07-476, para.64.

¹⁸ Request for Redactions, para.17.

¹⁹ ICC-01/04-01/07-475, para.73(c); ICC-01/04-01/07-476, para.64; and Decision, para.20.

²⁰ ICC-01/04-02/06-562, para.12.

²¹ Request for Redactions, paras.17, 23 and Decision, paras.47, 49.

Relief Sought

16. In light of the above, the Prosecution requests that the Request for Reconsideration and Request for an Order be dismissed.



Fatou Bensouda,
Prosecutor

Dated this 29th day of April 2015
At The Hague, The Netherlands